Friday, July 17.

SECOND DIVISION.

[Lord Trayner, Ordinary.

BURNS *v.* MARTIN (MARTIN'S EXECUTRIX).

Lease—Landlord and Tenant—Joint and Several Liability.

A mineral lease was granted to two tenants and the survivor, the tenants binding "themselves and their respective heirs, executors, and successors, all conjunctly and severally, renouncing the benefit of discussion," for the rent. It was stipulated that if the tenants or either of them should be sequestrated, the lease should in the landlord's option become *ipso facto* void and null. One tenant was sequestrated. The landlord did not intimate that he elected to hold the lease null. The other tenant shortly afterwards died, and the landlord sought to hold his executor liable for the future rents under the lease. He stated that on the sequestration of the bankrupt tenant and liability thereunder the lease devolved upon the other. *Held* that this averment implied that on the bankruptcy of the one tenant the lease was to be held null as to his interest, and therefore that the landlord could not maintain that the bankrupt was still tenant, and the other tenant's executor liable conjunctly and severally with him.

Lord Rutherfurd Clark *dissented*, holding that the pursuer's statement was only an erroneous statement of law, and that under the lease the defender as executor was liable conjunctly and severally with the bankrupt tenant.

By lease dated in February 1883 John William Burns, Esquire, of Kilmahew and Cumbernauld, let for 31 years from Martinmas 1882 to William Logan and Hugh Martin, "and the survivor of them, but expressly excluding assignees and sub-tenants, whether legal or conventional, and managers," certain seams of fireclay belonging to him in the parish of Cumbernauld, for which causes, and on the other part, Logan and Martin bound themselves, "and their respective heirs, executors, and successors, all conjunctly and severally, renouncing the benefit of discussion," to pay a fixed annual rent of £200 for the first five years, and £250 for the remainder of the lease, or otherwise, in the option of the lessor, to pay a specified royalty per ton of fireclay produced.

The lease contained the following clause:—"And it is hereby specially provided and declared that if the second parties, or either of them or their foresaids shall become bankrupt, or if sequestration shall be awarded against them or either of them . . . this lease shall in the option of the first party or his foresaids become *ipso facto* void and null."

The estates of Logan were sequestrated under the Bankruptcy Act on 19th October 1883.

Martin paid the half-year's rent due at Martinmas 1883. He died on 5th January 1884. His widow, the defender, was his sole executrix. She maintained that on a sound construction of the lease Martin's tenancy ceased on his death.

In November 1884 Burns raised the present action against her as executrix of Martin, for payment of £100 as the half-year's rent due at Whitsunday 1884, and £100 as that due at Martinmas 1884.

He averred that upon Logan's sequestration "the tenant's rights and liabilities in and under the said lease devolved wholly on the said Hugh Martin, who accordingly made payment to the pursuer of the fixed half-year's rent due in terms thereof at the term of Martinmas 1883, and worked and manufactured the said fireclay, and carried on the said business as alone interested therein, and in the subjects let by said lease."

The defender admitted that the rent due at Martinmas 1883 (after Logan's sequestration) was paid by Martin. She further stated that without admitting liability therefor she was willing to pay the proportion of rent applicable to the period between 11th November 1883 and the date of her husband's death (5th January 1884), being £30, 2s. 8½d., but that she refused to pay the sums sued for.

The pursuer pleaded—"(1) On a sound construction of the said lease the defender is liable in payment to the pursuer of the rents sued for. (3) In respect of the said lease, and of Mr Martin's having continued to possess and work the subjects let, as having the sole tenant's interest therein after Mr Logan's sequestration, the pursuer is entitled to decree as craved."

The defender pleaded—"(2) On a sound construction of the lease founded on, Mr Martin's tenancy of the clay-field in question ceased on his death, and no liability for rent for the period after that date attaches to the defender."

The Lord Ordinary repelled the defences and decerned against the defender in terms of the conclusions of the summons.

