

merits at all. Further, I do not think the ground of the Sheriff's decision can be maintained.

The Court pronounced the following interlocutor:—

“Sustain the appeal: Recal the interlocutor of the Sheriff appealed against, and dismiss the action as irrelevant, under reservation to the appellant (pursuer), as representing the Commissioners of Police for the burgh of Motherwell, to proceed *de novo*, if so advised: Find the respondent (defender) entitled to expenses in both Courts, so far as not already disposed of, and remit to the Auditor to tax the same and to report; and decern.”

Counsel for Petitioner (Appellant)—Trayner—Strachan. Agent—Alexander Gordon, S.S.C.

Counsel for Respondent—Asher—Moncreiff. Agent—Alexander Morison, S.S.C.

Wednesday, February 27.

### FIRST DIVISION.

[Bill Chamber, Lord Adam.

#### HENDRY v. MARSHALL.

*Lease—Diligence—Decree of Registration—Personal Diligence Act 1838 (1 and 2 Vict. cap. 114).*

A charge with an induciæ of six days given upon the warrant inserted in an extract registered lease requiring an agricultural tenant “to implement and perform the haill obligations” of the lease, “having reference to the proper cultivation and management” of his farm, *suspended* as incompetent.

*Question* whether a charge upon such a general warrant requiring the tenant to implement some specific obligation contained in the lease would have been competent.

By lease dated 12th and 17th September 1874 the respondent Marshall let to the complainer Hendry the farm of Flemington on a nineteen years' lease. This lease contained various obligations, such as are usual in similar contracts, as to proper cultivation, rent, &c., in terms of the Personal Diligence Act (1 and 2 Vic. cap. 114) and relative Act of Sederunt. The respondent, finding that the farm was not properly cultivated, on 21st February 1877 got the lease registered in the Books of Council and Session, in virtue of the clause of registration contained in it. An extract of the lease was thereupon obtained by the respondent, containing a warrant in these terms:—“The Lords grant warrant to messengers-at-arms in Her Majesty's name and authority to charge the said Alexander Hendry, defender, personally, or at his dwelling-place if within Scotland, and if furth thereof by delivering a copy of charge at the office of the Keeper of the Record of Edictial Citations at Edinburgh, to make payment of the foresaid sum or sums of money—principal, interest, and expenses—and to implement and perform the haill foresaid obligations, all in terms and to the effect contained in the decree and extract above written and here referred to, and held as repeated *breuitatis causa*; and that to the said John Marshall within six

days if within Scotland, and if furth thereof within fourteen days next after he is charged to that effect, under the pain of pointing and imprisonment, the terms of payment being always first come and bygone; and also grant warrant to arrest the said Alexander Hendry's readiest goods, gear, debts, and sums of money, in payment and satisfaction of the said sum or sums of money—principal, interest, and expenses; and if the said Alexander Hendry fail to obey the said charge, then to point the said Alexander Hendry's readiest goods, gear, and other effects; and if needful for effecting the said pointing, grant warrant to open all shut and lockfast places in form as effeirs.”

The respondent was thereafter, on 13th March 1877, charged to perform the obligations of his lease in conformity with the terms of the warrant. The charge was as follows:—“I . . . lawfully charge you, the said Alexander Hendry, to cultivate and manage the lands let by the said John Marshall to you, the said Alexander Hendry, by and under the lease after mentioned, according to the most approved rules of good husbandry, and to implement and perform the haill obligations having reference to the proper cultivation and management of the said farm of Flemington, and as specified and described in the lease thereof entered into between the said John Marshall on the one part, and you, the said Alexander Hendry, and James Hendry, farmer, Cairntown, by For-dyce, Banffshire, on the other part, dated the twelfth and seventeenth days of September Eighteen hundred and seventy-four, all in terms and to the effect specified and described in said extract and warrant, and that to the said John Marshall within six days next after the date of this my charge, under the pain of pointing and imprisonment.”

On expiry of that charge the respondent obtained a fiat of imprisonment, in terms of the Act 1 and 2 Vic. c. 114, sec. 6, and caused the complainer to be incarcerated in the prison of Inverness on 26th March 1877.

The complainer presented a note of suspension and liberation on 14th April 1877. Lord Ormisdale, Ordinary officiating on the Bills, passed the note and granted warrant for the immediate liberation of the complainer, adding this note to his interlocutor:—

“*Note.*—The charger appears to the Lord Ordinary to have been entirely wrong in incarcerating the complainer. He does not say that the complainer is owing him any rent, or any sum of money whatever; and there is nothing to show that the provisions of the lease in question have been violated or disregarded in any respect. There is nothing but the charger's statement to that effect; but the complainer denies the truth of that statement, and, on the contrary, avers that, ‘except in so far as prevented by the state of the weather, and by the proceedings of the respondent (charger) now complained of, the said farm has always been laboured and cultivated in the usual way, and in conformity with the provisions of the lease.’ Be that, however, as it may, the charger was not entitled to incarcerate the complainer without inquiry into and ascertainment of how matters really stood. He has mistaken his remedy; for obviously incarceration was not the appropriate one in the circumstances, and the charger's counsel admitted that he could

refer to no precedent for the course which has been taken in this case. The charger has indeed been unable to state in definite and intelligible terms the object of the incarceration, or the purpose it was intended to serve. He no doubt charged the complainer to cultivate his farm in conformity with the provisions of the lease, 'and that to the said John Marshall, within six days next after the date of this my charge, under the pain of poinding and imprisonment; but he has not explained, and the Lord Ordinary doubts whether he could possibly explain, how, if his statements be true, this could be done, at any rate in six days. Without adding more, the Lord Ordinary may say that he has had no hesitation in passing the note of suspension and granting liberation.'

