No. 7. 'consent of the landlord, he was entitled to a price for it, from the landlord 'or the incoming tenant, according to a fair valuation; and remited to the 'Lord Ordinary to proceed accordingly.'

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

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

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

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

No. 8.

Judgment of the Court and of the House of Lords in the case of an away-going crop.

Jurisdiction of the House of Lords in cases of appeal.

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

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

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

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

Against this judgment the tenant appealed to the Court, and

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

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have ceased between the time of sowing and of reaping. A tenant, entitled to hold the possession of his farm during seed-time, is entitled to proceed to the last moment in its cultivation, according to the usual course of husbandry; and although his interest in the soil ceases, his interest in the crop continues *propter curam et culturam*, till it is reaped; Craig, Lib. 2. Dieg. 9. § 2. In all arable farms, though the lease is said to commence at Whitsunday, the custom is well understood almost universally in Scotland, and forms part of the common law of the land, that the new tenant at that term only gets possession of the houses, and as much of the farm as is then in pasture, and that the rest does not come under his management till the outgoing tenant has reaped the crop which he put into the ground. As the new tenant does not reap the full benefit of the lease during the first year, he looks for his indemnification to the same arrangement at the end of the lease. If it were otherwise, the arable part of a farm, at the removal of every tenant, would always lie waste for a whole season; for no one would sow if he was not to reap, and, till the term of Whitsunday, he is entitled to exclude the landlord, and every one else, from the use of the ground. Such, accordingly, is universally understood throughout the country.

Answered: The custom by which a tenant reaps a crop after the expiration of the lease, is by no means universal, and is confined solely to the case of farms chiefly arable, which is not the situation of the farm in question, as it consists chiefly of pasturage. The removing at Whitsunday is not only not disadvantageous, but is attended with this beneficial consequence, that the arable lands will be laid under grass during the last year of the outgoing tenant's possession, from which he may derive benefit down to the last hour of his lease: This will totally destroy the danger of overcropping, at a time when peculiar temptations are held out for the outgoing tenant to study his own interest exclusively. But, whatever may be the custom, the terms of the lease expressly exclude its operation. The entry to every part of the farm is declared to be at Whitsunday 1783; nor does the lease leave its endurance as matter of inference, but expressly declares, that it will be at Whitsunday 1802. No custom, then, of any kind, can control the precise stipulation of the parties.

The judgment of the Court was given unanimously in these words, (4th July 1801:) 'Remit to the Lord Ordinary to alter the interlocutor reclaimed 'against, and to remove the interdict.'

To this judgment, the Court unanimously adhered, (19th November 1801,) by refusing a reclaiming petition, without answers.

Against these interlocutors, Scott appealed to the House of Lords, when the following judgment was pronounced, (10th March 1802:) 'It is declared 'by the Lords Spiritual and Temporal in Parliament assembled, That in this 'case the tenant will not be entitled to an away-going crop; and it is therefore

No. 8. ‘ ordered and adjudged, That the cause be remitted back to the Court of Session ‘ in Scotland, to review the interlocutors complained of.’

Both parties petitioned the Court to apply this judgment, when this interlocutor was pronounced, (10th June 1802): ‘ The Lords having advised this ‘ petition, with the answers thereto for the suspender John Scott, and counter ‘ petition for him, In respect of the judgment of the House of Peers, alter their ‘ two interlocutors of the 4th of July and 19th November 1801, and remit to ‘ the Lord Ordinary to adhere to his interlocutor of the 10th of June that year, ‘ passing the bill of suspension.’

Brodie next petitioned the Court to grant warrant to the Lord Ordinary to discuss the reasons summarily upon the bill, and to prohibit expeding the letters of suspension. This was granted accordingly, (12th June 1802.)

The cause having thus gone back to the Lord Ordinary, on the part of Scott it was contended, That although a numerous class of bills came into the Bill-Chamber upon an alledged statement of facts, the truth of which being afterward to be ascertained, the only question is regarding their relevancy, or whether the bill is to be refused or to be passed, giving room for such discussion; yet there is also as numerous a class of bills, in which the merits of the case are as fully and fairly tried in the Bill-Chamber as they could be after they have gone through the rolls in the Outer-House. Parties, when agreed upon the facts, have often the keenest arguments, in point of law, discussed and determined in this way; and the Court sitting in the Bill-Chamber, are frequently in the use of remitting to an inferior judge, with instructions decisive of the cause.

A court of appeal must possess in every respect the same extent of jurisdiction, and the same privileges in the mode of exercising it, which are competent to the court appealed from; so that wherever no fact remains to be investigated, or none which can influence the question at issue, and where the arguments on the cause have been fully and deliberately heard, no unmeaning or useless ceremony ought to retard essential justice. The House of Lords have remitted the cause, with this instruction, ‘ That in this case the tenant ‘ will not be entitled to an away-going crop,’ virtually finding that the facts offered to be established are irrelevant, and that no proof should be allowed. But whatever may be the practice of the Court of Session, it is *ultra vires* of any inferior judicature to refuse to carry into effect the judgment of a superior Court; and as the House of Lords have already explicitly declared, that they are satisfied no outgoing crop is to be allowed in this case, it is superfluous to pass the bill, and enter into any farther discussion, the final decision having already been obtained. This would be in fact to hold, that the House of Lords have given a judgment without sufficient evidence, or have committed an error in the forms of the Court; neither of which suppositions can be listened to, without in effect constituting the Court of Session as a court of review of the judgments of the House of Lords.

