to say, that time having been given without his knowledge (for time had been given, so far as appears, without his knowledge), he was not discharged by that; but if he was a co-principal as between him and Edgars and Lyon, and he and Ainslie both liable as principals, whatever delay there might be in suing either the one or the other, I apprehend one cannot be discharged without both being discharged. If, therefore, they were both principals, as I apprehend they both were, the money not being advanced till the last bill of exchange was paid by Edgars and Lyon, then the debt for which they had a right to enforce their demand against Robinson and Ainslie, still continued as against both. I apprehend it is quite clear that the appellant was not discharged by the frequent renewals of those bills of exchange which had taken place. May 11, 1826.

Upon the whole, therefore, though I do not think the case perfectly free from difficulty, I cannot say that the conclusion at which the Court of Session have arrived, is wrong; but being of that opinion, I must confess, I do not think this is a case in which the appellant should be visited with costs. I think there was a sufficient ground for his desiring to have your Lordships' judgment upon the case; and therefore, my Lords, thinking there was room for doubt, and a fair question for discussion, I shall not advise your Lordships to give any costs on this case, but simply to affirm the judgment of the Court of Session.

Appellants' Authorities.—2 Barn. and Ald. 210—Chitty, 291.
Respondents' Authorities—1 Bell, 341.—2 Barn. and Ald. Rep. 210.—3 Ersk. 4. 29.—Rutherford, Feb. 25, 1785.—(7069)—Douglas. Heron, and Co. July, 24, 1785—(7070)—Chitty (1818, edit.) p. 125.

A. MUNDELL—J. CAMPBELL, Solicitors.

Lieut.-Colonel JOHN GORDON of Cluny, Appellant.—*Shadwell* —*Buchanan.* JAMES ROBERTSON and others, Respondents.—*Adam Keay.* No. 15.

Tack—Clause.—Held (reversing the judgment of the Court of Session), that a clause in articles and conditions relative to a lease regulating the management of a farm, bearing, that 'the whole fodder to be used upon the ground, and none sold or carried 'away at any time, hay only excepted; and all the dung to be laid on the farm the 'last year of the lease,' created an effectual prohibition against the tenant disposing or carrying off the farm any part of the straw of the way-going crop.

MR ROBERTSON and others were tenants on the estate and barony of Slains, belonging to Colonel Gordon. No regular lease was granted to any of them, but they possessed in virtue of missives, which referred to certain articles and conditions relative to the whole estate, containing mutual obligations on both May 19, 1826. 2d DIVISION. Lord Cringletie.

May 19, 1826. the contracting parties, and by which all the tenants were to be governed. These articles and conditions were subscribed by all the tenants except Robertson, but he signed the scroll of a lease, in which it was stipulated that he should be bound by the terms of the articles and conditions. A printed copy of them was delivered to each tenant; and by the 16th article there was this provision: 'The whole fodder to be used upon the ground, and 'none sold or carried away at any time, hay only excepted; 'and all the dung to be laid upon the farm the last year of the 'lease.'

The leases were to endure for twenty-one years from Whitsunday 1801, and were to terminate at Whitsunday, and the separation of the crop in 1822. None of the tenants had received straw or fodder from the landlord or outgoing tenant.

At their expiration, Colonel Gordon understanding that the tenants had intimated an intention of selling the fodder of the way-going crop then on the ground, presented a summary application to the Sheriff of Aberdeenshire, against Robertson and others, and a separate one against Anderson, to have them interdicted from carrying off any part of their fodder, hay excepted, and to ordain them to use it on their farms. The Sheriff granted interim interdict, and appointed Colonel Gordon to say, whether, if the tenants must use the fodder as concluded for in the petition, he would agree to afford them accommodation for that purpose. Colonel Gordon answered, that certain of the respondents might have a barn or byre for a reasonable time; that the possessions held by the other respondents were let to different tenants, over whom he had no control; that there was little doubt that these tenants would be disposed to give what accommodation they could, but that this was a matter with which he had nothing to do, as he was under no obligation to that effect. Thereafter the Sheriff recalled the interdict, and allowed the tenants to remove and appropriate the fodder of their out-going crop according to the established usage of the country, reserving action to them individually against Colonel Gordon, for damages suffered by the illegal detention of the same.

Separate advocations were then brought by Colonel Gordon, the one of which against Anderson came before Lord Alloway, and the other against Robertson and others before Lord Cringletie, and in both these cases he relied on the decision of the House of Lords in the case of the Duke of Roxburghe *v.* Roberton. Lord Alloway reported the former of the cases to the Court on informations in respect of the above decision, which he considered as introducing a new practice into the law of Scotland on this subject; while Lord Cringletie, in the advocation

against Robertson and others, 'in respect of the judgment of the 'House of Lords in the case of the Duke of Roxburghe *v.* Ro- 'berton, "remitted" to the Sheriff to recall the interlocutors 'complained of, and to hear the parties on the allegation, that 'the articles of regulation for the estate of Slains were departed 'from, and never observed during the leases of the respondents.' May 19, 1826.

Colonel Gordon then raised an action of damages against Robertson and others for carrying off the fodder: and they having reclaimed to the Second Division, and the case of Anderson having come to be advised about the same time, the one Division required the opinion of the Judges of the other, and also of the permanent Lords Ordinary, 'upon the legal construction of the 'clause in the regulations relative to the leases of the estate of 'Slains therein referred to, especially as in this case, where, while 'the landlord insists upon the straw of the waygoing crop being used upon the farms, he maintains that he is under no legal obligation to afford upon the farms the accommodation requisite for 'such use.'

Thereafter, on a consultation and conference, the following written opinion was delivered by all the Judges, with the exception of Lord Cringletie, who gave a separate opinion.

"Cases having occurred before both Divisions of the Court regarding the import of certain clauses contained in articles of lease granted upon the estate of Cluny, it seemed expedient that both Divisions, with the permanent Lords Ordinaries, should hold a conference, and consult together; and in consequence thereof, we have perused the whole printed papers given in by the parties; and as the question which has been discussed is of great importance to the landlords and to the tenantry of Scotland, we consider it to be our duty, not merely to give our opinion, but to detail the grounds on which it proceeds.

