parties acquiesced, that tho deed 1716 was a valid and effectual marriage settlement to the effect of setting aside the entail executed by Southdun in 1747. By that decision there is a sufficient bar to the present question.

After hearing counsel,

The LORD CHANCELLOR said,

"MY LORDS,

"The decree in 1763, I am clearly of opinion, is not a bar to the appellants' action, and that the deed 1716 ought not to have the effect of a marriage contract. But as the Court below had not gone fully into that question in the present cause, I thought it right to give them an opportunity of reconsidering it."

It was therefore ordered and declared that the matter adjudged in the interlocutor of 19th November 1763 was essentially different from that brought into question in the present cause, and could not bind the subject matter of the present suit. And it is therefore ordered that the cause be remitted back to the Court of Session to hear and determine the point now put in issue without any prejudice arising from the said interlocutors.

For the Appellants, *Ilay Campbell, Geo. Wallace.*
For the Respondents, *Sir J. Scott, Alex. Abercromby, Thos. Andrew Strange.*

ANDREW STRATION, a Pauper, - *Appellant;*
THOMAS GRAHAM of Balgowan, Esq. *Respondent.*

House of Lords, 28th March and 12th May 1789.

LEASE—DEVIATION FROM MODE OF CROPPING—PENALTY.—A tack stipulated that the tenant was at liberty to deviate from the mode of cropping and management laid down in the tack upon his paying £2. per acre more of additional rent to the landlord. He departed from the mode of cropping. Held, in the Court of Session, that he was liable to pay the £2. of additional rent. Reversed in the House of Lords, and case remitted to ascertain and determine specially what was the number of acres the tenant became bound to cultivate in the manner specified in the tack, and what was the number of acres cultivated contrary to the conditions thereof.

The present question was raised by the respondent against the appellant, his tenant, for the additional rent mentioned

1789.

STRATION
v.
GRAHAM.

in the lease of his farm as conditioned and agreed upon to be paid on the tenant's deviation from the rule of cropping and management of the farm laid down in the lease.

The tenant alleged that, on entering into the bargain, or alleged form of a lease, nothing special was said as to any particular management and cropping of the farm, or of any penalty as a consequence of deviation from said management, but that he had signed a "form of a lease" applicable to all the tenants on the estate, with the names and sums left blank, but, though read partly over to him, the clause about the cropping and management of the farm was not read over.

The form of the tack ran thus:—"The form of a tack to "be entered into between Thomas Graham, Esq. and the "several persons signing agreements for leases of farms in "the baronies of Luncarty, Pitmurthly," &c. &c. Then followed the scroll of a lease, leaving blanks for the names of the lessee and the description of the farm. The term was filled up 19 years, commencing in 1777. Many reservations were made in favour of the landlord, particularly the following: "Reserving liberty to the said Thomas Graham, at any "time during the tack, to quarry and lead stones for build-"ing of fences, and to enclose and subdivide, with ditch and "hedge, or stone fences, all or any part of the said fences "on all or any part of the said lands; as likewise to plant "hedge row trees in the yards and along the fences already "made, or that may be made on these lands during this "tack, all at the said Thomas Graham and his foresaids "their own expenses." Next followed an obligation on the tenant to pay 5 per cent. per annum for the money expended by Mr. Graham in making hedge fences, and 10 per cent. for stone fences. And then follows this clause: "And for "the further encouragement of the said and "for the improvement of his farm, by enclosing the same "and clearing it of stones, the said Thomas Graham binds "and obliges himself and his foresaids, to be at the expense "of building into stone fences the whole stones that the said "and his successors shall take out of the "ground when dressing it, lead and lay down in a regular "manner, and sufficient quantity, on the marches of the said "farm, or on such lines of division as the proprietor, or "whom he may appoint, may mark out as a proper subdivi-"sion of the farm into regular fields and enclosures, each "containing about one-tenth part of the ploughable lands of "the farm, and that without charging the tenant any inte-

" rest on the money expended on building the said fences
" to which he hath bolled and led stones as aforesaid; it
" being always provided and declared, that the said fences
" made in any of the manners as aforesaid, shall be lined
" out and the places thereof determined by the said Thomas
" Graham, or such person as he may appoint for dividing
" the said lands into as regular and distinct fields as the
" grounds will admit of, and as equally as possible to con-
" tain in each field about the tenth part of the ground capa-
" ble of tillage, and calculated as much as may be to have
" water in each field."

Covenants were then inserted as on the part of the tenant, to pay certain fixed rents, for which blanks were left, during the first nine years, and an additional rent blank during the last ten years, together with the "occasional rents
" hereafter reserved in the cases hereinafter particularly
" mentioned. And whereas there is much encouragement
" given for enclosing and improving of the said farm as afore-
" said; and in regard to arable land, with such contiguous
" and best parts of the muir capable of tillage, in all a-
" mounting to the quantity of acres of the said lands
" is to be deemed ploughable and improveable arable lands,
" and is to be laid out and divided into ten distinct enclo-
" sures or brakes, each contiguous within itself, at the sight,
" and by the direction of the said Thomas Graham and his
" foresaids. Therefore the said binds and ob-
" liges him and his foresaids to manage the said fields and
" brakes in a regular and distinct thriving husband like
" manner, as after mentioned; that is to say, the said
" . binds and obliges him and his foresaids,
" by the end of the first five years of this tack, and there-
" after during the currency of the same, and at the end
" thereof, or his removal, to have one half of the said
" arable land, or five of the said brakes, consisting of half
" of the old infield and half of the old outfield, to be in
" grass, sown out with grass seeds as aftermentioned,
" and to have of the other five brakes or enclosures in til-
" lage, one of them in summer fallow, ploughed at least four
" times during the summer, or in a four feet wide drilled
" and horse-ploughed crop of turnip, cabbages, potatoes or
" the like green crop yearly, and the corn crop growing on
" the other four-fifths or brakes in tillage yearly shall be so
" arranged that no three white corn crops succeed one ano-
" ther." Then followed the clause upon which the present action is raised. " And it is hereby declared that notwith-

1789.

