[*8th July* 1834.]

JAMES LAWSON, Tenant in Castle Nairne, Appellant. No. 20.

Mrs. WEDDERBURN OGILVY, of Ruthven, Respondent.

Title to Pursue.—A lady who was served as heiress of entail, and "only child" of her father, held (affirming the judgment of the Court of Session) to have a sufficient title to insist for payment of rent falling under the executry.

Lease.—It was provided by a lease that a tenant should not take two white crops, or plough up for crop any part of the farm which had not been three years in grass, and if he deviated from this rotation he should pay 10*l.* of additional rent for each acre so cropped for the last three years of the lease; and in the penult year of his lease he cropped a field which had not been three years in grass, and also cropped the same field in the last year of the lease:—Held (affirming the judgment of the Court of Session), that the tenant was liable in the additional rent for both years.

1ST DIVISION.
Lord Newton.

IN 1806 James Ogilvy, Esq., of Islabank, the father of the respondent, entered into missives of lease with the appellant, James Lawson, by which he let to the appellant the farms of South and North Grange, of Airly, and the farms of Parkend and Fentonhill, as all then occupied by the appellant. The lease was to endure till Whitsunday 1827, as to the houses and grass, and till the separation of the crop as to the arable land; and the rent was to be 230*l.* for the farms of South and

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North Grange, of Airly, and 15*l.* for the farms of Parkend and Fentonhill, payable at two terms, Martinmas and Whitsunday, by equal portions, after reaping each crop, besides certain kain. It was afterwards abated 7*l.* 5*s.*, making the amount of the money rent for both farms 238*l.* 0*s.* 8*d.* Both parties bound themselves to enter into a formal lease containing certain stipulations; and in 1821, after a litigation on the subject, a lease to the above effect was executed, and in which the following mode of cropping was laid down; viz.—" The farm of " South and North Grange, divided into three parts " or divisions, two of which are the southmost and " northmost, and the third division comprehends Park- " end and Fentonhill, the southmost and northmost " divisions being each of them put into seven fields, " these two divisions shall be cropped exactly similar; " that is to say, one field the first year in clean fallow, " or drilled green crop; second year, wheat, oats, or " barley sown down with a sufficient quantity of rye- " grass, red and white clover seeds, and shall remain " in grass the three subsequent years, which grass may " be cut the first or second year, in the option of the " tenant, and shall thereafter remain in pasture until " the field or division is again ploughed up in the " rotation, and when broken up, two corn crops may " be taken, one of oats, and the other of barley; but " if the ground be not suitable for barley, both crops " may be oats, and so on regularly and yearly through- " out the other six fields; by which method of crop- " ping there will be always during the lease, and at " the expiry thereof, in each of the two divisions, one " field in clean fallow, or drilled green crop, three of " said fields in sown grass, and the other three in corn

"crop." It was farther declared, "that as the several "tack duties before mentioned were stipulated only on "condition of the tenant's adopting the rotations and "methods of cropping before specified, and adhering "strictly thereto during the lease; therefore, in case "the said James Lawson and foresaids shall at any "time during the lease deviate therefrom in any respect, "without the consent of the proprietor in writing, the "tenant shall be bound, as he hereby obliges himself, "to pay to the said James Ogilvy and his foresaids "the sum of 3*l.* sterling of additional money rent, over "and above the rent before specified for each acre, or "proportionally for any part of an acre, on which the "said deviation shall have taken place previous to "the last three years of the lease, and 10*l.* sterling "of additional yearly rent for each acre, and propor-"tionally for any part of an acre, on which the "said deviation shall have taken place for the last "three years of the tack; which additional rent shall "not be considered as penalty, but as pactional rent, "and shall be payable at the terms and along with the "money rents before stipulated."

Mr. Ogilvie died in September 1826, and was succeeded by the respondent, his only child, who was infeft as heiress of tailzie and of line on the 5th day of November 1827.

