Mar. 3. 1826. cases were referred to, which it is not necessary for me to state to your Lordships—the principle of that case of Arbuthnot I have already noticed. It is said, that the bond in that case was an heritable bond to be granted by the purchaser. Whether it was so or not, that case was under very different circumstances, and the principles applied to that decision cannot be applied to a case under very different circumstances. I have stated to your Lordships, that that case appeared to me the leading one, and for the reasons I have given, I think it does not militate against the decision of the Court of Session. The principle is perfectly clear, and the facts of that case bring it within the principle. The price had not been paid. The only thing done was to grant a personal security, and the price was to be applied in payment of the personal liabilities. Although, therefore, my Lords, it is not usual in moving to affirm a judgment, to state the reasons upon which that affirmance is moved, yet, considering this as a very important question, I have detailed to your Lordships the reasons for my opinion, that the judgment that has been pronounced by the Court below is right, and therefore I move your Lordships that this judgment be affirmed.

Respondents' Authorities.—2 Erskine's Institutes, 2, 5—14, 16, 17. 3 Ersk. 8, 52.—Fraser *v.* Fraser, 13 Nov. 1804, affirmed on appeal.

Appellants' Authorities.—Arbuthnot *v.* Arbuthnot, 23d June 1773.—(5225)—M'Nicol, 16th June 1814, and 31st Jan. 1816. (F. C.) 2. Bell's Com. 8.—Ord *v.* Edmonstone, 22d Nov. 1671.—(5551)—Wishart *v.* Northesk, Jan. 7, 1638.—(5552)—Kames's Select Decisions, No. 223, p. 288.—1661, c. 32.

CLAYTON, SCOTT, & CLAYTON—A. MUNDELL, Solicitors.

No. 7. JAMES MILLER, Appellant.—*Keay—Abercrombie.*
Lord and Lady GWYDIR, Respondents.—*Adam. D. Dundas.*

Landlord and Tenant—Penal Rent.—A tenant having entered to possession of a farm, on a missive of lease for nineteen years, prescribing a certain course of cultivation for the first sixteen years, and another during the last three years, under the penalty of paying an additional rent for these last years, and not having complied with the rules so prescribed,—Held (affirming the judgment of the Court of Session) that he was liable in the penal rent, and that it was not a valid defence, that he had adopted the same course as the other tenants on the estate, and as was prescribed by their leases, or that he had done so with the knowledge of the landlord.

March 8, 1826. 2D DIVISION. Lord Cringletie. MILLER received from the factor on the Perth estate an offer of lease of the farm of Leystone for nineteen years. The offer contained this, among other clauses:—'With regard to the general mode of managing the farm, you shall always have one 'third part of the arable land under green crops and summer 'fallow, (the fallow uniformly getting four ploughings, and not

'less than twenty bolls of lime-shells laid on the acre,) and Mar. 1826.
'shall not plough the same field more than twice for a white
'crop; and during the last three years of the lease you shall
'only have the one-third part of the arable land in crop and
'tillage, the other two-thirds shall be in grass, and which shall
'be cut only one year for hay, and pasture the other two. And
'should you fail to leave these two-thirds of the arable land,
'all or any of these three last years laid down in good heart,
'and properly sown with ryegrass and clover, or contravene
'any of the other regulations before laid down, then, for every
'acre managed otherwise than as above directed, you shall pay
'an additional rent of £4 Sterling per acre, for each year so
'mismanaged.' The lease was to commence at Martinmas 1801, and it was stipulated that, when it suited the conveniency of the proprietor, a regular tack should be extended, but that Miller's acceptance should in the meanwhile bind him.

