No. 6.

to be strictly interpreted. It is substantially fulfilled, if, without assigning or subsetting, the tenant allows his family to remain in possession. There has been no voluntary desertion on his part, and his family should not be implicated in his crime. Had he become insane, and been removed to a place of confinement, his family, during his life, would have remained in possession, and the present circumstances do not warrant a different judgment.

Observed on the Bench: An obligation by a tenant to reside on his farm, gives the landlord no power to remove him beyond what would arise from a simple exclusion of assignees and subtenants. But if, in opposition to either of these limitations, a tenant deserts his possession, or is banished Scotland, as he no longer fulfills the condition of his lease, it falls of course.

The Lord Ordinary found the letters orderly proceeded, and two reclaiming petitions against this judgment were refused without answers.

Lord Ordinary, *Armadale*. Act. *W. Erskine*. Alt. *Jo. Clerk, Hagart, Macfarlan*.

R. D. *Fac. Coll.* (*APPENDIX*,) *No.* 7. *p.* 13.

1801. *June* 16.

THE EARL of WEMYSS *against* JAMES and ALEXANDER WRIGHTS.

No. 7.

In a lease, which expired at Whitsunday as to the houses and grass, and at the separation of the crop from the ground as to the arable lands, and in which the tenant was obliged, 'during the currency of this lease, to consume upon the ground of the said lands the whole straw and fodder of every kind, except hay, produced by said lands, and to lay

JAMES and ALEXANDER WRIGHT had a lease of the farm of East Mains of Seton, in East-Lothian, which expired at Whitsunday 1799 as to the houses and grass, and at the separation of the crop from the ground as to the arable lands.

By the lease, the tenants were taken bound, 'during the currency of this 'lease, to consume upon the ground of said lands the whole straw and fodder 'of every kind, except hay, produced by said lands, and to lay the whole dung 'thereby produced on said grounds.' The farm consisted of 129 acres, of which 117 were under white crop, and 12 in pasture, the last year. From several of the fields this was the second, and in one of them the third white crop in succession.

The tenants had the whole dung produced since Martinmas 1798 still on hand at leaving the farm.

The Earl of Wemyss, who had recently purchased the lands at a judicial sale, gave the tenants a charge of horning to implement the terms of the lease, which was suspended.

His Lordship did not dispute their right to sell the crop 1799; and the only point in dispute between them related to the dung produced from the penult crop.

The tenants did not pretend right to carry it off the land, but maintained, that they were entitled to payment for it; because, according to the approved

No. 7.
the whole dung thereby produced on the said grounds,' the landlord was found entitled to claim, without paying for it, the whole dung produced from the penult crop, which had not been laid upon the farm.

system of husbandry in that part of the country, and which they had adhered to during the currency of the lease, the dung produced from crop 1798 fell to be laid, not upon the barley lands in spring, but upon the turnip land in summer, and wheat land in autumn 1799, but to which uses an outgoing tenant could not be bound to apply it.

The Earl

Pleaded: The lease obliges the tenant to lay upon the lands the whole dung produced upon the farm, and precludes all inquiry as to the proper mode of employing it.

At the same time, it might have been employed by the tenant with advantage upon the farm. It might have been laid upon the barley land, and part of the farm ought to have been left after a green crop, such as pease, beans, or potatoes, upon which the dung might have been profitably employed for both parties; 27th Jannary 1767, Finnie against Mitchell, No. 143. p. 15260; 30th June 1796, Pringle against Macmurdo, No. 24. p. 6575.

Answered: The terms of a lease must be interpreted according to the meaning of parties in employing them. The clause in question cannot be literally interpreted so far as relates to the straw and fodder of crop 1799, which it is admitted the tenant had right to dispose of, because he had no opportunity of consuming them upon the lands. Upon the same principle, he must be entitled to dispose of or to be paid for, the dung of the penult crop, so far as, according to the established rules of husbandry, he had no opportunity of using it upon the farm.

The Lord Ordinary, 'in respect of the clause in the lease, and that the 'dung in question was produced on the grounds from the straw, fodder, and 'other materials of the preceding crop,' found the letters orderly proceeded.

Upon advising a petition, with answers, the Court were much divided. Some Judges thought, that although the tenants were not entitled to take away any part of the dung, they ought to get payment for it, in so far as it could not have been laid on the lands, in consistency with good husbandry.

Other Judges thought, that the clause in question gave the landlord an unlimited right to the whole, precluded all investigation as to what ought to have been laid upon the lands, and was useful in freeing the tenant from all temptation to starve the lands at the end of the lease.

The Lords (7th February 1801) 'altered the Lord Ordinary's interlocu-'tor: Found, That the clause in the tack, by which the tenant was obliged, 'during the currency of the lease, to consume upon the ground of the farm 'the whole straw and fodder, except hay produced thereon, and to lay the 'whole dung upon the said grounds, cannot be strictly or literally enforced in 'the last year of the possession: Found, that the dung in question, made from 'the straw, fodder, and other materials of the crop preceding Whitsunday '1799, so far as the same did not fall, according to the rules of good husban-'dry, to be laid upon the bear land, was the property of the outgoing tenant; 'and that, although he could not remove it to any other farm, without the

No. 7.

'consent of the landlord, he was entitled to a price for it, from the landlord 'or the incoming tenant, according to a fair valuation; and remited to the 'Lord Ordinary to proceed accordingly.'

But, upon advising a petition for the Earl of Wemyss, with answers, the Lords 'altered the interlocutor complained of, and found, That the dung in 'question belongs to the proprietor, (the petitioner,) or the incoming tenant; 'and remited to the Lord Ordinary to proceed accordingly.'

Lord Ordinary, *Craig*. For the Earl of Wemyss, *C. Hay*.
Alt. *Arch. Campbell*. Clerk, *Menzies*.

D. D. *Fac. Coll. No.* 238. *p.* 538.

1803. *March* 2. SCOTT *against* BRODIE

No. 8.
Judgment of the Court and of the House of Lords in the case of an away-going crop.

Jurisdiction of the House of Lords in cases of appeal.

THE Earl of Traquair let the lands of Ormiston to William Murray 'for 'nineteen years from and after the term of Whitsunday next 1783, which is 'hereby declared to be the term of the said William Murray's entry to the 'possession of the said lands and others, by virtue of these presents;' further, William Murray 'binds and obliges himself, and his foresaids, at the expira- 'tion of this tack, which will be at the term of Whitsunday 1802, to flit and 'remove from the lands and others hereby set, and to leave the same void and 'redd, without any previous warning, or process of removing to that effect.'

Murray having possessed the lands for a few years, assigned over his lease to Alexander Brodie.

The property itself was purchased by John Scott, writer to the Signet, in the year 1799. As the farm was held by a lease, having the entry at Whitsunday, Brodie maintained his right to an away-going crop, that is, to reap the crop which was prepared and sown in the autumn or spring preceding Whitsunday 1802. Against this pretension, Scott presented a bill of suspension and interdict, praying, that the 'tenant might be prohibited and interdicted from 'ploughing any part of the farm after the separation of the current crop 1801 'from the ground.'

This bill was passed by the Lord Ordinary on the Bills, and the interdict granted (10th June 1801,) 'in respect it is intimated, a copy taken out, and 'no answer.'

Against this judgment the tenant appealed to the Court, and

Pleaded: Although, in ancient times, too little attention was paid to the rights of the cultivators of the soil, yet there appears never to have been a period in which this general maxim was not recognised in the jurisprudence of Scotland, that the person who *bonâ fide* ploughs and sows the ground is entitled to reap the crop, though every other interest he had in the land may