STRATION v. GRAHAM.

" standing the conditions of labouring, managing, and crop-
" ping the said lands, the said and his foresaids
" shall have power and liberty to alter the management as
" they may incline, upon their becoming bound, as the said
" hereby binds and obliges himself and his
" foresaids, to pay the sum of £2 sterling additional rent
" as herein before particularly mentioned, for each acre
" they, in consequence of the said liberty, may alter in their
" management from that particularly before expressed;
" which additional rent is not to be looked on as a penalty,
" but as a pactional rent to be paid over and above, and at
" the term with the first yearly rent, or at such future pe-
" riods as the same may be demanded after they have used
" the said liberty of altering the management from that
" above expressed." At the end of this form of tack there was a docquet signed by the landlord. There was also annexed a docquet signed by the tenant, specifying his rent, but stating nothing about additional rents.

The present action was then raised, several years after entering on the farm, for payment of £500 Sterling, as an alleged stipulated additional rent of 40s. for every acre not cultivated in a particular way, and for £160 as the additional rent for 80 acres, the half of the farm, for crop 1783 and for crop 1784, for not having this number of acres sown in grass, in terms of the form of tack. When the appellant entered on the farm, it was alleged that he set about improving it to the best advantage, so far *as his* judgment directed him, laid out a considerable sum on lime and marle, and managed the grounds in the most unexceptional manner, as far as their situation would admit, for all which he had to pay a rent, which he had done regularly, of 24 bolls of meal, 16 bolls beer, carriages, 16 hens, keeping one dog, together with £51 sterling yearly, for the first nine years, and £61 sterling for the last ten years. Whereas the landlord, on his part, although bound to enclose the grounds, had done nothing except in enclosing one field. The defences stated to the action were, 1st, That the writings founded on as a lease, were all void in law, as wanting the usual statutory solemnities. 2. Even if held to be valid, yet, looking at its contents, it was apparent, that those covenants relating to the management, could not be understood as applicable to every case, nor were so meant by the parties; so that the real intention was, that they should be varied according to circumstances. 3. That the additional rents claimed were in the strictest sense penal, and therefore subject to modification by the Court.

1789.

STRATION
v.
GRAHAM.
Nov. 20, 1787.

The Lord Ordinary, of this date, pronounced this interlocutor :—" Finds, that by the form of tack, now found by the " Court to have been binding upon the defender (appellant) " from the commencement of his tack, no obligation is im- " posed upon the master to enclose the farm into ten divi- " sions or enclosures, but that it was left to the master or " tenant to make these enclosures at any time during the " currency of the lease, with the burden of the tenant's pay- " ing interest at five per cent. for ditch and hedge, and ten " per cent. for stone dykes, if made by the master; and with " certain encouragements to the tenant, and repayment of " the price or value by the master, at the end of the lease, if " made by the tenant. And therefore finds, that the tenant " cannot found upon the master's not having completed the " enclosures, as a total liberation from the whole conditions " and limitations of the tack. Finds, that at the commence- " ment of the defender's (appellant's) tack, the whole farm " was subdivided by the master, with the knowledge and " assistance of the tenant, into the ten breaks specified in " the form of tack, and that these breaks were properly " meithed and marked, as the proper lines of division for " making the enclosures, when the master or tenant should " choose to complete all or any of those enclosures, and must " be held and understood as the ten breaks or divisions, ac- " cording to which the tillage of the farm and laying down " with grass seeds, was to be regulated according to the " form of tack. Finds, that the tenant cannot plead his " being ignorant of the import of his tack, previous to the " interlocutor of the Court, as an excuse for transgressing " the conditions of the tack. Finds, by every calculation " which the Lord Ordinary can make, the amount of the " additional rent which he has incurred by mislabouring the " farm, and the damage sustained by the master by the de- " fender's having failed to have any five of the breaks, at the " end of the first five years of the tack, sown down with grass " seeds, and the other five breaks in tillage, according to the " rotations therein prescribed, a very large sum must be due " by the tenant to the master: but not being able to obtain " evidence of the precise amount, without involving the " parties in a delay and expense which must be hurtful to " both, and ruinous to the tenant, and having considered " the whole circumstances of the case from the commence- " ment of the cause, modifies the whole sum due by the de- " fender, upon account of additional rents for over-plough-

1789.

STRATION
v.
GRAHAM.

" ing, and for damages for not laying down his breaks with " grass seeds, and all transgressions of his lease, preceding " Martinmas last, to the sum of £200. Finds him liable to " the pursuer for that sum over and above his rents, and " decerns."

Dec. 22, 1787. Jan. 31, 1788. Feb. 20, and Mar. 6, 1788.

On representation, the Lord Ordinary adhered. On second representation he adhered. And, on reclaiming petition to the Court, their Lordships adhered.

After hearing counsel for the appellant, on 28th March 1789,

LORD CHANCELLOR THURLOW said :—

" MY LORDS,

" I do not mean to give a decided opinion before hearing the respondent, yet there was a probability of the House declaring the judgment of the Court below erroneous. It was not the words used in the lease, but the sense of it, which a Court ought to consider, and here it seemed impossible but the parties must have understood the additional rent (which so far exceeded the real value of the land, however cultivated) as a penalty, whatever it might be called in the lease ; and it is against the principles of equity to allow any person to take from another, what bears no proportion to the loss he has actually suffered. As the consequence of sending the cause back to the Court of Session to take evidence of the real damages, and assess the *quantum*, would involve both parties in great expense, and disputes must be constantly arising between them during the lease, he thought it might be worth the landlord's while to make the tenant an offer for the surrender of his lease, and the tenant would probably see it to be his interest to accept of it."

His Lordship directed, with that view, the further hearing to stand over till after Easter.

