being a summary precess was not a process of such a nature as to afford room for such an accounting as was necessary in this case, and consequently the charge should be suspended, leaving it to the charger to bring a count and reckoning or such other process as would allow him into an accounting.

MILLAR, Q.C., and TRAYNER, for the respondent, were not called upon.

At advising—

LORD PRESIDENT—The result of the Lord Ordinary's interlocutor is, that he finds that there is a sum of £120, 10s. 8d. of trust-funds in the trustee's hands to go towards paying this bond. I can see no objection to this, and think that his finding should be adhered to.

LORD DEAS concurred.

LORD ARDMILLAN—The charger was not a creditor at the time of the execution of the trust-deed, he is only a creditor in consequence of an obligation by the trustees, and therefore these trustees must be liable in a question between their own creditor and themselves. As between the trustees who granted the bond and the creditor under the bond, there can be no doubt that they are liable to the extent of the trust-funds in their hands. As regards the accounting, the objection to such a proceeding generally arises on the other side—the suspender usually wishes to get into a question of accounting, and the Court often refuses to allow him to do so; but when the charger makes objections to a state, in order to show that there are funds to meet his claim, I think it would be unfair not to sift them if practicable. The Lord Ordinary is right here, I think.

LORD KINLOCH—It is a question with me whether the Lord Ordinary may not have dealt too favourably with the suspenders. There can be no doubt that trustees, as such, can be charged under a bond; and if they suspend that charge, the question is raised, and raised competently in the suspension, whether they have trust-funds in their hands sufficient to meet the charge. The Lord Ordinary has said that there may be objections which ought not to be taken up in such an action as this; but that there are here some objections which show at once that there are trust-funds in the hands of the trustees; and so he finds that there are funds which will go so far towards paying the amount in the charge, and he decerns accordingly. I think his course unobjectionable.

Lord Ordinary's interlocutor unanimously adhered to.

Agents for Complainers and Reclaimers—Duncan, Dewar & Black, W.S.

Agents for Respondent—M'Ewen & Carment, W.S.

Tuesday, November 22.

FOTHRINGHAM *v.* OFFICERS OF STATE AND OTHERS.

Teinds—Valuation—Constant Rent—Lease—Agreement. In a valuation of teinds, where the stock and teind are valued jointly,—*Held* that where the lands are let under an existing lease, the actual rent paid is "the constant rent" or criterion fixed by statute, and the practice of the court, for valuing the teinds: but that the rule does admit of exceptions.

Circumstances in which the existing lease had been modified by an after agreement, so as to reduce the rent from £370 to £300, but the Court held that this was not enough to take the case out of the existing rule, they being satisfied of the *bona fides* of parties in making the reduction, and that the reduced rent, and not the former one, was the fair annual value of the lands.

This was a summons of valuation of teinds at the instance of Mrs Marion Scrymsoure Fothringham, of Tealing, in Forfarshire, against the Crown, as titular of teinds and patron of the parish of Tealing, and against the Rev. William Elder, minister of the said parish, and concluding that a valuation of the teinds, both parsonage and vicarage, of all and whole the Kirklands, called the Priestown of Tealing, forming part of the barony and parish of Tealing, ought and should be led and deduced in terms of the several acts of parliament thereanent, at the instance of the pursuer against the said defenders; and that a constant and fixed yearly duty ought and should be determined . . . to be the constant, just, and true value of the teinds, parsonage, and vicarage, of the said lands and others, to be paid in place thereof in all time coming.

Mrs Fothringham is heiress of entail in possession of the lands and barony of Tealing, of which the Priestoun of Tealing forms a part. It is described in the titles as follows: "All and whole the Kirklands, called the Priestoun of Tealing, with the whole teind sheaves, great and small, as well parsonage as vicarage, which were never in use to be separated from the stock lying within the parish and sheriffdom foresaid." These lands of Priestoun were always until very lately considered to be exempt from teind, as held *cum decimis inclusis.* They were so dealt with in a final locality of the parish in 1821, and consequently the teinds of the lands have never yet been valued. The teinds of the parish not being entirely exhausted, the minister in 1865 brought an augmentation, which is still in dependence. It was then found that there was an error in supposing the Priestoun of Tealing to be held *cum decimis inclusis,* and accordingly the minister brought a reduction of the locality of 1821, in which he succeeded (see 6 Law Reporter, 220). The lands being now therefore liable in teind, the proprietrix became desirous of having the teind valued, and accordingly brought this action.