In the month of October of the same year she raised, with consent of her husband, an action before the sheriff of Forfarshire against the appellant, setting forth the terms of the lease, and in particular the above clause, and averring, "That in the year 1823 the field, "consisting of about fourteen Scots acres, lying on the "south-west of the cot-house in the middle of the farm,

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" being the second field west of the steading, and one " of the seven fields of South Grange division before- " mentioned was sown down with grass seeds along " with the corn crop of that year; and in the following " year, viz. 1824, said field was young grass of the " first year; in 1825 it was grass of the second year; " but in 1826 the field was ploughed up and sown " with oats, instead of remaining the proper time in " grass; and in the present year, being the last, " and awaygoing crop under the tack, said field was " also under a corn crop, partly barley, but chiefly " oats, being two successive white corn crops, after " grass of two years of age; so that the said James " Lawson has incurred the pactional or additional rent " of 10*l.* sterling per acre of said field for each of " the said last two years, viz. crops and years 1826 and " 1827." She farther averred, that the appellant was owing the ordinary rent of 238*l.* for crop and year 1826, " and the sum of 140*l.* sterling of additional " money rent, at the rate of 10*l.* per acre of said field " on which the deviation took place, for said crop and " year, amounting together to 378*l.* 0*s.* 8*d.* sterling, " payable the one half at Martinmas 1826, and the " other half at Whitsunday 1827; and also the like " sum of 378*l.* 0*s.* 8*d.* sterling, being the rent and ad- " ditional rent before mentioned for crop and year " 1827, payable," &c.; and she concluded for payment accordingly.

In defence it was pleaded, 1. That the respondent had not stated the nature of her title to pursue. (This was obviated by an amendment of the libel, in which she described herself as " only child and heir of tailzie " and of line" of her father, and infeft as such.) It

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was then objected, 2. That the rents pursued for, which fell due at Whitsunday 1826, fell to the executor, seeing that her father died in September of that year, so that they were in bonis of him. To this it was answered, that the respondent was the "only child" of her father, and consequently both heir and executor.

3. In regard to the merits, the appellant stated, that the farms of South and North Grange formed two divisions of seven fields each, and Fentonhill and Parkend formed a third division. The seven fields in each of the first two divisions were pactioned to be cropped in such a manner "so that there should be at the "expiry of the lease one field in clean fallow, or "drilled green crop, three of said fields in sown grass, "and the other three in corn crop." In the one division, the rotation of cropping was strictly observed; in the other, the state of the cropping for the last year was as follows:—one field in clean fallow, three fields in sown grass, of one, two, and four years old, and the remainder in crop; and he admitted, that a field of about fourteen acres, next adjoining to the field left in grass four years old, was broken up in 1826, when there was grass of two years old only, instead of three. In this way he alleged that the only deviation from the prescribed rotation was, that a field of grass of four years old was left in place of one of three, which was a difference much in favour of the respondent's interest. And he maintained that, supposing he was liable for breaking up that grass field in 1826, he could not be liable for additional rent, further than for that year, because he was entitled to break up that field for crop 1827. By paying the stipulated

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penalty or additional rent for doing so, the contravention would be entirely wiped off, because the respondents would thereby get the equivalent fixed on to discharge it; and such equivalent would place the matter precisely on the same footing as if the field had been in grass for crop 1826.

The Sheriff decerned in terms of the libel, and issued this note:—" There appears to be no doubt that the " defender deviated from the prescribed rotation as to the " field in question for crop 1826, and also for crop 1827, " and must pay the additional rents for both years: " that rent is no doubt high, but still it is rent, not " penalty, and this Court must adhere to the bargain " between the parties. On account, however, of the " high additional rent, and that the pursuers have " failed in some parts of the discussion, no farther " expenses have been awarded than those previously " found due."

The appellant brought the case under review of the Court of Session by advocation, in which Lord Newton on the 9th December 1831, repelled the reasons, and remitted simpliciter; but found no expenses due. The appellant reclaimed to the Inner House; and the judges, being equally divided in opinion, ordered cases, on advising which they unanimously (16th May 1832) adhered.*

Lawson appealed.

Appellant.—1. As the action is insisted in by the respondent, in the character exclusively of heiress of entail

* 10 S. & D., 531.

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of her father, who died between Whitsunday and Martinmas 1826, and a payment of 200*l.* was made to her, which exceeds the half of the whole rent claimed, whether additional or penal, such payment extinguished her claim for the rent of the year 1826, even on the supposition that penal rent was due, seeing that the remaining half of that year's rent falls under the executry of her father, to which he has shown no title. It is not sufficient for her to say that she is entitled to the character of executrix, because, even if she were so, she does not sue in that capacity, but as heiress of entail. She describes herself, no doubt, as being the only child of her father; but this is descriptive merely of the manner in which she is his heir of entail, and does not imply that she is executrix, or has any right to the moveable succession of the deceased.

