[*9th August* 1834.]

Lieutenant Colonel ROBERT HENRY, Appellant. No. 21.

ALEXANDER M'EWAN, Respondent.

Lease — Stat. 5 Geo. IV., *c.* 74. — A landlord and tenant entered into missives of lease, in which the rent was fixed at a half boll of wheat, three firlots of barley, and six pecks of oats for each Scotch acre, payable by the fiars prices; but the proportions were not expressed which these measures bore to the imperial standard measure; and the landlord, under whose direction the missive of lease had been framed, raised an action, after the tenant had entered into possession, to reduce the lease, libelling upon the act 5 Geo. IV. c. 74., ordaining uniformity of weights and measures. Held (affirming the judgment of the Court of Session) that the act did not apply to the case.

Personal Objection.—Question, whether under the above circumstances the landlord was barred from founding on the statute.

2D DIVISION.

Lord Moncreiff.

ON 17th of June 1824 an act was passed, (5 Geo. IV. cap. 74.) entitled "An Act for ascertaining and establishing uniformity of weights and measures," the preamble of which bears, that "whereas it is necessary for the "security of commerce, and for the good of the community, that weights and measures should be just and "uniform: And whereas notwithstanding it is provided "by the Great Charter that there shall be but one "measure and one weight throughout the realm, and "by the treaty of union between England and Scotland that the same weights and measures should be "used throughout Great Britain as were then established

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" in England, yet different weights and measures, " some larger and some less, are still in use in various " places throughout the United Kingdom of Great " Britain and Ireland, and the true measure of the " present standards is not verily known, which is the " cause of great confusion and of manifest frauds." It was therefore enacted, that there should be uniformity of weights and measures throughout the kingdom: and for the accomplishment of this it was declared, that " the " standard brass weight of one pound troy weight, " made in the year 1758, now in the custody of the " clerk of the House of Commons, shall be and the " same is hereby declared to be the original and genuine " standard measure of weight; and that the straight " line or distance between the centre of the two points in " the gold studs in the straight brass rod now in the " custody of the clerk of the House of Commons, whereon " the words and figures " standard yard, 1760," are " engraved, shall be and the same is hereby declared to " be the original or genuine standard of that measure of " length or lineal extension called a yard; and that that " weight and measure, or certain parts thereof, should " alone be sanctioned as of the standard or imperial " weights or measures from and after the 21st of May " 1835." By the 9th section it is enacted, " That any " contracts, bargains, sales, and dealings made or had " for or with respect to any coals, culm, lime, fish, " potatoes, or fruit, and all other goods and things com- " monly sold by heaped measure, sold, delivered, done, " or agreed for, or to be sold, delivered, done, or agreed " for, by weight or measure, shall and may be either " according to the said standard of weight, or the said " standard for heaped measure; but all contracts, bar-

" gains, sales, and dealings made or had for any other " goods, wares, or merchandise, or other thing done or " agreed for, or to be sold, delivered, done, or agreed " for, by weight or measure, shall be made and had " according to the standard of weight, or to the said " gallon, or the parts, multiples, or proportions thereof, " and in using the same the measures shall not be " heaped, but shall be stricken with a round stick or " roller, straight, and of the same diameter from end to " end." And by the 15th section it is enacted, " That " from and after the 1st day of May 1825 all contracts, " bargains, sales, and dealings which shall be made or " had within any part of the United Kingdom of Great " Britain and Ireland for any work to be done, or for " any goods, wares, merchandise, or other thing to be " sold, delivered, done, or agreed for by weight or " measure, where no special agreement shall be made " to the contrary, shall be deemed, taken, and construed " to be made and had according to the standard weights " and measures ascertained by this act; and in all cases " where any special agreement shall be made with " reference to any weight or measure established by " local custom, the ratio or proportion which every " such local weight or measure shall bear to any of the " said standard weights or measures shall be expressed, " declared, and specified in such agreement, or other- " wise such agreement shall be null and void." By the 17th section certain rules are laid down ascertaining and fixing in England and Ireland " the amount, " according to the standard of weight or measure by " this act established, of all existing contracts or rents " payable in grain or malt, or any other commodity or " thing, or with reference to the measure or weight of

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" any such grain, malt, or other commodity or thing, " and the amount of any toll or rate heretofore payable " according to any weights and any measures heretofore " in use within such counties, cities, towns, or places " respectively :" And it is declared, that " the amount " so to be ascertained shall be the rule of payment in " regard to all such contracts, rents, tolls, or rules, in all " time coming."

The 17th section commences thus:—" And for the " purpose of ascertaining and fixing the payments to be " made in consequence of all existing contracts or rents " in England and Ireland, payable in grain or malt, or " in any other commodity or thing, and in consequence " of any toll or rate heretofore payable, according to " the weights and measures heretofore in use, certain " rules shall be observed." The 18th section is expressed in the following terms:—" For the purpose of ascertain- " ing and fixing the payments to be made of all stipends, " feu duties, rents, tolls, customs, casualties, and other " demands whatsoever, payable in grain, malt, or meal, " or any other commodity or thing, in that part of the " United Kingdom called Scotland, or in any place or " district of the same," certain rules are prescribed.