On resuming consideration on 12th May 1789,

LORD CHANCELLOR THURLOW said :—

" MY LORDS,

" This is an appeal from a judgment of the Court of Session in Scotland, and the cause of action, as it is stated by the pursuer, is this : That he being the landlord of a farm called Pitmurthly, among a great number of other estates, did, as mentioned in the case, by a form of tack, let this estate, and the tenant took the estate upon certain conditions there stated. Among others here represented, it was intended that all the parts of the farm which were either arable at the time, or consisted of muir land capable of being brought into tillage, and containing a certain number of acres, should be deemed and adjudged between the parties as a quantity of land that should be call-

ed ploughable and arable and; and being once fixed, it was further agreed between them, that that land should be divided into ten equal parts, which, in the Form of tack, are called breaks and enclosures, and that when so divided, they should undergo a certain course of tillage, which, to speak generally, I shall state thus to your Lordships: That by the end of the first five years of the tack, five of these breaks should be in grass, sown out with grass seeds, and the other five of these breaks should be laid down, one in fallow, four times ploughed, and the rest with other kinds of crop, and in the manner of occupying equally distinct; namely, That the other four-fifths or breaks should be sown in corn, under certain restrictions, that certain crops of corn should not succeed each other, but a regular succession and rotation, it provides for those four-fifths or breaks. The consequence of the whole rotation would have been that, in the course of ten years, from and after the first five years of the term, the farm would have got into a course of cultivation that would have been varied as to each particular break, at least for 15 years; and the end of the term was four years more, for the tack was for 19 years.—This general proposition I should have stated to your Lordships before; after having agreed to occupy it in that manner, there is a clause in the tack very expressive, drawn to this effect, that it shall be in the power of the tenant to change this mode of occupation at his pleasure, but wherever he acted in a different manner from that described, either in the course of tillage or quantity of manure to be put upon it, or in any other small respects in which these covenants are conceived, he should pay the landlord after the rate of 40s. an acre additional rent upon that estate. The first topic of dispute upon this case is, that they pass over every speciality (which I have not yet mentioned to your Lordships) that extends to this case, and proceed *ex confesso*. Suppose this had been the most formal instrument that could be, and the tenant had covenanted to occupy in the most distinct manner, black acre or white acre, as here described, and had, notwithstanding that distinct compact, wilfully put there in a course of tillage in direct violation of the contract, this being in the nature of the thing, the penalty was to be so modified as it is called in the Court of Session, or relieved against, as it is called here, that instead of paying the sum specified, the tenant should be obliged to pay only so much as the landlord has qualified himself to receive from a breach of covenant; which is precisely the same as if he only covenants to make that payable for breach of covenant if there was no other clause but the last, and that one specified what should be paid for a breach of those covenants of the parties; that that shall be the sum to be actually paid.—When this cause was opened to your Lordships first, I observed that this penalty was so conceived as not only to apply to the case I mentioned before, but, from a particularity of expression, which I believe also was called "to implement or perform the several articles," whether this expression applied to every acci-

1789.

STRATION
v.
GRAHAM.

dent and omission that could have been in every part of the stipulation whatever, that obtained between the parties; and it struck my mind as a matter of doubt whether a covenant, conceived in such a form, as being applied to some of the subjects, must be deemed a penalty, must not also be in the contemplation of the parties making it a penalty on all the other subjects? In considering, as I have done with a great deal of attention, the principle upon which the Court of Session have always gone in modifying penalties, I am perfectly clear, though the covenant is so conceived, the Court, with a perfect consistency with that principle, might have modified it so with respect to some, and not have modified it so with respect to others, which, according to their respective circumstances, ought or ought not to have been so modified. I don't conceive it will fall into any person's contemplation to say it depends upon the form of the contract, whether the thing stipulated shall be deemed a penalty, because all penalties that result from stipulation have the same essential form of contract. I suppose, therefore, as in one of the cases that might be put upon this lease, the defect particularly imputed to the tenant had been, that he had occupied that break that ought to be laid down in fallow different from what was stipulated, and that the breach assigned was, that he ought to have improved that break, by laying 30 loads of lime upon one acre, and it turned out he had laid on but 29 upon the acre *res ipsa loquitur;* for that damage assigned as arising from a different mode of occupation, is the whole damage or penalty to result as if for violating of all? It would not be common sense, in the computation of so slight a difference as a 1-30th part of the whole of the manure upon the estate. Damages cannot be said to be stipulated where they are made to apply upon the subject, fairly and logically speaking, unequal; that does by no means apply where there is a distinct express mode of cultivation.

"The breach assigned is, that the tenant, in direct violation of it, deliberately and wilfully undertakes to draw a profit from the land in that manner in which he has engaged with the landlord he would not do, upon other terms but that of paying him 40s. an acre for that land so occupied. I have therefore not the least doubt in the world upon this subject, that if the parties had done that which this contract (as I shall explain presently) pointed out was their intention to do, and as I think absolutely called upon them to do, I have no doubt the tenant would have come under a very distinct obligation to pay that sum of money. Suppose he had done so, and the pursuer had gone for the money, what must he have done by way of allegation and proof? After stating the contract in the manner he has done, he must have stated that he became bound to occupy certain portions of that land in a given manner, and in regard to certain portions of the whole he was bound so to occupy, he had in some other given manner, equally distinctly expressed, occupied it differently, whereby he came within the very terms of the contract, and was bound to pay for those

acts respectively, that sum of money the contract obliged him to pay; —proving in that case, no answer, no argument could have been made upon it. It would have been extremely distinct and clear that he ought to have paid the sum of money.

" In this case, if the cause of action should fail in any respect, the pursuer can have no body to thank for it but his agent, who may be a man of extraordinary ability, but he has not considered the force of language, nor the nature of the obligation that he calls a form of tack, or a minute of tack, and charges it to be a tack in point of fact. He makes it out in this manner; not that the instrument is formal, but that being confirmed by possession or homologation, it is of force, and is become in effect obligatory, and will have the whole force of a binding contract.

