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CRAIGIE, &C.
v.
MACKENZIE.

[Fac. Coll., Vol. xvi., p. 304.]

ALEXANDER and JAMES CRAIGIE, late tenants of Little Fardle, in the County of Perth, } *Appellants* ;

SIR ALEXANDER MUIR MACKENZIE of Delvine, Bart., } *Respondent*.

House of Lords, 12th May 1815.

LEASE—LANDLORD AND TENANT—DEVIATION FROM MODE OF CROPPING—OPTION—PENALTY.—An interdict was brought by the landlord against the tenant, to prohibit him from ploughing and cropping the farm in violation of the mode of cropping laid down in the lease. The lease provided that the tenant was to keep the fourth part of the farm, yearly, either in hay or pasture, or to pay an additional rent over and above the year's rent, and the tenant contended that this gave him an option to deviate on paying the additional rent. Held the clause prohibitive, and not alternative in its nature, and therefore that the tenant had no option to deviate on paying the additional rent. Affirmed in the House of Lords.

A petition and interdict was brought against the appellants, as tenants of the respondent, before the sheriff, to have them inhibited and discharged from ploughing and cropping the farm in violation of the particular course of husbandry laid down by the lease.

The lease was in the following terms:—"All and whole the town and lands of Little Fardle, with the whole privileges and pertinents of the same, as then possessed by George Stirton and James Williamson, lying in the parish of Caputh and shire of Perth,"—"and that for the space of nineteen years from and after their entry thereto, at the term of Whitsunday 1791 years, as to the houses, yards, and grass, and after separation of crop 1791 years from the ground as to the arable and laboured land; declaring always that the island lately formed by the Tay on said possession, and the Horn Haugh, are to be constantly kept in pasture grass, and no part of them in tillage."

This lease had the following clause; that "the said tenants and their foresaids hereby become bound to keep, regularly and constantly, after the first five years following their entry to the said farm, a fourth part of the arable part of the said farm either in hay or pasture, or an additional rent of forty shillings sterling to be paid by them to the

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“ proprietor, over and above the current rent for each acre of
“ said fourth part of their farm they shall neglect to keep in
“ grass as above specified.”

The tenants did not deny the clause, but the interpretation they put upon it was that they had the option of ploughing this fourth part also, *on paying the additional rent.*

The sheriff pronounced the following interlocutor: “ Hav-
“ ing considered the pursuer’s petition, with the answers and
“ replies, and tack produced, and paid attention to the differ-
“ ent clauses in the tack, and the admitted meaning of the
“ parties at the time it was entered into, and the great differ-
“ ence of things now: Finds that the defenders (appellants)
“ must this year have a fourth part of their arable ground in
“ hay or in pasture grass, and inhibits and discharges them
“ from breaking up or cropping those parts of the farm which
“ were last year in hay or pasture grass, in so far as the doing
“ so will diminish the said fourth part; but of consent of the
“ pursuer, finds the defenders entitled to consider that part of
“ the farm received in exchange from the estate of Lethendy
“ as part of the fourth so to be let in pasture or hay, on this
“ condition only, that the part so exchanged shall not this
“ year be ploughed, or the sward broke up, and on this
“ branch of the cause decerns; declaring the interdict per-
“ petual. And further, inhibits and discharges the defenders
“ from ploughing or breaking any part of the sward of the
“ island and Horn Haugh referred to in the tack, or any
“ other part of the farm which has not been ploughed and
“ cropped at any time during the currency of the tack, and
“ particularly the sward grass close by the river. And further,
“ as the pursuer charges the defenders with infringing the
“ clauses of their tack in time past, finds it necessary and
“ tending to save expense to the parties, that the farm should
“ be immediately inspected, and a bird’s-eye sketch of it pro-
“ duced, showing how it is at present laid out, or how it was
“ laid out in crop last season, in so far as that can be discovered
“ by the eye, and how, from the present appearance it is likely
“ to be cropped for the present season. And with that view
“ appoints David Buist, land-surveyor in Perth, to make such
“ inspection and report, and appoints him likewise to measure
“ that part of the arable ground now in grass, and the grass
“ ground received from the estate of Lethendy, and assigns
“ the day of for him to make his report.”

This judgment was brought under the review of the Court of Session by bill of advocation. The Lord Ordinary ordered

the case to be stated in memorials to be reported to the Court; and these having been given in and reported, the Court were equally divided. It went back to the Lord Ordinary, and he refused the bill; and on reclaiming petition, the Court finally came to adhere to the interlocutors complained against.*

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1st, *The legal meaning and construction* of the particular clause in leases on which the respondent founded his application for an interdict, is now finally and unalterably fixed. It has been long settled in the law and practice both of Scotland and England, that a condition in leases, expressed as this is, resolves into an alternative contract,¹ in which the tenant has an option to deviate from the course of cropping prescribed in the lease on paying the higher rent, and there is no specialty in this case to subject the agreement between the appellants and respondent to a different interpretation.

2d, The various precedents of decided cases, declaring such clauses to be alternative agreements, and to give the tenant an option to adopt the course of husbandry that he thinks most expedient, are strictly consistent with the general principles of law recognized in all cases of alternative contract.