"*Opinion.*—By lease dated 1st and 6th February 1883 the pursuer let to William Logan and Hugh Martin, 'and the survivor of them, but expressly excluding assignees and sub-tenants, whether legal or conventional, and managers, except with the written consent' of the pursuer or his successors, certain seam or seams of fireclay within lands belonging to the pursuer. The lease was for the period of 31 years from Martinmas 1882, and the rent, payable half-yearly, was fixed at £200 per annum for the first five years, and at £250 per annum thereafter during the currency of the lease, with the option to the pursuer of claiming certain lordships instead of the fixed rent. It is also provided that in the event of the bankruptcy of either of the tenants, or the voluntary divestiture by them or either of them of their estate in favour of a trustee for behoof of creditors, the lease shall in the option of the pursuer become *ipso facto* void and null. The estates of William Logan were sequestrated on 19th October 1883, and Hugh Martin died on 5th January 1884. The pursuer has not exercised the option which the bankruptcy of Logan gave him under the clause I have referred to of putting an end to the lease. On the contrary, he holds the lease as still subsisting, and the present action is raised to recover from the defender, as executrix of Hugh Martin, the rent due for the year ending at Martinmas 1884.

"It seems to be quite clear (and the pursuer does not contend to the contrary) that by virtue of the terms of the lease the defender could not

claim to have any right under the same, either as in a question with the pursuer or as in a question with William Logan, the survivor of the joint-tenants. The death of Mr Martin left William Logan the sole tenant under the lease. In such circumstances, speaking generally, the liability for rent would follow the right to the privileges which the lease conferred — that is to say, William Logan, as the sole tenant, and alone entitled to exercise the rights conferred by the lease, would alone be liable for the rent and other obligations incumbent on the tenant, and the defender, as representing the predeceasing tenant, would not be liable. The pursuer, however, maintains that the defender is liable for the rents sued for, and for the whole rents which may yet become due under the lease in respect of its special terms. The clause relied upon by the pursuer is as follows:— 'For which causes, and on the other part, the said William Logan and Hugh Martin bind and oblige themselves and their respective heirs, executors, and successors, all conjointly and severally, renouncing the benefit of discussion, to pay to the said John William Burns' the rent stipulated.

"If the clause had merely bound Mr Martin and his heirs, executors, and successors, I should have held that the obligation thereby imposed on Mr Martin's representatives was merely an obligation to make good any arrears of rent due for the amount of any rent current at the date of Mr Martin's death. But the clause goes much further than that. It makes the joint-tenants, 'and their respective heirs, executors, and successors, all conjunctly and severally' liable for the rents. The meaning and effect of such an obligation was the subject of recent judicial interpretation in the case of *The Police Commissioners of Dundee* v. *Straton*, 11 R. 586, in which under a similar clause it was held that an original feuar remained liable, as his representatives would have been had he been dead, for all the feuar's obligations although he had disponed the subjects to another, of which change in the ownership the superior had had due notice. I cannot distinguish in principle between this case and the case of *Straton*, and have therefore no alternative but to pronounce decree as libelled."

The defender reclaimed.

Authorities—*Dundee Police Commissioners* v. *Straton*, February 22, 1884, 11 R. 586; *Skene* v. *Greenhill*, May 20, 1828, 4 S. 25; Hunter on Landlord and Tenant, ii. 648.

Pursuer's authority—*Bethune* v. *Morgan*, 1874, 2 R. 186.

At advising—

Lord Young — The defender is sued, as the executrix of her deceased husband Hugh Martin, for two half-years' fixed rent under the mineral lease referred to on record tand printed in the appendix. The circumstances in which the claim is made are peculiar. The lease is for thirty-one years from Martinmas 1882, to William Logan and Hugh Martin, "and the survivor of them, but expressly excluding assignees and sub-tenants, whether legal or conventional, and managers," and with a clause of nullity providing "if the second parties (the tenants), or either of them or their foresaids, shall become bankrupt, or if sequestration shall be awarded against them or either of them, this lease shall, in the option of the first party (the landlord) or his foresaids, become *ipso facto* void and null." Logan was sequestrated under the Bankruptcy Act on 19th October 1883, and the pursuer avers (Cond. 3) that "thereupon the tenants' rights and liabilities in and under the said lease devolved wholly on the said Hugh Martin."