" According to my own notion, the action is in some degree, though I think not fatally, but in some degree misconceived in that respect. It was not so understood between the parties. That which is called a form of tack, is a paper to which they did apply all manner of solemnities except parties, but there are no parties to it. Notwithstanding it was executed in proper form, it was digested in proper form just as if it was a binding paper, but no parties to it. It is called a form of tack.

" Tenants names are left in blank, farms are left in blank; and in other respects it certainly is incapable of being of itself an instrument to convey or bind in any manner whatsoever.

" My Lords, the clauses contained in it, applying as they do to a great variety of estates, situate in different parts of the country, ought to have suggested to the parties that took any one of these farms under the clauses, the necessity of defining them, and applying them to the subject so taken. For example, in the second page of the tack, your Lordships will find this sort of provision: " It shall be compe-" tent for the landlord to enter for the purposes of taking mines, miner-" als, *or any substance whatever* off the farm." It never was their intention that every species of soil should be liable to that clause, as, namely, that he should take the top of the soil to make a garden of. It ought in that respect to have been reformed, and put in a more regular form. He might also sink pits for the purpose of getting stone, and might take any part of the land for , grass for horses, and all " this.* ."

" I dare say some of those estates would apply to that sort of covenant, but it is clear this was not one of them, and the tenant had nothing to do with it. It was absurd to apply those clauses which were intended only for the farms of a separate nature, and for other parties, and not to this particular farm in question.

" The next clause is still more extraordinary. The landlord is at

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* Here his Lordship read from the form of tack itself, which contained a great many other clauses besides those printed in the appeal cases.

1789.

STRATION v. GRAHAM.

liberty to take any part of the farm, without limitation, and plant it, besides making roads and water courses over it, as might in their own nature cause a great extent of mischief. He may take this, and yet he is to pay a sum, provided it does not amount to above 10s. an acre for the arable, and 1s. for moor land. It happens, upon computation, the rent of the land, with the several possessions, were to be farmed at about 12s. an acre, the consequence is, if he is to take the arable part, and pays no more than 10s. he might leave the tenant under an obligation to pay three or four times the value of the estate; and that neither was in the contemplation of the landlord to expect, nor the tenant to perform, according to the several articles. It was intended the next covenant should be more regular. The next article has raised a great deal of doubt in my mind, not only how to understand it, but even to understand the material clause which we are now upon. The landlord was at liberty, as I mentioned before, to take stones from any part of this farm, to build fences and plant hedges in that part of the farm, the party only reserving the liberty to the landlord to quarry and take stones and to make hedges upon any part he thought proper. It was no more than a liberty upon his side. There is a clause, I don't know which, but it relates to the enclosures of the marches. They should be made by one of them paying half the expense, but which is to make it, or is at liberty to make it, as far as it stands upon that clause, it is difficult to decide.

" After all these clauses about the hedges, there is one sweeping clause:—That either party shall be at liberty to execute what is demanded, demanding half the expense from the other. So far the clauses are left as relate to the hedges, and so far as relate to the payment of the half. It appears to me, it was in contemplation to build or form fences; but it does not seem to infer farther but that each party may form them at half the expense of the other. One kind of obligation runs through the whole of them; they are to be laid out at the right, under the direction of the landlord, in ten equal parts as near as may be, infield and outfield in each of the marches, and * * * of the marches * * and other conveniences of that kind. As it stands, upon this clause, it is exceedingly indistinct and doubtful whether, in point of fact, these breaks have been laid out conformable to those rules, or whether, in point of fact, they could be so; but undoubtedly, if this form of tack, which purports to be only minutes of an agreement, had been to be executed, the Court of Session would have done what the Court of Chancery here does in these cases, when there is a suit to execute, (an agreement which, by a loose minute, is agreed to be executed,) by taking up the particular subjects of the general terms, and accommodating them to the sense of those general terms, and making distinct obligatory contracts, according to those forms, showing what was meant. At the same time, I don't undertake to say how far the rest of the terms of cultivation were or were not to have been fulfilled before the enclosures

were made, and in that part of the country, how far some of the exigencies of the places mentioned in this contract, might require enclosures, as the premises were situated, for the purpose of executing it at all. But when you come to the most material point that relates to this form of tack, it runs in this form. (Your Lordships will always recollect this is a clause which, like all the rest, is supposed to be applicable in a general way to all the farms intended to be the object of that tack.) "In regard to the arable land, (which I suppose to be the land in plough, and consequently known and distinguished to be arable land,) "with such contiguous and best parts of the muir capa-"ble of tillage, in all amounting to the quantity of acres of the said "lands, is to be deemed ploughable and improvable lands."—Now, it strikes me, and I cannot get very well out of that idea, that at this moment it has not been argued in the papers below, nor has it been argued now at the bar, and I have a great hesitation and a great dislike to taking up a conceit in a cause of this nature, especially in a country where the laws are not so familiar to me, upon the reading of the papers; but upon the best construction I am able to make, it appears thus: In regard to all these farms, it was plainly in the contemplation of the parties, that they were not all to be arable. It certainly, on the other hand, does not exclude the possibility, in regard to any particular farm, that the whole might be arable, but it was clearly never in their contemplation, that the whole of all the farms would be arable; much less would the whole of it be in the other description, contiguous moor land, capable of being turned into arable. It was agreed between the parties, as the basis of the agreement, not only that that which was actually arable, but that the contiguous moor capable of being made arable, should be ascertained between them at the time, to see what land did answer that sort of description. Now, my Lords, upon this, this sort of difficulty arises. It is exceedingly plain in point of fact, that, previous to the tenant's entering upon the estate, no idea was entertained of ascertaining that; so that he actually entered upon the estate before it was known, adjudged, and understood between them what parts were to be arable, and yet I take it to be clear that, till that was ascertained, such a contract as this could not arise, but still so are the terms of the contract.

"I will not trouble you at present further upon that subject, but will go on to consider what the rest of the instrument signed between the parties seems to import. The second part signed, is a schedule tacked to, and joined on to the form of tack and signed by the landlord; and that schedule says, "what is contained on this and "the preceding eleven pages, is the form of a tack to be entered into "betwixt the forementioned Thomas Graham and the several ten-"ants of the lands of Luncartie, Pitmurthly, Bridgeton, Pitcairn, "Craiginal and others, on the east of the water of Almond, and a-

1789.

