HUTCHINSON, . . APPELLANT.

FERRIER, . . . RESPONDENT (*a*).

1852.
4th, 5th, and 29th March.

In a case where the issues directed for trial were, whether the Pursuer was tenant, under the Corporation of Edinburgh, of a given piece of ground for a given period of time; and whether the Defender had wrongfully taken and retained possession of it, to the loss and damage of the Pursuer: there being no proof that the property in question was let by the Corporation to the Pursuer; and it appearing that the Defender was in possession, all along, under an independent title:—HELD, that the action against him could not be sustained.

A lease, in Scotland, to have its full effect, must be followed by possession; and, therefore, in the above case, *Semble*, even if the title had been proved, the want of possession on the part of the pursuer would have been fatal to the action.

THE action was brought by the Appellant against Ferrier to recover damages in respect of an alleged "wrongful" occupation of a certain arch or gateway, together with the soil on which the same was erected—extending to twelve feet in length, and "of the breadth of a cartway." The value of the subject-matter in contest was estimated at 2*l.* a-year (*b*).

The issues directed for trial were to the following effect:—

Whether from Whitsunday, 1837, to Whitsunday, 1846, the Pursuer was tenant under the magistrates of Edinburgh of a strip or piece of ground adjoining a wood-yard at Leith; and whether during the period from Whitsunday, 1837, to Whitsunday, 1846, or part thereof, the Defender wrongfully took possession of a gateway or entrance in the wall of the said strip or piece of ground, and of a portion of the said strip or piece of ground as a roadway or entrance to, and exit from, the said wood-yard; and during the said period, or part thereof, wrongfully continued to occupy and possess the said

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(*a*) Reported in the Court of Session Cases, Second or New Series, vol. xiii., p. 837.

(*b*) There had been four actions about it in the Court of Session, and one appeal to the House of Lords, anterior to the present proceedings. Lord Brougham asked what the Appellant would gain by succeeding? Counsel answered, "the satisfaction of settling the law."

In Scotland, agreements to demise are leases, and require to be stamped as such.

It is essential to a Bill of Exceptions, that it shall authenticate, by the Judge's signature, the documents to which the ruling excepted to applies.

Unless the documents are properly authenticated, the Court is precluded from looking at them.

In excepting to the ruling of a Judge, it is a great irregularity to represent the Judge as having decided something different from that which he really has decided.

Under the 13 & 14 Vict. c. 36, s. 45, the Court is to consider what effect documents rejected would have had, if admitted; and, if the Court shall be of opinion that the documents, if admitted, ought not to have affected the result, the undue rejection of them at the trial will not make it imperative to allow the exception.

gateway and portion of ground, and to exclude the Pursuer therefrom, to the loss, injury, and damage of the Pursuer ?

The cause came on for trial before the *Lord Justice-General* (*Boyle*), on the 26th of December, 1850; and it will be the safest course to describe what took place from the words of the bill of exceptions.

The bill of exceptions stated that

The Pursuer did adduce the following witnesses :—

1. *John Sinclair*—He is Assistant Town Clerk of Edinburgh. Knows there was a discussion about a piece of ground near Leith, of which Mr. John Hutchinson was tenant under the magistrates. His father had a lease, and he was entered tenant from year to year by the town, and was acknowledged as such (and is not aware of a written lease for many years.) The Chamberlain acts as factor in disposing of the city's property, and cannot let it for more than a year at a time. When he finds it necessary, he takes the direction of the Council as to letting any of city's property ; and witness is aware the Chamberlain got, from time to time, permission from the Council to let the piece of property to Mr. Hutchinson. Witness generally knows the property—a strip along one side of Morton-street, from Duke-street down towards the Links—and the strip came up to Duke-street.