2. It cannot be held to have been the intention of the parties that the penal rent should be exigible in the case that has occurred. The lease specifies the object of the rotation to be, that "there will be always during "the lease, and at the expiry thereof, in each of the two "divisions, one field in clean fallow or drilled green "crop, three of said fields in sown grass, and the "other three in corn crop;" and the fact is, that there was, at the expiry of the lease, the proper number of fields in each division of the farm in grass, fallow, or green crop, and corn crop.

3. But, at all events, as the additional rent is an exorbitant penalty, and as the deviation from the mode of cropping was unintentional and venial, and the damage sustained of the most trifling description, it is in the power of the Court to modify the penalty to such an

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amount as the justice and equity of the case demand.*

4. Supposing, however, the additional rent to be due and exigible for the year 1826, the claim for additional rent for the succeeding year, 1827, is inconsistent with the true meaning of the clause, which, being of an unfavourable nature, must receive the most strict and limited construction.†

The penalty stipulated for miscropping previously to the three last years of the lease, and for miscropping within the three last years, is imposed in respect of a deviation from the prescribed system of rotation; and it must be held to be satisfied by the payment for the year 1826, as being exacted in respect of "a deviation "for (*i. e.* during) the three last years of the tack." The clause does not authorize the penalty to be exacted oftener than once in respect of the same deviation, whether that deviation has taken place previous to the commencement of, or during the three last years of, the lease.

The Court below held, that the words "for the "last three years of the tack" are intended to specify the time during which the additional penalty should be paid; whereas it is obvious that it was intended to specify the time within which the deviation inferring the penalty might be committed. If the deviation take place during those years, then the additional rent is to be exigible; but if it be paid for the first of the three

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* Mackintosh v. Macdonald, 1st Feb. 1788, Mor. App. Tack. No. 5.

† Johnston v. Forbes, 22d Feb. 1639, Mor. 10037; Sir James Suttie v. Somner, 10th July 1828, 6 S. & D, 1122.

years, there is no provision that, if the same deviation be continued, the penal rent is to be due for the other two years.

Respondent.—1. The objection that the respondent has no right to recover any part of the additional rent for the year 1826, inasmuch as one half of the rent of that year belonged to the executors, and not to the heirs of the late Mr. Ogilvy, was overruled by the Sheriff by an interlocutor, of which the appellant did not complain in his advocation. But, even if the question were still open, there is no ground for the objection. The respondent distinctly set forth that she was the "only child" of her father, as well as his heir of tailzie; and this amounted to a declaration that she was de jure the person entitled to the office of his executor; and it is not necessary that an executor be confirmed before raising an action. It is sufficient if he produce his confirmation before extract; and if it be not necessary that he be confirmed when he raises his summons, it cannot be necessary to state in his summons that he is so.

2. By the lease the appellant is permitted to take two crops of oats in succession, (a practice which under ordinary circumstances is reprobated as contrary to good management,) only on one condition, viz. that the ground shall have been previously three years in grass. But it is admitted that when the field in question had been only two years in grass, he took a crop of oats in 1826, and another in 1827. It is therefore of no relevancy to say that he left a field in grass four years old, even if the statement were accurate; and

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consequently, both according to the spirit and the words of the agreement, the additional rent is due.

3. It is not competent for the Court to modify the rent. It is laid down by Mr. Bell, in his Treatise on Leases,* as the conclusion which is to be drawn from all the cases, that a "clause stipulating an additional rent, in order to enforce the conditions "of the lease, will be literally interpreted even where "the additional rent has been accidentally incurred, "and although, from the powers reserved to the land-"lord, and from its disproportion to the actual damage "sustained, it should amount to an exorbitant penalty." This rule was enforced in Frazer v. Ewart.†

4. Equally untenable is the plea that the appellant is entitled, on paying the additional rent for the year in which he commenced the deviation, to continue to deviate in future years merely on paying the ordinary rent. It is plain that if he take two crops of oats from ground which has not been three years in grass he is guilty of a deviation for each of the crops so taken; and he deviates more from the spirit of the contract by taking the second crop than the first.

For let it be supposed that the appellant after two crops of oats (the ground having been three years in grass) had proceeded to take a third crop of oats, instead of fallowing the ground or sowing it with green crop, it is clear that in that case he would have been liable for the additional rent during that year; but if, during the next year he took a fourth crop of oats, then, according

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* Bell on Leases, p. 202, note.

† Fraser v. Ewart, 25th Feb. 1813, Fac. Coll.

to the argument of the appellant, he would be liable in no additional rent at all, because if he had observed the prescribed rotation during the previous years, he was entitled during that fourth year to have had this particular field in oats, or barley, or wheat.