SIRATION v. GRAHAM.

" long the Tay, as also Dalcrow, Cloag, Methven, with the Baro-
" nies of Williamston and Gask, lying in their respective parishes
" and Sheriffdom of Perth, and referred to in the several docquets
" after mentioned, signed by each tenant, of the respective dates pre-
" fixed to their subscriptions. And it is hereby declared, that the
" respective tenants, by subscribing these presents, which compre-
" hend the general articles, conditions, and regulations of manage-
" ment of the whole estate before mentioned, with the term of entry
" and endurance of the leases, and also their subscribing the respec-
" tive docquets hereunto annexed, which contains the several farms
" bargained for by each tenant, and rent payable therefor, do here-
" by become bound, and hereby oblige themselves and their heirs to
" implement and perform the several articles in the form of a tack,
" before engrossed and docquets thereto annexed, and to sign a for-
" mal tack of the respective farms allotted to each tenant in terms
" thereof, when required, the said Thomas Graham having also sub-
" scribed the same in consequence of the obligation therein contain-
" ed to be incumbent on his part."

" When you read this instrument, it seems to me to be exceed-ingly plain that, upon the 28th of March 1778, which was the time of signing it by the tenant, the intention of the parties was by no means that he should go directly upon the estate, and enter upon occupation of it, without more being done; but that these agreements, which they call here the general articles, conditions, and regulations of it, should be applied to the 2nd docquet, and when so applied, and reduced to the form of an instrument upon that subject, then and then only, for the first time, it should be binding upon the parties. However, the fact was, it was signed in March 1778. The rest of the docquet referred to runs in this way:—the tenant says,
" I do hereby, in terms of the preceding form of tack, signed by me
" of this date as relative hereto, agree to take a tack of the farm of
" Pitmurthly for nineteen years after term of Whitsunday next, as
" bounded on the west by a new marked road on Balinblair march,
" on the north by the high road leading to Perth, till it joins the
" north-west corner of the Fir Park; then the south side of the said
" firs, Hillhead houses, &c. south side of the old fir plantation, till
" it joins the high road again. On the east, by a new marked road
" dividing it from Rogerton pendicles, excepting the kirk, manse,
" glebe, houses and yards at Rogerton, at the yearly rent of 24 bolls
" of oat meal, 16 bolls beer, 16 carriages, 16 hens, the keeping of a
" dog, together with £51 Sterling for the first 9 years, and £61 for
" the last 10 years of this tack."—Then there comes a clause of the proprietor allowing £20 Sterling, towards putting the offices in repair.—If necessary to observe upon that, other difficulties might arise, he is to charge it upon the houses, according to *recorded agreement* signed by him. It seems to me, he signed no such inventory, and when that comes to be liquidated between the parties, the same

doubt will arise as has arisen upon this. The sort of doubt which has arisen upon this, is on the second part, or docquet annexed by the tenant, which says he has taken a tack according to the *form.* —It expressly declares that the general regulation of the whole farm shall be looked for in the form of tack, and when the rent to be paid for that farm should be looked for in the second part of the tack, I confess, it occurred to me as a material omission, with respect to actions now pending, but not material with respect to others I shall mention presently, but material with respect to the action now pending, they did not in this instrument, to which intrument alone, an express reference is made for the rent to be paid, mention such additional rents, as would in certain cases arise upon the form of tack. And if you are not to look to the form of tack for rent, but this instrument for the additional rent; the consequence will be, in this instrument no additional rent is provided for in that instance.—I have been the less anxious upon that, because I have not any doubt in the world, if a process was raised for the purpose of making him take a tack under the inference I last mentioned, it would be arranged by the Court, and applied to the particular subject in question. I have no doubt in the world, all these provisions respecting the occupations, and all the consequences that followed in making those provisions, would have been there inserted; the doubt I entertained was, if it could be deemed to be inserted as it now stood, and more particularly show what land these covenants should be said to apply to; considering the whole, there was not in this tack, or minute, or form of tack, or any writing agreed on all hands, (though the agreement might be homologated,) any agreement to show what part of this estate shall be the subject matter of those covenants; they allude to a form of tack which imports that part of it will not be the subject of the covenants, and what is more material still, it supposes that part that is material is to be fixed in acres and numbered as the part to be applied to the subject. Upon this also I should conceive doubts, if the suit was raised to make that part of the tack implemented, and the parties considered the truth of the fact upon which they are at issue, one saying the whole of 23 acres particularly muir land, the other saying not muir land, how is it to be known, unless they will examine that fact? The truth of this is, the Lord Advocate pressed me very much with the authority of the Lord Ordinary, nobody will expect I should doubt upon the authority of that great judge, if that had been so, nobody has a greater deference to his judgment than I have; I believe him as honest, just, and learned a man as ever sat on the Bench. He observed in the end, the landlord is to pay, and the landlord is like to get little or nothing. He thought, by giving damages beyond the extent, or coming down to the time the decree was reversed, he would have put an end to the contest between the parties. I wish it had bound them, or this appeal had been cut

1789.