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The defender, again, pleaded: That upon presenting a bill of suspension to the Court, the established law and course of proceedings is not at once to decide upon the merits against the person complained against; but, however clear an opinion may be expressed that the suspender will ultimately prevail, nothing can be done in the first instance but to pass the bill, whereby an opportunity will be given for going at large into the case, by the deliberate form of expeding the letters of suspension, and discussing the merits as an ordinary action. It is probable, indeed, that if the great majority of the Court express themselves strongly, the matter will not be carried farther, giving the cause the appearance at least of having been decided in the Bill-Chamber; still, however, if he chooses, he is entitled to proceed after the letters are expeded, as if no such opinion had been expressed.

The Court of Appeal can in no case pronounce a judgment which it is incompetent in the Court from whose sentence the appeal is lodged to pronounce; and as the Court of Session could have only refused or passed this bill, the House of Lords can do no more, without violating the forms of procedure of the Court of Session, and exceeding the limits of their own jurisdiction. This never can be supposed; so that their intention could be no other than to express their opinion as the case then stood; and the effect can be no other than that a proof should be allowed, to show that in this case the tenant, having received no crop the first year of his lease, is entitled, according to the universal practice of the country, to an away-going crop.

The Lord Ordinary pronounced the following interlocutor, (26th June 1802:) 'Having resumed consideration of the remit of the whole Court to 'discuss the reasons summarily on the bill, the said bill itself, and the minute 'of debate put in for the chargers; and having heard counsel for the parties, 'and also considered the above short minute of their arguments, and the pro'ceedings in the Bill-Chamber referred to by them, and founded on by the 'suspender as containing a judgment of the House of Lords conclusive as to 'the merits of his suspension; Finds, That by virtue of the remit, the discus'sion of the reasons of the bill becomes a process before this Court, of pre'cisely the same nature and effect, in all respects, as if it had come before the 'Lord Ordinary in consequence of letters of suspension having been expede at 'the Signet, under the warrant of the interlocutor passing the bill, been there'after executed as a summons, called in the Outer-House, and carried on as an 'ordinary process of suspension: Finds, that the discussion of the merits of 'processes of suspension in this Court is not prejudged nor restrained by the 'previous interlocutors of the Court of Bill-Chamber, the purpose and legal 'effect of which are merely to grant or refuse a warrant to the Signet to issue 'a writ for commencing a process of suspension, or to grant or refuse an in'terdict in the mean time, till the merits of such process be tried: Therefore, 'finds it still competent to the chargers to oppose the validity of the reasons of 'suspension in the bill, and that the trial thereof is not barred or predecided

No. 8. ‘ by the judgment of the House of Lords, founded on by the suspender, which ‘ rules only the proceedings preliminary to the present process, and to the new ‘ and more regular and full discussion therein which that judgment authorises, ‘ but which cannot, by any known form, enter on the record thereof as a judge- ‘ ment belonging to it: And being of opinion, that if the profits of the farm ‘ in question depend in any considerable degree on the corn crops, it must be ‘ material, in the interpretation of the tack thereof, as a *contractus bonæ fidei*, to ‘ ascertain whether the preceding tenant, holding under a similar tack, had an ‘ out-going crop at the entry of the author of the chargers, whereby the te- ‘ nants under the tack in question would, according to the construction con- ‘ tended for by the suspender, enjoy only eighteen corn crops, while they pay ‘ nineteen years full rents; grants warrant for letters of incident diligence at ‘ either party's instance, for recovering the deed of tack under which the pre- ‘ ceding tenant held the farm, to be reported in eight days; and ordains the ‘ suspender to put in a minute in eight days, answering articulately the different ‘ allegations in the minute put in for the chargers at last calling; and authorises ‘ the Sheriff of the county, on the application of either party, duly intimated, ‘ to order the growing crop to be inspected and valued, on oath, by persons of ‘ skill of his appointment; and dispenses with any representation against this interlocutor.’

The pursuer reclaimed to the Court. Upon advising the petition, with answers, (14th December 1802), the Lord Ordinary's interlocutor was adhered to.

The pursuer again reclaimed; and the Court having advised his petition, with answers, (2d March 1803,) altered their former interlocutor, and pronounced this judgment: ‘ The Lords having advised this petition, with the ‘ answers thereto, and having also considered that the judgment of the House ‘ of Lords has already declared, that in this case the tenant will not be entitled ‘ to away-going crop, and that it is the indispensable duty of this Court to give ‘ effect to that declaration, are of opinion, that, under these circumstances, the ‘ discussion of the merits of the question, which, according to the forms of this ‘ Court, would regularly take place, is not now necessary; therefore, alter the ‘ Lord Ordinary's interlocutor, and find, that Messrs. Alexander and William ‘ Brodie had no right to any part of the crop which was raised on the farm of ‘ Ormiston for the year 1802.’

The Court, at the same time, delivered an unanimous opinion, that an error had crept into the proceedings, which, however, could not now be remedied in this Court.

Lord Ordinary, *Meadowbank*. For Scott, *Solicitor-General Blair, Walter Scott*.
Agent, *Party*. Alt. *H. Erskine, Forbes*. Agent, *Tho. Cranstoun*, W. S.
Clerk, *Pringle*.

F. *Fac. Coll. No. 92. p. 203.*