Miller accepted this offer, and entered into possession. No regular tack, however, was extended, and he alleged that no copy of the missive was delivered to him. He did not pursue the rotation prescribed, but adopted that followed by and prescribed to the other tenants on the estate; and no objection was made, although the farm was annually visited, and he received several agricultural premiums from his landlord. The rent of the first of the last three years was discharged, and the farm was not in bad order at the conclusion of the tack. During the last year of the lease, an action was raised against him by his landlord, before the Sheriff of Perthshire, founded on the missive, and averring that he was bound, 'during the last three 'years of the lease, to have only the one-third part of the arable 'land in crop and tillage, and the other two-thirds in grass, 'which shall be cut only one year for hay, and pasture the 'other two, and also to have always one-third part of the land 'under green crops and summer fallow, the fallow uniformly 'getting not less than four ploughings, and twenty bolls of lime-'shells laid on the acre;' and alleging that the stipulations had been contravened, and therefore concluding for the additional rent and damages, for miscropping, in so far as the tenant 'had 'not for the present, or the two last years, the stipulated quan-'tity of grass or fallow, nor has the fallow received the stipula-'ted quantity of lime.'

The Sheriff, after various proceedings, and finding that the rent for 1817 having been discharged by the pursuers, no claim for that year could be maintained, found, that 'the obligation on 'the defender in the missive of lease to have always one-third

Mar. 8, 1826.

'part of the arable land under green crops and summer fal-
'low, cannot be held applicable to the three last years of the
'lease, the obligation respecting which is to have only one-
'third part of the arable land in crop and tillage, and other
'two-thirds in grass, which shall be cut only one year for hay,
'and pastured the other two; that the defender had not esta-
'blished that the pursuer Lord Gwydir, or any other person
'having authority to do so, approved of the mode of manage-
'ment adopted by the defender, so as to preclude the pursuers
'from insisting for implement of the conditions of the missives
'of lease of the farm of Leystone, where the mode of manage-
'ment subsequent to crop 1817 was inconsistent with the said
'conditions—that although the missive of lease is not a regu-
'lar lease, duly extended by a man of business, the conditions
'as to cropping during the three last years are precise, and not
'inconsistent with the other clauses as to two white crops) since
'the defender, by the introduction of green crop or summer fal-
'low, might easily have satisfied that stipulation); and this in-
'terpretation arising out of the plain words of the missive, is
'still farther strengthened by the subsequent clause, "and should
"you fail to leave these two-thirds of the arable land, all or any
"of these three last years laid down with rye grass and clover"
'—implying that the grass was to be three years old, otherwise
'that there would be a contravention;' and appointed the pur-
suer to give in a state pointing out the contraventions by the
defender for the two crops 1818 and 1819. Thereafter the She-
riff found the deficiency of pasture grass to be 35 acres, and
53 decimals; and decerned, at the stipulated rate of £4 per acre
of additional rent, for £142, 2s. 4d., with expenses of process.

Miller having advocated, and the Lord Ordinary having re-
mitted simpliciter with expenses, he petitioned, and the Court,
on the 2d March 1824, adhered as to the rents, but altered as to
the expenses; and, on the 26th May 1824, refused a reclaim-
ing petition, without answers.*

Lord Craigie.—I think that the tenant has been hardly dealt with. In the early part of the lease he was permitted, with the approbation of the landlord, to carry on a different rotation from that which had been prescribed; and even as to the three years, no objection was made till May 1819, being the last year. I therefore think that it is not just to subject the tenant in the penal rent; and that, in the circumstances, some notification should have been given to the tenant. Besides, the cultivation

---

* See 3, Shaw and Dunlop, No. 41.

which was followed was beneficial, and was similar to that which was prescribed in the extended leases of the other tenants on the estate. Mar. 8, 1826.

Lord Pitmilly.—This is certainly a hard case, but I do not think that we can alter the interlocutor. The first question is, What is the construction of the clause? If it had been unintelligible, and the mode prescribed impracticable, the tenant should have objected at the commencement of the lease; but he did not do so; and it appears to me that the Sheriff has put the correct interpretation on the terms of it. The management for the last three years was to be different from that of the preceding period, and we are bound to give effect to that which was stipulated by the landlord. The second question is, Whether the landlord has precluded himself, by acquiescence, from making his present claim? He has certainly done so for the year of which he received and discharged the rent; but there is nothing to cut off his claim for the two subsequent years.