"1st, Although a tack is said to be stricti juris, by which is meant, that the right is to be no farther extended than expressed in the deed, yet it is a personal, consensual, and bona fide contract. It is a contract entered into for mutual benefit and advantage. The obligations therefore arising, either from the nature of the contract itself, or from direct stipulation, are to be interpreted (where interpretation is not completely excluded) fairly, justly, and equitably.

"2d, The obligations between landlord and tenant, though not expressed in the written contract, have been well understood in Scotland, and are fixed by the common law, and recognized by a long course of practice in the country, and of decisions of the Court, founded mainly on the principles of the civil law.

May 19, 1826. "Among other things, it has been perfectly fixed, that a tenant, by the nature of the contract, is obliged to use the power given him over the surface tanquam bonus vir, without running out or wasting the soil; and consequently he is, under sundry circumstances (which must be left in arbitrio judicis), tied down, without any express clause, both with respect to the grounds which he may cultivate with the plough, and as to the method of cultivation and husbandry. Following these principles, it has been held and understood in practice, that a tenant cannot sell any dung produced on the farm, previously to barley or bear seed time, in the concluding year of his possession; and that he is not entitled to sell any part of the straw raised from the farm, except that of the last crop.

"3d, The improvement of agriculture in Scotland, during the preceding century, is much indebted to the practice of written leases to endure for a term of years; and it has been a great object with landlords to make these leases as perfect as possible, partly to prevent disputes about powers, and partly to guide and direct the tenants in such a mode of management, as would be beneficial to all interested.

"The desire, however, to make the written contract as complete as possible, and the anxiety, and often the ignorance of the parties and their factors and agents, have induced them anxiously to avoid omission, and to express everything, and consequently to insert in the lease many of the obligations universally understood to be incumbent on them, and sanctioned by the common law, independently of any express stipulation. Where the duties of either of the contracting parties have been acknowledged at common law, and have been defined by the undeviating understanding of the country and by practice, the mere expression in writing of those duties, and the obligations arising therefrom, cannot vary or alter the practical execution of them. What therefore would be deemed satisfaction to the common law, must be also deemed satisfaction to the written stipulation.

"4th, The term of entry adopted in pasture farms, has almost universally been fixed at Whitsunday. The kind of management proper for such farms, naturally suggests that period as prudent, expedient, and even necessary, The entry to arable farms has, in some parts of Scotland, been made by convention at the term of Martinmas after the separation of the crop, or even at the more indefinite period of the separation of the crop itself. But the great proportion of farms in Scotland are either entirely pasture, or have so considerable a part of them pasture, that the term of Whitsunday has been considered as the chief and principal term of entry. Accordingly, by the com-

mon law, all warnings to remove, made in whatever shape or form, must be given forty days prior to the Whitsunday immediately preceding the period of removal, so that the term of entry, in general, for the tenantry of Scotland, where nothing is expressed to the contrary, is held to be Whitsunday for the whole houses of every description, and for the pasture land; and Martinmas, or the separation of the grain crop, for the arable land. From this arrangement, the reaping of a crop by the outgoing tenant, after he has left the natural possession of the lands, becomes unavoidable. But this crop is by law his exclusive property, and necessary to complete the period of the stipulated annual possession; and as no way or means have been generally fixed or provided by the common law, to enable the tenant to use or consume this crop on the lands, it has necessarily de praxi been understood, that the outgoing tenant has the right to dispose of such crop at his pleasure.

"5th, In the contract of lease, parties may agree to what conditions they think proper; and if they are lawful, they must be made effectual by a Court of Justice; and if plainly and directly at variance with the practice of the country, and the rule of the common law, it must be held by the Court, that the parties did truly mean to make a practice for themselves. But the mere putting into writing an obligation, arising from the nature of the contract itself, and already recognized by the common law, will not bestow on that obligation a different effect from what it would otherwise have had, nor will it warrant such an interpretation to be put thereon as is contradictory to the common acceptation and understanding of such obligation, and such as is adverse to the true and real interest of the parties.

"6th, The clause in the articles of lease giving rise to the present question, and which is not uncommon in other tacks, is thus conceived: 'The whole fodder to be used upon the ground, and 'none sold or carried away at any time, hay only excepted; and 'all the dung to be laid upon the farm the last year of the lease.'

"The term of entry to the farm is declared to be Whitsunday; and of course it necessarily follows, that the tenant, to complete his possession, must reap his crop of grain, necessarily sown by him before Whitsunday, after he has left the houses and pasture land. In the articles of lease, no provision is made, or accommodation stipulated to be given by the landlord for the housing of this crop, or for the consumption of the straw which he takes the tenant bound to USE, not simply to leave; and yet, what is extremely material, he maintains, 'that he is under no 'legal obligation to afford upon the farms, the accommodation

May 19, 1826. ‘ requisite for such use.’ Considering that the straw is the undoubted property of the tenant, and that neither the common law, nor the special contract, deprives him of the right to use it for the benefit of his own cattle, the plea of the landlord leads to consequences hitherto unknown in the implement of the contract of lease. The clause must be either extended so as to create or imply various obligations on the landlord and incoming tenant; and if these are not performed, there is a breach of agreement which will liberate the outgoing tenant, and leave his rights to be determined by common justice: Or if no legal obligation is to be held as implied against the landlord to afford accommodation to the outgoing tenant, as is here maintained, then the tenant is deprived of part of his property which has been purchased by his rent.

“ Clauses, therefore, which are so generally expressed, without imposing co-relative obligations on the part of the landlord for the last year, can be held to apply to the conduct of the tenant only during his actual residence and the subsistence and existence of the lease, and as imperfect for the last year; and of course, that the clause under consideration must be viewed as nothing but an exposition of the common law, which requires the tenant to consume the fodder during the subsistence of the lease in all its parts.

