

Dec. 7, 1830. through. They all concur in imprinting on my mind the same impression, that it is impossible for me to advise your Lordships to affirm this judgment.

As for the observations made in the Court below, treating the promissory note as of no value, because, through the error in protest and diligence, it had lost the privileges of summary execution, these are plainly without foundation. It was good for all not actually paid on it, although it lost those privileges; and I now humbly move your Lordships that these interlocutors be reversed.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be reversed.

Appellants' Authority.—2 Ersk. 3. 27.

Respondent's Authorities.—Riddell, 9th February, 1706. Ferrier, 16th May, 1828, (6 Shaw and Dunlop, 818.)

J. M'QUEEN,—S. S. BELL,—Solicitors.

No. 47. JOHN M'TAVISH, Appellant,—*John Campbell—Wilson.*

JAMES SCOTT and OTHERS, (M'KENZIE'S TRUSTEES,) Respondents,—*Denman, Att.-Gen.—James Campbell.*

Cautioner.—Circumstances in which it was held, (reversing the judgment of the Court of Session,) that cautioners for a tenant, who had stipulated that the landlord should exercise his right of hypothec before calling on them to fulfil their obligation, were discharged.

Dec. 7, 1830. M'KENZIE of Dundonell, who held a lease of the farm and house of Seabank, near Inverness, agreed to sublet them to Mrs Fraser, from May 1818 to May 1822, at the yearly rent of L.135, payable at Martinmas yearly, on condition of caution being found for the rent. The appellant M'Tavish, writer in Inverness, and two other parties, thereupon granted an obligation to 'guarantee the rent of one hundred and thirty-five pounds, offered by Mrs Jean Fraser, for Seabank, in manner stated in her missive, the principal tacksman Dundonell (M'Kenzie) being bound to exercise his right of hypothec before calling on us to fulfil this obligation.'*

1ST DIVISION.
Ld. Alloway.

Possession was taken; but the rent not being paid at Martinmas 1819, M'Kenzie applied for, and obtained on the 30th No-

* Mrs Fraser's husband, Captain Fraser, was alive, but he was insolvent, and in consequence all right on his part to the lease was excluded.

vember, a warrant to sequester Mrs Fraser's effects, which was Dec. 7, 1830. executed.

Nothing farther was done till 3d February, 1820, when M'Kenzie's agent wrote to M'Tavish in these terms:—'As one
' of the sureties to Dundonell for the said back rent due by
' Captain and Mrs Fraser, I beg leave to inform you, that
' sequestration has been executed against them; and as this step
' has not produced payment, I have to request you will, on re-
' ceipt, settle the rent due at Martinmas last, being L.135, ex-
' clusive of interest and expenses. If you and the other cau-
' tioners desire it, my constituent will give an assignation to his
' right of hypothec.' To this M'Tavish answered,—'In reply
' to yours of yesterday's date, addressed to me as one of the
' sureties to Dundonell for the Seabank rent, I beg to say, that
' I do not consider myself bound as such. Some time in May
' 1818, an offer was made by Mrs Fraser for Seabank, and
' Messrs Frasers and I did consent to guarantee the payment
' of the rent, on condition of that offer being accepted. It
' was not accepted of by Dundonell, but a new bargain was
' some time thereafter made by Mrs Fraser, to which the in-
' tended sureties were not parties;* besides there was a stipula-
' tion in our letter, which, if the transaction had been entered
' into in terms of it, would protect the cautioners from any de-
' mand for payment of rent until the principal debtor was dis-
' cussed. For these and other reasons, which I may explain to
' you verbally, I do not consider myself, in any manner of way,
' connected with the payment of the rent referred to in your
' letter, and Mr William Fraser, who is in town, is of the same
' opinion, in so far as he may be interested.'