Lord Glenlee.—I see no reason for departing from the Sheriff's interlocutor.

Lord Robertson.—I am of the same opinion.

Lord Justice Clerk.—I cannot put the same meaning on the tack which has been done by Lord Gwydir in his summons. We must hold the agreement as to the three last years to be separate from the general system, which applies to the sixteen preceding years. With regard to the first of these three years, the discharge of rent frees the tenant. It is clear that, for the sixteen years, the tenant carried on a different course of cultivation from that which had been prescribed, and that this was fcllowed during the seventeenth year. Now, although the landlord saw that the tenant had not complied with the provisions relative to the three last years, yet he granted to the tenant a full discharge for this, which was the first of the three years, and he gave the tenant no warning that he was not proceeding in this course until the year 1819, when it was no longer possible to adopt it. I think that the landlord was bound in good faith to give that notice, and as it is not denied that the farm has been left in as good condition as any in the barony, I cannot adhere to the interlocutor.

Miller appealed.

Appellant.—The Sheriff's judgments adhered to on the merits by the Court of Session, are inconsistent with the terms of the summons, and his interpretation of the missive is widely different from the respondent's. Instead of loss from the appellant's

Mar. 8, 1826.

management having arisen to the landlord, the system has been most beneficial and advantageous, much more than could possibly have been the case under the directions of the missive, which indeed were absurd and unintelligible. The appellant worked the lands like a skilful agriculturist, and his skill was acknowledged by his landlord. Besides, the landlord acquiesced in the management adopted.

Respondent.—The stipulations of the lease are intelligible to any practical agriculturist. The respondent did not, before the Sheriff, press the conclusion as to want of fallow with lime, during the three last years. The regulations were satisfactory to the landlord (who had a right to dictate them) and to the tenant, at entering into the lease, and must be fulfilled. The question is not as to good or bad management, but as to the obedience to the rules agreed upon. There was no consent by the landlord to depart from them, nor any acquiescence in the unwarranted management followed by the tenant.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed, with £50 costs.

LORD GIFFORD.—My Lords, having heard the argument of the learned counsel, it does not appear to me that the Court of Session have made any mistake in this case. This was an action by my Lord Gwydir, against Mr Miller, who was his tenant, for a breach of covenant in respect of the lands held by him under lease. It appears that he stipulated by that covenant, that he would have, during the last three years of the lease, only one-third part of the arable land in crop and tillage, and that the other two-thirds should be in grass, and which should be cut only one year for hay, and pastured the other two. It was contended, before the Sheriff of Perthshire, (before whom this case originally went,) that the tenant had not a sufficient quantity of grass upon his farm to comply with his covenant.

The summons, after stating the covenant into which the tenant had entered, concludes in these terms: 'That by the said lease, which expires 'at the term of Martinmas first, the said James Miller is taken bound, 'during the last three years of the lease, to have only the one-third part 'of the arable in crop or tillage, the other two-thirds in grass, which shall 'be cut only one year for hay, and pasture the other two; and also to have 'always one-third part of the lands under green crops and summer fallow, 'the fallow uniformly getting four ploughings, and not less than twenty 'bolls of lime-shells laid on the acre.' It alleges, first, that there was not a sufficient quantity of grass; and, secondly, a deficiency of fallow and manure. The lease having provided an increased rent of £4 an acre in case of contravention of any of the covenants, my Lord Gwydir claimed that increased rent.

Mar. 8, 1826.

The defence set up by the tenant (the present appellant) was, that the farm was very properly managed, and that the course of cultivation required of him, as set forth in the summons, was impracticable; and also, that Lord Gwydir had acquiesced in the system of management which he had adopted, for that he had received rent for the year 1817, the first of the three years, in respect of which he makes his demand; and that in respect of the years 1818 and 1819, his lordship's factor, or managing-man, had been fully aware of the course which was pursued by the tenant, and had never given him the slightest intimation, that, in his opinion, he was conducting himself in a manner contrary to the contract.