The said Kirklands of Priestoun consist of only one farm, which was let, in 1856, on a nineteen years' lease to George Anderson. The rent stipulated was £370. This rent was paid for some years, but on the representations of the tenant, and advice of her agents, Mrs Fothringham in 1865 reduced the rent to £300. This fresh agreement was not reduced to writing till 1869, when it was embodied in a minute of agreement, which declared "that, except only as regards the amount of rent, the original lease should remain good and effectual in every respect." The pursuer accordingly represented that the constant rent of the lands in question was £300, which, according to the rule laid down, that the true and just rate of teinds shall be the fifth part of the constant rent which each land pays in stock and teind, where the same are valued jointly, would give £60 per annum of teind.

The minister pleaded that he was "entitled to have the rental of £370 contained in the original lease of Priestoun taken as the true legal rental for the purposes of the present valuation, subject to all competent deductions allowed in valuations of teinds for permanent improvements."

It appeared, both from the correspondence and the proof led, that when the farm was let in 1856 there was great competition for it, and that both the proprietrix and her agent Mr Mackay were of opinion that the rent of £370, offered by Mr Anderson was too high. It was not till he began to fall into actual arrears with his rent that Mr Anderson made any complaint of being over-rented, but he did so in the end of 1864, and, with their previous knowledge, Mrs Fothringham and her agent willingly admitted it, and the above-mentioned agreement of reduction was arranged between the parties, and acted upon from 1865. For reasons not affecting this case, it was not reduced to writing till 1869.

On 9th June last, the Lord Ordinary (GIFFORD) pronounced an interlocutor finding "that in the present case it is unnecessary to make up any formal state and scheme," and dispensing therewith accordingly; and finding that the teinds of the Priestoun of Tealing, "are of the yearly value of £60 sterling, being one-fifth part of the constant rent of £300 sterling which is paid for the constant yearly rent of the said lands both in stock and teind jointly."

In his note, the Lord Ordinary says that "the only question in dispute between the pursuer and defender, is what shall be taken to be the true *cumulo* rental of the lands in question." And that he "is satisfied, upon the proof and in the whole circumstances, that the reduced rent of £300, and not the rent originally stipulated of £370, was the true *cumulo* rent of the lands at the date of the present process of valuation, and has valued the teinds accordingly."

The defender, the Rev. Mr Elder, reclaimed.

The LORD ADVOCATE and NEVAY for him.

The SOLICITOR-GENERAL and MACKAY for the pursuer.

NEVAY, for the defender, argued that the higher rent must be taken as the criterion in this valuation. While admitting that the general rule was to take the existing lease as giving the value of the lands, he contended that this was not conclusive in every case, and quoted *Caddell* v. *Burns*, 10 June 1827, Shaw's Teind Cases, 129; and *Leslie* v. *Earl of Kintore*, 25 Feb. 1795, F.C. On the authority of these cases, he submitted that the original rent was the just and constant rent of these lands. If that be not so, then at any rate the additional rent obtained during the first eight years must be looked upon as a *grassum*, and treated as such. It is not the existing rent, but the subsisting lease which ruled the question.

Farther argument was not called for on either side.