This act was repealed by the 6 Geo. IV. cap. 12., in so far as related to the date of its commencement, which was postponed till 1st of January 1826; and it was amended in some respects not material to the question in the present case.

On the 20th of October 1827 the respondent made an offer to the appellant (said to have been written by the latter) in these terms:—" Woodend, 29th October " 1827. Sir,—I make offer of the following yearly " rent for the farm of Ardbenny, as now possessed by

" yourself, for a lease of nineteen years from the term of
" Martinmas first, viz. one half boll of wheat, three
" firlots of barley, six pecks of oats, all of the fiars
" prices of the county, payable at two terms, viz.
" Candlemas and Whitsunday, beginning the first
" payment at Candlemas 1829; but as the fiars prices
" may not then be fixed, a sum nearly what may then
" be considered a half year's rent shall then be paid to
" account, and the balance of the year's rent shall be
" fully paid up at Whitsunday following, for each
" Scots acre of arable land; you to give 35*l.* to assist
" in building a house on the farm, deducted off first
" rent, also the stones of the old office house, near the
" present dwelling house. I am to put what is now
" fences in repair, and keep them and leave so at the
" expiry of the lease; and if any new fences shall be
" necessary, I agree to make the same, you paying half
" the expenses thereof, except the fences to protect your
" plantations, which you shall keep up during the
" lease. I am to have liberty of watering my cattle and
" horses in the north east corner of the park, where the
" dwelling house now stands; also liberty of a road for
" my cattle to pass and repass through the ground
" possessed by Mr. Andrew to the low ground of the farm.
" The rotation of cropping:—First year oats, second
" barley, third fallow or green crop, fourth barley or
" wheat sown with grass seeds, fifth hay, sixth and
" seventh pasture; or, in the tenant's option, first year
" oats, second year fallow, third wheat, the fourth green
" crop, the fifth barley, the sixth hay. The dung and
" fallow at present upon the farm to be allowed me
" without valuation, at entry of the lease. I am to allow
" what then may be upon the farm, without valuation,

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" at the expiry of the lease. You are to have liberty of " the present road by the west of low ground. The " new wheel for the thrashing mill to be put up by " you on or before Lammas next. The thrashing " mill to be taken at valuation, without any payment at " the entry, and left at valuation at expiry of the lease. " You shall have the liberty of the thrashing mill for " the crop that is now upon Ardbennie. I agree " to perform the carriage of four hundred stones " of coals from Dollar to your house at Woodend.— " I am, &c.

" (Signed) ALEX. M'EWAN."

" To Colonel Henry at Woodend."

This offer was accepted by the appellant in the following terms:—" I agree to the above terms of lease " for the farm of Ardbenny, the mill being left of same " value at expiry as at entry. (Signed) ROBERT " HENRY."

The respondent thereupon entered into possession of the farm at Martinmas 1827.

Disputes thereafter took place between the parties as to the principle on which the rent was to be converted into money; whereupon the appellant applied for sequestration of the respondent's effects, and raised an action before the Sheriff of Perthshire, concluding for removal of the respondent, in respect the lease made mention of Scotch acre, without specifying the ratio or proportion which it bore to the imperial acre. The Sheriff assoilzied the respondent from the action of removing; and Lord Moncreiff refused a bill of suspension, and issued this note:—" The Lord Ordinary is not convinced that the " complainer's very rigorous construction and application " of the statute to set aside a real right of lease, con-

" stituted by a regular deed and full possession, has any " solid foundation; but he does not mean, by refusing " this bill, to decide the question, which the complainer " may discuss in the reduction which he says he has " brought. He is of opinion that the Sheriff judged " rightly in holding that that question could not be " competently discussed in the form of an action of " summary removing in the Sheriff Court. The ques- " tion would be the same under the statute, if the " respondent stood infeft on a feu contract, against the " validity of which the same objection could be stated. " But it could never be maintained that the Sheriff " could, in a process of removing, declare the seisin " standing in the record null and void."

In the meanwhile the appellant raised before the Court of Session an action of reduction, on the ground that " the foresaid pretended missive or agreement, con- " taining a special reference to the Scotch acre of land, " according to which the rents of the defender's pos- " session were stipulated to be paid, and containing no " specification of the ratio or proportion which the " Scotch acre bears to the imperial standard acre, and " as there are no bolls in the imperial standard measure " for grain, is null and void, in terms of the act " 5 Geo. IV. cap. 74. sect. 15."

In defence the respondent pleaded, 1. That the clause of the statute had no application to contracts for the sale or lease of lands by the Scotch acre, or to rents payable in Scotland by bolls or other customary measures; and, 2. That the appellant was barred, personali exceptione, from attempting to take advantage of the enactments of the statute, even if they applied to this case, seeing that he had induced the

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respondent to enter into the lease, and, on the faith of it, to expend much money and labour in buildings and other improvements.