“ 7th, In a lease for a period of years, when the term of entry is at Whitsunday for the houses and pasture land, and at the separation of the crop or Martinmas for the arable land, the right of use or possession of the outgoing tenant completely ceases upon the arrival of the term of Whitsunday, and separation of the crop of the year fixed by the parties. But the constructive possession of the tenant as to the arable land is continued, although after Whitsunday he cannot set his foot into the houses or offices, or upon the pasture land. After the separation of the crop from the ground, the outgoing tenant has no right of possession of any kind or nature. The decree of removing, by the law of Scotland, requires the tenant, after the term of possession is past, ‘ to flit and remove himself, wife, family, servants, ‘ cottars,’ &c.; ‘ dependants, goods and gear, forth and from All ‘ and Whole,’ &c.; so that the outgoing tenant, after leaving the houses and pasture land at Whitsunday, has nothing more than a right to come back to reap the crop when it is ripe; and upon which, the incoming tenant can compel him to remove off his land, and out of his way. And unless the landlord, in his new contract of lease, has taken care expressly to reserve a right to use the houses on the lands, either by himself or outgoing

tenant, the new tenant cannot be compelled, by any process at common law, to afford any such use. Under such circumstances, it has been uniformly understood, that the tenant was entitled to dispose of the straw of his outgoing crop. We consider this to be the universal practice of the country, and which has been directly sanctioned by the judgments of the Court in the cases of the Duke of Roxburghe contra Archibalds, 5th March 1785; and Jamieson, 16th May 1792; and indirectly admitted and acknowledged in the cases Pringle against M'Murdo, 30th June 1796; Earl of Wemyss against Wrights, 16th June 1801; and Forester against Wright, 19th February 1808, when such practice was attempted either to be resisted or controverted. And in consequence thereof, we can have no doubt of the understanding of the tenants on this estate, of the import of the clause in question, when they signed the articles of lease. We have as little doubt of the understanding of the landlord himself; as we observe, that, when he executed a regular lease in terms of the same articles, he put that interpretation on the obligation which was agreeable to the practice of the country. And, accordingly, in that lease it was declared, 'that the tenants should be allowed 'for a reasonable time the use of the barns, and other necessary 'accommodation for threshing out their last or outgoing crop; 'and that they should receive from the landlord, or incoming 'tenant, the value of the straw or fodder of said crop, as the 'same should be ascertained by persons to be mutually named.'

"8th, The above regulation, allowing the tenant to dispose of his outgoing crop, has been introduced from necessity, and has been universally so understood. It occasions no injustice or damage, and is productive practically of no inconvenience to landlord or tenant. In fact, the rule generally ends in an arrangement between the outgoing and incoming tenant, by which the latter takes the crop or straw at a valuation; and as this is truly for the mutual interest of both, the matter may be said to be commonly, if not always, adjusted in this way; and if this so happens, the landlord has not the least grounds of complaint. But, even supposing that this arrangement should not take place, the landlord will not suffer, as the incoming tenant either brings the waygoing crop of his last farm along with him to his new farm, if this can be conveniently accomplished, or he will take care to provide substitutes for the fodder so taken away by the outgoing tenant, and so prepare, in kind and extent, his crop for the ensuing season. It is his interest to do so, and always has been done de praxi, without the smallest objection on the part of the tenantry. The tenant suffers nothing by it, as he again, in

May 19, 1826. his turn and in due time looks to his indemnification, by the right he has to dispose of his outgoing crop.

"But we would observe, that a contrary interpretation of a clause, so generally expressed as the present, and left to be extricated by extrinsic regulations to be arranged hinc inde between the parties, would, on the other hand, be productive of the greatest inconvenience, injury, and damage, to both the contracting parties.

"If the tenant is bound to consume or use the outgoing crop, the right to do which it is impossible to dispute, as it is his property by law, then the proprietor must furnish him with the means of doing so, and, of course, over and above the proper house and offices belonging to the farm, and necessary for the incoming tenant, he must erect proper accommodation for the use of the cattle required, and of the servants necessary to take care of them, and also for the occasional residence of the outgoing tenant to superintend them.

"Again, on the part of the outgoing tenant, over and above the cattle and horses required for the new farm he is to occupy, he must provide a stock sufficient to consume the fodder of his outgoing crop; he must hire servants to take charge of them; he must have liberty uncontrolled, to come to the farm, and look after those servants; and if he happens to be provided in a farm at a considerable distance, all this must be at a considerable expense, and necessarily at a certain loss. In fact a tenant, according to this system, must, for a certain period after leaving his farm, have two separate stocks and two separate establishments; and what adds to the inconvenience, whenever the crop is consumed, the tenant may have no alternative but to dispose of his extra stock, and to dismiss his extra servants, when nothing but loss can ensue, while e contra the landlord must have two houses, and two sets of stables, cow-houses, barns, and other offices on each farm.

"To interpret, therefore, the clause contained in the articles referred to, and as contended for by the landlord, would be to frame a new contract for the parties, contrary to the common law and practice of the country, and evidently contrary to their understanding at the commencement of their agreement, and directly injurious to their true interests.

"Lastly, If the landlord has a desire to alter the common law, consistently with the rights and interests of the parties in this contract, he has two simple known remedies, either to take the tenant bound in the lease to sell the outgoing crop to him or incoming tenant at a valuation; or at once, at the commence-

ment of the new lease, to purchase the right to the fodder, and to declare the same steelbow, and so the straw of the outgoing tenant will be deliverable in succession, from tenant to tenant. May 19, 1826.

"These modes are well known in the practice of Scotland, and particularly the last, from the earliest times; and in those districts of Scotland where agriculture has been best conducted, that mode of steelbow has been adopted with much advantage, and other regulations as to the straw of the last crop have been understood and tacitly agreed upon, between the outgoing and incoming tenant, for their mutual comfort and advantage; but such partial usage cannot form the law of Scotland, or regulate the tenantry in situations totally different.

"Taking into consideration all these reasons, we cannot consider the authority so much relied on by the petitioner as decisive of the present case, and we are persuaded that the judgment must have proceeded in some measure from the want of a full exposition of the common law and practice of Scotland.

"We therefore, upon the whole, come to the following conclusions:—

"I. That although, by the common law and practice of Scotland, a tenant is bound to consume the whole fodder of his farm on the lands during the lease, yet that this obligation has never been held to apply to the waygoing crop, and therefore that he is entitled to sell the fodder of his last crop.

"II. That the clause made use of in the articles of lease in question, unaccompanied by any corresponding relative obligation on the part of the landlord or incoming tenant, is not more extensive in its application than what would have been implied from the nature of the contract.

"III. That as no means are provided by the landlord in his articles of lease to carry into execution that for which he contends, and as he maintains that he is under no legal obligation from these articles to furnish any such, we apprehend that he is barred from putting any other construction on the clause, than what has ever been the common understanding of the country.

"IV. That in this case the tenant is entitled to dispose or carry off the straw of the waygoing crop. The contrary supposition would extend the obligation of the tack against the tenant for near 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 is to use the straw on the farm; for, as the straw is his undoubted property, it is he, the outgoing tenant, who is entitled to the use of it, and not the incoming tenant or the landlord, without paying value for it."