At advising—

LORD PRESIDENT—This is an action of valuation, in which the stock and teind of a certain property is sought to be valued. The rule of the statute and Act of Sederunt and our practice is, that "the rate and quantity of all teinds in the kingdom is and shall be the fifth part of the constant rent which each land payeth in stock and teind, where the same are valued jointly." The statute appeals directly to the constant rent which is actually paid. In precise accordance with that is the Act of Sederunt. It is therefore quite fixed that in such valuations, lands under lease are to be taken according to the value which that lease ascertains, that is, according to the rent actually paid. No doubt this rule is liable to certain exceptions, and very various cases may be figured in which such exceptions would occur. But the general principle is quite established. Now the application of that doctrine here is not at all difficult. The cases cited by the Lord Ordinary are highly illustrative of its working, while those quoted to us to-day, with an opposite intention, rather support the Lord Ordinary's view than otherwise. That of *Leslie* is certainly one of those exceptions which fortifies the rule. It proves that the actual rent paid by the occupant is the proper one to resort to for a criterion. In the same way, the case of *Caddell* does not at all detract from the rule I have stated. Now if the kind of rule which we are asked to introduce here were established, the Court should have dealt quite differently with this last case. The law being then perfectly clear, we have only to ascertain what is the rent actually paid for the lands in question. Now the peculiarity of this case is that the lands were let some years ago on a lease at a rent of £370, and after some years of the lease had run, the rent, by agreement of parties, was reduced to £300 per annum, the lease remaining otherwise valid and binding. There is, however, very satisfactory evidence that at the very time at which the lease was first entered into, the proprietrix and her factor were of opinion that the rent offered by the tenant was too high, and that some new arrangement would have to be made in the course of the lease. Accordingly in 1864 the lessee found that he had made a mistake in his offer, and applied, reasonably enough, for a reduction of rent. An arrangement was then entered into which took a formal shape in 1869, and that is in fact the existing contract under which the lands were held at the time the action of valuation was raised. The terms of the contract are most explicit, and they expressly declare that "except only as to the amount of rent, the lease shall remain good and effectual in all respects." Now it appears to me that the effect of this is just the same as if the tenant had renounced the old lease and got a new one, and this entirely disposes of the minister's argument, that we should take the excess of rent paid during the first years, and, treating it as a *grassum*, spread it over the whole term, and take an average. The difference between this case and that in which a *grassum* is stipulated, is, that there the rent does not confessedly represent the true value of the land, while in the present case we have the strongest evidence that the new rent does represent the annual value, while the old rent was a great deal above it. No doubt, if Mrs Fotheringham had come into Court at an earlier time, she would have found it difficult, if not impossible, to avoid the valuation being made at the existing and excessive rent; but as she has not done so, and we are satisfied that the lands are now let at their *bona fide* value, there is nothing to induce us to make this an exception from the general rule applicable to the case.

LORD DEAS—The case is as clear as a case can be. The lands were let in the year 1856, and the lessor was then perfectly aware that the rent was too high. It was so found by the tenant, and in 1864 it was agreed to be reduced. We have the correspondence that passed at that time on the

subject, and can see its whole bearings. The *bona fides* of all concerned is perfectly clear. Even if we had not the evidence of Mr Howe, the agent, I should still think anything but *bona fides* out of the question. There were still about eleven years of the lease to run, and the proprietrix thus gave up a sum of more than seven hundred pounds. It was not likely she would do this in order merely to affect the teind of future years; the thing would be absurd. If, then, the transaction was in *bona fides*, as I have no doubt it was here, there remains no difficulty as to what should be held as the constant rent.

LORDS ARDMILLAN and KINLOCH concurred.

Agent for the Reclaimer—A. Beveridge, S.S.C.
Agent for the Respondent—A. Howe, W.S.

Tuesday, November 22.

RIDDLE *v.* MITCHELL.

Reparation—Damages for Wrongous Sequestration—Process—Relevancy. Circumstances in which it was *held* that no sufficient and relevant averments had been made to support an action of damages for wrongous sequestration for rent—the rent being admittedly due at Martinmas, and the sequestration process having been raised on 17th November—the only allegation made in support of the action being "that according to the universal custom of the district, and in the understanding of parties, the rent was not due till 22d November."

This was an appeal from the Steward-court of Kirkcudbright in an action of damages for wrongous sequestration for rent.