The Lord Ordinary, upon advising cases for the parties, reported them to the Court, and issued this note:—

" The great importance of the question raised in this " cause, to the proprietors and tenants of this country, " renders it necessary that it should be decided by the " Court in a deliberate manner, and as speedily as cir- " cumstances will admit of.

" The question itself appears to the Lord Ordinary to " be by no means free from difficulty. The point is " short and simple. The parties entered into a con- " tract of lease for nineteen years, by missive letters " exchanged, in which the terms and conditions of the " lease were definitely expressed, the rent being fixed " at a half boll of wheat, three firlots of barley, and six " pecks of oats for each Scotch acre, payable by the " fiars prices. The contract thus entered into was " followed by full possession of the farm, and by the " payment of a half year's rent. After this the parties " got into litigation. And now the pursuer (the land- " lord) insists in this action of reduction for setting " aside the contract of lease, on the ground that though " the missives have fully expressed the terms of the " bargain, they have not expressed the proportions " which the several measures mentioned bear to the " imperial standard measures, whereby he maintains " the lease is rendered absolutely void.

" It is unnecessary to make any remark on the " general character of this plea. That is too plain to " require observation. But, whatever may be thought " of it, it must be dealt with according to law; and

" when the Lord Ordinary reflects on the extent to
" which leases liable to the same objection may have
" been entered into, he must feel the importance of
" carefully weighing the merits of it.

" He is not at present able to enter into the view taken
" by the defender, that the provisions of the statute do
" not at all apply to contracts relative to the rents of
" lands in Scotland. The words of the 15th section
" appear to be so broad as naturally to comprehend
" that case. But, considering them in connexion with
" the 17th and 18th sections, there is very great diffi-
" culty in coming to any other conclusion. For the
" 17th section, which refers to lands in England, is
" framed for the express purpose of regulating the
" payment of rents under leases which were then exist-
" ing; which seems to establish beyond any doubt,
" that the 15th section was understood to comprehend
" contracts for the rents of lands; and if the words
" which relate indiscriminately to every part of the
" kingdom, were understood to include contracts for
" rent in England, it would not be easy to reach the
" conclusion that they do not also comprehend similar
" contracts in Scotland. The argument is therefore
" reduced to the narrow point, that in the 18th section,
" which relates to Scotland, the word 'existing' is not
" used. But the Lord Ordinary has great difficulty in
" thinking that this circumstance is sufficient to render
" the scope and purpose of this clause different from
" those of the 17th, or to convert it into a clause ex-
" ceptive of rents in Scotland from the general opera-
" tion of the 15th section.

" Neither is he satisfied that bolls and firlots and
" pecks and Scotch acres are not to be considered as

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" local measures in the sense of the statute. He thinks " that they certainly are so. As to the bolls, &c., indeed " it might perhaps be held that they are to be taken as " meaning imperial bolls, firlots, and pecks, or the " measures defined in the sheriff's books as correspond- " ing thereto, nothing to the contrary being expressed. " But the Scotch acre is a measure so plainly peculiar " and local, that if the 15th section is to have any effect " it seems clearly to apply to it.

" But although the Court should hold that these " pleas of the defender cannot be sustained, the Lord " Ordinary still thinks that the case is one of great " difficulty. The statute relates altogether to contracts " or agreements. But a lease, by the statute law of " Scotland, is something more than a contract. When " the contract has been clothed with possession it " becomes a real right. The decisions of the Court " have gone very far in establishing that any writing, " however defective in statutory requisites, if followed " by possession, constitutes a good lease to give the " tenant a real right under the act 1449. The most " informal writing, though it should not even express " the whole terms of the lease, or in particular the " precise rent, has been held sufficient to sustain the " title of possession, the terms being otherwise ascer- " tained. But if other statutes which are held to con- " tain sanctions of nullity, are overruled by the force of " possession, as constituting the real right, it will be a " very serious question whether the right must totally " fall, even where there is the most distinct and specific " and probative written contract, followed by possession, " wherever the provisions of the late statute have not " been observed.

"If the plea of the pursuer be good, it must apply to "a feu contract or disposition, even after seisin has "been taken and recorded. This would be strong "enough. But yet even a feu right is not so strong a "case as that of a lease; for a feu can only be made "by a regular deed, and seisin can only be taken on a "technical precept, and can only be made effectual by "a technical instrument. But the law is that a real "right of lease may be constituted by possession follow-"ing on the most informal writing. And the question "is, whether after a real right is so constituted under "all the former laws, it can be annulled by pro-"visions which relate only to simple contracts or "agreements.

"The Lord Ordinary sees very well that there are "dangers and difficulties connected with this view of "the question. But the difficulty of supporting the "pursuer's plea, consistently with the established law "of Scotland, appears to him to be very great; and "the danger of it is manifest. At least, if a lease so "circumstanced is null and void, it is full time that a "matter of law, which must so constantly and deeply "affect the practice and good faith of both landlord "and tenants should be made clearly known.