The Sheriff of Perth, in the first instance, and the Court of Session, before whom this case went subsequently, held that the tenant was liable for the increased rent during the last two years of the lease; but that Lord Gwydir having actually received the rent for the year 1817, the tenant was, by that circumstance, discharged from paying an increased rent, for that he must be considered as having acquiesced in the management pursued during that year.

My Lords, the first question is, Whether or not the complaint is adapted to the case? and if it is, then, secondly, whether the defence has been proved? Upon the first question I entertain no doubt that the summons does sufficiently state the ground on which a demand for increased rent is made by Lord Gwydir, namely, that the tenant had not a sufficient quantity in grass during the last three years of this lease. The next question then is, Whether Lord Gwydir has debarred himself from seeking an increased rent for the first of these three years, by having accepted the rent? whether that is to be considered as amounting to an acquiescence in the course pursued, and discharge of a tenant from the liability under which he had placed himself? The Sheriff of Perthshire, and the Court of Session, in affirmance of his finding, have decided that Lord Gwydir has, by that receipt of rent, precluded himself; and Lord Gwydir has not cross appealed.

My Lords, it has been argued very ingeniously, that if he acquiesced in this during the year 1817, he must have known that, by the course pursued, if it went on during 1818 and 1819, it could be grass only for two years, whereas it is contended that it must be grass for three years. My Lords, I see no ground whatever for holding that because Lord Gwydir accepted the rent for 1817, therefore he was to be considered as acquiescing in the tenant going on in breach of the covenant during the two subsequent years. It has been contended, that the factor of Lord Gwydir having seen on one occasion the mode of cultivation which was adopted, if objection was intended to be made, he ought to have expressed his disapprobation of that management. But really, my Lords, if it be expected that a landlord is to give notice to his tenant to this effect—"You have entered into a stipulation to manage your farm in such and such a manner; I have reason to fear you are not conforming to the stipulation; and I hereby give you notice, that if you do not manage your farm in that manner, I shall enforce the contract;" and if it is to be said, that,

Mar. 8, 1826.

in case he does not give him that notice, he shall not be at liberty to enforce his contract, that appears to me to be imposing a condition on a landlord in Scotland, which is not called for by the law. I conceive it is not any part of his duty to give that previous notice to the tenant; and if he does not conform to the contract, he shall enforce it against him; and that the absence of such a notice cannot be considered as depriving him of his right. Under these circumstances, my Lords, it does not appear to me, that there is any ground for saying, that what took place in the two last years can be considered any acquiescence in the mode of management adopted during these two years. It is not pretended that he received any rent for the year 1818 or the year 1819, (for the last year it is impossible he could have received any rent till the contract had expired): however; it is sufficient to say, that for these two years no rent had been received; and it is upon that ground alone, that the Court of Session decided that his Lordship was precluded from demanding an increased rent for the year 1817.

My Lords, having taken this review of the circumstances, I feel bound to say, that it appears to me, there is no fault to find with the decision of the Sheriff of Perthshire in the first instance, and the Court of Session afterwards; and I shall therefore take the liberty of moving, that the interlocutors be affirmed; and in this cause I shall propose that they shall be affirmed with the sum of fifty pounds costs. It is stated that this farm was managed in the general in a proper manner. I should think that, under all the circumstances, your Lordships would be satisfied with awarding to the respondent that sum for his costs, instead of the precise sum which he may have expended, which very probably exceeds that sum. It appears to me that justice requires that the interlocutors be affirmed, and that some costs should be given to the respondent, who has been brought by the appeal to your Lordships' bar.

Appellant's Authorities—Murray's Trustees, 26th Feb. 1806, (No. 12 Ap. Tack.)
Respondents' Authorities—Grahame, 11th May 1789, (F. C. XVI. 425 note); Fraser, 25th Feb. 1813. (F. C.)

J. RICHARDSON, and SPOTTISWOOD, and ROBERTSON, Solicitors.