

their inability to charge upon it, was just the difference between the amount due on the bill and the dividend they have received from the acceptors' estate. There is, I think, no presumption after so long that the Dominion Bank would have been no more successful in securing payment at the date the bill was cancelled than a year after. No doubt it is quite relevant for the Bank of Scotland to aver and offer to prove that the Andersons were insolvent at that date, and that no loss resulted from the inability to charge on the bill. The *onus* is, I think, on the Bank of Scotland to prove that, and I am accordingly of opinion that if it is matter of doubt whether the Andersons were able to pay at the date of the cancellation, any evil which has resulted must fall on the Bank of Scotland.

If, then, I concurred with Lord Mure as to the doubtful nature of the evidence, I should still have held the Bank of Scotland liable. On the contrary, however, I agree with the Lord President and Lord Shand on the evidence in the case, that if the holders had been in a position to charge on the bill they would have recovered the amount due on the bill. And I also agree that if the loss has arisen from the cancellation of the bill, it is no answer to say that it is possible that some other persons might have been able to pay. The Bank of Scotland is on the other hand, I think, entitled to get an assignation to the bill, and to recover if it can.

The Court adhered.

Counsel for the Pursuers—Gloag—C. S. Dickson. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Defenders—Sir C. Pearson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 19.

## SECOND DIVISION.

CUMMING (MURRAY'S TRUSTEE) v. GRAHAM AND OTHERS.

*Lease—Sequestration—Heritable and Moveable—Grass Crop—Industrial Crop.*

The lease of an arable farm for twenty-four years was taken to the tenant, whom failing to his two daughters jointly. The estates of the tenant were sequestrated after his death. The daughters entered into possession under the destination in the lease. In an action by the trustee in the sequestration of the deceased tenant against the daughters—held that the pursuer had no claim for the value of permanent wire fencing, although by express stipulation it was to be paid for by the landlord at the expiry of the lease if left in good order, or for grass sown by the deceased not being new grass sown for a hay crop.

The late George Wilson Murray, farmer at South Colleonard, near Banff, who died on 14th June 1887, had a lease of that farm from the Earl of Fife for twenty-four years from 1884. The lease was taken in the name of George Wilson Murray, whom failing to Lizzie Wilson Murray

or Graham and Cecilia Blake Murray, his daughters, jointly, and the survivor and her heirs. George Wilson Murray appointed his son-in-law William Graham and George Cumming, Collector of County Rates, Banff, his testamentary trustees, and his estates were sequestrated on 10th January 1888, when George Cumming was appointed trustee thereon. The testamentary trustees, and after the sequestration the trustee in bankruptcy, carried on the farm until Whitsunday 1888, when George Wilson Murray's daughters entered into possession under the destination in the lease, and Mr and Mrs Graham took up their residence there.

In June 1888 the trustee, George Cumming, brought an action against Mrs Lizzie Wilson Murray or Graham, Miss Cecilia Blake Murray, and William Graham, for £401, 8s. 9d. with interest from Whitsunday 1888. The sum included, *inter alia*, the price of articles in the house and on the farm taken over at a valuation by William Graham, and the value of certain wire fencing, of the whole grass sown by the deceased tenant, and of the dung made on the lands.

The lease contained the following clause—“Further, it is hereby stipulated and mutually agreed that at the expiry hereof the tenant shall be paid for the threshing mill and whole wire fencing on the farm, as also for grates and marble mantelpieces in the dwelling-house, as well as for metal fittings in the stables and milk house, all at valuation, if the same are left in good order”—and was taken subject to the rules which regulated all the Fife estates in Scotland, one of which was, “All the straw and turnips produced on the farms shall be consumed thereon, and all the manure made thereon shall be applied annually to the lands.”

The defenders in their answers “explained that the wire and iron fencing and gates belong to the defenders Mrs Graham and Miss Murray in a question between them and the pursuer. The dung made on the lands also belongs to the said defenders. The grass included in the said valuation also passed to the said defenders along with the lease.”

The defenders pleaded—“(2) As in right of said lease the defenders Mrs Graham and Miss Murray became entitled to the fixtures upon the said farm, the grass, and the dung made upon the farm.”

Upon 16th October 1888 the Lord Ordinary (TRAYNER) appointed intimation of the dependence of the process to be made to George Cecil Dickson, M.D., Carnoustie, who had been married to the defender Miss C. B. Murray since the raising of the action, and upon 6th February 1889 (after a proof) pronounced the following interlocutor:—“Assoilzies the defenders Mrs Lizzie Wilson Murray or Graham, Mrs Cecilia Blake Murray or Dickson, and George Cecil Dickson, from the conclusions of the summons: Finds the defender William Graham liable to the pursuer in the sum of £161, 4s. 1d. sterling, with interest as concluded for; and *quoad ultra* assoilzies the said William Graham from the conclusions of the summons, and decerns, &c.

