upon to allow himself on the public street to be subjected to police search of the parcel he is carrying, and his refusal to do so would never justify arrest. It does not give just ground for any suspicion, and cannot give reasonable ground for taking into custody. Such an idea seems most extraordinary, and it is one which can have no countenance from this Court. I must say I think this a most unfortunate case.

It may turn out when the case comes to trial that the statements of the pursuer are not substantiated as he states them, and that the statements which the defenders make are substantiated. In that case the question of malice may arise at the trial, but I see no ground whatever for interfering with the issue proposed, and I am for approving of the issue as it stands.

LORD DUNDAS was absent.

The Court approved of the proposed issue.

Counsel for Pursuer and Appellant—Watt, K.C.—Paton. Agents—Reid & Milne, W.S.

Counsel for Defenders and Respondents—Morison, K.C.—Duffes. Agent—W. Carter Rutherford, S.S.C.

Tuesday, May 21.

FIRST DIVISION.

[Sheriff Court at Duns.

GORDON *v.* HOGG.

Lease—Termination—Management—Rotation of Crop—Five-Shift Rotation—Duty of Waygoing Tenant to Sow, or Permit to be Sown, Grass Seeds with Waygoing White Crop.

The tenant of a farm was bound under his lease to observe the rules of good husbandry and to follow a regular rotation of crops known as the five-shift rotation, defined in the lease as follows:—First year, old grass; second year, white crop after grass; third year, green crop or bare fallow; fourth year, white crop after green crop or fallow; and fifth year, young grass.

Held that he was bound when sowing out his last grain crop at the end of the lease to sow out grass seeds with the waygoing crop—he receiving the cost of the seeds and sowing from the incoming tenant—or otherwise to permit them to be sown by the landlord or incoming tenant.

On 9th May 1911 A. D. Forbes Gordon of Langlee and Greenknowe, liferent proprietor of the farm of Gordon East Mains, Berwickshire, *pursuer*, brought an action against Alexander Hogg, farmer, the outgoing tenant of the farm, *defender*, in which he craved the Court "to find and declare that the defender, as outgoing tenant foresaid, . . . is bound either (*First*) to sow down and harrow and roll in, in so far as not already done, with his waygoing crop upon said farm and others upon that break which in the year 1910 was in fallow or turnips, the usual kind and quantities of grass and clover seeds either supplied by himself or by the pursuer or the incoming tenants as the defender may elect, and upon payment by the pursuer or incoming tenants after mentioned of fair and reasonable remuneration for all additional work and all expenses occasioned thereby; or alternatively, (*Second*) To grant all necessary facilities and access for the pursuer or James Haliburton and Ralph Haliburton, both farmers, Raecleuch, near Lauder, incoming tenants of said farm and others, and his or their servants, to sow, harrow, and roll in the same upon said break in so far as not already done."

The lease, *inter alia*, provided—"With respect to the management and cropping of said lands, the said Alexander Hogg binds and obliges himself and his foresaids to labour, cultivate, and manure the same in all respects agreeably to the rules of good husbandry, and particularly without prejudice to said generality to farm and manage these parts of said lands that are arable by at least the five-shift rotation thus to have in each year not less than one-fifth thereof in old grass, and not more than one-fifth in each of the following crops, *videlicet*:—Young grass, turnips or bare fallow, white crop after grass and white crop after turnips or fallow, declaring that no two white crops shall succeed each other."

The pursuer pleaded, *inter alia*—"(1) The defender being bound to labour and cultivate said farm in accordance with the rules of good husbandry, and *separatim* to preserve and maintain the rotation of cropping thereupon, and having failed to implement said obligations or either of them as stated, decree should be granted as craved. (2) The defender being bound in accordance with the common law and the custom of the said farm and surrounding district to adopt one or other of the alternatives concluded for, and having refused to implement same, decree should be granted as craved."

The defender, *inter alia*, pleaded—"(1) The defender not having failed to implement any of the obligations incumbent upon him as tenant of the said farm either under his lease or at common law, decree of absolvitor should be pronounced, with expenses."

