Friday, February 1.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

LORD ELIBANK AND OTHERS *v.* SCOTT.

Lease—Landlord and Tenant—Straw of Waygoing Crop—Obligation to Consume on Farm Whole Straw Raised thereon.

An outgoing tenant was bound by his lease "to consume the whole straw, turnips, and other fodder raised on the farm, with the exception of clover hay, which he is permitted to sell for consumption elsewhere." *Held* that the clause did not apply to the straw of the waygoing crop, and that he was entitled to sell it and carry it away off the farm.

Walter Scott was tenant of the farm of Milkieston, Peeblesshire, the property of Lord Elibank, for a term of nineteen years from Whitsunday 1862 as to the houses and grass, and as to the land under tillage at the separation of that year's crop from the ground. Under the lease he became bound, *inter alia*, to "observe a five-course rotation of cropping, having not less than two-fifths of the arable land in grass each year, one-fifth in drilled green crop, ... one-fifth in barley or oats sown down with a sufficient quantity of grass and clover seeds, and the remaining one-fifth in oats, the landlord or incoming tenant paying for the young grass (which will amount to one-fifth of the arable land) at the removal of the said Walter Scott, as an industrial crop." He further bound himself "to consume the whole straw, turnips, and other fodder raised on the farm, with the exception of clover hay, which he is permitted to sell for consumption elsewhere." He further bound himself under a penalty to remove from the premises at the expiration of the tack, without any warning.

Scott possessed the farm till the expiry of the lease at Whitsunday 1881 as to the houses and grass, and until separation of the crop of 1881 as to land under tillage. This crop he offered to sell to his landlord or the incoming tenant at a price to be fixed by valuators. Both offers having been refused, he sold the crop by auction. Eighteen acres of it were bought by the incoming tenant, but the rest when reaped was carried off the farm.

Lord Elibank raised this action to have it declared that Scott was bound under his lease "to consume on the farm the whole straw, turnips, and other fodder raised thereon during his tenancy of the farm," and had failed to do so, and on its being so found, the pursuer sought to have him ordained to pay a sum of £500 as the price or value of the straw illegally sold and removed from the ground, or otherwise to pay £500 as damages. There were also other conclusions relating to the dung made on the farm previous to 1880, but the questions relating to that matter were subsequently arranged by joint minute.

The pursuer pleaded—"(1) The defender having become bound by his lease of Milkieston Farm to consume thereon the whole straw raised by him on the farm, he was not entitled to remove from the farm any part of the straw of his last or waygoing crop. (2) The defender is bound to pay to the pursuers the price or value of the straw illegally and [illegible] removed by him, and the pursuers are [illegible] to decree therefor."

The defender pleaded—"(1) The [illegible] averments are not relevant or sufficient to support the conclusions of the summons. (2) The clause in the lease relative to the consumption of straw on the farm cannot apply to the straw of the defender's last crop. (3) The last crop being the property of the defender, he was entitled in the circumstances to dispose of it, and the pursuers have no good claim for the price or value of the straw, or for damages."

The Lord Ordinary (KINNEAR) decerned and ordained the defender to make payment to the pursuer of the sum of £250.

"*Note.*—The lease binds the tenant 'to consume the whole straw, turnips, and other fodder raised on the farm, with the exception of clover hay, which he is to be permitted to sell for consumption elsewhere.' The obligation is in terms applicable to the straw of the waygoing crop; and although the stipulation may be a severe one as against the tenant, it must receive effect according to its terms. It is said that it cannot have been intended to apply to the waygoing crop, but there appears to me to be no room for speculation as to intention. A similar claim was judicially construed in the case of *Gordon* v. *Robertson*, 2 W. & S. 115, in the sense contended for by the pursuers. The cases are said to be distinguishable, because in that case the obligation was that the straw should 'be spent on the ground,' whereas in the present case it is that the tenant 'shall consume' the straw. But I agree with the observations of Lord Cowan in *Greig* v. *Mackay*, 7 Macph. 1109, that the difference in the form of words is immaterial.