"The defender has endeavoured to maintain, that the "pursuer may be held to be barred from founding on "the statute by personal exception; and the plea deserves "attention. But it is to be considered, that unless the "limits of such a plea could be very specifically deter-"mined there would be danger of defeating the statute "altogether; and that it is not easy to see how a statu-"tory nullity in an agreement otherwise perfect, can "receive its fair effect, if facts inferring the consent of

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" parties to wave it were sufficient to prevent the nullity " being pleaded.

" With these remarks the Lord Ordinary reports " the case for the consideration of the Court."

Thereafter their Lordships appointed the parties, to be farther heard in presentia, by one counsel on each side; and counsel having been accordingly heard, their Lordships, on the 25th of May 1832, repelled the reasons of reduction, sustained the defences, assoilzied the respondent from the conclusions of the libel, and found expenses due.*

Colonel Henry appealed.

Appellant.—1. The missives of lease are clearly null and void under the act of parliament, if that act applies to contracts for the lease of lands in Scotland. They constitute an agreement made with reference to the Scotch acre, and the Perth boll, firlot, and peck, and the stone of coals—all these being weights and measures established by local custom; for there is no such thing as a boll, firlot, or stone in the imperial standard, while the peck referred to in the lease is the Perth, not the standard imperial peck. Although it is thus a special agreement with reference to weights or measures established by local custom, the ratio or proportion which such local weights or measures bear to the standard weights or measures is not expressed, which it is imperatively required to be under penalty of being null and void.

Considering the general object and spirit of the act, there is afforded a strong presumption that con-

* 10 S. & D., 572.

tracts of the nature in question, made after the passing of the act, were intended to be embraced by it; a presumption so strong, that nothing less than a total inability to reach such a contract under the words used by the act, or a positive express exception, could authorise the conclusion that they were intended to be or are excluded. This is established by the preamble, which is most comprehensive in the declaration of the object and purpose of the statute. In like manner the provisions in the 15th section are of the most general and extensive description; they are such as would be used where the utmost universality of application was intended. And, construing them with reference to the object and spirit of the act, and to what its preamble shows to have been the purpose and intention of the legislature, it is impossible that any room can be found for contending that they were not meant to apply to contracts for the lease of lands in Scotland.

The argument of the respondent, that the 15th section only relates to contracts regarding moveables, and where the whole subject of the contract can be stated to be "goods, wares, or merchandize, or other "thing" of the same kind, is altogether unfounded. The words of that section, even although their meaning were not fully explained by the terms of the 17th and 18th sections, apply generally to all contracts, bargains, sales, and dealings which shall be made or had for any thing to be sold, delivered, done, or agreed for by weight or measure. But if, by a lease, land is agreed to be delivered to a tenant by the Scotch acre, this is plainly a contract, bargain, or dealing made or had for goods, wares, or merchandize, or other thing

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to be delivered, done, or agreed for by weight or measure established by local custom; and it cannot be held to be excluded, because land cannot be stated to come within the terms goods, wares, or merchandize.

Even if, in this limited view, the statute might not apply to a lease or contract for a lease of lands, it will be observed that the land to be given to the tenant is only one part of the contract, and that there is the counterpart of it in the rent to be paid by him to the landlord, which is to be paid in a certain quantity of grain, and by the carriage of a specified quantity of coals; therefore, the question remains, whether, although it were conceded that the subject of the contract on the one part might be agreed for by a measure established by local custom, without the agreement being brought under the statutory sanction of nullity, the subject of the contract on the other part, namely, the rent, payable in grain and by the carriage of coals, can be so agreed for withour incurring that penalty.

Supposing that the stipulation as to the quantity of land may be made in any measure the parties choose to select, it is enough to bring the contract or lease within the statute, if it further amount to or contain a contract for something to be delivered, done, or agreed for by a local weight or measure, which thing is of a nature comprehended by the act.

Accordingly, the words of the 17th section distinctly show that where the rent is made payable in "grain or " malt, or in any commodity or thing," if it be contracted or agreed for by any weight or measure established by local custom, the proportion which such weight or measure bears to the standard weights or

measures must be set forth, in order to save the contract from the declaration of nullity. It may be true, that if land may be contracted for by local measure, leases of land, although the measure applied to the land be a local measure, will not fall under the statute, because the rent may be made payable in money, or in some other way not requiring any observance of the provisions of the act. But if the rent is agreed to be paid in so many bolls of wheat and firlots of barley, and by performing the carriage of so many stones of coals, as in the present instance, there is clearly a contract or bargain or dealing "for goods, wares, or merchandize, "or other thing," to be delivered or done by weight or measure; and as these weights or measures are not standard weights, there is in such a case necessarily a special agreement with reference to a weight or measure established by local custom, which, in terms of the 15th section of the statute, rendered it necessary that the proportion which the boll and firlot and stone bore to the standard weights and measures should be expressly specified in the agreement to save it from nullity.