STRATION
v.
GRAHAM.

off by it, but not being so, your Lordships will be obliged to determine upon what appears to be alleged, and not upon any other subject whatever. I own I should have thought the only process that could have been raised with effect, would have been to compel the tenant to take a tack, in so strict, distinct, and regular a form, that there could be no doubt in the world what the effect of those covenants were. In looking back to the text book of the law of Scotland, it is unavoidable to observe, that a case in which such additional rent must arise, must be distinct and clear; and the thing to be imputed to the tenant, must be a wilful, deliberate breach of terms he has clearly and fairly entered into. Suppose that to be the case, those difficulties will remain. In the first place, from what time shall those rents become due? I confess, myself, I thought it rather wonderful any doubt should be raised upon that, considering the terms of the clause. The terms are, the tenant shall enter upon the estate. The deed in the form of the tack, your Lordships will observe, was signed in March 1776, and calculated therefore for tenants entering upon the estate in the course of the year 1777; and then the tenant was to enter and pass into the houses and yards at Whitsunday to the pastures, and not to enter to the arable land till the corn crop should be reaped at the end of the year, and to pay the rent of £51 sterling for the first nine years, and £60 sterling for the last ten years of the tack, that was payable at Martinmas the 11th of November. The consequence would have been, when the form of tack was signed, no doubt, he must have entered upon it in 1777. Suppose he entered in 1777, the next question is, how the five years shall be computed? it is said here, after five years from entering upon this tack. I conceive it impossible to compute those five years as to the mode of computation or contracts made upon that. If he had entered at the latter end of 1777, and continued till the year 1783, the commencement of 1783 was the commencement of the 6th year that he would have entered on the estate, in that way he signs one on the 28th of March 1778. You will never say the dates of a mere form, to which this refers, can be controlling dates of the tack to be taken under it, if he entered in 1776, he would lose the first ten years, which was never the intention under the form of tack and this deed of 1776. The rent does not run in 1777, the first rent is to be paid expressly upon Midsummer 1778, the next at Martinmas 1778. That was right, his tenant was not to have the substantial occupation of the farm; and the entering upon the yards and houses, was to prepare for the occupation of the farm; it was not intended to charge him for that; but he was to pay the first rent for the first year after entering, that was, the succeeding year to the entry, the latter end of 1777. The consequence of that will be, the first rent will be due upon Midsummer 1779, instead of Midsummer 1778. Now, all those additional rents, which appear stipulated by the form

of tack, are to be paid with the main rents, or to be paid upon the same terms with the main rents. Suppose this to have been, as it ought to have been, the tenant would appear, in the beginning of 1784, not to have five of the said brakes, consisting of half of the old infield, and half of the old outfield, laid down in sown grass, five might, or three might; and, in respect to those in tillage of another kind, instead of sown grass, he would have been obliged, on Whitsunday 1779, to pay 40s. an acre. The first additional rent he was to pay at all (and he was to pay none of the additional rent till then) was after the first five years, which would have been 1784, and upon the 11th November following, another additional rent would be due.

"In this process, before the 11th November 1784, it seems abundantly clear, no breaches as to tillage could be assigned discoverable by this process, but those between the 1st of January 1784, and before the 11th November 1784, and these were breaches as to the regular payments of the rent, and what is still worse in this cause, these parties have published five hundred and odd sheets of the judgment, and in a variety of allegations, there does not appear one allegation of the quantity of land that ought to be put under this routine of tillage, neither alleging the whole farm nor any particular quantity to be put in tillage. The process only alleges he was in the practice of neglecting all his agreements, therefore, concludes he ought to pay a certain sum of money. The value of the houses erected upon it is a thing upon which they have never yet agreed. It appears to me, if we are now desired to do that which the Court below never thought of doing, down to the time of the decree, and long after it was made, there are no such materials pointed out to me, upon which it would be possible for your Lordships to say what number of 40s., or whether any number of 40s. has been incurred upon this alleged breach of the lease. Supposing this to be the state of the case, I have a great difficulty in desiring your Lordships to close up that point concerning which I have been desirous to form the best opinion I could, and think that this should be so ascertained that any judgment pronounced might stand as a regular judgment upon record. I therefore shall move your Lordships not to assoilzie* the appellant from the additional rent, but remit the cause back to the Court of Session in Scotland, to enquire and find what number of acres the defender became bound to cultivate in the manner set forth in the form of tack mentioned in the libel, after the first five years of the tack therein mentioned, and what number of such acres were cultivated in any manner contrary to the said agreement, and whether any and what sum of additional rents beyond the annual sum of £51 was incurred, and became due before

* His Lordship reversed the judgment.

1789.

STRATION
v.
GRAHAM.

the 24th of November 1784, when the summons in question was raised, and whether any, with what part thereof now remains due. I put in the last clause upon this account, your Lordships will not be inclined to decide in the appellate jurisdiction for the first time, without evidence of receipts having been given for rent down to Martinmas 1784. It was argued, and with justice, those receipts may be given for liquidated sums, but not to prevent their demanding additional rent. I agree, if given so *nomine*, which I find was the very case referred to the other day, when I was not so able to speak to it; but suppose you receive the rent, the landlord goes on ten years receiving rent every Martinmas, without demand for the ulterior rent, that would be evidence that it was not paid for the additional rent. If there are any receipts to produce, it is necessary they should produce them, if not so, we shall hear no more of them. As to the action, which must be brought *de novo*, I do not believe, after this thing is thoroughly sifted and enquired into, that they will doubt that the best manner of arranging this matter between landlord and tenant, will be to have a tack added to the former, to make it regular and fit; and I own, as far as one can talk beyond the cause, I have a wish the tenant should come under that regulation. It is a hard thing for a landlord to get a tenant upon his estate, that has broke his covenants and held him at defiance, not being able to pay for the breach of his covenants. I hope he will be able to recover upon it."