2. *Mr. James Robertson*—He is City Chamberlain, and has been so since 1838. He succeeded Mr. Turnbull, who is dead. Knows the property occupied by Mr. Hutchinson, who had occupied it before witness's time ; and his father had held it from year to year before ; and the Pursuer has occupied it from year to year. There never was any lease to him. He was annually asked if he was to continue, and he answered : and ordinary missives passed every year relative to that ground in the form of letters.

The counsel for the Defenders here objected that, in respect of the existence of these missives or letters which are in process, the Pursuer cannot prove his tenancy otherwise than by their production.

The following statement was merely to explain the facts for informing the Court, in reference to this objection, but not as evidence to the jury.

Looks at letters.

They began in 1836 and go down till 1846.

The first year from 1836 was at a rent of 16*l.*, and it has been the same ever since.

Shown two receipts for 1837 by Mr. Turnbull ; these are for 8*l.* each half year ; and it has continued 16*l.* ever since, he is quite sure.

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The *Lord Justice-General*, after argument of Counsel, sustained the objection, that the letters or missives which passed between the City Chamberlain and the Pursuer, offered in evidence, are not stamped, and therefore could not be admitted as proving leases between Mr. Hutchinson and the City of Edinburgh of the subjects in question, and that these being in existence, the tenancy cannot be proved without them.

The counsel for the Pursuer excepted to the above ruling, that the letters which passed between the City Chamberlain and the Pursuer during the period in question constituted written leases, and which, not being stamped, could not be given in evidence, nor the contents thereof, nor the Pursuer's tenancy proved without them.

And it being stated by the counsel for the Pursuer, that, in consequence of the deliverance of the *Lord Justice-General*, he would not lead evidence, nor ask for a verdict, the jury did then, under the direction of the *Lord Justice-General*, deliver their verdict finding for the Defenders. Whereupon, the counsel for the Pursuer requested the said *Lord Justice-General* to sign the said bill of exceptions, according to the form of the statute, in such case made and provided; and the said *Lord Justice-General* did sign the said bill of exceptions accordingly, on the 22nd day of January, one thousand eight hundred and fifty-one years.

D. BOYLE.

This bill of exceptions was brought under the consideration of the First Division of the Court of Session; and on the 4th March, 1851, was disallowed. Hence this appeal.

Mr. *Roundell Palmer* and Mr. *Forsyth* were heard for the Appellant; and Mr. Sergeant *Byles* and Mr. *Anderson* for the Respondent.

The arguments, however, of these learned counsel are omitted; because the decision of the House went on grounds not taken at the bar.

The LORD CHANCELLOR (*a*):

Lord Chancellor's opinion.

My Lords, since the argument by counsel at your Lordships' bar, our attention has been drawn by my noble and learned friend opposite (*b*) to the bill of

(*a*) Lord St. Leonards. (*b*) Lord Truro.

Lord Chancellor's opinion.

exceptions;—upon the frame and contents of which I apprehend that the decision of the House will now turn.

My Lords, I shall always regret when your Lordships have to pronounce judgment upon points not argued at the bar; even although those points may appear to be free from all doubt. I shall regret this the more when our decision is governed by a matter of technical formality, as it happens to be here. I have, however, satisfied myself that the merits agree with the form; and that both upon the merits, and upon the form, the order complained of in this case must be affirmed with costs.

The exception charges the learned Judge with having laid it down that the letters or missives *were leases*.

The counsel for the Pursuer excepted to the ruling that the letters *constituted written leases*.

My Lords, there was no such ruling. What the learned Judge said was, that the letters or missives, being unstamped, could not be admitted as proving leases. He did not say that they actually constituted written leases.

My Lords, there is a passage in the bill of exceptions well calculated to puzzle and embarrass the Judges who have to decide this cause.

The following statement was merely to explain the facts for informing the Court, but not as evidence to the jury.

In point of fact, nothing went to the jury. The bill of exceptions proceeds—

Looks at letters.