On 15th July 1911 the Sheriff-Substitute (MACAULAY SMITH) pronounced the following interlocutor:—"*Finds in fact* (1) that the defender under a lease of fifteen years was tenant of the farm of Gordon East Mains down to Whitsunday 1911 as to houses and grass; (2) that about one-fifth part of these subjects, now under white crop, is not to be vacated by him till the separation of said crop; (3) that in or about the month of April 1911 the defender was requested by pursuer either himself to sow, or to grant facilities for his successor the incoming tenant to sow, grass seeds along with said crop of corn in order to provide young grass for said incoming tenant, and

at same time preserve the rotation of cropping; (4) that defender, after having permitted a portion of said ground to be sown by his successor, refused to allow the remainder to be sown except upon the granting to him by the incoming tenant of certain conditions which, *inter alia*, included a reference to arbiters; (5) that in consequence of defender's refusal a portion of said subjects consisting of about 41 acres is still unsown with grass seeds; (6) that under his said lease the defender was bound to observe the rules of good husbandry and to follow a regular rotation of crops known as the five-shift rotation; (7) that there is no clause in said lease explicitly binding the defender to sow grass seeds as described, nor reserving to the pursuer the right to permit anyone else to come upon the subjects to do so; (8) that in agricultural districts generally there is a practice or custom proved to exist under which sowing of grass seeds with a waygoing crop is carried out either by the outgoing or incoming tenant by arrangement between themselves; and (9) that the defender, in terms of some form of arrangement with his predecessor in the lease, was allowed under certain conditions to sow grass seed with his predecessor's waygoing corn crop: *Finds in law* (1) that the defender is not bound by said practice or custom either himself to sow grass seeds as described or to permit his successor in the lease to do so; and (2) that he is not bound to do so either by the fact of his having himself had access at the beginning of his lease for sowing grass seeds or by the terms of his lease: Therefore refuses the crave of the initial writ. . . ."

Note.—"The contention of the pursuer in this case is that the defender in connection with his occupancy of the farm of Gordon East Mains is bound, on his being granted reasonable allowance for labour and for any incidental expense incurred by him, to sow down, harrow, and roll in grass seeds upon approximately one-fifth part of the arable subjects comprising said farm, and that in conjunction with the sowing of his own waygoing corn crop on that portion; or alternatively, to grant all necessary facilities for the same being done by the pursuer or by incoming tenants.

"The reasons stated by pursuer for this obligation on the defender are that (1) the defender is bound so to act by the terms of a lease which the pursuer avers is held by defender subject to the right of entry on the part of the pursuer and incoming tenants for the purpose above stated; (2) in virtue of the necessary and invariable custom to that effect used in connection with this farm and surrounding district in farm outgoings; and (3) in any event in respect of defender having claimed from his predecessor in said farm as outgoing tenant under a lease in similar terms to his own one or other of the alternatives stated for sowing grass seeds at his own entry.

"Consequent upon this reasoning, and in respect as is averred that the defender, *quoad* a portion of said fifth part, has refused either himself to sow or to grant facilities to the pursuer to sow grass seeds as described, the pursuer asks for declarator to the effect that the defender is bound either himself to sow grass seeds under the conditions stated on said portion still unsown, or to grant the necessary facilities to incoming tenants or their servants for doing so.

"In terms of his lease which the defender entered into in 1895, he is bound to quit possession of the subjects (1) as to fallow at 1st January; (2) as to houses and grass at Whitsunday; and (3) as to the portion of arable land in dispute at the separation of the corn crop in the autumn, all in the year 1911.

"Since the normal time for sowing grass seeds is admittedly long past, it will thus be evident that such a declarator as is craved can have no such practical effect as its terms suggest, but (as the pursuer maintains) it is a necessary adjunct for his success in any future action he may find it necessary to take for the recovery of damage suffered by him.

"The lease of said subjects has been produced by the pursuer, and as to its terms it may be remarked to begin with that the pursuer's averment about its being held by defender 'subject to the right of entry on the part of the pursuer and incoming tenants' for the purpose of sowing grass is merely an inference drawn by pursuer from his own propositions thereanent, since there are no such explicit terms therein contained.

"The decision of the question of declarator must therefore rest either upon inferences drawn from the terms actually found in the lease, or upon the effect which the custom averred by pursuer may have upon the interpretation of the deed should it be found that the introduction of custom is justified in such circumstances. [*After examining the evidence as to "custom" the Sheriff-Substitute proceeded*]—"A lease of land intended for cultivation seems to me to be about the last form of contract to the interpretation of which custom should be applied so long as there is a possibility of making its terms clear without such an aid. It is a form of contract which is in the hands of the proprietor of the land so far as the drawing of it is concerned. It is an instrument by which he has the opportunity of reserving to himself every right, and of imposing on the tenant every obligation, necessary for the preservation of the subjects. When the proprietor has reserved every right he intends to reserve, and imposed every obligation he considers necessary then in return for the rent paid by him, the tenant is entitled to the uncontrolled possession of the subject only under any restriction as to the form of cultivation imposed by the lease. In the absence of any stipulation to the contrary he is entitled from the first to the last day of the period of his lease to the full possession of the subjects let, or to an abatement of rent for any part withheld—*Munro*, 16 R.