May 19, 1826. Lord Cringletie gave a separate opinion as follows:—

"In this case the question arises relative to the meaning of a clause in general articles and conditions, laid down by Mr Gordon of Cluny, for letting his estate of Slains, in Aberdeenshire. The clause is expressed thus:—'The whole fodder to be used 'upon the ground, and none sold or carried away at any time, 'hay only excepted; and all the dung to be laid on the farm the 'last year of the lease.' The tenant pleads, that notwithstanding of this stipulation, he is entitled to sell or carry away the fodder of the crop of the last year of his lease, because it is the common custom of the country to do so; and the clause in the articles of lease stipulates no more than what is enjoined by common law. The question then is, What is the true meaning of this stipulation?

"Undoubtedly, it is the custom generally throughout Scotland, to make the term of a tenant's entry be at Whitsunday, as to the houses and grass, and to the arable land at the separation of the crop from the ground in the same year; and as the outgoing tenant must leave his farm as soon as the corn is reaped, and has previously left the houses, the general practice is, that he either sells by public auction his crop, including corn and straw, while on the ground, or to the incoming tenant, by valuation of neutral persons. Even in Berwickshire, the parent of agriculture in Scotland, the entries to farms are the same; but the practice is, that the outgoing tenant leaves the straw of his last crop to his successor. The same takes place in East Lothian, where agriculture is in its highest perfection; and the law provides the means of executing this, as without any stipulation in the lease the outgoing tenant retains the use of the barn-yard, the barns, and other accommodations, till the month of April, often till Whitsunday, and sometimes later in the succeeding year, being at same time bound to thrash out his corn regularly, so as to provide straw for the cattle of the incoming tenant. It appears to me that this practice must be at once seen to be highly useful, and right to be everywhere introduced by special stipulation; because an incoming tenant is thereby enabled to continue the same system of agriculture observed by his predecessor; he is saved the risk of either losing the straw of his predecessor's last crop, or paying an extravagant price for it at a sale; or of bringing from a distance so bulky a commodity as straw to his new farm. And it further appears to me, that Mr Gordon saw this, and meant to introduce into his estate in Aberdeenshire

that custom, observed in two of the finest counties in Scotland. He therefore stipulated 'the whole fodder to be used upon the 'ground, and none sold or carried away at any time, hay only 'excepted; and all the dung to be laid upon the farm the last 'year of the lease.'

"I cannot bring myself to think that this clause merely embodies in writing, what is understood to arise from common law. 1st, 'The whole fodder to be used on the ground.' To this extent the clause is in conformity to common law; because a tenant during his lease must use straw on the ground, except in the neighbourhood of great cities, where manure is to be had in abundance, in which case straw is universally sold. But the clause goes on to provide thus: 'And none sold or carried 'away at any time, hay only excepted.' This is directly in the face of the common practice, which is to sell the straw of the outgoing crop; for surely the last year of the lease is excluded by the words 'at any time,' and the exception of hay, which may be 'sold at any time,' fortifies the exclusion of the sale or carrying away of the straw. 2d, It is as much the practice of the country to sell all the dung remaining after sowing barley of the last crop, as it is to sell the straw; but by the stipulation in question, all the dung on the farm is to be laid on the farm the last year of the lease, which is another proof of the meaning of that article, to exclude or shut out the common practice of the country. Lastly, In point of execution, the obligation is not laid on the tenant; but it is, that the whole fodder is 'to be used 'upon the ground, and none sold or carried away at any time;' whereby it is to be left gratis to be used by the landlord or incoming tenant. And what appears to me to fortify this is, that although the stipulation relative to the dung be as much against common custom as that to the straw, there has been no sort of dispute about it. I have already mentioned, that there is no need for the law contriving means to carry the stipulation into execution, for the means are notoriously known and used in Berwickshire and East Lothian, and have been so for probably a hundred years.

"Various cases have been quoted by the tenant Anderson, in support of his argument, that he is entitled to sell his straw; but none of them appear to me to be in any way applicable. In the case of Forrester *v.* Wright, there was no question about the straw. The dispute related to a quantity of dung, and the obligation in the lease was 'to lay the whole dung thereon (viz. 'the farm), the last year of the tack at bear seed-time.' The

May 19, 1826. tenant hoarded his dung, and did not lay it on the ground, and therefore his successor was found entitled to 450 yards of dung without paying for them. In the case of the Earl of Wemyss, 10th June 1801, the tenants were bound, 'during the currency 'of their lease, to consume upon the grounds of the lands the 'whole straw and fodder of every kind, hay excepted, produced 'by the said lands, and to lay the whole dung thereby produced 'on said grounds.' It follows, of necessity, that the out-going crop, both corn and straw, belonged to the tenants, because the lease was at an end when the last crop was reaped, and the obligation was laid on them during the currency of the lease only. But the Court found the landlord entitled to retain all the dung on the farm, without payment; and in so far as the judgment relative to the dung goes, it appears to me to be decidedly clear against the tenant in this cause, because it held that the tenant was not entitled to the value of the dung bona fide remaining after bear seed-time, when by common law he was entitled to it.

"The tenant has quoted the lease, given by Mr Gordon, of one of his farms to Provost Robinson, as in his own favour; but that lease seems to me to demonstrate, that the article in the conditions of lease, on which this question turns, was distinctly understood on all hands to mean an exclusion of sale of straw at all times, comprehending the last crop as well as during the lease. For Mr Robinson would not consent to this condition of not selling the straw of the last crop, and took a lease to himself in these terms:—'And the said George and William Ro-'binson farther bind and oblige themselves and their foresaids 'to give actual residence by themselves, or a proper overseer 'or servant to manage the farm, and keep sufficient stocking 'upon the lands hereby let, and to consume with cattle upon 'the farm the whole fodder raised thereon, hay only excepted, 'and not to sell or carry away any part of the said fodder, at 'any time during the currency of the lease; it, however, being 'understood and agreed, that the said George and William 'Robinson, or their foresaids, are to be allowed for a reasonable 'time the use of the barns, and other necessary accommodation 'for thrashing out their last or outgoing crop; and that they 'shall receive from the landlord, or incoming tenant, the value 'of the straw or fodder of said crop, as the same shall be ascer-'tained by persons to be mutually named.'