3rd, There are the strongest grounds in expediency for adhering to former decisions upon such clauses as the present. The additional sums stipulated in such cases must inevitably be found either to be penalties or conventional rents, entitling the tenants, on payment of them, to reject the landlord's and adopt their own course of husbandry. But it is the obvious interest both of landlord and tenant, that the additional rent should be viewed as a *penalty*.

4th, The argument of the respondent has no foundation in law; and in particular his distinction between general and specific penalties, is novel in itself, and unsupported by a single authority in the law of Scotland, or of any other system, and at any rate the penalty in this peculiar case is provided in *another* clause of the lease.

Pleaded for the Respondent.—Though the meaning of the parties in any covenant must depend, not merely upon the terms of that covenant, but upon the whole of the contract entered into between them with reference to its subject mat-

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Rolfe v. Peterson, 2 Vernon, p. 119; et 2 Bro., P. C. 436.
Pollock v. Paton, July 24, 1777; Mor. 15262.
Graham v. Straiton, *vide ante*, vol. iii., p. 119.
Henderson v. Maxwell, Feb. 24, 1802; Fac. Coll., vol. xiii., p. 49.
Wortley v. Batley, 1808; unreported.

* The majority of the judges construed the clause in the lease as *prohibitive* and not *alternative*.

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ter; and though upon the just construction of the lease in the present case, very few words might be necessary to show that the respondent was entitled, upon the covenants therein contained, to restrain the appellants from breaking up the grass ground in question, yet as the appellants endeavoured to support their right to break it up, by reason that the penalty in the present case was a specific penalty, it may be necessary to show that the enforcing an obligation by a specific penalty, does not give an option to perform the obligation, or to pay the penalty.

When it first became the fashion in Scotland for landlords to prescribe a certain course of husbandry to their tenants, the observance of the rules laid down, was usually enforced by means of a general penalty at the end of the lease; for example, £100 sterling or a year's rent over and above performance; but in equity, penalties of this nature are subject to modification, that is to say, they are restricted to the actual damage that can be qualified. For some years past, therefore, it has been the custom to stipulate a specific instead of a general penalty, the tenant becoming bound to pay an additional sum per acre, for every acre which is not managed in the method prescribed. But a specific penalty, in other words, a liquidation of damage made by the parties themselves beforehand, is not subject to restriction like a *general penalty*. The object, however, was not thereby altered; it was still only a means of enforcing performance of the covenant of which it formed a part; and was sufficient for its purpose, so long as the loss to result from the infringement was greater than the profit to be gained by it; in point of fact, in the present case, it was sufficient for its purpose, until the last year of the lease.

Chilliner v.
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Earl of
Wemyss v.
Skirving, 1809;
Fac. Coll., vol.
xix., p. 8.
Mackenzie v.
Batley,
1810 (unre-
ported).
Mackenzie v.
Gilchrist, Dec.
13, 1811; Fac.
Coll., vol. xvi.,
p. 419.

Accordingly, the decisions on this point in England and Scotland go to support this view, *vide* Lord Hardwicke's decision, reported in Vesey, 2d vol., p. 528; and in Scotland, the late decision of the Earl of Wemyss v. Skirving, as well as the judgment pronounced in the case of the Honourable Mr Wortley Mackenzie of Belmont v. Stewart Mackenzie Bately; which decision was confirmed by the case of Mackenzie v. Gilchrist, in the following year, holding that the "tenant was not entitled to contravene the stipulation by which he is bound to leave one-third part of the farm in grass, even upon offering to make payment of the additional rent stipulated by way of penalty."

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

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For the Appellants, *Sir Saml. Romilly, John Cuninghame.*

For the Respondent, *Geo. Cranstoun, James Keay.*

SIR WILLIAM CUNINGHAM FAIRLIE, Bart., *Appellant* ;

Dame MARIANNE CAMPBELL or CUNING-
HAM FAIRLIE, *Respondent.*

House of Lords, 3d July 1815.

DIVORCE FOR ADULTERY—REMISSIO INJURIÆ.—The plea of *remissio injuriæ* was sustained by the Court of Session, but in the House of Lords the case was remitted for reconsideration, with considerable doubts expressed as to the judgment below, in consequence of there being no evidence that the husband had probable knowledge of his wife's guilt at the time of the alleged condonation.

This was an action of divorce brought by the appellant against the respondent for adultery committed by the latter, in which the special defence of *remissio injuriæ* was stated by the respondent as a bar to the action.

The appellant, in regard to this defence, stated that, at the time alluded to, when he forgave the respondent, he knew nothing of any act of adultery having been committed. Certain rumours and hints led him to inquire, and he found that they all ended in certain familiarities with a young man of the name of Begbie, who resided in the house, but did not amount to guilt, such as could found a divorce. And having charged her with these, it led her to protestations of innocence, which reconciled him to her at the time. Afterwards, however, having received two letters from Major Brown, in regard to her conduct, which he opened in her presence, and on reading them, discovered his uneasiness, such as led her to be anxious to know their contents. Accordingly, that very night, or early next morning, he found that she had taken these two letters out of his pocket, and had gone to Begbie's bedroom, where he found her reading to him (Begbie) the two letters which he had received about her conduct with him. He left the house on this occasion, and on her entreaties again returned, and slept with her again. Afterwards, however, he received