Who looks at letters? Your Lordships will observe that, although it might be a fair inference here that it was the witness who "looked at letters," yet this is not stated, nor does it anywhere *authentically* appear what

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the letters were. The letters are said to be in an appendix. They are indeed set out in the printed case on your Lordships' table. But they are not incorporated, as they ought to have been, in the bill of exceptions. Your Lordships, therefore, are precluded by the authorities from looking at them (*a*).

Thus much on the point of form.—As regards the merits, I think the case is equally clear. The point to be proved was the *tenancy*. But it was not to be proved simply as between lessor and lessee. It was not a case of clear and undoubted demise from A to B, and then an entry by C; but it was a case in which C had held possession during the whole period, claiming in his own right, and adversely to the city itself. Now it was incumbent on the Appellant to show that he held the property under the Corporation.

It appears from the correspondence that provision was made to secure to the Appellant the very thing which he now makes the foundation of a claim for damages. There is a stipulation in one of the letters from the Corporation that 2*l.* a-year should be set apart to answer the loss which the Appellant might sustain if he did not get possession of this arch or gateway. And there is an answer from the Appellant thanking the Magistrates for "having agreed, to a certain extent, to his wishes." I submit to your Lordships, therefore, that this property never was intended to be demised, so as to create a tenancy absolutely as between the city of Edinburgh and the Appellant, and that he never could have recovered the damages which he sought.

My noble and learned friend opposite will state more at large that which we are indebted to him for having pointed out, upon the bill of exceptions, and which I

(*a*) *Galway* v. *Baker*, 5 Cla. & Fin. 157; *Gordon* v. *Graham*, 8 Cla. & Fin. 107; *Lord Trimleston* v. *Kemmis*, 9 Cla. & Fin. 749—771; *Irish Society* v. *Bishop of Derry*, 12 Cla. & Fin. 641.

have but slightly referred to; but I shall now move that your Lordships do affirm this order with costs.

Lord Chancellor's opinion.

Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, I entirely concur with my noble and learned friend who has just addressed your Lordships. And I hope that my noble and learned friend opposite (who I know has much considered this case) will now go fully into it.

Lord TRURO:

Lord Truro's opinion.

The issues, when applied to the admitted facts, seem to give rise to the following questions:—1. Is the disputed spot part of the ground belonging to the Corporation? 2. Was it included within the letting by the Corporation to the Appellant from Whitsuntide, 1837, to Whitsuntide, 1846? 3. Did the letting, in point of law, establish the relation of landlord and tenant in regard to such disputed spot?

My Lords, it is material to bear in mind that the affirmative or onus of proof lay on the Appellant upon both issues.

Now, upon reference to the record, it will be observed that the proceedings upon the trial and the bill of exceptions are not set forth formally or satisfactorily. One of the exceptions to the ruling of the Judge is, that he held certain letters or missives to be inadmissible in evidence, but it is only to be collected inferentially, as my noble and learned friend has observed, that any, or, if any, which of the letters were ever tendered in evidence, or considered as comprised within the principle of rejection laid down by the Judge—the documents set forth (*a*) being subject to very different constructions and considerations.

(*a*) The letters, though not in the bill of exceptions, were set out in the prints on the table of the House.

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My Lords, it will be proper to attend to the precise manner in which the documents in question came before the Judge, and the manner in which the objection to them arose. The Appellant called Robertson, the chamberlain of the Corporation, as a witness to prove the letting; and he said that he knew the property occupied by the Appellant, and that he had occupied it from year to year—that there was never any lease to him—he was annually asked if he was to continue, and he answered;—the ordinary missives thus passing every year relative to the ground in the form of letters.

Now, my Lords, there is no suggestion throughout the case of any verbal letting; and the question is, whether or not the effect of Robertson's evidence is that the letting took place by writing, that is, by the letters or missives. If such was the effect of the evidence, the issue being whether the tenancy included a precise and definite spot, it seems to follow that the only evidence, *against a third person*, that such letting did include the disputed spot, would be the written documents. Much might have been evidence in a question between the lessor and lessee by way of admission, which would not be evidence against a person claiming adversely, and that in a question of parcel or no parcel, and in relation to the spot of which neither the Corporation nor the Appellant had been in possession during the term or period to which the letting extended.