"If the defender has bound himself not to remove the straw, it is no answer that the incoming tenant would not take it at a valuation. The stipulation prohibits the removal of the straw from the farm, but there is no stipulation that it shall be paid for if allowed to remain.

"The defender having taken away the straw in breach of his obligation, is answerable in damages; and the measure of damages appears to be the admitted value of the straw."

The defender reclaimed, and argued—The clause attempted to be enforced was one which the tenant could not possibly carry into execution. To enforce it would be to extend the obligation of the lease against him for nearly a year after it had expired, after he was removed, and after he ceased to have right to come on the farm, either by himself, his servants, or his cattle, all of which he must do if he was to use the straw on the farm. He had offered the straw to the incoming tenant at a valuation, and as this offer had been refused, there was no other possible course open to him than to sell it—*Gordon* v. *Falconer*, March 8, 1822, 1 S. (N.E.) 361, had a bearing on the question favourable to the defender. The cases relied on by the pursuer of *Gordon* v. *Robertson*, May 19, 1826, 2 W. & S. App. Cas. 115, and *Duke of Roxburghe* v. *Robertson*, 1820, 2 Bligh's App. 156, were distinguishable, and were only authorities for clauses framed in exactly similar terms.

The pursuer replied—The clause was express, and must be construed *stricti juris*—*Gordon* v. *Robertson* and *Duke of Roxburghe* v. *Robertson*

(*supra cit.*) closed the door against the defender's attempt to contravene it. The difference between the clause here and the clauses in those cases was merely in the form of the words used, and was immaterial—Lord Cowan in *Greig, &c.* v. *Mackay*, July 20, 1869, 7 Macph. 1109. To give effect to the defender's contention would be practically to change a nineteen years' lease into one for eighteen years.

At advising—

Lord Craighill—The reclaimer Walter Scott was tenant under the pursuer Lord Elibank of the farm of Milkieston, in the county of Peebles, for a term of nineteen years from Whitsunday 1862 as to the houses and grass, and as to the land under tillage from the separation of that year's crop from the ground. The last crop under this lease thus came to be the crop of 1881. The defender in due time offered to sell this crop to the landlord or the incoming tenant at a price to be fixed by valuators, but both refused to buy, and in consequence the crop was reaped and carried off the farm by the defender. The pursuer challenges the course thus pursued by the defender as being an infraction of a stipulation by which the tenant bound himself to consume the whole straw, turnips, and other fodder raised on the farm with the exception of clover hay, which, on the condition specified in the lease, he was permitted to sell for consumption elsewhere; and the present action has been instituted for rendering this challenge effectual— first, by a decree declaratory of the defender's alleged obligation in the premises; and secondly, by a decree for payment of the price or value of the straw which was removed from, instead of having been consumed upon, the farm. The Lord Ordinary has decided in favour of the pursuer on the ground that the question at issue is foreclosed by the decisions cited in the note to his interlocutor. Hence the reclaiming-note upon which parties have been heard before this Division of the Court. There are two questions for consideration. The first is the meaning of the clause in the lease on which the claim of the pursuer is founded, apart from the decisions by which that, in the opinion of the Lord Ordinary, has been determined? the second, whether the defender's contention on this subject is so foreclosed? These questions will be taken up in their order. There can be no doubt that the defender