

1805. *December 7.* GORDON, Petitioner.

No. 11.

Conventional irritancy in a tack, on the bankruptcy of a tenant, found incurred, altho' before decree, he had obtained a discharge from his creditors upon a composition of the debts.

OF the date 23d August 1792, Robert Gordon entered into a lease with William Copland, Esq. of Collieston, which contains the following clause :
 ' Secluding assignees and subtenants of all kinds, also the legal diligence of creditors, as it is hereby expressly covenanted and declared, that this tack shall be at once irritated and made void by the statutory or actual bankruptcy of the tenant, instructed by the appointment of trustees, compounding of his debts, the sequestration of his effects, or otherwise.'

In the end of the year 1803, Gordon's affairs became embarrassed ; his creditors took out a sequestration against him, and a trustee was appointed.

Mr. Copland brought a process of removing against Gordon before the Sheriff of Dumfries, upon the ground, that the irritancy in the lease had been incurred ; and decree was pronounced in terms of the libel.

Two days before obtaining this decree, the creditors had agreed to accept of a composition, which was followed up by obtaining a regular discharge in terms of the bankrupt-act.

A bill of advocation was presented, where it was argued, that no irritancy can be incurred without an action of declarator to establish it ; and that before decree was pronounced in the inferior court, the irritancy was purged by the discharge from his creditors. But it was held to be a satisfactory answer, that the event which the lease provides against has happened ; and the subsequent discharge cannot do away the fact of the previous bankruptcy and compounding of his debts, which were the acts expressly provided against ; *Dict. voce IRRITANCY.*

The bill of advocation was (3d August 1805) refused by the Lord Ordinary ; and a petition against that interlocutor was refused, without answers.

Lord Ordinary, *Meadowbank.*
 Clerk, *Pringle.*

For Petitioner, *Reid.*

Agent, *John Thorburn.*

F.

Fac. Coll. No. 229. p. 519.

1806. *February 26.* MURRAY'S TRUSTEES *against* GORDON.

No. 12.

The damage incurred by non-implementation of the stipulation of a lease in regard to cropping, cannot

JAMES MURRAY, Esq. of Broughton, on the 6th and 15th September 1794, entered into a lease with Agnes Gordon, and Thomas Gordon her son, in implement of a minute of tack in September 1789, of the farm of Enrick, and by a subsequent deed (15th December 1794) extended the duration of the tack to fifteen years after Whitsunday 1809, when the previous one was to expire. In these leases certain rules of husbandry were laid down, accord-

ing to which the farm was to be cultivated ; particularly as to the quantity of crop which was to be raised, and the rotation of crops to be adopted.

Mr. Murray died in 1799, and in 1804 an action was brought at the instance of his trustees for damages, on account of alleged mismanagement of the farm, and contravention of the stipulations in the lease during the year 1791, and every subsequent year.

The Lord Ordinary (29th January 1805) pronounced this interlocutor :
 ‘ In respect the pursuers do not condescend on any complaints made against
 ‘ the defenders, or Wilson their subtenant, while he occupied the farm under
 ‘ them, for having too large a proportion of the farm under crop, and not fol-
 ‘ lowing the particular rotation of crops prescribed by the lease, finds, That
 ‘ the landlord must be presumed to have acquiesced in the general mode of
 ‘ management pursued by them in that respect, and that his representatives
 ‘ cannot now be admitted to institute an inquiry into the mode of management
 ‘ not attempted to be interrupted or made a ground of complaint at the time,
 ‘ or found any claim of damages on it, on any supposed mislabour which has
 ‘ hitherto taken place, further than that it shall appear, that any particular
 ‘ field or fields upon the farm are worn out or exhausted by over-cropping or
 ‘ otherwise ; and therefore, before answer as to any claim of damage which
 ‘ may be on this last ground, remits to the Sheriff-Depute, or his substitute,
 ‘ in the district where the lands lie, with instructions to appoint three judi-
 ‘ cious farmers in the neighbourhood to visit the farm alluded to by the par-
 ‘ ties, and to make a report as to the condition of the different fields thereof,
 ‘ and as to any order which may be necessary for obliging the tenant to bring
 ‘ them into a proper condition ; reserving, as to this particular, to the pursuers
 ‘ to insist on the implement thereof, and for following the mode of labour pre-
 ‘ scribed by the lease as to cropping.’