But the appellant cannot admit that even the delivery of a quantity of land in lease can be validly agreed for by a local measure, without the proportion which that measure bears to the standard measure being specified in the agreement, in the terms of 15th section of the act. Such an agreement falls within the words of the 15th section, when correctly construed with reference to the object and spirit of the act, more especially where the rent is made payable in grain or malt, or in any other commodity or thing embraced by the words of the 15th section.

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2. The plea of personal objection cannot be pleaded in defence to an action upon this statute. It is founded on public policy, and is to be enforced on that ground, and consequently it cannot be met by any personal exception against the party pleading it. If the agreement is legally void the homologation of parties cannot cure its defects.

Respondent.—1. The provision of the statute has no relation to contracts for the sale or lease of lands, or for the payment of rents: it relates entirely to contracts for work to be done, or for the sale and delivery of " goods, wares, merchandise, or other " thing." The general phrase, " other thing," must, according to the well known rule of construction, be confined to things of the same kind with the goods, wares, and merchandise previously mentioned. And in confirmation of this rule, as applicable to the statute, it will be observed, that in the 18th section a rule is given for ascertaining and reducing to the new standard the payment of all " stipends, rents," or other demands payable in grain or other commodity, in Scotland, and it does so without distinguishing between contracts made for such payments before or after the date of the statute, which is the more remarkable, as in the immediately preceding sections relative to England and Ireland the enactment is confined to " existing contracts " or rents," which limitation seems, ex preposito, to have been omitted as to Scotland.

The provisions made in these two sections prove clearly that the 15th applies exclusively to mercantile transactions and to agreements for the performance of work.

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If the argument of the appellant were well founded in regard to a lease of land, it would equally apply to a feu contract; and all feu contracts entered into subsequent to the date of the statute, whereby any part of the feu duty is made payable in grain according to the measures still in use, would be utterly void. It seems impossible, however, that this can be maintained consistently with the express enactment relative to rents, feu duties, and other demands payable in grain, as specified in the 18th section. A lease of land or a feu contract is a complex transaction, not embraced or falling within either the words or spirit of the enactment. It is not an agreement for the performance of work, or for the sale or delivery of goods, wares, or merchandise. It is a contract for the delivery of land; and although the stipulated rent or return may form a part of the agreement, it is not the substantial or main part of the transaction. The delivery of land is the main and principal part of the contract of lease or feu, and the rent is merely the accessory or subordinate part of the contract.

Besides, even if the enactment could be held to have such a meaning as that contended for by the appellant, the question would remain, how far the nullity could apply to a lease upon which possession had taken place. Such a lease is a real right, and not an agreement. But independent of this, and supposing the missive was objectionable under the statute, the possession would exclude the objection altogether. Thus, a missive of lease which is not tested in terms of the statute 1681, or which is not holograph, is null; but if possession has followed upon it, it is thereby rendered valid; and it is vain for either of the parties afterwards

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to allege it was originally null in consequence of the statute 1681, and that as it could not at first have afforded a sufficient title whereby the possession could have been demanded, or any of the stipulated rights enforced, it cannot now afford a sufficient title whereby the possession may be maintained. It is equally vain for the appellant, after possession has taken place, to attempt to set the lease aside on the grounds now pleaded by him.

2. Even if the statute applied to this case, the appellant is barred, personali exceptione, from attempting to take advantage of the enactments. The missive of offer was written in the appellant's own presence, and under his direction. He thus entrapped the respondent to make an offer for a lease of a certain endurance, but which, according to his present plea, was to be binding upon him only so long as he thought proper. While the tenant was bound to the landlord for a certain term of years, and while the landlord seemed to be equally bound to the tenant for the same period, he secretly reserved the power of putting an end to the lease whenever he pleased. In short, it was a lease for a term of years so far as related to the tenant, but a lease at will so far as regarded the landlord. Nothing more unjust can be conceived; and whatever the landlord may plead in apology for his conduct, its practical result, so far as the tenant is concerned, involves a fraud, of which he cannot be allowed to avail himself.

LORD CHANCELLOR.—My Lords, I do not at present feel it to be necessary to call on the counsel for the respondent, but I propose to take an opportunity of looking particularly into the act of parliament upon

which this question arises, and the authorities, (if authorities there are,) to see whether the opinion I have formed from the argument I have heard is well founded. If I should, on such reference, be led to entertain any doubt, I will then propose to your Lordships to hear the counsel in support of the judgment of the Court of Session. My Lords, those who maintain that this penalty attaches to the use of any other than the imperial measures prescribed by the act of parliament must found upon the 15th section of that act; for it is needless to observe, that we are not to assume in favour of penalties and forfeitures,—they must be enacted by express words; there is no doubt that if there are words in any other section, reference to which will tend to explain and effectuate the intention of the Legislature in a particular section, they may be adverted to; a deficiency in that respect may be supplied by reference to other parts of the statute, the preamble, and even the title; but if, with the explanation which may be thus afforded to the words of the clause enacting the penalty or forfeiture, there is a deficiency in that clause, and the penalty or forfeiture is not enacted, it is not in the power of the Court to assume such to have been the intention of the Legislature. The first matter, however, is to consider the words themselves; they are, "that all contracts, "bargains, sales, and dealings," (very large—but then comes this,) "which shall be made or had within any "part of the united kingdom of Great Britain and Ire-"land for any work to be done, or for any goods, wares, "and merchandise." Now these are the very technical expressions by which the law designates personal property as contradistinguished from real property;—to say that land or a house may be called merchandise, because