The defender admits Logan's sequestration, and the payment of the Martinmas rent by Martin, but denies the averment *quoad ultra*.

Hugh Martin died on 5th January 1884. The defender's counsel stated at the bar that the workings under the lease were stopped on Logan's bankruptcy, and never thereafter resumed. I do not understand this to be denied. If it is, the parties are at issue on the fact. The pursuer's counsel treated it as immaterial, resting the case against the defender, not on the ground that she, as her deceased husband's executrix, is now tenant under the lease, which, it was conceded, and indeed contended, she was not, but that as his executrix she is bound for the rent due by the bankrupt Logan, as the survivor of the two tenants, her obligation as such executrix standing on the clause in the lease whereby the tenants Logan and Martin bind themselves, "and their respective heirs, executors, and successors, all conjunctly and severally, renouncing the benefit of discussion," to pay the fixed rent, or, in the landlord's option, the lordship agreed on for the privilege of working" &c., under the lease.

Now, I am not prepared to hold that this clause was intended to bind, or is effectual to bind, the heirs and executors of the predeceasing tenant, who are excluded from all right or interest under the lease, for the rents and other prestations due by the survivor to whom exclusively the lease is destined. On the contrary, I am of opinion, and if necessary should decide, that the language of the clause is satisfied by construing it as an obligation on each tenant and his heirs, executors, and successors, "conjunctly and severally, renouncing the right of discussion" (limiting the application of these words to "heirs, executors, and successors"), for the rents and prestations incurred during the subsistence of his own right of occupation.

But it may be thought unnecessary to decide this more general question, having regard to the ground taken by the pursuer on the record, and in the presentation of his case to us in argument. In the record he says that on Logan's bankruptcy and sequestration in October 1883 "the tenants' rights and liabilities in and under the lease devolved wholly on the said Hugh Martin." But this necessarily implies that the pursuer as landlord deprived Logan and the trustee in his sequestration of all rights and freed them of all liabilities under the lease, which he was undoubtedly entitled to do by reason of the bankruptcy and sequestration. But if Logan and his trustee was thus deprived of all rights and freed of all liabilities as from 19th October 1883, Logan could not by his survivance become tenant on Martin's death three months thereafter in January 1884. It follows clearly, and indeed necessarily, that the defender cannot be liable as bound for rents due by Logan since Martin's

death. The only other view in which the defender can be liable is, that she is herself the tenant. But this view the pursuer distinctly repudiated, and I think rightly, at least I see no construction of the lease consistent with a right of tenancy in her, and, none was suggested by the pursuer. On the contrary, any such right in the defender was distinctly repudiated by the pursuer. The result is that there is no longer any tenant under the lease, and that since Martin's death in January 1884 the relation of landlord and tenant under this lease has ceased to exist. It may be that after Logan's sequestration, and the termination by the pursuer of his rights and liabilities under the lease, the pursuer agreed to allow Martin to continue as tenant till his death in the following January, on the terms as to rent specified in the lease, and as the defender, to avoid controversy, assents to this view, and tenders the rent on that footing, viz., till Martin's death, the pursuer may have decree accordingly, but beyond this I think his claim ought to be disallowed.

What I have said is sufficient for the decision of the case. I desire, however, to say that had the pursuer abstained from discharging Logan, as he avers no doubt truly that he did, and was now proposing to accept him—a sequestrated bankrupt—as his tenant under the survivorship clause of the lease, I should have regarded it as an inequitable and unconscionable device to render the defender liable for the rents which he, Logan, certainly could not pay, and for which neither he nor the defender could possibly have any consideration, and so not to be countenanced by the Court. I am of opinion that the pursuer may have decree for the sum tendered by the defender, and no more, and that he ought to be found liable in expenses.

Lord Rutherfurd Clark—I am sorry I cannot concur in the opinion which Lord Young has just read, but as I know that that opinion is to become the judgment of the Court I must express the views I entertain with great hesitation.