LORD VISCOUNT STORMONT:—

"After what has been stated by the noble and learned Lord, that there was a great question involved in this cause, which is now perfectly at rest; it is chiefly with a view to that that I now presume to detain your Lordships for a moment, because it certainly would have been a thing of infinite consequence to every landholder in Scotland, if there had been in the breast of any man of legal knowledge, but above all in the breast of the noble and learned lord who has just sat down, any doubt or hesitation with regard to that which was not much argued here, but had been argued below, namely, Whether stated damages, by way of additional rent, in the form of quit rent between the two parties, came under the nature of that penalty from which, by a Court of Equity, they would be relieved.* The noble and learned lord did take up that point, (and I heard it with great satisfaction, at a very early opportunity, the first time I attended this cause, his Lordship state there could be no doubt upon that point), he has now delivered in the most explicit manner, and entertained no doubt upon the subject, and so clear upon it as not to think it necessary for counsel for the respondent to enter into it at large. With respect to the other points, which are comparatively called, and proper-

* It was much argued in the Court of Session, Whether the additional rent was due *ex contractu*, or by way of penalty. If the latter, it was subject to modification; if the former, the whole rents were due.

ly called speciality, I shall not venture to enlarge upon, but only state the manner in which, it strikes me, from the little experience I have had occasionally in matters of this kind. I have heard of many agreements so fair, of a similar nature, but I hope more accurately drawn, but I will state in a very few words what I think of this informal agreement, as I conceive it to have been. I do apprehend in that agreement there can be no doubt as to the extent of the ploughable ground, and the difficulty and confusion has arisen from making use of the word arable, which, as the Solicitor-General very properly stated, was something equivocal, and sometimes meant one thing and sometimes another. But I apprehend the whole purport of this agreement to have been in this form of tack, a kind of general agreement, which is very inaccurately drawn, but in that mode all the clauses were to refer to the tenant: Thus there were to be ten divisions of ploughable ground. I use the word ploughable in the strictest view of arable, ploughable, and improveable. I apprehend what has been done in this case, has been done very frequently in improveable ground; where there is a good deal of moor ground, the landlord makes a separation according to the different nature of his land, for there is a great deal ploughable, and improveable for very good purpose, and a great deal not improveable in any way, but by way of plantations, but I conceive that it was marked out by the division; and if I can state it to your Lordships with a very few words, my reasoning upon it is this. It will appear that the intended improvement required a certain rotation, and a division of the ground into ten improveable parts,—that division was made in the manner marked out in the cause, and made in the presence of the tenant, soon after the tenant took possession, and at a time when it cannot be supposed, as I conceive, that he had any deliberate purpose of breaking the conditions of this lease. Now, supposing him to understand the terms referred to in that form of a lease,—to understand the nature of the obligations he entered into, and was disposed *bona fide* to abide by the terms of agreement. The very first thing that could have occurred to him possessed of the idea, was this, that it was absolutely necessary there should be a division, and to make ten allotments of improveable ground, to enable him to perform the conditions of this lease. In that division, a proportion is allotted for such ground as the counsel at your bar stated to be incapable of being ploughed, and stated to be incapable of any improvement whatever. Would not he have said, You make such an allotment as puts me under an absolute impossibility of fulfilling the conditions of the lease. It occurs to me the lease, I call it so, the form of lease referred to, did require a certain rotation, which was impossible, unless there was an allotment of ten divisions improveable ground, according to the manner in which it was agreed at the bar, and since stated by the noble and learned lord, as matter of doubt at least, whether the moor was improveable or not. Suppose for a moment, in argument it was not improveable, and the tenant disposed to abide by the agreement *bona fide*, it was proper to him to have said, what you are doing is preposterous; you make but nine allot-

1789.

STRATION
v.
GRAHAM.

ments, and you should make ten. I am under an absolute impossibility of performing my contract, if you don't subdivide it in order to make them ten. It is not pretended he made such objection, or any objection at the time this division was made. Now, as to the other part, the noble and learned lord seemed to doubt, whether enclosures were not a necessary part of this agreement; it was very natural that should occur to any man who takes his ideas of agriculture from the improved state in which it is in this country, there is no doubt, that the performance of the stipulation would have been much more easy, and much more profitable, and very feasible upon the whole; but, in the imperfect state of agriculture in Scotland, we are frequently contented with what is called breaks:—A word that I believe is common to Berkshire as well as to Scotland, and marks the division in which the enclosures are to follow the land; but you don't make them to mark the line of boundary without a wall, which does answer to a degree the purpose, but does not answer it so well as an enclosure would do; but I believe there are many here more acquainted with the business than I am. There are many divisions of land, where the separation is only marked by a kind of ideal boundary, without any fence whatever. In regard to another point, much agitated at the bar, I do own that it appears to me as clear in evidence as anything in figures can be, that the additional rent can only commence in the year 1784, that there cannot be a real claim for additional rent in the year 1783. There might have been a claim for damages, but not for additional rent. I conceive, that what the tenant was bound to perform was this, that the ground should be laid down in sown grass in the year 1783. I should have doubted very much whether he could have been held to have performed his contract, if he had laid it down in grass in the end of 1783, because the words are, it ought to have been laid down in sown grass in the year 1783."

"LORD CHANCELLOR:—

"The words are," "By the end of the first five years of this tack, "and thereafter during the currency of the same, and at the end there-"of, or his removal, to have one half of the said arable land, or five of "the said breaks, consisting of half of the old infield, and half of the "old outfield, to be in grass sown out with grass seeds as after men-"tioned." My Lord, if he had sown at that period of the year it might have been different."

"LORD STORMONT:—

"The idea of the landlord and the tenant, at this time was, it should be sown in the spring, in the usual way of sowing grass in Scotland, when you sow it with oats. What my great difficulty is, is with respect to what is now before us. I certainly shall not directly object to your Lordship's motion, or to what comes from so great and so special an authority; but I had considerable difficulty in reversing the decree of the Court of Session, and I should wish that it had been

modified: for the noble and learned lord said, that it can as easily be settled in point of fact. The noble lord seemed to say, where is the number of acres specified? Now, I do apprehend in some part (I have not had the patience the noble lord has in reading the whole of these voluminous papers), but I do conceive, I heard it at the bar, not argued by counsel; but in some part of the original papers, there is a demand of 80 acres as half of the farm. Now, that is very fairly specified, they name particularly the number of acres in point of fact —they claim for 80 acres qualified as one half part of that farm.

"I have no doubt your Lordships will do that which the regularity and order of your proceedings, and the attention that is due to all the forms of justice shall warrant; but I am afraid that even now, by the mode proposed, no good will follow. What I apprehend as the mischief to arise from this mode of proceeding, that there will be a very considerable additional expense incurred; and it was remarkable what was thrown out at the bar in defence of the appellant, that he being in such a situation that any additional expense should be matter of indifference to him, because, though expenses are completely denied to him, it cannot affect him.