was bound to consume, and the fact is that he did consume, on the farm all the straw which could possibly be consumed during his occupation. But the straw of the last year's crop he could not consume upon the farm, because his tenancy of the land under tillage (that of the houses and grass having expired at the preceding Whitsunday) had come to an end at the separation of that crop from the ground, and he had bound himself to remove from the portions of the farm of which till then he was in the occupation, or to pay what may be called a penal rent should this obligation not be fulfilled. My view of the matter is, that the clause in question does not cover, and could not reasonably be held to cover, the straw of the last crop raised under the lease. How was the alleged obligation to be fulfilled? In the first place, the straw could not be separated from the grain upon the farm. The only thing the defender could do with the crop was to remove it when reaped. It could not even be stacked, much less could it be thrashed, because the right of occupation even of the ground under tillage—that of the barn as well as other buildings having ceased at the preceding Whitsunday—came to an end when the crop was separated from the ground. This is plain upon the face of the lease, but it may be mentioned that a claim to use the barns for thrashing, under a contract like the present, after the expiry of the lease, has been overruled by two decisions of the Court—*MacEwen* v. *Pattinson*, November 19, 1803, M. 13,891; and *Anderson* v. *Tod*, November 21, 1809, Hume, 842. The defender, therefore, if he was to leave the straw, must also have left the grain which grew upon it. This is a contention far too extravagant to be maintained, and accordingly in form it was not maintained. What alternative, then, was the defender to follow? Was he to remove the crop to thrash it on another farm, and to bring back the straw to Milkieston? There is no provision to this effect in the lease, and indeed the case of the pursuer is based upon the assumption that the straw of the last crop, as had been the case with previous crops, could not be removed upon any pretext. But, in the second place, how was the straw to be consumed by the defender? For its consumption there must have been bestial, but none belonging to the defender could be upon the farm. He was no more entitled to feed cattle than he was to put another crop into the ground after the period of his tenancy expired. These results—and they are necessary results—seem to me to be plainly inconsistent with the idea that the straw of the last corn crop is covered by the clause of the lease about which parties are in controversy. There is, however, something more which points to the same conclusion. Clover hay, according to the clause in question, was not to be consumed upon the farm unless the defender should choose so to use it, for he is permitted to sell it for consumption elsewhere. The words by which this permission is granted are as applicable to the clover hay of the last year as to that of previous years, which is all the landlord has to say relative to the consumption of the straw raised upon the farm, and yet it is perfectly certain that the clover hay of the last year is not covered by this clause. The young grass of the last year, the lease by a previous clause provides, is to be paid for by the landlord or incoming tenant at the defender's removal—that is to say, at Whitsunday 1881, this being the term at which he was to leave the offices and grass; and as this young grass was the crop to yield the hay, there could be no hay of that crop for the defender to consume or sell for consumption. The inapplicability of the clause to the last year of the tack is thus made as plain in one way as it could have been in another by an express declaration that the provision was to operate only in the first eighteen years of the lease.