"Now, it appears to me quite undeniable, that Provost Robinson understood the articles in the conditions of lease to mean positively, that the straw of the outgoing crop was to be left

without payment for it; and not consenting to that, he agreed to leave it, but stipulated to receive its value, and took a lease to himself, departing so far from the stipulation in the articles of lease; whereas the tenant in this case possessed in virtue of these articles. Contrast the two clauses. By the one in question, the whole fodder is to be used on the ground, and none sold or carried away 'at any time.' By Robinson's lease, he is 'not to sell or carry away any part of the said fodder during 'the currency of the lease,' but provides that he shall leave the straw of the last crop on receiving payment of its value; thereby proving his idea, that the exclusion of sale and carrying away 'at any time,' comprehended the straw of the last crop, as well as of the other years of the lease. With much deference, this appears to me to prove incontestably, that the meaning of the clause was fully understood in the country; that the means of executing it were also understood, as it was provided that the use of the barns and other necessary accommodation should be given to him. This is of no inconvenience to the incoming tenant, because, having no crop, he needs neither barn-yard nor barn, nor the full compliment of horses and servants afterwards requisite, to thrash out his corn and carry it to market. May 19, 1826.

"I have said, that this is the practice in Berwickshire and East Lothian; and I believe, that in these counties the straw is steelbow; viz. that the tenant gets the straw at his entry, and leaves it at his removal; but steelbow must have had a beginning. A landlord must have agreed with his tenant that the straw of the last crop was to be left, and probably got a smaller rent during the lease than he would have obtained if the tenant had sold the straw of the last crop. In the same way here, Mr Gordon appears to me, and I think he was understood by the people on his estate, to have intended to introduce steelbow straw in Aberdeenshire; and I think that he carried that intention into execution by the clause in question; for although there be no provision for executing it, the means are well known, and in very few of the leases of East Lothian or Berwickshire, is anything said on the subject. The law provides the means where the end is in view.

"In the case of the Duke of Roxburghe *v.* John Roberton, the clause in the lease was, 'And at no time shall the said John 'Roberton, or his aforesaids, sell or give away any of the hay 'or straw of the farm, which shall always be spent on the 'ground.'

"Observe, 1st, that here is a prohibition equally applicable to hay and straw: 2d, That the tenant was not bound to spend them

May 19, 1826. on the ground; but it is declared, that they shall be spent on the ground, and at no time any part of them sold or given away. I cannot agree that the last year of his lease formed any exception; it was excluded by the words 'at no time.' This Court thought otherwise, but the judgment was reversed in the House of Lords; and I confess that I assent to every word that is contained in what is given to us as the opinion of the Noble Lord on the woolsack, when giving judgment in that case. It is in precise conformity to what I consider to be the true interpretation of the clause in Roberton's lease. It is in precise conformity to the practice of Berwickshire, East Lothian, and must be so wherever such a stipulation is made.

"But compare the present case with that of Roberton, and the conclusion will be found to be identically the same. The clause in the articles is thus conceived, 'The whole fodder to 'be used upon the ground, and none sold or carried away at any 'time, hay only excepted, and all the dung to be laid upon the 'farm the last year of lease.' There is no question about the dung in this cause. The only debate is concerning the straw; and such being the point at issue, I cannot see the smallest shade of distinction between this case and that of Roberton. In the latter, the tenant was 'at no time to sell or give away 'any of the hay or straw of the farm, which shall always be 'spent on the ground;' and in this case, the stipulation is, 'the 'whole fodder to be used upon the ground, and none sold or 'carried away at any time.' In both cases the whole fodder is to be used upon the ground; that is settled; and as the outgoing tenant is not bound to use it, nothing is required of him that he cannot fulfil. In both cases sale is prohibited at any time. In the former, it is said, that 'at no time' shall there be a sale of straw; and in this case the words are, that none shall be sold or carried away 'at any time.' It is utterly impossible for me to construe these words so as to interpolate the words 'except the straw of the outgoing crop.' The stipulation is, that the tenant shall sell or carry away none of the fodder at any time; and I cannot interpret this so as to say, that the last year of his lease is not 'at any time,' and not being at any time, he may sell the fodder of the last or outgoing crop.

"And I am no way moved by there being no provision for his thrashing out the straw of the waygoing crop; because, 1st, Such practice is no novelty in the best cultivated parts of Scotland, as I have already observed; and, 2d, The common law will compel the landlord, as it has done in Berwickshire and East Lothian, to provide the means of his tenant performing the obligation which has been imposed on him; or failing such pro-

vision, will restrain the landlord or the incoming tenant per- May 19, 1826.
sonali objectione from insisting for the 'due and forfeit of the 'bond.'

"It is with the utmost deference, as well as with reluctance, that I presume to differ from so many of my brethren; but I feel myself emboldened to do so by seeing a judgment of the highest Court in the kingdom, on a case identically the same, in conformity to my opinion; and when I feel perfect conviction that the tenant in this case must have understood the stipulation in the articles under which he possessed his farm, to have the same meaning which I affix to it, I cannot permit him to give it a different interpretation, in order to pocket the price of the straw.

"I have made no observation upon any of the specialties in the cause, because I do not think that these were intended to be submitted to my consideration."

In consequence of these opinions, the Second Division, on the 11th March 1825, found, 'That in this case the tenants are entitled 'to dispose or carry off the straw of the waygoing crop. There- 'fore, alter the interlocutor complained of; dismiss the advoca- 'tion, and remit the cause simpliciter to the Sheriff, and de- 'cern, &c.—Find the petitioner entitled to expenses,* and at 'the same time assoilzied in the action of damages.' The First Division also, after having previously to the consultation pronounced a judgment on a specialty (which was afterwards explained did not exist), and stating that they had consulted with the other Judges, 'in relation to the general question at issue, be- 'tween the parties in this cause, recalled their interlocutor, 'and found that the 16th article of the general articles of lease 'regarding the estate of Cluny, cannot be held as applying to the 'crop of the last year of the lease, and that the right of the par- 'ties respecting the same must be regulated by the common law 'and usage of the country; and therefore, repelled the reason of 'advocation,—remitted the case simpliciter, to the Sheriff;' and found Colonel Gordon liable in expenses.†

Colonel Gordon then entered an appeal, both on the advocation and the action of damages, against Robertson and others.