Although a warrant of sale might have been got on 6th December 1819, M'Kenzie did not apply for it till 26th August 1820, when it was granted. A sale took place on 16th September, but in consequence (as was alleged, of the absence of bidders,) only a small part of the effects was sold; and after deducting taxes and expenses, the whole sum realized was about L.25. A renewed warrant of sale was craved on the 5th October, but being resisted by Captain Fraser, it was not obtained till 21st March 1821; and on the 10th April following, the officer reported that no part of the sequestered effects were to be found. The produce of the partial sale was L.81. In the meanwhile, Captain Fraser had been imprisoned for debt—a circumstance known to M'Kenzie.

* This plea was afterwards abandoned.

Dec. 7, 1830. With reference to the rent due at Martinmas 1820, M'Kenzie, on the 4th of October, obtained a warrant to cut down, and secure the crop of 1820—and on the 7th of the same month, he got a warrant of sequestration, in virtue of which, a large quantity of oats and barley, besides turnips and potatoes, some farm stock, and household-furniture, were sequestered. Thereafter, on 21st January 1821, he applied for and obtained warrant to sell—in virtue of which he sold, on the 13th March, effects; but the expenses exceeded the proceeds, part of the effects having been (as was alleged) carried off. The next year's rent, due at Martinmas 1821, was also not paid, and M'Kenzie did not apply for warrant to sequester till January 1822, when it was granted, but he did not execute it till the 11th of February; nor did he apply for and get warrant to sell till the 11th of May. It was ordered to be executed on the 28th, but the officer reported, no effects—these having been (as was alleged) abstracted.

During these proceedings, M'Kenzie, founding on the act of sederunt 14th December 1756, and alleging that Mrs Fraser was more than one year's rent in arrear, raised an action of irritancy and removing, in which he obtained decree; and Mrs Fraser was ejected on 9th March 1822. To this action the cautioners were not called as parties.

M'Kenzie thereupon entered to the farm; and, by a transaction with his landlord, ceded possession in the course of the same year.

He then brought an action before the Court of Session against M'Tavish and the other cautioners, for payment of the balance of the rents due at Martinmas 1819, 1820, 1821, and 1822. The cautioners pleaded in defence, that M'Kenzie, by his own conduct, had discharged them, seeing that he had not duly exercised his right of hypothec.

The Lord Ordinary found, that ' by the letters of guarantee ' the pursuer was bound to use his right of hypothec before calling on the defenders to fulfil their obligation; that the defenders are entitled to insist upon the pursuer's having bona fide exercised this hypothec for their security; and that they will be entitled to be relieved from any part of the rent for which the pursuer had not used the ordinary means of securing and rendering it effectual under the hypothecation,'—and appointed the cause to be enrolled, that these principles might be carried into effect. This interlocutor was acquiesced in by all parties. Thereafter, his Lordship, ' In respect that ' the pursuer failed for the first three years to exercise his right

‘ of hypothec, in the effectual manner which, from the condi- Dec. 7, 1830.
 ‘ tion in the letter of guarantee, he was bound to do ; and in re-
 ‘ spect of the proceedings before the Sheriff, by which Captain
 ‘ and Mrs Fraser’s lease was irritated in terms of the act of
 ‘ sederunt 1756 by the pursuer, Mr M’Kenzie, and they were
 ‘ removed from the possession, without the cautioners being
 ‘ even called in the process, and the pursuer entered into pos-
 ‘ session of the farm, cultivated the same, and made an arrange-
 ‘ ment with the landlord, without the concurrence, knowledge,
 ‘ or approbation of the cautioners ; assoilzied the defenders.’
 M’Kenzie having reclaimed, the Court, after ordering conde-
 scendence and answers, (but not followed by proof,) altered the
 interlocutor complained of, and found the defenders liable, in
 terms of the libel, under the deductions there specified, and re-
 mitted to the Lord Ordinary to ascertain the amount.*