This is a lease for thirty-one years in favour of William Logan and Hugh Martin and survivor. There is a power on the part of the landlord to terminate the lease on the bankruptcy of both or either of the partners, the clause of the lease applicable to such an event being in these terms—"It is hereby specially provided and declared that if the second parties, or either of them or their foresaids, shall become bankrupt, or if sequestration shall be awarded against them or either of them, . . this lease shall, in the option of the first party or his foresaids, be *ipso facto* void and null."

But I shall in the meantime consider the question on the footing that Logan is the survivor, and that that power on the part of the landlord has not yet been exercised. The question, then, in that simple form in which I have stated it, comes to be this, whether the executor of the predeceasing tenant remains liable for the debts which are due by the survivor Logan. The answer to that question depends entirely upon the construction which is to be put upon the clause which is quoted in the appendix—"for which causes and on the other part the said William Logan and Hugh Martin bind and oblige themselves and their respective heirs, executors, and successors, all conjunctly and severally, renouncing the benefit of discussion." I do not think the meaning of that clause is really doubtful. I think it lays a burden not only upon Logan and Martin but also upon their respective heirs, executors, and successors, so that the burden on Logan would descend to his heirs and successors, and the burden on Martin shall equally descend to his heirs, executors, and successors. In that way, although one of them ceases to have any interest in the lease, by reason of his predecease, the landlord has taken his heirs bound for the payment of the rent during the subsistence of the lease. No doubt that is a very hard clause, and if one could reach any other construction I would willingly adopt it. But the construction that I put on these words was almost admitted to be their natural and grammatical construction, and I can see nothing in the other clauses of the deed by which I can deprive these words of the meaning which attaches to them according to their natural and ordinary grammatical construction. I therefore hold that when Martin died, Logan, the survivor, was the tenant, and the heirs, executors, and successors of Martin were bound under this clause for payment of the rent that might become due.

But it is said that there are certain statements in the record which present the case in such a shape as to disentitle the landlord from suing upon the clause, even according to the construction of it which I think must be adopted. I am always unwilling to tie up any party very strictly to any averment which he has made upon record, especially as there is a very large power of amendment permitted by statute. But I do not think that the statement on which the judgment of the Court is to proceed is a statement of fact. I rather take it to be an erroneous statement of law. I do not understand that the landlord avers that in the bankruptcy of Logan he exercised the option of putting an end to this tenancy, for if he did, that would terminate not only the lease but terminate the obligations as well as the rights of Martin because of the termination of the lease. I think he meant merely to put a construction upon the lease and to assert, as he has erroneously asserted, that in consequence of the bankruptcy of Logan, not in respect to the exercise of any right competent to him as landlord, conferred by the lease, but simply in respect to the bankruptcy, Logan and his heirs were released from their obligations under the lease. I think he was wrong in that view. The bankruptcy of Logan had no effect merely of itself upon the lease. The lease would continue to exist, and Logan and Martin to be tenants under it. I cannot hold the pursuer bound by any erroneous statement of the law which he may have made, and I do not think that what he says here is more than an erroneous statement of the law. It might have been very different if it had been an erroneous statement of fact. But looking upon it in that light only, and considering that the statement as made on record was repudiated by the pursuer's counsel as an erroneous statement of law, I do not think we can proceed upon it. Nor can I expect the pursuer to renounce the rights, however severe they may be on the defender, which he possesses under the lease to exact the rent from the predeceasing

tenant's executors notwithstanding the bankruptcy of the other tenant.