The summons concluded that the defender ought "to be decerned to pay to the pursuer the sum of £50 sterling in name of damages and *solatium* for the gross wrong, and manifest and unjustifiable injuries which the pursuer has sustained in his reputation, character, and feelings, in consequence of the defender, who is proprietor of a house and garden situated in Port Street of Dalbeattie aforesaid, which he let to the pursuer, for the year from Whitsunday 1869 to Whitsunday 1870, at the rent of £6, 10s. for the year, and which the pursuer obtained possession of on 26th May 1869, and has since occupied as tenant thereof accordingly, having most nimiously and oppressively, illegally and unwarrantably, and groundlessly and injuriously, as well as wrongfully and maliciously, and without probable cause, raised a small-debt summons of sequestration on the 17th of November 1869, before my Circuit Small-Debt Court at Castle Douglas, at his own instance against the pursuer, on the allegations that he was due to the defender the sum of £3, 5s. as the rent of said house and garden from Whitsunday 1869 to Martinmas in that year, and that the pursuer refused or delayed to pay said rent, which allegations were false, as no part of said rent was due or exigible either by law or according to the universal custom of the district, and in the said stewartry, and the understanding of parties, till 22d November 1869 for the half-year preceding—not expired till that date from said date of entry—and the pursuer had never been asked for and had never refused to pay said rent."

The defence was that the action was irrelevant and incompetent, and contained no statement to warrant the conclusions. The pursuer's statements were denied, and counter statements made.

The Steward-Substitute (JOHNSTON) found the summons relevant and competent, and allowed a proof of the respective averments of parties on these among other grounds, that if the pursuer in this case can show (1) that in the custom of the country the date of payment is fourteen days after the legal term day; and (2) that in the understanding of parties the rent was to be paid according to the custom of the country; he will establish the fact that the sequestration was taken out too soon, and was therefore illegal.

The case was appealed to the Sheriff (HECTOR), who sustained the appeal, and recalled the above interlocutor of the Steward-Substitute. The following are the terms of his interlocutor:—"Finds that, according to the statement in this summons of damages, there was let to the pursuer by the defender a house and garden, situated in Port Street, Dalbeattie, for the year ensuing Whitsunday 1869, at the yearly rent of £6, 10s., and the pursuer occupied the premises in pursuance of said lease; Finds that, according to law, the first half of the said rent, being £3, 5s., became due on 11th November 1869, being Martinmas term-day; and the pursuer has not made averments specific or relevant, and sufficient to the effect of importing or implying an agreement or understanding by the defender that said half-year's rent was not to be payable until 22d November, as now pretended by the pursuer; Finds it not alleged by the pursuer that he made or tendered payment of the said rent before 17th November 1869, when the Small-Debt Court summons, containing warrant to inventory and sequestrate, was raised against him; Finds that the said action and warrant were competent and lawful at the instance of the defender, and in conformity with the provisions of the Small-Debt Act, 1 Vict., cap. 41, § 5, and relative schedule B thereto subjoined; Finds that the pursuer has averred that the defender caused the said warrant to inventory and sequestrate to be executed on 18th November, but finds that, although it was competent for the pursuer to have appeared in the small-debt action to which he was cited, and to have shown cause against the defender's claims therein, he has not averred in this summons of damages that he did so, or obtained any judgment therein to the effect that the foresaid rent had not become payable at or before the date of said action or warrant; Finds that summons of damages was raised on 6th April last (1870), and that the pursuer has not recorded averments relevant or sufficient to support the same, or to be admitted to probation."

The pursuer appealed to the First Division of the Court of Session.

MAIR for him.

CHAS. SCOTT for the respondent.

At advising—

LORD PRESIDENT—I have no doubt about the way in which this case should be decided. The sole ground on which it was alleged that the sequestration was illegally laid on was that the rent was not yet due. The rent in question was admittedly due at the term of Martinmas, and Martinmas means the 11th of November, unless it can be shewn that the usual term day is not intended. All that the pursuer avers is, that according to the universal custom of the country, and in the said stewartry, and the understanding of parties, the rent was not due till the 22d November. That