93. The doctrine as pointed out by Lord President Inglis in the case of *Munro* was clearly stated by Lord Fullerton in the case of *Graham* v. *Gordon*, 5 D. 1211, in these terms—'Rent is a matter of contract in consideration of something to be done. It is paid for possession of the subject let. If the tenant says he has not got possession, that is a good answer to the claim for rent.' In this sense, and in the absence of a right of entry or control being specifically reserved in the lease, the dictation by the lessor to the tenant as to the sowing of any crop which is not to be reaped by the tenant or the lessor's permission to any person other than the tenant to invade the subjects for the purpose of interference with the land is an infringement of the tenant's right of possession. The landlord's remedy for the proper maintenance of his subjects lies in the common practice of inserting in the lease a clause reserving his right of entry to the land for such a specific purpose. When he fails to take such a precaution he can only blame himself if the tenant refuses to allow his land to be invaded. I have therefore come to the conclusion that what has been proved in this case in the name of custom cannot be imported so as to affect the interpretation of the rights of the lessor in this contract.

"Since in the present case there is no explicit clause compelling the defender either himself to sow grass seeds or to allow his successor to do so, it falls to be considered whether the right claimed by the pursuer can be fairly implied from the only obligations imposed on the defender which are relevant to this issue, namely, the obligation to observe the rules of good husbandry and to follow the five-shift rotation of cropping. With regard to the first of these, it cannot, I think, with reason be maintained that taken by itself the sowing of two crops at or about the same time in the same land can be termed good husbandry. Such a method must from its nature husband the resources of the land less than if only one crop at a time were sown. It was fairly generally agreed that such a method contained in it at least the risk of detriment to the corn crop, and the best that could be said of it was that it was a necessary, as it was the only known expedient for preserving a specified rotation of cropping. I am satisfied, therefore, that from this obligation alone the pursuer cannot derive the right he claims. The other obligation, that of observing the five-shift rotation, especially when taken in conjunction with the fact that the defender began his lease with a portion of young grass sown in this way, is to my mind more forcible and comes nearer to demonstrating an inferential right such as is claimed. In this view of the case it was argued that even during his own tenancy the defender, seeing he began his lease at this point, should, in order to fulfil his five-shift obligation, have left off only with the sowing of the grass seeds demanded by the pursuer; and had it been quite clear that the defender got this condition of things as a right and not as a concession from his predecessor I should have been strongly inclined to hold that in such a condition of affairs the defender was under this obligation bound to sow grass seeds for his successor as a necessary part of his five-shift rotation. Here, however, the circumstances throw us back upon an analysis of the alleged 'custom,' since the defender maintains that in arranging with his predecessor for the sowing of his grass seeds he had to give something for what that predecessor maintained was a privilege. Such an interpretation of the proceeding is not admitted by the pursuer, but we have the admission that the defender's predecessor's lease contained no compulsory clause, the evidence of the defender that Mr Allan informed him after the matter had been arranged that he might be thankful that he had got leave to sow his seeds, and the evidence of defender's servant to the effect that on the occasion of the sowing the operations were only allowed under unusual and difficult conditions.

"The position of the defender in conducting the preliminary negotiations for sowing with Mr Haliburton is not, it must be admitted, very clear or consistent throughout. There is, however, sufficient evidence to show that some kind of a bargain of give and take was in contemplation between them at one stage of which it is evident. The defender stood upon what he considered to be his legal rights. This position of legal right, it is fair to say, was never admitted by pursuer's representatives, who, quite rightly from their point of view, refused to concede the idea of submitting the question of possible damage. Short of this they seem to have done everything in their power to satisfy the defender that they would keep him immune from loss or damage. He, however, preferred to take his own course and to make his own conditions, which, being declined, he refused to allow the sowing to proceed, and, as I have indicated, I am of opinion that, in the absence of a clause either specifically compulsory or sufficiently inferential, he was entitled to take this course."

The pursuer appealed, and argued—The evidence showed that the five-shift rotation could not be carried out except by sowing grass seeds with the waygoing white crop. That being so, it was the defender's duty either to sow them himself or to permit the landlord or incoming tenant to do so—*Purves* v. *Rutherford*, December 3, 1822, 2 S. 59 (53); *Marshall* v. *Walker*, May 26, 1869, 1 Macph. 833, 6 S.L.R. 525; *Simson's Trustee* v. *Carnegie*, May 27, 1870, 8 Macph. 811, 7 S.L.R. 502.