Appellant.—The clause is explicit and unambiguous, and ought to be interpreted according to its obvious meaning and import. The articles and conditions had never been departed

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* See 3 Shaw and Dunlop, No. 440.

† See 4 Shaw and Dunlop, No. 12.

May 19, 1826. from. Take the custom and common law to be, that the fodder of the last year is excepted—this exception is, by written agreement and contract of parties, excepted. The argument ab inconvenienti, from the want of accommodation to the outgoing tenant, cannot affect a deliberate contract of parties, nor indeed does any practical inconvenience ensue. Even if the tenants had received no straw at entering, it is obvious that the rents were adjusted in reference to the whole obligations in the leases. But the very point at issue has already been tried and settled by the Court of last resort.

Respondents.—By common law and practice, although the fodder of the current year must be consumed on the farm, yet the tenant, except in the case of steelbow, is entitled to sell or dispose of the fodder of the waygoing crop, as he pleases, and there are obvious and sound reasons for such a rule. The straw is the exclusive property of the tenant, and if he cannot take it away, he must lose it altogether; for the appellant denies that he is bound to afford accommodation to the outgoing tenant, and without that accommodation the tenant cannot use the fodder on the farm. Even if the outgoing tenant had a legal right to barns, &c., for that purpose, and had access to them, how could he be expected to keep up two establishments? The clause, in point of fact, was not intended to control the rights of parties as at common law, and the practice of the country, but merely to express the law of landlord and tenant; therefore, what is satisfaction to law, is satisfaction to this stipulation; no doubt common-law rights may be altered or relinquished, but that is not to be presumed from words of vague and doubtful meaning. 'At any time,' obviously refers to the currency of the lease; but the waygoing crop is reaped after the termination of the lease, and the removal of the tenant. The clause was merely introduced to corroborate the obligations implied in a lease, and not to abrogate them. The respondent's pleas are supported by various authorities in the law of Scotland. The case decided in the Court of last resort, is materially different from the present; besides, the 'articles and conditions' in question, were departed from by the tenants, and the departure sanctioned by the landlord.

The House of Lords found, that the tenants were not entitled to carry away the straw or fodder of the waygoing crop; and therefore ordered and adjudged that the interlocutors complained of be reversed, and that the Court of Session proceed to decide the other points of the cause.

LORD GIFFORD.—My Lords, there is a case, which stands for the judgment of your Lordships, which involves a question of considerable importance, not only in itself, but as it affects a judgment of your Lordships' house: I refer to the case of Gordon and Robertson. I must confess, I approach the consideration of this case with considerable concern; and I hope your Lordships will excuse my saying so when I state the nature of it. May 19, 1826.

My Lords, the appellant in this case is Lieut.-Colonel Gordon, and the respondents were tenants of different farms belonging to the extensive Barony of Slains. The leases were all of the same date, and were for 21 years, and expired at Whitsunday and the separation of the crop in 1822. My Lords, with the exception of one tenant, Mr Robinson, none of the tenants possessed under regular leases, but all of them held by separate missives, as they are termed, in reference to which certain printed articles and conditions were laid down by Mr Gordon, relative to the cultivation of his estate. My Lords, it may be necessary that I should call your Lordships' attention, in this stage of the cause, to the articles and conditions which were proposed by Mr Gordon. They were to be for 'a twenty-one 'years' lease to be granted, and the tenant to be tied down to actual re- 'sidence; assignees and subtenants, legal or voluntary, without the pro- 'prietor's consent, to be excluded; the farms to be let, and marches lined 'out and fixed, agreeable to Mr Johnston's plan; supposing the above rent 'to be L.2500, Mr Gordon agrees to allow L.400 a-year of it for the 'first three years, to be given the tenants in lime, in proportion to their 'rents, retaining a due proportion for the three farms still under lease; 'Mr Gordon to purchase the lime, but the tenants to carry it, and furnish 'certificates of what they receive and use.'

Then there is this stipulation, by which Mr Gordon was to allow 'as 'much of the first year's rent, as, when added to the present value of big- 'gings belonging to him on each farm, will be equal to the said year's 'rent, for building suitable dwellings and offices, agreeable to the plan 'fixed by him, the dimensions to be larger or lesser in proportion to the 'rent and extent of the farm; the tenants finding all the carriages, and 'recompensing the outgoing tenant where he has any claim for meliora- 'tions.'

Then, if the tenant wishes to make enclosures 'by making the outer 'fences stone dykes, and the inner subdivisions ditch and hedge, lined out 'to the satisfaction of the factor for the time, they shall be allowed by the 'heritor, at the expiry of their lease, the value of such enclosures and 'fences, according as shall be valued by men mutually chosen, providing 'such enclosures are then fencible.'

I am detaining your Lordships by enumerating these articles, in order to show you the particularity of them, and the nature of the stipulations, both on the part of the tenant and on the part of Mr Gordon. Then it stipulates, 'that the victual rent should be payable 'twixt Yule and 'Candlemas, and the money rent at Martinmas and Whitsunday each 'year; and the tenants should be allowed to give houses, yards, and por-

May 19, 1826. ‘ tions of land to such cottars only as were necessary for assisting in the ‘ culture of the farm; and that the proprietor should pay cess and stipend, ‘ but the tenant to pay schoolmaster, ground officer, moss grieve, statute ‘ labour, and all other incidental and parochial burdens or assessments ‘ imposed or to be imposed.’ There is then a stipulation as to the rotation of cropping; and that the tenant was to have the ‘ privilege of firing ‘ for their own use from the common moss of the estate, and of marl ‘ shell, or other common manure.’ Then there comes a stipulation, which I call your Lordships’ attention to: ‘ The whole fodder to be used upon ‘ the ground, and none sold or carried away at any time, hay only except‘ ed; and all the dung to be laid on the farm the last year of the lease.’