LORD JUSTICE-CLERK—I have had very great difficulty in this case, and very much on the grounds which Lord Rutherfurd Clark has stated. But in considering the views which have been stated by Lord Young I am inclined on the whole to concur with him. I think the action is a stringent one, and proceeds on a view of the rights of the landlord of a somewhat hard and oppressive description. No doubt it is argued that the contract has provided that the rights of parties shall be so determined, and that we should give effect to the words of the contract. But I am inclined to think that there is a great deal of force in Lord Young's reading of that clause by which the executors of the two tenants are made liable for the prestations of the lease. The lease is taken to two tenants and the survivor, and I think that the clause in question may be read as binding the heirs, executors, and successors of both the tenants for the prestations incurred while both survived, and that there is nothing inconsistent with this construction in reading the clause as applicable to the heirs, executors, and successors of the survivor only for the prestations incurred after one of the tenants had predeceased. Indeed, I think that is the equitable result, because this is a lease in which the executors of the predeceaser can have no interest in the way of working or managing the subject. They cannot enter into possession, because when the predeceaser dies the survivor takes the whole right of management and possession. I say therefore it is not inequitable to read the clause as binding the executors of the survivor only for the prestations coming due after the lease has devolved upon him alone. But a complication was introduced here which I rather think, followed to its legitimate results, brings us to the conclusion which Lord Young has suggested. The pursuer in stating his case as against the executors of the predeceaser says expressly that the ground of it is that the whole right in the lease vested in the predeceaser before his death, and that Logan therefore was entirely divested of all right under the lease. I think the legitimate result upon that, as the true statement of the rights of the parties, is that this lease and its prestations has come to an end. Logan is disqualified from holding the right, and it vested in Martin, and Martin having died the lease comes to a termination entirely. On the whole matter I concur in the view expressed by Lord Young.

LORD CRAIGHILL was absent.

The Court recalled the Lord Ordinary's interlocutor, decerned against the defender for the amount tendered, and found her entitled to expenses.

Counsel for Pursuer (Respondent)—Solicitor-General Robertson—Dickson. Agents—J. & J. Ross, W.S.

Counsel for Defender (Reclaimer)—Balfour, Q.C.—Rhind. Agents—R. P. Stevenson, S.S.C.

Saturday, July 18.

FIRST DIVISION.

[Lord Trayner, Ordinary.

SCOTT PLUMMER, PETITIONER.

Entail—Entail Amendment Act 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 4—"*Such and the like Consents.*" Sec. 4 of the Entail Amendment Act 1848 provides that an heir of entail in possession of an entailed estate may sell, alienate, dispose, charge with debts or incumbrances, &c., "with such and the like consents" as would enable him to disentail the estate. *Held* that an heir in possession may avail himself of the provisions of sec. 4 though he is in a position to disentail without consents.

This was a petition under section 4 of the Rutherfurd Act, presented by Charles Henry Scott Plummer, heir of entail in possession of the lands and estates of Middlestead, &c., to charge the estates with a debt or incumbrance of £6000.

Section 4 of the said Act provides—"That it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in Scotland, with such and the like consents as by this Act would enable him to disentail such estate, to sell, alienate, dispone, charge with debts or incumbrances, lease and feu such estate, in whole or in part, and that unconditionally, or subject to conditions, restrictions, and limitations according to the tenor of such consents, the authority of the Court of Session being always obtained thereto in the form and manner hereinafter provided; and such heir of entail shall be entitled to make and execute, at the sight of the Court, all such deeds of conveyance and other deeds as may be necessary for giving effect to the sales, dispositions, charges, leases, or feus so made and granted."

The petitioner held the estates under a deed of entail dated 21st October 1799, and was born in October 1859. He was therefore entitled, under sec. 2 of the same Act, to disentail without any consents, being an heir of entail born after 1st August 1848, of full age, and holding under an entail dated before 1st August 1848.

The Lord Ordinary (TRAYNER) remitted to Mr H. B. Dewar, S.S.C., to inquire into the proceedings. Mr Dewar in his report doubted whether, seeing that sec. 4 only enabled heirs to avail themselves of the powers thereby conferred, "with such and the like consents" as would by the Act enable them to disentail, the petitioner could avail himself of the provisions of sec. 4, as he was in a position to disentail without any consents.

The Lord Ordinary thereafter pronounced this interlocutor—"Having heard counsel for the petitioner, appoints the petition, with this interlocutor and note, to be boxed, with the view of reporting the same to the Judges of the First Division of the Court, and grants warrant to enrol.

"*Note.*—The petitioner, who is the heir of entail in possession of the lands of Middlestead, &c., seeks the authority of the Court to charge the estate with a debt or incumbrance of £6000. The entail is dated and recorded in the year