M’Tavish appealed.†

Appellant.—The right of hypothec imports not merely a general lien, but also the capability of being converted into a real pledge, or a specific security, by warrant of sequestration, and being rendered productive by sale. It was on the express condition that M’Kenzie should make this right effectual, that the cautioners agreed to be liable, if it proved unavailing ; but instead of doing so, he neglected the execution of it in the usual manner. It is not sufficient to say, that he obtained and executed warrants of sequestration, or even warrants of sale. It was his duty to have done so with due diligence ; whereas, by his dilatory proceedings, he, according to his own statement, permitted the effects to be carried off. Besides, he allowed the cautioners to remain ignorant of the responsibility which, according to his views of their liability, they were each year incurring. Had they been informed of the real state of matters, they could have insisted on his duly exercising his right of hypothec ; or by assignation to his proceeding under that right, they could have secured themselves by measures against the tenant. Even if they were liable for the three first years, it is clear they cannot be for the fourth, because the tenant was removed from the possession by M’Kenzie himself.

Respondents.—The argument of the appellant rests upon a

* 5 Shaw and Dunlop, p. 597.

† In the meanwhile M’Kenzie conveyed his estate to Scott and others, as trustees for creditors, and after the appeal died.

Dec. 7, 1830. misconception of the true nature of a landlord's right of hypothec—or the duty incumbent on him, either in relation to the tenant, or a cautioner. The landlord while he protects himself, is bound to protect the tenant; and the cautioners cannot shake off their responsibility, because the landlord will not, in order to save them, ruin the tenant. The landlord is entitled to act with reasonable discretion; if he deals with all parties in perfect bona fides, that will protect him. It never was thought of, that a landlord was obliged to carry the right of hypothec to extremities. It is enough if he sequesters—if he exercises his right so as to exclude other diligence. If the cautioners wished severe measures, they might have taken an assignation from the landlord, and proceeded as they saw best under it. In point of fact, however, they would have little benefited themselves—clearly for the second and third years they would have recovered nothing. When the tenant left possession, the cautioners were not kept in the dark. On the contrary, they were told of the tenant's incapacity to pay, very soon after the first year's rent was due, and they ought therefore to have been on the alert.

LORD CHANCELLOR—My Lords, though I confess, after attending to the arguments of the learned counsel for the respondents, who have placed the case on the only grounds on which it can be rested, my mind does not entertain any considerable doubt with respect to the judgment I ought to recommend to your Lordships to give upon this appeal; yet, as that judgment, in the only way in which the subject now presents itself to my mind, would be reversing the judgment of the Court below, I think I shall best discharge my duty by adopting the course I have followed since I have had the honour of sitting in this House—namely, delaying to offer that advice to your Lordships, until I shall have had an opportunity of deliberately looking again into the whole of the case for the respondents, and the reasons for the judgment. The right of hypothec is nearly a convertible term for a right of pledge. It is, in its nature, a species of pledge. By it, in fact, the party obtains a title to the possession of the matter to which it attaches. In the mercantile law, we talk of hypothecation; and in the civil law also. It is an expression used in all foreign laws. A ship, being hypothecated for certain engagements which have been contracted, wherever it goes, carries that hypothec about with it, and may be followed, and the remedy made effectual in the hands of any person who has got possession, provided it is not obtained in a way to defeat that original title. But the hypothec of the landlord in Scotland appears to be of a nature exceedingly strong and very peculiar, arising from the former state of that country, and from the fact of the landlords having made the laws, and not the tenants, and still less the traders, who,