My Lords, the respondents entered on the farms under these conditions at Whitsunday 1801. Your Lordships perceive, therefore, that the term expired in 1822, and of course before the last crop was taken from the ground. Mr Gordon, discovering that the tenants meant to insist that they had a right to take the crop and carry off the straw, he made an application to the Sheriff of the county, setting forth the terms of the lease, and stating that his prayer was to ordain the tenants to use the fodder of the present crop upon the respective farms where it presently grows on the lands of Slains; and in the meantime to prohibit and discharge them, and each of them, from carrying off any part of the fodder of the said farm. The object of that proceeding was to prevent their carrying off the straw of the last crop. The respondents appeared to resist the application, on the grounds which have been already alluded to. The Sheriff, on the 4th November 1822, gave the following deliverance:—

‘ Before farther answer allows the procurator for the petitioner to see the ‘ quadruplies, and appoints the petitioner to state whether or not, on the ‘ supposition it shall be found that the respondents must use the fodder ‘ in question, as concluded for in the petition, the petitioner will agree to ‘ afford them accommodation for that purpose, as stated in the quadru‘ plies,’ which was a sufficient barn for threshing out the crop, and a sufficient accommodation of houses to contain their cattle while consuming the straw; and finally, he pronounced an interlocutor, by which he allowed the tenants ‘ to remove and appropriate the fodder of their outgoing crop, ‘ according to the established usage of the country, reserving action to ‘ them individually against the petitioner for damages suffered by the ‘ illegal detention of the same.’

The appellant brought the judgment of the Sheriff under the review of the Court of Session. A bill of advocation was passed, and the cause came before Lord Cringletie, and, as Lord Ordinary, he pronounced an interlocutor, in which he stated, that, ‘ In respect of the judgment of the ‘ House of Lords, in the case of the Duke of Roxburghe against Robert‘ on, remits to the Sheriff to recall the interlocutors complained of, and ‘ to hear the parties on the allegation, that the articles of regulation for ‘ the estate of Slains were departed from, and never observed during the ‘ leases of the respondents, as well as any of the other points of the cause, ‘ and dispenses with a representation.’

Your Lordships perceive that the Lord Ordinary remitted the cause to the Sheriff to recall his interlocutors; but against this interlocutor the respondents presented a reclaiming petition. The cause came before the Second Division of the Court of Session, and they pronounced, on the 22d of May 1824, the following interlocutor:—'The Lords of the Second Division, in terms of the Act of Parliament thereanent, require 'the opinions of the Judges, either as a collective body or as individual 'Judges, upon the legal construction of the clause in the regulations re-'lative to the leases of the estate of Slains therein referred to, especially 'as n this case.' In consequence of this, their Lordships of the First Division, and the permanent Lords Ordinary, took the case into consideration; and their Lordships of the First Division and the permanent Lords Ordinary, with the exception of Lord Cringletie, concurred in an opinion altogether favourable to the respondents, 'being of opinion that 'the respondents were entitled to carry off the straw of the waygoing crop.' My Lord Cringletie was the single Judge dissenting from that opinion; and he dissented from it mainly upon the principle of a decision to which I will call your Lordships' attention, considering that this case could not be distinguished from a case which was heard by your Lordships' House in the year 1820, of the Duke of Roxburghe *v.* Roberton. May 19, 1826.

It appears that by the custom of Scotland, (when I say the custom of Scotland, I mean the prevailing usage of a great part of Scotland,) where there is no stipulation between a landlord and tenant with respect to the straw or fodder, the tenants usually enter after the regular expiration of the term to reap the crop; and therefore, having the crop to reap after the expiration of their term, are entitled, where there is no stipulation to the contrary, to take away the straw of the waygoing crop. And, my Lords, I observe the learned Judges, in giving their opinion, talk of this—sometimes as the common law—and at others, as the custom of the country; but it appears not to be universally prevailing, for in parts of Scotland, particularly in East Lothian, I think, and Berwickshire, the custom prevails, that the incoming tenant has the straw of the last crop of the outgoing tenant, and then he leaves on the land he is quitting the straw of his last crop: And this is called receiving in steelbow.

The learned Judges appear to have been of opinion that this common law or custom ought to prevail in this case, notwithstanding the stipulation that the tenant has entered into, and although the articles in question bound him not to carry off or sell at any time; the words of the obligation being, 'the whole of the fodder to be used upon the ground, 'and none sold or carried away at any time, hay only excepted; and all 'the dung to be laid on the farm the last year of the lease.' They consider that, with reference to the usage, it ought to be construed with the exception of the last crop; and no less than thirteen of the learned Judges (which makes this a painful case to deal with, if your Lordships shall differ from that opinion) expressed an elaborate opinion, that the custom of the country, or the common law with respect to the waygoing crop, is to prevail, notwithstanding the stipulation introduced into these

May 19, 1826. articles, and that that stipulation ought not to be considered as inconsistent, but rather as made with a view to the general custom of the country.

But I should state to your Lordships what they admit in the 5th division of their opinion. They state that, 'In the contract of lease parties 'may agree to what conditions they think proper, and if they are lawful, 'they must be made effectual by a court of justice, and if plainly and 'directly at variance with the practice of the country and the rule of the 'common law, it must be held by the Court that the parties did truly 'mean to make a practice for themselves; but the mere putting into wri-'ting an obligation arising from the nature of the contract itself, and al-'ready recognised by the common law, will not bestow on that obligation 'a different effect from what it would otherwise have had, nor will it 'warrant such an interpretation to be put thereon as is contradictory to 'the common exception and understanding of such obligation, and such 'as is adverse to the true and real interests of the parties.' Then they say that this clause, 'the whole fodder to be used upon the ground, and 'none sold or carried away at any time, hay only excepted, and all the 'dung to be laid upon the farm the last year of the lease,' is not an uncommon provision in other tacks.

They conclude thus:—'Clauses, therefore, which are so generally 'expressed, without imposing co-relative obligations on the part of the 'landlord for the last year, can be held to apply to the conduct of the 'tenant only during his actual residence and the subsistence and exist-'ence of the lease, and as imperfect for the last year; and of course, that 'the clause and the consideration must be viewed as nothing but an ex-'position of the common law, which requires the tenant to consume the 'fodder during the subsistence of the lease in all its parts.' They also say, that 'If the landlord'—I beg your Lordships' attention to this—'If 'the landlord has a desire to alter the common law consistently with the 'rights and interests of the parties in this contract, he has two simple 'known remedies, either to take the tenant bound in the lease to sell the 'outgoing crop to him or incoming tenant, at a valuation, or at once, at 'the commencement of the new lease, to purchase the right of the fodder, 'and to declare the same steelbow; and so the straw of the outgoing 'tenant will be deliverable in succession from tenant to tenant. These 'modes are well known in the practice of Scotland, and particularly the 'last, from the earliest times, and in those districts of Scotland where 'agriculture has been best conducted, that mode of steelbow has been 'adopted with much advantage, and other regulations as to the straw of 'the last crop have been understood and tacitly agreed upon between the 'outgoing and incoming tenant, for their mutual comfort and advantage, 'but such partial usage cannot form the law of Scotland, or regulate the 'tenantry in situations totally different.'

