provided certain conditions under which Wallace agreed to assign over to Todd his claim in Gardner's sequestration. After two months Todd declined to carry on the supply of dross, and alleged that the complainer did not use proper expedition in the pumping operations, and moreover, that the stage of 'putting out coal' as contemplated by the agreement had been reached. I think that, even if the defence be a relevant one, the want of due and reasonable expedition has not been proved. It was shown that some of the machinery was not new; there was not however any obligation to use the best machinery, but only to proceed with due expedition.

With regard to the putting out of coal, I think that it was meant by this that the pit should be left in good workable condition. The putting out of coal from the "lodgment" (or reservoir half-way down the pit-shaft used in pumping up the water) was caused by Todd's failure to supply dross, and consequently did not bear upon the circumstances contemplated by the agreement.

Lord Cowan concurred, and said that by "working faces" are meant those faces marked on the plan as having been so worked; there is no such "face" marked at the "lodgment."

Lords Benholme and Neaves concurred.

The Court pronounced the following interlocutor:—

"Find it proved that the respondent, on or about 16th Nov. 1868, ceased to supply dross in terms of the agreement No. 12 of process: Find that it is not proved that the appellant failed to use due expedition in conducting the pumping operations at the pit in question; find it proved that coals were taken from a lodgment in the said pit in order to supply the place of the dross which the respondent was bound to have furnished, but find the respondent's obligations under the contract were not thereby terminated; therefore sustain the appeal, alter the judgment appealed from; find it unnecessary to pronounce any further judgment on the merits of the petition; find the appellant entitled to expenses in this and in the Inferior Court, and remit to the Auditor to tax and report, and decern."

Counsel for Petitioner and Appellant—Fraser and R. V. Campbell. Agent.—R. Finlay. S.S.C.

Counsel for Defender and Respondent—Scott and M'Laren. Agent—A. Kelly Morrison, S.S.C.

Tuesday, November 19.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

M'INTYRE AND ROSE *v.* ANDERSON.

Lease—Construction—Damage.

Circumstances in which an outgoing tenant found liable in damages to the incoming tenant for loss through non-implement of an obligation in the lease to roll in grass seeds sown among his waygoing corn crop.

The pursuers in this action are John and Donald M'Intyre, joint tenants of the farm of Meikle, Kildrummie and Moss-side, in the county of Nairn, and Major Rose, proprietor of Kilavrock; the defender is Robert Anderson of Lochdhu, formerly tenant of the farm of Meikle Kildrummie and Moss-side; and the summons concludes for payment of "£350 sterling, as loss and damage which the said John M'Intyre and Donald M'Intyre, pursuers, have sustained by and through the defender's failure to roll in the grass seeds sown by him, on the employment and for the behoof and at the expense of the said pursuers, in the spring of 1870, among the defender's waygoing corn crop immediately after green crop, and that part of the said waygoing corn crop of the said farm of Meikle Kildrummie and Moss-side with which it is customary to sow grass seeds, in terms of the defender's lease of said farm, dated 10th November and 11th and 16th December 1857, which expired at Whitsunday 1870 as to the houses and pasture, and at the separation of crop 1870 from the ground as to the arable land, and in conformity with the custom or practice of the district."

On 22nd May 1872 the Lord Ordinary (Mackenzie) pronounced the following Interlocutor.—"The Lord Ordinary having heard the counsel for the parties, and considered the Closed Record, Proof, and process, Finds it established as matter of fact, 1st, that by the lease of the defender as tenant of the farm of Meikle Kildrummie and Mossside, in the county of Nairn, he was bound to allow the landlord or the incoming tenant, in the last year of the said lease, to sow grass seeds among such parts of his away-going corn crop immediately after green crop as the incoming tenant might desire, and to harrow and roll in the same without any remuneration; 2d, that in the spring of 1870, being the year of the defender's away-going crop, the defender, on the employment of the pursuers, John M'Intyre, and Donald M'Intyre, as the incoming tenants, who paid him for doing so, sowed grass seeds delivered to him by them on 86 acres 2 roods and 33 poles or thereby of the said farm; 3d, that the defender failed to fulfil his obligation to roll in the said grass seeds; 4th, that it is established by a preponderance of evidence that the defender's failure to roll in the grass seeds was injurious to the growth of certain portions of the said grass seeds; and 5th, that the said pursuers suffered loss and damage thereby to the extent of £25: Finds that the defender is responsible for the said loss and damage: Decerns against the defender for payment by him to the said pursuers of the sum of £25: Finds the defender liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor, to tax and to report.

"*Note.*—The land on which the pursuers' grass seeds were sown was in numerous parts covered with stones, many of them being of a large size, the expense of removing which would have been considerable. The pursuers maintained that under the obligation in his lease to harrow and roll in the incoming tenant's grass seeds sown with his away-going crop of corn after green crop, and by the practice of the district, the defender was bound to remove the whole stones from the land which could interfere with the beneficial operation of the roller. The Lord Ordinary is of opinion that the lease imposes no such obligation upon the defender, and it was proved by a great preponderance of evidence that by the practice of the district the defender, as outgoing tenant, was not bound to remove the stones.