probably, had no existence at the origin of the law. The landlord has his hypothec upon the corn and grain of the year, if any rent remains unpaid; and that corn is not released from the hypothec unless it is sold in market overt, and purchased by a person in bulk; for that appears to be the doctrine. A sale by sample, we are told, will not do, but sale in bulk to a bona fide purchaser, without notice of an arrear of rent, can alone protect the purchaser from either being obliged to send back the corn—for it can be followed in substance—or, at all events, paying the price to the landlord. This, therefore, is the nature of the landlord's right of hypothec. He has the right of hypothec in him, whether he has done any thing to make it effectual or not. He may exercise the right of hypothec (which is the ground upon which the case of the respondents appears to proceed) as having this right in him, without making it effectual to the full extent of obtaining the fruits of that right. But it is clear that the condition in the guarantee in the present case goes a great deal farther; for it says, unless the landlord shall first exercise his right of hypothec, we, the persons making the guarantee, shall not be liable as cautioners; and the words clearly import in themselves a restriction, that the right of hypothec must be exercised before the rent is demanded of them, and that rent can be demanded only for the balance remaining unpaid, after the landlord shall have exercised a full right of hypothec, and after the exercise of that right shall have enabled him to obtain so much as he can under it. If, having exercised that right, he obtains nothing, then the cautioner is liable for the whole; and, if he obtains the whole, the cautioner is liable for nothing. The very force of the words, "the landlord being bound to exercise his right of hypothec before calling upon us to fulfil this obligation," appears to me distinctly to import this as the substance and effect. That being the case, I certainly incline, at present, strongly to advise your Lordships to reverse this judgment; nevertheless, for greater security, I shall carefully look into the cases. They do not appear to me to have any reference to the construction of an express condition. The cases for the respondents turn on what may be called the common law doctrine between an obligee and obliger; this is a case between a landlord and a cautioner. Whether or not he is bound, first, to discuss the principal before he goes against the surety, is another question, with which we have nothing at all to do in this case; because, here is an express condition. Both parties have bound themselves by a condition, which is adjoined to the cautionry by the guarantor of the condition, and which has, by the acceptance of the obligee and the guarantee, limited his right against the guarantor, because he has accepted it with that modification, on the part of the person giving him the cautionry; so that here the rule of the case is the express condition of the obligation, and the construction of that condition is the only question for the consideration of the Court, upon which no light whatever appears to me to be thrown by cases arising in circumstances of a totally different nature, and where there was nothing but the common law right under consideration—of

Dec. 7, 1830.

Dec. 7, 1830. recourse against the guarantor—without any express condition adjected. These being the grounds on which I shall probably advise your Lordships to consider this case, (wishing not to proceed further into this matter until I shall have examined more minutely the grounds on which it may be supposed this judgment was given in the Court below,) I shall now forbear urging your Lordships to come to any conclusion, that I may have time to make that farther investigation. But, should I find nothing to alter the opinion I have come to, I shall, on a future day, simply propose the reversing of this judgment, omitting, on that occasion, adding any reasons, unless any matters should, in the interval, occur to me; as I shall now have given the reasons on which it appears to me the determination of your Lordships should proceed. I think the fact of the early interlocutor of the Lord Ordinary not being appealed from, is not immaterial to this case;—that stands, and that certainly did raise a principle quite inconsistent with the subsequent interlocutors; because, when they want to apply that interlocutor to the case—what do they do? They make a new interlocutor, departing from the former, and proceeding on a totally different view of the subject, recognising a different principle entirely, and one quite inconsistent with that of the Lord Ordinary, in the view he took of the question. I think that is a very singular state of things in this cause; and that, if it were to be sanctioned by your Lordships, it would, in after times, be drawn into a precedent in other cases on the construction of an obligation, though there is a specialty on which it really turns. The parties who complain of the decision can obtain a reversal alone of the further interlocutors—the first standing unappealed from; so that, if the final decision were affirmed by this House, there would stand with it on the record another judgment unappealed from, and therefore final, proceeding on a wholly different ground, irreconcilable with it, and deciding the opposite way. These are the grounds on which I shall, on a future day, simply recommend the reversal of these interlocutors, unless I see that there is ground for adding any observations, or altering the course that I have proposed. I have thought it more convenient to proceed thus; because I shall not put the parties to the expense of the counsel attending; and my addressing your Lordships now enables the counsel to know the grounds on which I proceed, which are not always very distinctly communicated to the learned counsel when they are not present. I now move your Lordships to adjourn the further consideration of this case.