“*Opinion.*—The late Mr Murray was at his death on 14th June 1887 the tenant of South Colleonard. He held that farm under a lease granted by the Earl of Fife in his favour, and failing him in favour of his two daughters, the

female defenders, jointly, and the survivor and her heirs. The farm was carried on by Mr Murray's testamentary trustees from his death until January 1888, when Mr Murray's estates were sequestrated, and from that date until Whitsunday 1888 by the pursuer, as trustee in the sequestration. At Whitsunday 1888 the female defenders entered on possession of the farm under the lease, and are still in possession. The pursuer now makes certain claims against the defenders, which I think may be classed (1) as claims arising upon contract, and (2) claims which he is entitled to make and enforce as outgoing tenant.

“Mr Graham subsequently entered into agreement with the pursuer to take certain articles upon the farm at a valuation. Here again I think he was acting as for himself, and not for the female defenders, whose authority was neither asked nor given in reference thereto. No liability in reference to such agreement has been made out against the female defenders, but Mr Graham admits his liability. The extent of that liability is the next question, and it may most conveniently be dealt with by considering the items of the pursuer's claim to which he objects. In dealing with these items I proceed upon the principle that the pursuer is entitled to decree for the value of those things which passed to him by virtue of the sequestration, and which therefore he would sell, but that he is not entitled to any benefit as an outgoing tenant. That character in my opinion he never possessed. His alleged tenancy (and that of the testamentary trustees before him) was never authorised or recognised either by the successors in the lease or the landlord.

“The first item of the pursuer's claim for which Mr Graham disputes liability is wire fences, £22, 16s. 2d., to which may be added (being part of the fences) gates, £9, 7s.

“It appears from the proof that these fences were the proper dividing fences of the farm, and were indeed to all practical intents the only fences there. They were necessary for the working and cultivation of the farm according to the system of rotation stipulated for by the lease. They were fixed into the ground, and were intended to be permanent, and were not merely erected for temporary or experimental purposes, like the wire fences which were held to be removeable by the tenant in *Duke of Buccleuch v. Tod's Trustees*, 9 Macph. 1014. In my opinion the fences in question were by annexation and intention fixtures not removeable by the tenant. Apart from this, however, it is stipulated by the 16th article of the regulations on the Fife estates (which form part of the lease) that if the tenant shall at his own cost erect any fences on the farm the landlord shall be entitled to take them at a valuation, if so disposed. It appears to me that the fences in question being property which the deceased could not have removed or sold they did not pass by the sequestration to the pursuer; at all events, that the pursuer was not in a position to sell or deliver these fences to Mr Graham at Whitsunday 1888, and is not now in such a position, and for what he cannot sell or deliver he can claim no price.

“The second item is for grass, £146, 8s. 11d. This also appears to me to be an item for which the defender Mr Graham is not liable. An out-

going tenant had under the lease certain rights in the grass of the arable lands, but, as I have said, the pursuer has no rights as an outgoing tenant. The pursuer, however, maintained his right at least to the new grass, as an industrial crop which the deceased had sown. This claim the defender contended was excluded by the decision in *Marquis of Tweeddale v. Lorimer*, November 19, 1816, F.C., which seems quite in point. The decision in that case was subjected to some adverse criticism in the subsequent cases of *Keith*, December 3, 1825, 4 S. 267, and *Lyall*, November 27, 1832, 11 S. 96, but it was not overruled, and I am therefore bound to follow it, although personally I agree with the views expressed by some of the Judges, who regarded the new grass as a crop which should go to the tenant or his executor. It was observed in *Lyall's* case ‘that it is often expedient not to disturb a rule which has been long settled even when the principle on which it rested has ceased to operate,’ and that observation may be repeated here although it is an observation likely to find fewer adherents now than in 1832 when it was made.

“The third item objected to is dung, £77, 18s. 6d. By the terms of the regulations it was stipulated that all manure made on the farm should be ‘applied annually to the lands.’ The deceased could not have removed or sold it, and neither therefore could the pursuer. But part of this item consists of dung bought by the deceased and carted to the farm. For this the defender admits liability. The price of the carted dung is £16, 16s., so that this item will be allowed to that extent.

“The sum sued for is £401, 8s. 9d., and the items I have disallowed amount *in cumulo* to £240, 4s. 7d., leaving a balance of £161, 4s. 1d., for which the pursuer is entitled to decree against Mr Graham. I assolvize the female defenders (1) because the things which were moveable they did not buy; Mr Graham did so, and is ready to pay for them; and (2) because the things left by the deceased on the farm, which he was bound to leave, are not things for which the successors in the lease are bound to pay in a question with the preceding tenant's creditors.”

The pursuer reclaimed, and argued—(1) *Fencing*—Under express stipulation in the lease the tenant was to be paid for it, and his claim to its value passed to his trustee in bankruptcy. (2) *Grass*—The cases relied upon by the Lord Ordinary were out of date. More care and expense were laid out upon the sowing and top-dressing of grass than formerly, so that it was now an industrial crop which should pass to the tenant's executor in competition with his heir. The Lord Ordinary seemed to approve this view apart from authority. In the recent *Agricultural Holdings Act* the Legislature had recognised that grass was an industrial crop. No doubt the claim would be less the older the grass, but its value was a matter easily determined by a skilled valuator. (3) *Dung*—The pursuer was entitled to its value as moveable.