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it may be made the subject of traffic, and turned into money, would be a very wild and a very novel mode of interpretation, either in etymology or common parlance, or in respect of the legal acceptance of terms in an act of parliament. The words "goods, wares, and merchandise," are generally, indeed I may say universally, the very words which the Legislature and pleaders employ to designate that which is not real property, but strictly matter of personal property, the subject of traffic and delivery from hand to hand, and as to which there is this difference distinguishing it from real property, that the possessor becomes possessed of it by the actual transfer or delivery of the thing itself, and not a symbolical delivery, as in the case of land or other real property, as to which the possession of the thing is impossible; possession is delivered in the one case by putting the article of merchandise into the custody and corporeal keeping of the party, whereas possession is delivered in the other case in a reverse mode, namely, by putting the person to whom it is to be transferred into possession of the premises, according to the doctrine we hold in livery of seisin, that being required to be given on the lands. It has been argued here, and was argued in the Court below, and Lord Cringletie, in giving his judgment, appears to have adverted to it, that this may be considered to be a contract for the sale and delivery of grain. No doubt it is one part of the contract, that grain is to be delivered; but is it not a forced, if not a violent construction, to say that this is a contract, not for the letting of land, but for the delivery of grain, because the consideration the party receives for the use of the land is so much grain, or the value of so much grain? Should we not reckon it a new mode of

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speech, to say, I have been making a contract for the purchase of so much wheat, when, if you were to ask what price did it fetch, or what did you agree to give, you would reply, "I did not agree to give money at all, "but I agreed to let the man with whom I dealt have "the use of so many acres of my land, and for that I "am to receive so much grain twice a-year?" The person with whom you are conversing would say, "You "surprise me; then you have merely agreed to let land "instead of purchasing wheat. You might equally "say, that because you sold articles for which you were "to be paid in gold, therefore it was a bullion trans-"action; or that, though goods were the subject "matter, because they were paid for in money, there-"fore it was a money transaction." In the common acceptation of terms, the grain to be returned is the rent reserved, just the same as if it were in monies numbered. It is not merely in common parlance, but in legal phraseology, that this would not be considered a sale of wheat, because it did so happen that the rent reserved was in grain, and not in money. There is an illustration which suggests itself in the very manner in which the Legislature have enacted in respect of penalties, and in respect of nullity. In the stamp act, your Lordships are aware that agreements, generally speaking, are subject to a stamp duty; but the statutes in favour of trade except agreements "in respect of goods, wares, mer-"chandise." Now, could it be said, that because this rent was to be paid by so much grain rendered at Michaelmas and Whitsuntide, therefore the agreement was exempted from the operation of the stamp act, as being "in respect of goods, wares, and merchandise?" It is a contract for the use and occupation of the land,

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and the consideration is the payment of so much grain, or the value of it, according to certain prices, at two periods of the year. But an observation has been made upon the words, "or other thing," which follow "goods, "wares, and merchandise." Generally speaking, there can be no doubt that the rule is inflexible, that if, after an enumeration of particular things, words of that kind are added, they must be taken by reference to the preceding enumeration to the things ejusdem generis, unless it can be shown from any other part of the statute that the Legislature meant to make an exception in that particular case; and I may venture to say, that there never was a case in judgment, and much more a case on the words of an act of parliament, in which there was an enumeration of particular things in which a different rule was adopted, unless there were expressions which gave ground for such a construction. The authorities would be ransacked in vain; you would not find an instance in which under chattels matters of real property have been considered as included; that where it was said "chattels and other "things," those "other things" were held to include real property. I cannot conceive that those words, on any soundness of construction, or any precedent, legislative or judicial, were ever so considered. Then it says, "other things sold, delivered, done, or agreed for "by weight or measure." Now, the stretch to which you are compelled to resort is, that it must be a taking or letting of land by weight or measure. I think, upon this view of the subject, the Court below has come to a sound conclusion, in considering that the lease of the land is not drawn in such a manner as to bring it within this clause. Then the act says, "and in all cases where

" any special agreement shall be made with reference " to any weight or measure established by local custom, " the ratio or proportion which every such local weight " or measure shall bear to any of the said standard " weights or measures shall be expressed, declared, and " specified in such agreement, or otherwise such agree- " ment shall be null and void." If these words had stood alone,—if this branch of the section had stood without the preceding part,—I think there would have been a much stronger ground in behalf of the present appellant, and against the judgment below; but coupled as it is with what preceded, it must be taken to be applicable to chattel interests alone,—those chattels capable of delivery and possession. Taking this branch of the section in connexion with that which precedes it, I think the whole must be confined to that particular subject. I see Lord Moncreiff appears to have had very considerable doubts whether bolls, and firlots, and pecks, and Scotch acres, are not to be considered local weights or measures in the sense of the statute. They are local, as contradistinguished from imperial; but they are not more local than many weights and measures we have in England. I should have very great doubts upon that; but it is not necessary to go into that on the present occasion; it would certainly open a door to very considerable doubts as to the effect of this statute. I cannot help thinking that the Legislature must have intended to put down the Scotch weights and measures, except so far as they have introduced them into this act. I cannot look at this statute without a very strong impression upon my mind that it was not drawn with all that degree of care and accuracy which might be wished; one cannot see why the same degree of nullity should.