LORD CHANCELLOR.—My Lords, with respect to the case of Mactavish v. Scott, I may preface the very few observations with which I propose now to trouble your Lordships—having stated my opinion upon it already,—with saying, that having had an opportunity of looking again into the pleadings, it is quite impossible that the judgment can stand, even if, as far as regards three of the years, it were right in substance. Your Lordships will recollect, that it was an action against a surety by a landlord, for the non-payment of rent by his tenant. Four years are in arrear. What-

ever is said respecting the three years, it is impossible to affirm that judgment respecting the fourth year; and stating this, I will beg to remind your Lordships of the situation in which that fourth year stands. The defender in the action below, Mactavish, was surety for the tenant, under a guarantee, of May 1818, in these terms:—‘ We, the undersigned, do hereby guarantee the rent offered by Mrs Jean Fraser,’ of so and so, ‘ the principal tacksman,’ Dundonell, being bound to exercise his right ‘ of hypothec, before calling upon us to fulfil this obligation.’ Now, what did the principal tacksman do? Did he exercise his right of hypothec or not? That is the whole question, buried in a mass of papers of twenty folios on one side, and eleven folios on the other, which might very well have been stated in two folios on each side. There was no one disputed fact which any lawyer in Westminster Hall would not have stated in half a folio—which any Court of Westminster Hall would have said it required more to state—and which any Court in Westminster Hall would not at once have decided against the decision which has been pronounced in this case. My Lords, I say not this invidiously towards the Court below, and those most learned and accomplished judges who compose it; for where the question which has arisen is one of Scotch law, founded on the peculiarities of that system of jurisprudence wherein it differs from our own, I have always been, and ever shall be, found the last person to recommend to your Lordships lightly to deal with the authority of that Court. I lately recommended to your Lordships—in affirming a judgment complained of—to act contrary to the reason of the case—contrary to all the analogy of English law proceedings, because I found it a case of Scotch pleading, and Scotch practice; and although one Judge differed from his brethren, after having held the same opinion which they retained, I did not feel it to be proper to propose to your Lordships to set aside the decision of the majority;* and the same with regard to the question as to the effect of the omission of the bailie’s name in an instrument of sasine.† But, my Lords, this is not a question peculiar to Scotland—it is a question of the construction of a guarantee, and is precisely the same question in Scotland as it would have been in the Court of King’s Bench, or the Court of Common Pleas. The question is simply this—Whether the landlord was bound to exercise his right of hypothec, before he called upon the surety? I apprehend, my Lords, that the landlord has only a right to enforce against the surety payment of the balance—that he must get, by all means in his power, as much as he can, himself, under his right of hypothec, which is a large right in Scotland—a much larger right than is possessed by a landlord in England; for he can follow goods when sold to bona fide purchasers for a full price. With this large right which he possesses, it is his duty to enforce his own remedy, before calling on the cautioner, the surety; and he can only call upon the surety to pay the balance. I will venture to say, that if your Lordships were to take any ten lawyers accustomed to the legal construction of instruments, and ask them to construe this instru-

* Cogan v. Lyon, ante, p. 391. † Morton v. Hunters and Others, ante, p. 379.