Argued for respondent—There was no such duty on the respondent, for the lease did not prescribe it. Such a duty must be stipulated for in the lease, and could not arise by implication—Hunter on Landlord and Tenant, vol. ii, 630; *Lyall* v. *Cooper*, November 27, 1832, 11 S. 96, at p. 116. The five-shift rotation did not involve it, for it was expressly declared in the lease what that rotation should mean. It was enough

for the respondent to have complied, as he had done, with the stipulations of the lease—*Stark* v. *Edmonstone*, November 28, 1826, 5 S. 45 (42).

Lord President—This case raises the question whether a landlord is not entitled to have grass seed sown along with the white crop under a five-shift rotation in the last year of the lease. The lease in question binds the tenant "to labour, cultivate, and manure the lands in all respects agreeably to the rules of good husbandry, and particularly, without prejudice to said generality, to farm and manage these parts of said lands that are arable by at least the five-shift rotation."

Now the whole question, it seems to me, comes to be what is the five-shift rotation, and secondly, is the sowing of grass seed with the white crop part of that rotation? I cannot imagine that anybody, whether lawyer or farmer, could give any but the one answer. But I will take two witnesses, who will do as well as more. The first I take is Mr Davidson, a well-known authority on the subject, who says this — "I would say that the failure to have these grass seeds sown is a complete violation of the rules of good husbandry, and also of the fifth-shift system. It is plain you can't have that system unless it is done." And the other is Mr Forrest, Edrom, a witness for the defender, who in his examination-in-chief, gives us the advantage of some legal views as to what the tenant is bound to do in the last year of the lease, but who, when he is cross-examined, not upon legal views but upon what actually happens, says that he has sown grass seeds after harvest if the sowing which had been done previously had misgiven, that is to say, come to grief. And he goes on thus—"With that exception I have always sown down my grass seeds with the waygoing crop. I have never known of anybody on the fifth shift who did not follow that procedure. (Q) Would you say that anybody who did not do that was following the rules of good husbandry? (A) He could not do it otherwise."

I think these two witnesses are quite enough to confirm one in what one might say was part of judicial knowledge, namely, that it is part of the five-shift rotation to sow down grass seeds with the white crop so as to get the young grass in terms of the rotation. Now I do not think that custom, that is to say, custom in a technical sense, has anything to do with this. Custom in a non-technical sense has, because custom, or what everybody does, may serve to show how the five-shift rotation is in practice carried out. When the sowing of the grass seeds is done by the tenant who is leaving, in the last year of the lease, then custom, in the technical sense, has provided that he shall be remunerated for the grass seeds (if he provides them), inasmuch as he is not going to reap the grass which he has sown, and also that he shall have the right (if they are provided by the landlord or the incoming tenant) to be paid for his labour in sowing them, and for harrowing and rolling them in, unless there are special stipulations in the lease providing that he is to do it for nothing.

I must say that I think it is exceedingly clear that this tenant had no right to take up the attitude he did during the last year of his lease, and to say that, by refusing to sow grass seeds himself and preventing the landlord or his assignee, the incoming tenant, doing so, he would make it impossible for the five-shift rotation to be carried on, that five-shift rotation being the particular thing which he was bound to see carried out.

Accordingly I think the Sheriff-Substitute is wrong and that the appeal should be allowed.

Lord Johnston — This lease has, as it seems to me, the unusual merit of brevity, but at the same time it contains an exact statement of the situation that was intended to be created between the landlord and his tenant during its currency, and between the landlord and the outgoing tenant on the one side, and between the outgoing tenant and the incoming tenant on the other. The lease is also drawn evidently with an accurate knowledge of agriculture so far as bearing on the matter, and if agricultural knowledge had been applied to its interpretation instead of legal ingenuity this litigation would not have occurred.

To come to the details of the lease, if the farm is to be cultivated upon a five-shift rotation it must be so cultivated. What, then, is the five-shift rotation? I do not take this from my own knowledge. I take it from the lease itself. The five-shift rotation is — first year, old grass; second year, white crop after grass; third year, green crop or bare fallow; fourth year, white crop after green crop or fallow; and fifth year, young grass. Now, how is the young grass to get there? It can only get there, according to the rules of good husbandry, by being sown with the white crop. That is the course which on the five-shift rotation the tenant was bound to follow, and if he does not there will be no young grass to follow the last white crop, and as Mr Forrest says in two lines after the passage your Lordship quoted, "if there was no young grass on the farm it would throw it out of rotation for the incoming tenant."