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not be intended to extend to contracts as to land as is extended to personal property; but if it is not done, that is what is to guide us. I think the ninth section, where the words are almost precisely the same, (as is justly remarked by the Lord Justice Clerk in giving his judgment in this case,) throw very considerable light upon the construction of this clause; for the words which are used in those two sections, and the manner in which they are used, is of necessity exclusive of all possibility of their being intended to apply to any thing else "but "goods, wares, or merchandise, or other thing" of the same nature. This renders it, if possible, still clearer that the contracts, bargains, and so forth, are those with reference not to land but to personal chattels. I shall look, my Lords, anxiously into this again, and shall refer to the English as well as the Scotch statute. I should be sorry to put a construction upon the act which may tend to the defeating of those objects which the Legislature had in view. If I should, after having done so, entertain any doubt, I shall call upon the counsel for the respondent to address your Lordships on the case. If not, I shall not subject either your Lordships or the parties to that trouble. I must say I feel no reluctance in protecting this defender against this action of reduction. I understand it to be an action of reduction, brought by the landlord, who takes advantage of the tenant because the requisition of the statute has not been complied with, and on that ground he avails himself of this act, to endeavour to set aside this lease. Every one has a right to that which the law gives him; still the Court may feel great satisfaction if the law which has been supposed to be in favour of this course of conduct is in reality not in favour of it, but is in favour of the right of the defender.

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Before closing the few observations with which I have taken the liberty of troubling your Lordships upon this case, I wish to call your attention, and the attention of the learned counsel on both sides, to the manner in which certain matters have been brought upon the pleadings. The Lord Ordinary, by his interlocutor of the 5th of March 1830, appointed the pursuer to give in a condescendence, framed in terms of the acts of parliament and sederunt, of the facts he avers and offers to prove in support of his action, and the defender to answer the same, framed in like terms. The manner in which that interlocutor has been acted upon is, in averring the existence and the construction of the law. The law is pleaded as a matter of fact. The party pleads an act of parliament,—not a local act, but a general statute, as public as Magna Charta, or the Bill of Rights, or any of the other known statutes of the realm, and yet the 4th article of the revised condescendence states, "That by the act of 5 Geo. IV. "cap. 74, entitled an act for ascertaining and establish-"ing uniformity of weights and measures, certain "standards of weights and measures are established "throughout the kingdom of Great Britain and Ireland; "and that by the 15th section of said act it is enacted, "that from and after the 1st day of May 1825 all con-"tracts, bargains, sales, and dealings which shall be "made and had within any part of the united kingdom "of Great Britain and Ireland, for any work to be "done, or for any goods, wares, merchandise, or other "things to be sold, alienated, done, or agreed for by "weight or measure, where no special agreement shall "be made to the contrary, shall be deemed, taken, and "construed to be made and had according to the

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"standard weights and measures ascertained by this act; "and in all cases where any special agreement shall be "made with reference to any weight or measure estab- "lished by local custom, the ratio or proportion which "every such local weight or measure shall bear to any "of the said standard weights or measures shall be ex- "pressed, declared, and specified in such agreement, or "otherwise such agreement shall be null and void." To this the answer sets forth, humorously enough, "admitted that the statute here mentioned was passed." And it goes on, "and that it contains the enactments "here quoted, and various other enactments." This is the pursuer's condescendence, stating this act or law as a matter of fact. The defender, in like manner, in article 5th of his statement, avers his construction of the statute as a matter of fact thus: "The enactment of "the statute founded on by the pursuer makes no men- "tion of the sale or lease of land, and by the 18th "section of the statute a rule is given for ascertaining "or reducing to the new standard the payment of all "rents, stipends, or other demands payable in grain or "other commodity in Scotland. By the 19th section "of the statute the sheriff of each county is appointed "to ascertain, in the manner therein prescribed, the "amount by the standard measure of all rents, feu-duties, "stipends, &c., payable in grain, according to the weights "and measures heretofore used, and accurate tables are "ordered to be prepared and published, showing the "proportions between these weights and measures and "those established by the statute." To that he pleads his own commentary or argument on the law as a matter of fact, as coming within the terms of the condescend- ence. But I must say, that the pursuer does not treat

with the same courtesy the plea of his adversary which that adversary had shown to him. The defender candidly said that the act was passed, and that it contained that section and other sections; but the pursuer says, "denied"—he denies it altogether, "and the statute "itself is referred to." Certainly, my Lords, this is not a very creditable course of proceeding for the pleaders in the Court below; and though we have been going on for twenty years endeavouring to get them to strictness of pleading, and to bring them to articulate condescendence, and not arguing law and fact together, a case now comes up with such inconsistencies and confusion of law and facts. I should hope that the attention of the Court being called to this, they will take the proper steps to confine the parties to that which is called for by the interlocutor, otherwise the laying down of rules is of very little use. My Lords, I will say no more at present, but that I shall apply myself to the construction of the act of parliament, and probably consult such of the English Judges as may be in town, on this matter, so far as regards the construction of the statute in the Courts of this country. If I entertain, in the result, the least doubt upon it, I shall then propose to continue the argument on another day.