The Respondent's counsel required the missives to be produced to show what was comprised in the letting or demise—or, in other words, whether it included the disputed spot. The bill of exceptions does not state that the Appellant's counsel objected to produce them, but proceeds by saying "Looks at letters," &c. (*a*).

In the Appellant's case, it is stated, that "the letters were not produced in process by the Appellant, or

(*a*) See *suprà*, p. 197.

tendered in evidence by him." And, again, "They were not offered in evidence by the Appellant." It is not easy to collect the precise effect of the different statements. It is said that the documents were tendered in evidence; but the contrary is rather to be inferred from the words in the bill of exceptions: "that they were offered for the information of the Court, and not as evidence to the jury." "Looks at letters." It is not said *who* looks, nor *at what letters*, nor *who* produced or identified them.

The bill of exceptions proceeds with the statement of facts, of which no evidence is given, and it does not mention who stated the facts. It says, "the first year from 1836 was at a rent of 16*l.*, and it has been the same ever since." "Shown two receipts for 1837 by Mr. Turnbull;" but we are not told by whom, or to whom such receipts were shown, nor by whom produced, nor how authenticated. The word "shown" might perhaps mean shown to the Judge, but the latter words of the statement, "he is quite sure," must refer to some one else, most likely the witness, Robertson.

There being no statement that the letters had ever been tendered in evidence, or that their admissibility had been objected to, the record states, "The *Lord Justice-General* sustained the objection that the letters or missives, offered in evidence, were not stamped, and therefore could not be admitted as proving leases of the subjects in question."

Whether this ruling applied generally to all the letters which had been shown, or only to such as imported an agreement to let or to take, may be uncertain; but the Judge's remark could not, with equal propriety, be applied to all the letters set out, some of them having nothing in them importing either a letting or a taking.

Now, my Lords, it is essential to the validity of a bill

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of exceptions, that it should set out, and authenticate by the Judge's signature, the letters or written documents which the Judge rejects, especially those in which the propriety of the rejection depends upon the contents of each letter or document. In the present instance, the Judge's signature does not purport to authenticate any letters or documents; but after the bill of exceptions is set out, there is a statement in the Appellant's printed case, unauthenticated by any signature, "That the following are the missives or letters referred to in the bill of exceptions;" and then follow several letters of very different import and effect from each other.

My Lords, unless the documents embraced by the Judge's ruling be authenticated by his signature, I think the House cannot deal with the exceptions at all. There is no rule more inviolably observed than that the merits of the exceptions to a Judge's ruling must be determined with reference to the matter apparent upon the record, and it is quite settled that the Appellate Court will never look beyond it. The House cannot go out of the bill of exceptions to inquire to which of the letters in particular it did apply. My noble and learned friend has referred to the cases, which, upon this point, are distinct authorities.

My Lords, I have inspected the original appeal presented to the House in this case. It is in manuscript on parchment, and purports to set out the record of the bill of exceptions. It does not, however, set out the letters; but a printed paper is annexed to the appeal which does set out the letters, and which has the name of "Walker," an officer of the Court, attached to it. The appearance of the document, I think, imports that the copy of the letters did not form part of the record signed by the Judge, nor was annexed to it, nor authenticated by the Judge's signature.

But assuming the letters which were rejected to be sufficiently authenticated by the Judge's signature, still I think the ruling must be deemed to apply to those letters only which contain expressions importing a contract to let or take, and which by the Scotch law would operate as leases. The Judge sustained the objection to the admissibility of the letters as proving leases, because they were not stamped as leases; and if they were tendered as proving leases, I think his ruling was right; and certainly the Judge's language imports that the letters had been offered in evidence as proving leases, and the ruling only excludes them *as proving* leases.