Now that is just exactly what this outgoing tenant has maintained his right to do. But it seems to me that he is not entitled to say that he has fulfilled the conditions of his lease if when at the end of his lease he is sowing out his last grain crop he does not also do that which is part of the due cultivation of the farm on a five-years' rotation, and with that grain crop sow out grass seeds for the next year's grass. I do not think, therefore, that there is any question whatever that it was an obligation on the outgoing tenant under this lease to sow out with the last white crop grass seeds to provide young grass for next year. Without doing so his obligation to cultivate the farm under a five-shift rotation, according to

the rules of good husbandry, would not be fully implemented.

It is perfectly true in many and probably in most cases that the incoming tenant is by arrangement allowed to come in and sow the grass seed for himself, because, while the obligation is as I have stated, it is, if not expressed, implied by custom that the incoming tenant must pay for the seed the grass of which he is to reap and for the cost of sowing it. But this is not his right. It is a mere arrangement for mutual convenience between the outgoing and the incoming tenant that the incoming tenant should be allowed to do himself that which he must otherwise pay for, and the doing of which is not a matter of profit to the outgoing tenant. But that does not affect the obligation upon the outgoing tenant in such a case as the present to sow the grass seeds with the waygoing crop, receiving the cost of the seeds and sowing from the incoming tenant.

I therefore agree with the judgment which your Lordship proposes.

LORD SKERRINGTON—I concur.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute dated 15th July 1911: Find in fact in terms of the first six findings in fact in said interlocutor: Find further in fact (7) that the five-shift rotation requires that grass be sown along with the grain crop on the fields in question: Find in law that the pursuer is entitled to decree as craved: Find and declare accordingly in terms of the crave of the initial writ, and decern: Find the pursuer and appellant entitled to expenses, and remit," &c.

Counsel for Pursuer—Constable, K.C.—D. M. Wilson. Agents—Kinmont & Maxwell, W.S.

Counsel for Defender—Johnston, K.C.—T. G. Robertson. Agents—Steedman & Richardson, S.S.C.

Tuesday, May 28.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

MILLS *v.* KELVIN & JAMES WHITE, LIMITED.

Process—Diligence—Recovery of Documents—Slander—Documents in the Hands of Crown Officials—Precognitions Taken by Defenders.

A manager brought an action of damages against his former employers for having, as he alleged, falsely, maliciously, and without probable cause, lodged with the procurator-fiscal a charge of theft, and also one of fraud, against him. An issue and counter issue having been allowed, the Court *granted* the pursuer a diligence to recover "All charges, statements, or other writings lodged by the defenders or their solicitor, or by any of their directors, with the Procurator-Fiscal, Glasgow, or the Crown Agent, Edinburgh, and relating to charges of theft or fraud against the pursuer between 1st November 1911 and 16th January 1912."

R. K. Mills, instrument maker, Clarkston, *pursuer*, brought an action against Kelvin & James White, Limited, nautical instrument makers, Glasgow, *defenders*, in which he claimed £5000 damages for slander in respect, *inter alia*, of their having, as he alleged, falsely, maliciously, and without probable cause, lodged certain criminal information with the procurator-fiscal against him.

The pursuer, who had formerly been in the defenders' service as works manager, but who had been dismissed, averred—"(Cond. 4) In or about the month of November 1911 the defenders, through their law agent, lodged with the Procurator-Fiscal at Glasgow two serious criminal charges against the pursuer, viz., (*first*) a charge of the theft of certain gauges, jigs, and other articles which were the property of the defenders, and (*secondly*) a charge of fraud in connection with the despatch of said articles to the premises of Messrs Burt Brothers in Birmingham. The precise words in which the defenders formulated the said charges against the pursuer are unknown to him, but the substance of the charges is as above set forth, and said charges were put forward by the defenders on or about the 4th, 8th, and 15th of November 1911, and these were maliciously persisted in and pressed in the following months of December and January. The defenders have prevented the pursuer from obtaining the documents which the defenders, through their law agent and directors, lodged with the criminal authorities, but he believes and avers that the charge of theft was contained in a statement lodged in or about November 1911 with the procurator-fiscal, and the charge of fraud was made in or about the month of December or January following and was contained in what purported to be precognitions and statements of certain of the defenders' directors and servants and Mr F. H. Harris (works manager for Burt Brothers), and in certain letters written by or on behalf of said directors (who were acting for the defenders) to the Crown Agent in Edinburgh."

He pleaded—"(1) The defenders having falsely, maliciously, and without probable cause lodged the said criminal information with the procurator-fiscal against the pursuer, the defenders are liable in reparation."

The defenders, who admitted that in the month of November 1911 they "laid before the Procurator-Fiscal at Glasgow certain information which had come to their knowledge with reference to the pursuer's actings, with a view to the prosecution of