"It is not disputed by the defender that he did not roll in the grass seeds; but he maintained that the spring was very windy,—that the rolling of the ground would, owing to its light and sandy nature, have increased the risk of the seeds being blown away, that the pursuers, being aware of this, did not insist on the seeds being rolled in,—that they

suffered no damage from his failure to roll the ground,—and that they acquiesced in the propriety of that not being done.

"It is clearly proved that the pursuers requested the defender to roll in the seeds, and that they never acquiesced in his not doing so. From his own evidence it appears that he intended to roll it, but that, being afraid of his corn seed being blown away, he told his grieve not to do it, and said to him, 'they will make me pay a small price for not rolling it, but I cannot help it; better that than lose the crop.' He also admits that he never intimated to the pursuers his intention not to roll the ground; and his agent, in his letter of 4th January 1871, No. 45 of process, wrote to the pursuers' agent that so satisfied was the defender of the injurious consequences likely to result from rolling the ground 'that he says he would have interdicted your clients if they had attempted it.'

"It is proved that the proper time for rolling light land where there is risk of the seed being blown away is after the corn crop has brairded, and the defender did not prove that he was prevented by stormy weather from rolling the ground after the corn had brairded. It was also proved that during his own occupation of the farm it was his general practice to roll the ground after the corn and grass seeds were sown.

"The defender adduced a number of skilled witnesses to prove that the soil was so light that harrowing in the grass seeds was quite sufficient, and rolling was not required to make them germinate. But the Lord Ordinary considers that the evidence of the witnesses who were on the farm and saw the land at the time is entitled to greater consideration than the evidence of skilled witnesses who did not see the ground at the time the seeds were sown. Now, it was clearly proved by several of the witnesses who were on the farm at the time that owing to the dirty state of the land there were a good many clods, that the grass seeds which fell on these clods did not germinate in consequence of not being rolled in, and that there were in consequence a considerable number of bare patches where these clods were. For the loss thence arising, the defender is, in the opinion of the Lord Ordinary, responsible.

"The pursuers claim a very large amount of damages, not only on account of the loss arising from the want of grass on these bare patches, but also on account of the loss sustained through the ground being occupied by stones, and on account of the loss which they allege they sustained by being prevented by these stones, and by the clods, from cutting and making a crop of hay in the summer of 1871. The Lord Ordinary considers that the defender is not liable for any loss which may have arisen by reason of the ground being covered with stones, or for the loss alleged to have been sustained by the pursuers having been prevented by the stones and clods from cutting and making a hay crop. The defender was under no obligation to remove the stones, and their presence, it is proved, effectually prevented a hay crop from being taken. Further, it is proved that if the pursuers had removed the stones between the harvest of 1870 and the spring of 1871, and rolled the ground in the spring of 1871, as is the usual and common practice of farmers intending to take a hay crop, they could have made the ground perfectly fit for cutting and making hay. But the pursuers did not do so, and they never spoke to anyone of their intention to make hay from the grass, except to their own grieve, whom the pursuer Donald M'Intyre asked, in the spring of 1871, whether he did not think it would be a good plan to fence off a bit of the ground to make hay, and who pointed out about 12 acres of it, which he says was the only part suitable for a hay crop. Although this part of the ground could easily, and at small expense, have been freed from stones, and rolled, and cut, they did not attempt to do so, and never again spoke to their grieve about it. Further, it is proved that the land in question was so poor that, with the exception of these 12 acres, it would not grow a hay crop which would have remunerated the pursuers, and that if they had attempted to take a hay crop off the whole ground, instead of pasturing it, they would have sustained a considerable loss.

"According to the view which the Lord Ordinary takes of the proof, the only loss which the pursuers sustained in consequence of the defender's failure to roll the ground arose from the grass seeds which fell on the clods not germinating. There is considerable discrepancy in the statements of the witnesses as to the extent of the ground which was occupied by clods, and upon which in consequence the grass seeds did not germinate. The pursuers' skilled witnesses included in their estimate of damage the ground occupied by stones as well as clods; and it was proved that about two-thirds of the ground on which there was no grass were occupied by stones. Keeping this in view, the Lord Ordinary, after careful consideration of the proof, is of opinion that the loss and damage sustained by the pursuers on two years' grass, in consequence of the defender's failure to roll the ground in which the pursuers' grass seeds were sown, will be fully made good by the sum of £25.

"The defender attempted to show that the failure of grass was partly owing to the pursuers having mixed an insufficient quantity of clover with the ryegrass. But there was a full quantity of ryegrass seed sown, and these grass seeds germinated and produced a good crop of grass in the whole ground, with the exception of the parts occupied by the clods and stones. The failure to roll the ground, and the quantity of stones on it, made the cutting of the corn crop difficult, and occasioned loss in the ingathering of that crop. But this away-going corn crop belonged to the defender. The pursuers took it at a valuation, and it is proved by one of the valuators and by the oversman that they gave the pursuers the large allowance of 13s. 6d. per acre on account of the increased difficulty of cutting and harvesting thereby occasioned."

Against this interlocutor the defender reclaimed.

Case cited—*Graham* v. *Lindsay*, 23 D. 440.

The Court adhered.

Counsel for Pursuers—Guthrie Smith and Dean of Faculty. Agents—Macrae & Flett, W.S.

Counsel for Defender — Shand and Nevay. Agent—D. Scott Moncrieff, W.S.