If the Appellant either offered the letters in evidence, or was desirous of using them to prove something else than leases, that other object should have been stated, and the Judge should have been called upon to decide with that view upon their admissibility. But the Judge having held them to be inadmissible as proving leases, no statement was made of their being offered for any other purpose.

My Lords, I have before noticed the assertion of the Appellant in his printed case, that the letters never were offered in evidence on his part, and it must be admitted that the record does not state that he ever did so offer them. The fact is to be inferred only from the expressions of the learned Judge in delivering his opinion.

The Appellant cannot be permitted to except on account of the rejection of documents, which he never offered as evidence; and I also think that the exceptions can only be maintained by his establishing that the rejected letters were admissible in evidence as proving leases, although not properly stamped as leases.

My Lords, it was also remarkable that the counsel

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for the Appellant, in his reply, strongly urged that the letters had no reference to the spot in dispute, and persisted in the assertion, even after my noble and learned friend opposite arrested his attention to the effect of his objection; and the letters are certainly fairly open to objection in this respect, but the objection operates against, not for, the Appellant.

Among other irregularities, apparent upon the record, it will be seen that the counsel, in stating his exception to the Judge's ruling, affected to repeat the Judge's direction. The Judge having ruled that the documents were inadmissible as proving leases, the exception imputes to the Judge the having ruled that the letters *constituted leases.* This alteration is very improper; because the Judge who finds his ruling correctly stated in one part of the record, may be taken off his guard by his expressions being varied in another part, and his signature may be obtained without the change being called to his notice. Such a course should be narrowly watched and checked.

Now, my Lords, in the result I think Robertson's evidence proved the letting to have been by writing; and, regard being had to the question to be tried, I think that the Appellant was bound to produce such writing.

I am further of opinion that such of the documents as tended to prove, or were tendered in evidence to prove a letting, or an agreement to let, were inadmissible unless stamped; and that such letters as were not evidence of a letting of ground, which included the disputed spot, were *res inter alias acta,* and so not receivable at all against the Respondent. The rejection, therefore, is not the subject of exception.

My Lords, the terms of the Stamp Act, 55 Geo. III. c. 184, are "Lease or tack, &c., at a yearly rent not amounting to 20*l.*—1*l.*; lease or tack of any kind, not

otherwise charged in this schedule, 1*l.* 15*s.*" The Appellant relies upon a part of the schedule which speaks of agreement, minutes, or memorandum of agreement made in England or Scotland, where the matter thereof shall be of the value of 20*l.* or upwards, 1*l.* And he contends that the documents in question are only agreements, and not subject to stamp duty—the subject-matter being under the value of 20*l.*

But, upon reference to the authorities, it will be seen that, contrary to English law, agreements to demise, in Scotland, however informal, by whomsoever signed, or whether signed or not, are leases; and it is quite clear that such agreement requires to be stamped as leases.

The result, however, of the present appeal will not depend altogether upon the question whether the letters were improperly rejected or not; inasmuch as by a recent statute (*a*), it is enacted "that it shall not be imperative on the Court to sustain a bill of exceptions, on the ground of the undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have affected the result at which the jury by their verdict have arrived."

It, therefore, must be considered what effect ought to have been given to the letters as maintaining the issue on the Appellant's part, if they had been received in evidence, and submitted to the jury; and for that purpose regard must be had to the precise question raised by the issue.

But, my Lords, I am inclined to think that one fact is, and ought to be, decisive of the present case; namely, that at the commencement of the period from which the Appellant claims to have been tenant, viz.,

(*a*) 13 & 14 Vict. c. 36, s. 45.

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Whitsuntide, 1837, and throughout to its termination at Whitsuntide, 1846, the Respondent was in entire, exclusive, and adverse possession of the ground in dispute.

By the Scotch law, even the most formal lease or tack does not give any possessory interest in the land which it purports to demise, until the proposed lessee or taker enters into possession actual or constructive.

Now, in the present case, there was no possession, either actual or constructive, on the part of the Appellant.