"It seems to me to be a thing much to be wished—it should be the earnest wish if possible, to avoid putting it into that shape, which will be ruinous to him who certainly is in the right. It is said, as I conceive, in that respect it would be much more serious to him than to the appellant, he will be, by the principle laid down by the Court of Session, decreed to pay a much larger sum, because, for the same reason, what applies to 1784 will apply to 1785 and 1786, and so on, and thus there will be a very considerable expense incurred by it. A decree against the appellant, which decree, though it shall oblige, as far as it can, the appellant to pay a much larger sum, perhaps three times the sum now decreed against him, will be no real benefit to the pursuer, (respondent), because the appellant is a pauper and a ruined man,—he states himself to be such, and what I contend is, in my apprehension, a most unfavourable circumstance annexed to the ruinous state and spirit of litigation, that he builds his hopes upon, the certainty that no damages—that no decree against him, can affect him in any respect whatever, or be of any advantage to the original pursuer. This is the light in which that subject has appeared to me. I beg your Lordships' pardon for having stated the opinion that occurred to me. I certainly don't object to the mode now proposed by the noble and learned lord, though it was the wish of my mind some other methods, which would have led more rapidly to substantial definitive justice—namely, by modifying the decree, and confining it to £160 instead of £200 additional rent, that the tenant has occurred for mislabour in the year 1784."

"LORD CHANCELLOR:—

"The noble and learned lord has certainly made me more satisfied

1789.

STRATION
v.
GRAHAM.

than I was before, in respect of having formed this resolution I have proposed to your Lordships, which has shut up no point against them. I have taken as much pains as in my power to make it correspond exactly with the views of the great point the gentlemen were obliged to contend upon, as it appears at the bar, and in all probability did so in the Court below, trying to find out those facts alleged and proved throughout the whole of the case, to make it impossible to assign the particular damages that ought to be given; and being clear the Court, in giving those damages, did not go by a rule of that sort, nor find themselves within the terms of the contract, I can assure your Lordships neither myself, nor with any assistance, by all the questions I could put to the bar, could I find out those terms upon which that calculation could be made. The noble lord has mentioned a great number of topics, and argued them very ably, and has raised doubts, and if any of your Lordships have entertained those doubts, I wished to have them stated, and as those contracts go to a great number of other estates, I think it would be advantageous it should be so settled. If he thinks proper to go on with his tenant he will be obliged to raise a process for subsequent years; and to confine the process as it ought to be, I would undertake to draw in the compass of 40 out of that 502 sheets, all the material allegations. They never begin with proving nor end in alleging. I will undertake to draw my conclusions to be formed in that libel that ought to be the beginning of the subject, within 40 sheets. I should suppose this, by the manner of the proceedings obliged them to come to a more formal tack, I should think they would rather begin with subsequent years, than waste money upon what it is suggested the enquiry does go to, that except the mere stating of the instrument, nothing more has been done to elucidate the conclusions that ought to be drawn. I really thought there was a great deal of ground respecting the manner of agriculture; it was laying the ground to contend those should be actual enclosures. I observe, among other articles, the landlord has reserved to himself the right of enclosing grounds if he pleased, or that the tenant should enclose, and he should pay half. I apprehend, that liberty which he has reserved to himself related to the enclosures of lands when he intended to charge the other party with one moiety, I rather believe it was the intention of the landlord to leave the tenant to make the enclosures and pay for it at the end of the time, or for the landlord to make them, and charge the tenant half, and fix him with several articles to be enclosed. The noble lord says truly, that the tenant himself alleges that certain grounds were scored out to be enclosed in that manner. I wish that we may make no innovation in the law of Scotland with respect to grounds that he held. If by tack land be taken for more than one year, all the agreements must be in writing. I conceive, what succeeded the scoring out the ground in the presence of the tenant and by order of the landlord to amount in point of legal conclusion, to nothing more than an agreement between them in the coun-

try, that such and such was the extent of the ground that was to be the subject of their covenants. Undoubtedly, it is to be wished they could have a judgment in the regular form that must have the effect of a verdict. If he lets this land at 12 shillings an acre, you would never insist he should take 10 shillings. The regular course would be to make a formal tack of the matter, mentioning the terms: as, 1st. What was the agreement of the party for the land subjected to this particular tillage? 2nd. How much the tenant did mislabour? and, 3. How much was due? Thus computing the acres that turn out for that mislabour. Those terms I don't believe will rise to the extent the noble lord imagines. I flatter myself, when reduced to points like this, they will not go to that immense expense they have gone through, there is no evidence in all that judgment on those points; and to be sure these facts must be ascertained. On the other hand, I am very ready to say, if I could find a single acre specifically brought within the description proposed, I would give him 40 shillings for that, and it would be of more advantage to the gentleman to take 40 shillings than nothing at all. In point of fact, it seems to be of no consequence what he gets here, as the appellant comes as a *pauper*—no other costs will be incurred hereafter to him—it does not seem very material what your Lordships give now. If I were to allow myself to form a judgment upon this case, abstractly from the allegations and proofs, judging of it respecting him, as far as I am able, he would not do a thing contrary to general justice. I enter into his feelings; the gentleman has been exceedingly ill used upon this case, by putting it off to be argued.—If I could raise the point otherwise I should,—but I don't think it worth while for the gentleman himself."

It was therefore ordered that the interlocutors complained of be reversed, and that the cause be remitted back to the Court of Session in Scotland, to find what number of acres the defender became bound to cultivate in the manner set forth in the form of tack mentioned in the libel, after the first five years of the tack therein mentioned, and what number of acres were cultivated contrary to the said agreement; and what sum of additional rent, beyond the annual sum of £51, was incurred and became due before the 24th November 1784, when the summons in question was raised, and what part thereof now remains due.

For Appellant, *William Adam, William Alexander.*
For Respondent, *Sir J. Scott, Robert Blair, A. Cullen.*