There remains, however, the question whether the point in controversy—that is to say, the import of the clause as to which parties are at issue—has been determined by authority. This is the opinion of the Lord Ordinary, who accordingly has not given what is his own reading of the clause, but thinking it unnecessary even to indicate that, has decided in conformity with what he considers has been decided to be the true construction by the House of Lords. Did I view the cases referred to as he does, I would

give judgment as he has done, for the authority of a judgment of that House, which is plainly a precedent, must be regarded as paramount. But as upon full consideration I am satisfied that the clause, the import of which is the subject-matter of the present litigation, is different from those which have been construed by the House of Lords, I feel at liberty, or rather I feel bound, to give judgment on the present occasion in accordance with my own interpretation. Two things—and only two things—were settled by these decisions. One was that a clause in a contract is to have effect though the result be different from that recognised by the common law or the practice of the country, and this principle is of course here accepted by all concerned. The other is, that clauses expressed as were those which the House of Lords construed, must be held to have the meaning which has been put upon them by the House of Lords. But of course a decision upon one clause leaves unconstrued other clauses differently expressed. The difference, no doubt, must be substantial, and not merely illusory, but where it is the former, the judgments referred to cannot possibly be conclusive in fixing the meaning of the new stipulation. The first in date of the cases by which the present is said to be ruled is *Roxburghe* v. *Roberton*, 1820 (H. of L.), 2 Bligh, 156. There a tenant, by a clause in his lease was bound "at his removal to leave upon the land all the dung and manure of the preceding year, the value to be paid by the succeeding tenant, &c., and at no time to sell or give away any of the hay or straw of the said farm, which shall always be spent on the ground;" and it was held on appeal, reversing the judgment of the Court of Session, that the tenant under this contract was not entitled to sell or give away any of the hay or straw upon the farm at any time during the continuance of the tack, or upon the same at the expiry of the tack. But the clause in this case differed, both in what it contained and in what it did not contain, from the clause now to be construed by the Court. In the first place, the former provided that the tenant is "at no time to sell or give away any of the hay or straw of the said farm," while there is in the latter no such prohibition. The importance of this consideration will be realised on referring to what was said by Lord Chancellor Eldon when proposing that the judgment of the Court of Session should be reversed. As regards the words "at no time," he observed (2 Bligh, pp. 166-7), "The provision that the tenant shall 'at no time' sell or give away the hay or straw is absolutely incompatible with the supposition of a right in the tenant in any manner to eloign those articles during the last year, if, indeed, the express words of the instrument leave us at liberty to enter into conjectures as to any intention to except the last year of the lease." He added, according to notes of his opinion read by Lord Gifford when moving the judgment of the House in *Gordon* v. *Robertson*, May 19, 1826, 2 W. & S. 146—"I cannot for the life of me conceive how the words 'at no time' can mean at any time during the last twelve months of this tack." Another variance between the clauses is this. In the *Roxburghe* case the clause which was construed ended with a provision that the hay and straw should "always be spent on the ground," while in the present case the obligation is one by which the tenant "agrees and binds himself to consume the whole straw, turnips, and other fodder raised on the farm with the exception of clover hay," as to which there is, as already has been explained, a special provision. The variance between the words in the one clause and those in the other may not at first appear to be important or significant, but it will be found, when fully weighed, to be almost of essential materiality. This is shown by another passage of Lord Eldon's opinion in the *Roxburghe* case, where he said (2 Bligh, p. 166)—"The clause which provides what shall be done at the removal—that is, the expiration of the lease—stipulates that the hay and straw of the farm shall always be spent on the ground, not that the tenant shall spend it—an expression which might possibly lead to a different construction." Considering by whom this suggestion was thrown out, there obviously is here ample room for the inference that if the words of the present clause had been used in the lease granted by the Duke of Roxburghe the judgment of the Court of Session would not have been reversed. The reason of the thing is plain. There all that is provided is that straw or hay shall be spent or consumed on the ground, and this stipulation is capable of even literal fulfilment whether the tenant has or has not removed from the farm. The difficulty of reconciling the idea that the clause now to be construed was intended to apply to the straw of the waygoing crop, with the fact that so read it could not be fulfilled, was therefore not an element presented for consideration in the case by which the question of interpretation now submitted for our decision is said to have been foreclosed. But there is still another variance between the two clauses, certainly not less material than those already noticed, which calls for observation. In the *Roxburghe* case there was no provision which, when read in the light of another provision occurring in the lease, showed indubitably that the obligation could not be intended, so far as concerned one at least of the articles to be spent on the ground, to cover the waygoing crop. In the present case, however, there is such a provision. The tenant, in all the years but the last, was to be entitled to sell his clover hay, but the crop of the last year was taken out of his power of disposal, inasmuch as the young grass had been already sold to the incoming tenant in terms of a preceding provision of the tack. Having this in view, the true reading of the clause becomes, as I think, almost matter of demonstration. The tenant "binds himself to consume the whole straw, turnips, and fodder raised on the farm with the exception of clover hay, which he is to be permitted to sell for consumption elsewhere." Thus the years embraced by this clause were years the hay crop of which the tenant was entitled to sell for consumption off the farm. But he had no such power over the hay crop of the last year, and the consequent conclusion necessarily is that the crop of the last year is not affected by this clause.

The only other case of importance is *Gordon* v. *Robertson*, May 19, 1826, 2 W. & S. 115, which, it may be observed, is the only House of Lords' decision cited by the Lord Ordinary, but it will not be necessary to say much as to it, because the observations on the earlier case of *Roxburghe* are substantially, if not ab-