To this interlocutor the First Division of the Court adhered on 12th May 1877.

A record was then made up.

The complainer, *inter alia*, pleaded—“(1) The charge of which suspension is sought, and whole grounds and warrant thereof, being incompetent and inept, the same should be suspended as prayed for, and the complainer liberated. (2) *Separatim*, the charge ought to be suspended and the complainer liberated, in respect that there had been no default on the part of the complainer on the matters to which the said charge relates.”

The respondent pleaded—“(2) The said registration, warrant, charge, and incarceration, having proceeded under and in terms of the Personal Diligence Act and relative Act of Sederunt, were competent and valid. (3) The complainer having failed to implement the obligations of his lease, holding the farm untilled and without any stocking or implements of husbandry, and having consented to registration for execution, the suspension should be dismissed, with expenses.”

The Lord Ordinary (ADAM) pronounced the following interlocutor on 18th July 1877:—“Having heard counsel for the parties, suspends the charge *simpliciter*, and whole grounds and warrants thereof, and decerns: Finds the complainer entitled to expenses, and remits the account thereof when lodged to the Auditor to tax and report.”

The respondent reclaimed, and contended that he was entitled to imprison his tenant under the warrant appended to the extract registered lease, in terms of the Personal Diligence Act 1838 (1 and 2 Vic. c. 114), unless he began to do something showing his intention to fulfil the requirements of the charge within the induciæ. The question came to be—Could a decree *ad factum præstandum*, on which a charge had been given, be enforced by imprisonment? These obligations must have some sanction, and it was difficult to see what other there could be than imprisonment. Bell on Leases, ii. 299 (4th ed.); Boyd's Judicial Proceedings, 211-12. The case of *M'Dougall v. Buchanan*, December 11, 1867, 6 Macph. 120, was a direct authority for the competency of such a general charge as this.

The complainer's counsel was not called upon. At advising—

LORD PRESIDENT—The charge suspended here is a charge on what is commonly called a decree of registration—that is to say, a decree of this Court pronounced as a matter of course in virtue of a clause of registration inserted in a written

instrument—and the warrant which the proper officer gives in extracting that decree is thus expressed—[reads terms of warrant *ut supra*].

Now, this is a warrant following on a contract of lease, and of course like all leases it contains a variety of stipulations and a number of obligations on the tenant to do a variety of things over and above his obligation to pay rent at the stipulated terms. This warrant was intended to cover all these obligations. If the landlord had given a charge in the terms of that warrant, that charge would, in my opinion, have been entirely incompetent, for it would have been impossible for anyone receiving it to understand what it was the landlord meant him to do. There is no statement in it of what the tenant has failed to do, and it never can be taken for granted that the tenant has not done any of the things required by his lease, and must now be ordered to do them all.

Then, in the second place, to give a charge in such general terms is quite beyond the usual course of diligence, and I never heard of such a thing before. No doubt it is quite competent to charge a man on a decree *ad factum præstandum*, but that must be a decree ordering the performance of some specific act, and there is nothing of that kind in this warrant at all.

Then, when we come to the charge, we find that it is not co-extensive with the warrant. It runs thus [reads *ut supra*]. These are the ordinary penalties for failure to obey a charge; that is a matter of style; but the competency of this charge may very well be tested, I think, by the possibility of enforcing performance of what is required by the use of these penalties. Now, take poinding—can the cultivation of the farm be helped by poinding the tenant's goods? The great object of ultimate diligence is to give the landlord by means of it that which he has failed to get by the charge; but he would never get any nearer the cultivation of his land, which is his object here, by putting his tenant in prison. Neither poinding nor imprisonment will avail him in enforcing the obligations of a complicated contract of lease. Besides, it is a most unnatural thing to attempted to enforce these obligations within a period of six days, and on that point we indicated our opinion when the case was last before us by ordering the liberation of the tenant. The operations required cannot be executed in six days, so that these penalties are utterly powerless to effect that which is the landlord's object, although they are the penalties properly applicable to a charge of this kind; and that being so, I am of opinion that that shows that the charge was incompetent.

In short, a charge to implement generally an obligation to cultivate a farm is an incompetent charge altogether. A different question would have arisen if the landlord had, upon such a general warrant as the warrant here is, given a charge to implement some specific part of the obligations contained in the lease. On that question I give no opinion. It would be much more regular in that case too, to raise an action for fulfilment of the specific obligation which it is desired to effect, and I think that it would be at least inexpedient to specify any particular obligation in a charge proceeding on such a general warrant as this is.