Adjourned.

LORD CHANCELLOR.—I stated at the close of the argument why it appeared to me that the Court below had come to a right conclusion upon this very extraordinary case. It is a case in which the appellant, Lieutenant Colonel Henry, the landlord, sought to set aside, under the 15th section of the 5th George IV. cap. 74., a tack, or an agreement for a lease, which he had given to the respondent. If the law was with him, he had a

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right to take advantage of the nullity of that tack. I stated my opinion upon it formerly, but at the same time expressed a wish, before I finally decided it, to communicate with some of the learned judges in England, as it affected both English and Scotch questions. That communication and further consideration confirm the opinion I then expressed, and I shall now move your Lordships to affirm the judgment.' The section is in these terms: "That from and after" such a day "all "contracts, bargains, sales, and dealings which shall be "made or had within any part of the United Kingdom "of Great Britain and Ireland, for any work to be "done, or for any goods, wares, merchandise, or other "things to be sold, delivered, done, or agreed for, by "weight or measure, where no special agreement shall "be made to the contrary, shall be deemed, taken, and "construed to be made and had according to the standard "weights and measures ascertained by this act; and in "all cases where any special agreement shall be made, "with reference to any weight or measure established "by local custom, the ratio or proportion which every "such local weight or measure shall bear to any of the "said standard weights or measures shall be expressed, "declared, and specified in such agreement, or other-"wise such agreement shall be null and void." It is said this is an agreement for the sale of grain, because the rent reserved is in grain, and that it is not expressed according to the imperial standard. But, my Lords, it is an abuse of terms, and a very gross abuse of terms, to call an agreement for a lease an agreement for a sale of corn. The rent is to be received in corn; but it is contrary to the common sense of mankind to consider this section as intended to cover such a dealing as this, what-

ever the words of the section, or of any other section, to which reference was made in the argument, and on which I commented in the course of the argument, and to which I received no satisfactory answer from those whom I pressed with it; namely, the 9th section, which uses the very same words, "that any con- "tracts, bargains, sales, and dealings made or had for "or with respect to any coals, culm," and so on, "and "all other goods and things commonly sold by heaped "measure, sold, delivered, done, or agreed for, or to "be sold, done, or agreed for by weight or measure,"— using the very same words. Now, see what is to be done: that it "shall and may be either according to the "said standard of weight, or the said standard of heaped "measure; but all contracts, bargains, sales, and deal- "ings made or had for any other goods, wares, or mer- "chandise, or other thing, done or agreed for, or to be "sold, delivered, done, or agreed for by weight or mea- "sure, shall be made and had according to the said "standard of weight, or to the said gallon, or to the "parts, multiples, or proportions thereof; and in using "the same the measures shall not be heaped, but shall "be stricken with a round stick or roller straight, and "of the same diameter from end to end." These words remove all doubt. It is clear this does not mean an agreement for the sale of land, nor for doing any thing with respect to the land, but a bargain for the sale of goods, wares, and merchandise, which could be measured by standard measure, or weighed by standard weight. I have no doubt whatever that the Court below decided quite correctly, and I shall move your Lordships that the judgment of the Court be affirmed; and to allow costs, not exceeding 250*l*. Colonel Henry had a right

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to be as harsh as the law would allow him to be. He had a right to say, I, a well-informed man, used to the construing acts of parliament, know that this 15th section of the 5th of George IV. cap. 74. applies to my case; but that I will keep to myself. I will not say a word about it, but I will have the lease drawn up, all the while knowing it to be a nullity, and will afterwards take advantage of the nullity of which my ignorant tenant was not aware, and will turn him round when he least expects it. Colonel Henry may reconcile that to his own feelings of propriety; he may satisfy his own conscience; and a man has a right to adjust his conscience according to the law of the land. Those who deal have a right to the protection of it, and have a right to enforce it; but let every man take care that he exercises a good judgment,—that he does not go farther than the law will carry him; if he does, he must take the consequences. Colonel Henry brought his tenant, first before the Sheriff, then the Court of Session, and afterwards before your Lordships' House. It appears to me that, under such circumstances, the respondent ought to receive his costs. I shall therefore move your Lordships that this judgment be affirmed, and with costs not exceeding 250*l.*

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of 200*l.* for his costs in respect of the said appeal.

A. H. M'DOUGALL—A. and R. MUNDELL, Solicitors.