Dec. 7, 1830. ment, there would not be one found who would put upon it a contrary construction. What is the construction contended for on the part of the respondent? That he was only to take it and go to the Sheriff and get a warrant of sequestration, and so seize the goods, and then allow them to be taken away by the tenant, and used. Being quite secure, he allows the tenant, who may be a friend of his own, to go and consume the produce, and eat up the crops, and sell the farming tools. Having a solvent cautioner, he seizes L.500, and, being lulled by his having the cautioner, as he thinks, to retire upon, he only sells to the amount of L.25, or thereabouts, for the first year's rent, which is L.135, and rests there, having ample security in his hands; and afterwards he proceeds for the balance of the L.135 against the cautioner—where is this to end? If it is allowed he may do it for one year, why might not he do it for two, three, or four? Is he to be permitted to allow every thing to be carried away, and never take any remedy, and then, when the whole is driven off and sold through his own laches, to come for his remedy against the cautioner? I ask your Lordships, whether that is the right construction of the word, 'the principal tacksman being bound to exercise his right of hypothec?' Surely that is not, in common sense or common reason, construction of the instrument, or any thing like it. What did Dundonnell do? He took what I have mentioned for the first year. He took something for the second year, and sold. For the third year he took nothing, for he had, by his laches, debarred himself of the power of taking any thing; for the farm was stripped and dismantled. What did he do the fourth?—nothing. He goes and ousts the tenant, and takes possession under the act of sederunt, and, upon an arrangement with the landlord, cedes possession. That act of sederunt is said by the gentleman at the Bar, to be merely explanatory of the common law. I cannot help thinking, however, that the Court of Session there may have exercised some quasi legislative power; and my reason is this: By the law of England, the landlord had no such recourse until a late period. He might sell his distress under the statute of William, which he could not do before. Before the statute of William, he could distrain without a warrant of the Court, as is required in Scotland, but he could not sell. It was only a pledge he possessed himself of by his distress. In England they may sell within five days, and in Scotland they sell within six days. A statute passed early in the reign of George the Second, some time before this act of sederunt—and that raises in my mind a suspicion of the Court of Session having passed this act of sederunt, in the exercise of a quasi legislative function, the limits of which have never been very nicely defined. They appear to have exercised this power in a half-enacting and half-declaratory shape, introducing into Scotland that which had been introduced into England by the statute of George the Second. This is a mere suspicion; it may be so or not, but, by that act of sederunt, it is conceived there is a power of summary removal. The fourth year the tacksman took possession in a summary mode. What did the Court of Session do? They have not only held the tenant's cautioner liable to pay the last three years' rent, but they have actually held him liable to pay the fourth year. Now, was it ever supposed that a cautioner could be liable when the principal is not liable? It must be

an oversight of the Court below. They certainly have not attended Dec. 7, 1830. to this, that the cautioner is liable only subsidiarie, and that if you cannot sue the principal, you cannot sue the cautioner; nevertheless, they have found him liable for the whole four years.—This case was argued for the respondents by the Attorney-General, but he and his learned coadjutor hardly contended for that; and, at all events, that cannot stand beyond the reasonable and consistent view of the subject, but on the grounds I have taken the liberty now to state—and those I stated before. Unless the landlord has exercised the right which he possesses, he cannot have a right to call upon the cautioner. He has his recourse against the goods—he takes possession of them; but how does his taking possession of the goods put him into a different situation from that in which he would have been, if he had not taken possession? It only prevents their being taken away *brevi manu*, but he has the same remedy against the goods, whether they are in his possession or not. He may follow them for unpaid rent, and if necessary, he is bound to do so. He is bound to exercise his right of hypothec before he calls upon the cautioner to fulfil his obligation. I have stated my opinion to your Lordships, as to the construction you are bound to put upon these words. Is this construction inconsistent with the law? Not at all; nor is it inconsistent with the cases which have been decided, which were cases as to the common law. It is not necessary here to enquire, whether you must discuss the principal before you come upon the surety; for there was in none of those cases an express condition; and *pactum tollit legem*. This is a *pactum* by which parties are bound—in those cases there was no *pactum* at all. My Lords, upon these grounds of law, upon which I conceive this case must stand, I feel it my duty to recommend that your Lordships should reverse this judgment, applying the principles which, in my opinion, the Court is called upon to apply to the case. Some of the learned judges have thought Mr Mackenzie was very ill used; but if any body was ill used, it appears to me it was the surety. Even if there had not been this express condition, I should have been inclined to think that your Lordships must have decided in favour of the surety, and against the principal, but this is wholly immaterial in the present case, and need not be decided either way; because the express condition by which the parties bound themselves is the law of the case—by which both are bound, the landlord and the cautioner. The interlocutor of the Lord Ordinary is on the right principle—that therefore stands unimpeached. With respect to the other interlocutors, I would humbly submit to your Lordships that they be reversed.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be reversed.

Respondents' Authorities.—M'Millan, Jan. 21, 1729. M'Queen, June 11, 1811, (F. C.) 3 Ersk. Inst. 3. 66. 2. 6. 62.

J. M'QUEEN—MONCREIFF, WEBSTER, and THOMSON—
Solicitors.