I may add, with regard to the form of the in-

terlocutor pronounced by the Lord Ordinary, that when his Lordship suspends the "whole grounds and warrants" of this charge, I hold that to mean that "the whole grounds and warrants" of the charge are suspended as grounds and warrants for such a charge as this—not of any charge that may be given on this warrant.

**LORD DEAS**—The tenant was imprisoned on this charge, and he now complains of that imprisonment, and necessarily therefore of the charge which was the foundation of it. I am not disposed to call in question the form of this extract. I see no reason to doubt that it is in the ordinary and approved form, but we must attend to what it is that it authorises. It authorises pouncing and imprisonment under the charge that is to be given, "the terms of payment being always first come and bygone." Not "terms of implement," be it observed, but "terms of payment." Pouncing you may use where pouncing is competent, and pouncing and imprisonment you may use where they are competent "when the terms of payment are come and bygone." But you are not to use pouncing or imprisonment whether it be implement or payment that you desire. What must be done when implement of any of the obligations to do any of the acts required is desired is therefore to bring an action for implement, and thereupon the landlord can get personal diligence to enforce the decree in that action. The only other way I know of is this—It used to be competent (but whether it is so still or not I do not know) to bring a bill in the Bill Chamber, and to get from the clerk upon that bill a warrant, "*fiat ut petitur*," to do the particular thing that is required. That, too, is a decree. Whether it is still competent or not I am not sure, but it was not done here. These are the only ways in which you can make the thing you want specific, so as to enforce it by imprisonment. But the charge here is to implement "the hail obligations" of the lease. Any one of these obligations may be enforced by one or other of the means I have mentioned under pain of imprisonment. Without that you cannot so enforce any single one of them; much less can you put a general charge like this into force with the penalty of imprisonment attaching to failure.

**LORD MURE** concurred, on the ground that the landlord was bound to make specific the obligation he desired to have fulfilled.

**LORD SHAND**—This is admittedly an attempt to introduce what is an entire novelty in our practice with reference to clauses of this general nature in instruments of this kind. No case can be found in the books to justify it. I am of opinion that the proceeding now attempted is incompetent. I think that the terms of the charge are obviously objectionable because of the general nature of the acts which the tenant is called on to perform. A charge in such general terms is, I think, incompetent, and it is obvious that it would lead to confusion if we were to hold such a charge good, for no one receiving it could possibly understand what it was he was required to do.

The case, as your Lordship in the chair has remarked, does not raise the question as to whether such a charge is competent for any specific act that may be demanded under the stipulations of

the lease. I must say I entertain serious doubts as to whether it could be used to enforce any specific obligation. This lease contains, like all leases, a variety of obligations upon the tenant. Would it make matters any better if this charge referred to any one of these obligations? I am of opinion that a warrant of this kind cannot be used even for a charge to perform one of these specific obligations. In short, we find that obligations to pay money where claims have become liquid are the only class of obligations for which this summary warrant his hitherto been in use. And there is no hardship in not extending its operation. If the landlord has any objections to make against his tenant, that can be made the subject of a summary action, and he can work out his remedy in that way.

The Court adhered.

Counsel for Complainer—Strachan. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Respondent (Reclaimer)—Guthrie Smith—Millie. Agents—Watt & Anderson, S.S.C.

Wednesday, February 27.

## SECOND DIVISION.

[Lord Rutherford Clark,  
Ordinary.]

### HOPE V. THE EDINBURGH ROAD TRUST AND HERIOT'S HOSPITAL.

Property—Edinburgh Roads and Streets Act 1862  
(25 and 26 Vict. cap. 53)—Private Street—Obligation to Causeway.

Held that a "private street," in the sense of the Edinburgh Roads and Streets Act 1862, includes roads over which there is a general use, though not a public right, and that in these circumstances the Road Trust are empowered, in terms of the 33d section of the Act, to assume the management, and to require the owner to have such road "made up, constructed, and causewayed" at the expense of the owner.

These were conjoined actions of declarator raised by John Hope, W.S., the first brought against William Duncan, clerk to the Edinburgh Road Trust, and the second, a supplementary action, brought against The Feoffees of Trust and Governors of George Heriot's Hospital.

The summons concluded that it ought to be found and declared "that that road or way forming a continuation of London Street eastward to Annandale Street, within the city of Edinburgh, or at least so much thereof as lies to the eastward of the westmost line of march of the pursuer's lands of Gayfield, is not a street, private or otherwise, according to the true intent and meaning of the said Edinburgh Roads and Streets Act 1862, or at least is not a private street of which the carriageway has not been made up and constructed according to the true intent and meaning of the said Edinburgh Roads and Streets Act 1862; and that the provisions of the said Act with regard to private streets, where the carriageway shall not have been made up and constructed, and in particular the provisions of the 33d section of the