It may, perhaps, be said that nothing has transpired to negative the title of the Corporation to this disputed ground. But it is equally true, on the other hand, that no affirmative evidence was given either of title or of possession, on the part of the Corporation, or of the Appellant, who claims under it.

I can discover no authority, in any Scotch law-books, tending to support a claim of the nature of that urged by the Appellant, under a lease where possession has not been had under it; but it seems to me that, even if evidence had been given of the title of the Corporation to the disputed spot, the circumstances connected with the possession would have repelled the Appellant's claim; and even supposing there had been an instrument clearly purporting to demise to him the spot in question, he would have had no case against the Respondent. He could neither have maintained a process of removing against the Respondent: nor enforced the recovery of damages in the nature of rent or mesne profits. In short, his remedies would have been confined to the Corporation, from whom he had received the demise.

I think, further, that a very serious question exists, whether the disputed spot was included in the demise by the Corporation to him during any part of the nine

years in respect of which he claims. And regard being had to the knowledge of the Appellant, year after year, that he could not get possession, still greater doubt would have arisen as to the land having been demised for each year of the term.

The authorities (*a*) show that the want of possession, under the circumstances, would have precluded the Appellant's right to a verdict under the issue of tenancy. So that, even if the letters had been received in evidence, the present appeal must have been dismissed under the authority of the statute to which I have referred.

The question, however, remains to be considered—whether, supposing the letters had been received in evidence, there would have been sufficient evidence to warrant a verdict that the disputed ground was let to the Appellant under the description set out in the issue. Now, it appears to me that the letters either leave the point uncertain, or negative the fact that the disputed ground was included. I think the letters, if received in evidence, would not have maintained the affirmative issue of the Plaintiff, and I am of opinion that the jury upon such evidence ought to have found a verdict for the Respondent.

It cannot properly be surmised that the Appellant might have had other evidence, which, if the letters had been received, he might have given, and which, when coupled with the letters, would have maintained the issue on his part; because, if any such evidence were in existence, the Appellant was bound not to leave its existence and its probable effect to conjecture. He was bound to tender it in evidence, in order that the Judge might see what it was, and judge of its effect, and that a Court of Error or Revision might see how far the

(*a*) Stair, B. 3, T. 2, § 6; Erskine, B. 2, T. 6, § 25.

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letters, if received, aided by such other evidence, might, or might not reasonably be supposed to have affected the verdict.

Now, my Lords, no observation arises in regard to the effect or value of the parol evidence independently of the letters, because the Appellant not only did not request that evidence to be submitted to the jury, which he was bound to do, but he, in express terms, withdrew it from the jury, and declined to ask for a verdict; and, further, there is no exception upon the ground that that evidence was not submitted to the jury. And, indeed, under the circumstances, there could not be any such exception.

My Lords, with reference to the opinion of the learned Judge, "that the missives or letters being in existence," the tenancy could not be proved by any other evidence; I submit to your Lordships that no exception lay; and that the Appellant's counsel, if he had any other evidence which he was prepared to contend ought to have been received in maintenance of the issue, was bound to produce it; and, if rejected, to except to the rejection.

It was not competent to the Appellant to rest upon the opinion so expressed by the Judge. The Respondent had a right to see what the evidence was. He might not have objected to it, or might have waived any objection, preferring to rely upon some answer to it, or upon its failing, to satisfy the jury, rather than risk the case upon the validity of the objection. But by the Appellant standing upon the opinion expressed by the Judge, the Respondent was excluded from the benefit which might have accrued to him from the exercise of that discretion; and the Judge could not waive the production to the prejudice of the Respondent.

Upon the whole, my Lords, I entirely concur in the

view which is taken by my noble and learned friend upon the Woolsack; and I cordially assent to his motion that the judgment of the Court below be affirmed, with costs.

Interlocutor appealed from affirmed, with Costs.

LANG.—EVANS & CLODE.