Argued for respondents—(1) *Fencing*—This was not a case of the expiry of a lease, therefore the clause founded on by the appellant did not apply. The fences belonged to the landlord although the tenant was to be paid for them, but that only if they were left in good order. (3) *Dung*—The pursuer had no claim. Under the

terms of the lease the dung had to be used upon the farm. It could not be sold.

At advising—

LORD LEE—This is an action at the instance of the trustee on the sequestrated estates of the deceased George Wilson Murray, who died in June 1887, and is directed against his successors in the farm under the contract of lease. By the terms of the lease Mr Murray's daughters became the tenants upon his death. But this was subject of course to Mr Murray's rights and interests in the stock and crop and furniture. It appears, however, that his testamentary trustees entered into possession of the farm for the purpose of realising the crop of 1887, and that they continued to possess till the sequestration of the deceased tenant, which took place in January 1888.

The position of matters at the date of the sequestration therefore was that the trustee had right to recover from the testamentary trustees what they had realised from the crop of 1887, and had right to remove and sell any moveable property or effects upon the farm belonging to the deceased.

I do not think that any question which arose between the deceased tenant and his successors in the lease was of the nature of a question between outgoing and incoming tenant. The trustee in bankruptcy did not represent an outgoing tenant but a deceased tenant, whose successors under the lease might have been different persons altogether from his next-of-kin or executors.

But while such was the strict legal position it appears from the evidence that it was quite recognised by all concerned, on the occurrence of the sequestration, that time would be required for realising the effects belonging to the deceased tenant, and for enabling his successor in the farm to enter upon the possession, and begin the cultivation of it. For this purpose some interim arrangements were obviously necessary, unless the defenders, as successors named in the lease, chose to renounce the succession and leave the trustee to wind up the estate as he best could. In this state of matters various interim arrangements were made, and I think it not of much consequence whether they were made by Mr Graham with or without the authority of his wife and sister-in-law if it appears, as it does, that they ultimately took the benefit of these arrangements and adopted the lease.

In the result there are only three points upon which the Lord Ordinary's decision has been challenged before us. For the respondents agreed to pay the value of the thrashing mill, estimated at £3.

1. The first point is as to the wire fences and gates. I see no reason to differ from the Lord Ordinary as to the proof about these being necessary for the cultivation of the farm and of a permanent character, and in that view I am unable to hold that they formed part of the moveable estate of the deceased Mr Murray.

But the peculiarity of the case is that the lease contains a stipulation that the whole wire fencing is to be paid for by the landlord at the expiry of the lease "if left in good order." This may be merely a premium on attention to the fences. But it is said to imply that the wire fencing belonged to the tenant. I cannot assent to that,

looking to the whole conditions of the lease, and in the absence of proof that the wire fencing in question was either paid for by the deceased, or put up by him, or possessed by him, otherwise than as fencing for which there was to be a money claim at the expiry of the lease, "if left in good order."

I am for adhering to the Lord Ordinary's judgment on this point.

2. The second question is as to the grass. I think that this point is settled by the case of *Keith*, 4 S. 267, as commented on and explained in the case of *Lyall*, also referred to by the Lord Ordinary. It was there decided that a tenant possessing under a lease fixing the term of Whitsunday for his removal from "grass," was not bound to remove from land sown with grass in the preceding year for the purpose of a hay crop, but it was also decided that he must remove from all other grass not being "crop."

The proposal to make the defenders pay on the next year after the deceased tenant's right had terminated the value of second and third years' grass is in my opinion unprecedented and untenable, even on the supposition that the pursuer is to be dealt with as an outgoing tenant at the term of Whitsunday 1888. It is not a case of new grass sown for a hay crop at all.

Here also, therefore, I agree with the conclusion reached by the Lord Ordinary.

3. The third point is as to the dung. It was not on the farm at the death of Mr Murray, but was made from the straw and turnips belonging to his executors, and which were consumed on the farm in terms of the stipulation to that effect in article 11 of the regulations, which require that "all the straw and turnips produced on the farm shall be consumed thereon, and all the manure made thereon shall be applied annually to the lands." I agree with the Lord Ordinary that such dung can form no part of the deceased's estate. The carted dung is not in dispute.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for the Pursuer—Comrie Thomson—Jameson—G. W. Burnet. Agent—A. Morison, S.S.C.

Counsel for the Defenders—Sir C. Pearson—Low. Agents—Henderson & Clark, W.S.

Friday, July 19.

## FIRST DIVISION.

MACKENZIE v. COULTHART AND OTHERS.

*Interdict—Breach of Interdict.*

Circumstances in which the Court pronounced a sentence of two months' imprisonment for breach of interdict.

William Dalziel Mackenzie of Newbie, in the county of Dumfries, had obtained interdicts against John Coulthart, William Hill, and John Birnie, all residing at Powfoot, in the said county, interdicting and prohibiting them from erecting or maintaining or using during the open salmon fishing season stake-nets on the shores of the