The lease stipulates not only that the farm during each year shall consist of a certain number of breaks, each under a particular crop, but also that each of these crops shall follow a particular course of previous cultivation. It is not enough that there shall be two sevenths only in oats. It is a part of the contract that one of these sevenths shall be oats from grass of three years old newly broken up, and that the other shall be a second crop of oats from grass of the same age.

LORD CHANCELLOR.—My Lords, I have thought it necessary to call upon the respondent's counsel for an answer only on one point; and upon that point the first question is, whether there be any or what portion of the rent which falls within the executry; and, in the next place, whether enough has been done in the proceedings to supply the defect in the summons? I should be extremely sorry if any material alteration were necessary in the interlocutor, the more especially (though it must be admitted that the point as to the defect of the summons was taken in the course of the argument) as I can find no appearance of any discussion having been given to it by the Court of Session; and it is exceedingly unpleasant, when a case comes before a Court of the last resort, to make any considerable alteration in the judgment upon grounds that do not appear to have occupied, any considerable portion of the attention of the Court. On

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the main point I have, in the course of the argument, thrown out that my opinion is in exact accordance with that which the Court below formed; but it is not quite correct to state, that this is a penalty which is to be taken with all that strictness of construction that is applied in the jurisprudence of Scotland upon matters strictly penal. There is a difference between the construction to be applied to a penalty imposed by one party upon another and the construction which is to be applied to a penalty arising out of that which is done by the voluntary compact of the parties themselves. A much less rigorous degree of construction may be applicable in the first case towards the party failing than to the party claiming the penalty of the failure in the second case. Although it is called pactional rent, that would not vary materially its penal nature; but a much more rigorous degree of construction is applicable where a party has with his eyes open laid himself under this prohibition, and has obliged himself to pay so much additional rent. It may not have been a very prudent bargain, but the party knew what he was about; and words can hardly be clearer than are used here. If the party breaks the conditions as to the cultivation during any of the years preceding the last three of the term, 3*l.* additional rent an acre, or any proportion of an acre, upon which he committed that contravention, was to be added to the pactional rent for the rest of the term. If it was in the last three years that the breach took place the 10*l.*, and not 3*l.*, for a very obvious reason, with reference to the rights of the landlord, was made the penalty. It is said that this construction, which at first the Court seem not to have adopted, upon one breach of the

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condition would give a right to the landlord to claim the additional rent for every succeeding year though the breach was not continued. The Court first held that that was not the construction, though they unanimously afterwards came to that determination. But it is said, this is not for the interest of the landlord, for it will give the tenant a strong interest, (and there is some foundation for that argument,) if he commenced it, to continue cropping out the land, for he would be no worse off by repeated contraventions than by one. But it is said farther, that it would prevent an action for damages on the part of the landlord quoad the subsequent contraventions. That might be the consequence; but the increased rent during the rest of the year would not prevent an action for damages at the suit of the landlord if the tenant continued to contravene during the next year, for there would be no compensation by the increased rent. It is needless, however, to answer that argument, for he would be entitled to an injunction or an interdict; and there is a compact providing for it: he is to be allowed to have an interdict, as if he foresaw that he might be compelled to restrain the tenant from continuing the breach of the contract, and no answer could be given to an application for that preventive remedy by saying, I pay the pactional rent. The reply to that would be, Yes, you pay the pactional rent, but not for what you are now doing or in the course of doing, namely, the second breach, but in respect of the first breach of the contract, that breach extending the penalty through the whole term. I consider that is no substantial answer to the construction adopted unanimously by the Court below, and for that reason I did not call

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upon the counsel for the respondent to argue it; and all that remains is, to consider the other point, which goes to a considerable portion of the sum in question, and that, as I said before, resolves itself into two questions: first, whether from the nature of the lease any rent comes within the description of executry; and, secondly, if it does, whether what has taken place in the proceedings in the cause does not entitle the present respondent to hold the judgment for that as well as the remainder? And upon that point I move your Lordships that the farther consideration of this case be postponed. Adjourned.

LORD CHANCELLOR.—My Lords, I have looked again into this case and into my notes, and into some authorities, and the opinion I then held is confirmed. I have now, therefore, humbly to move your Lordships that the interlocutors appealed from be affirmed, but without costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed.

MONCRIEFF, WEBSTER, and THOMSON—SPOTTISWOODE and ROBERTSON, Solicitors.