The pursuers reclaimed, and

Pleaded : There can be no reason to presume, that the landlord has acquiesced in a mode of management inconsistent with that originally framed by himself, merely because he does not instantly bring his action for obtaining redress. At one time, he must have been desirous that these rules should be strictly observed, and, if he had seen reason to vary them, the tenant was bound to have obtained an expression of this opinion more satisfactory than the mere negative presumption arising from his delaying to institute an action against the tenant. There seems to be no reason for applying the doctrine of prescription to such claims as these during the currency of the lease ; and it appears to be a landlord’s right, at any time during its subsistence, to enforce the stipulations, and to claim damage from the tenant for having violated the conditions on which the use of the subject was granted, and that such a claim may comprehend the damage done during a series of years.

Answered : It would be unjust, by means of a proof at large, to raise up a claim for damage against a tenant for alleged breaches of the lease during a

No. 12.
 be insisted in
 for a long
 period *retro*,
 by the land-
 lord’s repre-
 sentatives, he
 not having
 objected to
 the deviations
 when they
 happened.

No. 12. series of many years; and it would be impossible, by such means, accurately to ascertain their amount. The acquiescence of the landlord is the best proof that he had altered his views with regard to the management of the farm; and his trustees, after his death, cannot enforce what he himself did not think proper to insist upon. A tenant ought always to be informed when the stipulations of his lease are to be rigorously insisted upon; and, if damage is to be claimed, it ought to be done immediately after the breach of contract which gives occasion thereto. When this is not done, he is entitled to presume that his landlord is pleased with his mode of management, and consequently that he may continue it till he obtain some intimation to the contrary.

The Court adhered.

Lord Ordinary, *Bannatyne.* Act. *W. Erskine.* Agent, *Ro. Ayton, W. S.*
 Alt. *Gillies.* Agent, *Tho. Scotland. W. S.* Clerk, *Pringle.*

F.

Fac. Coll. No. 239. p. 538.

1806. *May 23.*

SIME'S TRUSTEE, Petitioner.

No. 13.

Where a farm under lease had been subset, an assignation to the lease may be made to another, which will be effectual if he possesses by levying the subrents.

WALTER SIME, merchant in Aberdeen, obtained a lease from Lord Arbuthnot of certain subjects, for fifty-seven years from Whitsunday 1786. These subjects (20th March 1793) he subset to Robert Davidson, for the remaining years from Whitsunday 1792, for payment of the original rent to Lord Arbuthnot, and for £100 of surplus-rent payable to Mr. Sime himself.

Mr. Sime having borrowed a sum of money from William Fiddler residing in Aberdeen, granted (20th June 1797) his bond for it, payable 20th June 1798; and in further security, he subset to him the whole subjects contained in the original lease granted by Lord Arbuthnot, but under the burden of Mr. Davidson's lease, and that for thirty-three years from Whitsunday 1796: ' Declaring hereby, that the said William Fiddler, by his entering to the possession of the lands hereby subset, or uplifting the rents payable by the said Robert Davidson or others, he shall be obliged, first, to pay out thereof the hypothec rent payable yearly to Lord Arbuthnot, the proprietor of the said lands, in terms of the original lease thereon; and to apply the surplus-rent, first, for payment of the interest of the foresaid sum of £1000 Sterling, and the balance to be imputed in part payment of said principal sum: And in regard the said Robert Davidson stands bound by the foresaid sub tack in his favour, not only to pay said hypothec rent, but also the sum of £100 Sterling of additional surplus-rent to me, my heirs and successors: Therefore I, for me and my foresaids, make, constitute and ordain the said William Fiddler, his heirs and successors, my lawful cessioners and assignees, in and to the whole clauses, and obligations and conditions contained in my favour, by the