solutely, applicable to it also. The clause, the interpretation of which was settled in the later case, provided that "the whole fodder was to be used upon the ground, and none sold or carried away at any time, hay only excepted." Here, again, there are at least two things by which this clause is differenced from that with which we have to do. In the first place, there are the words "at any time," the materiality of which has been already shown; and, in the next place, the provision relative to hay, in place of showing that the last year was to be exceptional, shows that the obligation and the rights of the tenant were to be the same as regards all kinds of fodder in the last year as in all the other years of the tack. Furthermore, what was provided was, not as here that the tenant himself should consume, but only that the whole fodder was to be used on the ground. In these circumstances I have come to the conclusion that by neither decision is the present question foreclosed. The Lord Ordinary also refers in his note to the case of *Greig* v. *Mackay*, July 20, 1869, 7 Macph. 1109, for the sake of the *dictum* of Lord Cowan that "the difference in the form of words is immaterial," which, of course, is true, when the words in both cases are all of the same value; but it cannot be said to be true—indeed the contrary is the truth—where the words of one clause are different in their import from those which occur in another contract. Besides, the *dictum* is obviously inappropriate where there is not only a difference in the words used, but there is the omission from one clause of a provision which occurs in and is material to the sense of the other. Had it been the case, as the Lord Ordinary assumes, that the only distinction betwixt the provision in this case and that in *Gordon* v. *Robertson* was that in the latter the word "spend," and in the former the word "consume" is used, Lord Cowan's *dictum*, if authority was required for so plain a proposition, might appositely have been cited for the purpose of showing that such a difference in the expression of the thing is immaterial. But the Lord Ordinary, and presumably from what he says the parties also, overlooked the consideration that the difference between the clauses is not dependent on the substitution of "consume" for "spent," but in the broad fact that the obligation constituted by the one is in several respects essentially different both in the words used and in words omitted from that which is constituted by the other. On the whole matter I am of opinion that our judgment is not foreclosed by previous decisions, and that we should find in favour of the defender's right to carry away the straw of his waygoing crop, the restriction relied on by the pursuer having, according to the sound construction of the clause, no application to the last year of his tack.

Lord Young—I am of the same opinion, and can express my view of the case in a single sentence. There are two questions raised, first, Whether this case is ruled by the decision in the House of Lords in the case of *Gordon* v. *Robertson*? The Lord Ordinary thinks it is, and if his view is sound, then it is conclusive of the matter. His Lordship states the distinction between the two cases in two lines of his interlocutor, and his opinion is that the distinction is not real. I agree with Lord Craighill that there is a distinction between the two cases. In the one case it was provided that the straw should be "spent" on the farm. Here the tenant binds himself to consume the straw on the ground. I think the cases are not the same, and indeed it was pointed out by the Lord Chancellor that a case like the present was not necessarily ruled thereby. Agreeing, then, with Lord Craighill that this case is not ruled by the case of *Gordon*, I come to consider the second question, What is the law to be applied to the case? I am of opinion that when a tenant binds himself to consume the straw on his farm, he does not bind himself when he ceases to be tenant to leave any straw to be consumed by another. Therefore, in the first place, I am of opinion that this case is not ruled by the decision in the House of Lords, and, in the second place, on the merits of the case, that the defender is entitled to prevail, the obligation he undertook not including that which the pursuer, his landlord, seeks to enforce against him.

Lord Justice-Clerk—I concur in the elaborate exposition of the law given by Lord Craighill, and Lord Young's summary of it.

Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the reclaiming-note for the defender against Lord Kinnear's interlocutor of 26th July last, Recal the said interlocutor; assoilzie the defender from the conclusions of the summons; find the defender entitled to expenses; remit," &c.

Counsel for Pursuers—J. P. B. Robertson—— Pearson. Agents — Thomson, Dickson, & Shaw, W.S.

Counsel for Defender—Trayner—A. J. Young. Agents—Romanes & Simson, W.S.

Saturday, February 2.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

MITCHELL *v.* URQUHART.

Process—Proof—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40—*Appeal—Jury Trial.*

Where an action raised in the Sheriff Court for a sum which exceeds £40 is appealed for jury trial at the proper stage, the party so appealing is, if the case be in itself of a nature suited for jury trial, entitled to have it submitted to a jury.

By the Judicature Act 1825 (6 Geo. IV. cap. 130), section 40, it is, *inter alia*, "expressly provided and declared, that in all cases originating in the inferior courts, in which the claim is in amount above forty pounds, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior court (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either