Now, my Lords, I come to a passage which I read with considerable pain, because I apprehend that the decisions of your Lordships' House, whether they are on Scotch cases, or whether they are on English cases,

or whether they are on Irish cases, are to be taken when so pronounced as a rule for decisions in future; and however the opinions of learned Judges may differ from the opinions that are entertained by your Lordships, or by those who advise your Lordships, I apprehend, that being once pronounced by your Lordships, it is their duty to follow and to carry into effect those decisions. My Lords, they make this remark upon a decision to which I am about to call your attention. 'Taking into consideration all these reasons, we cannot consider the authority so much relied on by the petitioner as decisive of the present case; and we are persuaded that the judgment must have proceeded, in some measure, from the want of a full exposition of the common law and practice of Scotland.' My Lords, when I call your Lordships' attention to that case, and to the judgment which was pronounced by the Lord Chancellor upon it, I think your Lordships will perceive that the Lord Chancellor, in point of fact, acted with especial reference to what was considered the common law of Scotland, and that he also acted with a reference to the undoubted principle, that it was competent for the landlord to make what stipulations he pleases. The tenant, when he enters into a lease, if it is disadvantageous to him to leave the fodder or the straw, takes that into consideration in the rent which he pays. My Lords, in this case there is another stipulation with respect to the dung; and I find that the learned Judges, particularly my Lord Cringletie, says, that stipulation is contrary to what is considered to be the common-law usage in Scotland with respect to the dung. The stipulation respecting the dung is, that all the dung be laid upon the farm the last year of the lease. My Lords, what does my Lord Cringletie say upon that? He says, 'This is directly in 'the face of the common practice, which is to sell the straw of the outgoing crop. It is as much the practice of the country to sell all the dung 'remaining after sowing barley of the last crop, as it is to sell the straw; 'but by the stipulation in question, all the dung on the farm is to be laid 'on the farm the last year of the lease, which is another proof of the meaning of that article to exclude or shut out the common practice of the 'country.' If it be the common practice, that where there is no stipulation between the landlord and the tenant, the tenant shall be at liberty, in the last year of the term, to sell the dung remaining after sowing barley of the last crop; it appears to me, that in the case of a stipulation that all the dung shall be laid upon the farm the last year of the lease, the common usage and common law of the country being that the tenant was not bound to lay it, it might be as well contended that he had a right to take off the dung, which is not contended in this case.

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Your Lordships will perceive, that in this case, as well as in the case of the Duke of Roxburghe *v.* Roberton, which is referred to in a part of this judgment, there was a written stipulation between the landlord and the tenant; and if that written stipulation be distinct and clear in its terms, (it being competent for the parties to make those stipulations they think fit,) no common-law usage can negative the contract of the parties. I have read to your Lordships a number of the stipulations, and your

May 19, 1826. Lordships will perceive there is a variety of particular stipulations with respect to rotations of cropping, very beneficial, for aught I know—(ignorant as I profess myself to be upon that subject, not that I think an ignorance of that subject prevents the coming to a right conclusion on this contract)—but, at the same time, the stipulation with respect to the rotation of croppings in this contract may be contrary to that which, in the absence of the stipulation, would be required by the landlord, or agreed to by the tenant. But what is to prevent Mr Gordon introducing upon his farm that which is admitted to be the custom and usage in East Lothian and Berwickshire? What is to prevent his saying, I will stipulate with these tenants that they shall leave the fodder of the last crop, because I mean to introduce this mode of husbandry into my farm; the incoming tenant shall have the advantage of that, and I will not let my lands without stipulating that he shall have it. The learned Judges do not say that it is illegal to make stipulations contrary to the common usage and common law of the country. They admit that it is legal to make such stipulations, and, if such stipulations are made in precise form, it is admitted that those stipulations must be obeyed.

My Lords, this case comes then to a very narrow question—What is the meaning of the stipulation in question? But what was the question in the Duke of Roxburghe against Roberton? After all the attention I have been able to give to this case, I am perfectly unable to find any cause for the observations to which that judgment of your Lordships has given rise; and I did take the liberty of saying, when the case was before your Lordships on a former day, that, considering the expressions which had been used by the learned Judges, I thought it was incumbent upon your Lordships to come to a solemn, deliberate, and dispassionate consideration, uninfluenced by anything which might have passed in the Court below upon the subject of that judgment; and I very much regret that in this case there should have been introduced into the printed papers, after the well-considered, deliberate opinions of the learned Judges of the Court below, any hasty observations made at the time this cause was there heard, and which one cannot conceal from one's self were intended to throw discredit upon your Lordships' judgment in the preceding case, being intended to have the effect of showing that your Lordships' judgment had not proceeded with that attention to the law of Scotland which ought to be paid to it.

I have now a note of the judgment of your Lordships in the case referred to, and I will state to your Lordships what that case is, which I will read from the report published by Mr Bligh,—'In 1790, a farm 'called Newton, being parcel of the entailed estate of Roxburgh, was let 'by John, Duke of Roxburghe, for twenty-one years from that date, to 'John Roberton, the respondent. In the lease there was a clause in 'these words: Farther, the said John Roberton, or his foresaids, at their 'removal from the said lands, shall be obliged to leave upon the ground 'all the dung and manure of the preceding year, but the value thereof 'shall be paid to them by the succeeding tenant, as the same shall be as-

'certained by two neutral men, one to be chosen by each party; and at 'no time shall the said John Roberton or his foresaids sell or give away 'any of the hay or straw of the said farm, which shall always be spent 'on the ground.' Your Lordships observe these words—'This lease ex- 'pired in 1811,' but, by agreement with the factor, the tenant was permitted 'to possess until Whitsunday 1815, on the same terms as in the 'lease, which was to be held as continued to that period.' In August 1815, the tenant informed the manager of the Roxburgh estate, 'that he 'meant to sell the whole straw of that last crop, unless the appellant 'would take the crop, both corn and straw, at a valuation. The appel- 'lant having no occasion for the corn declined this proposal, stating, that 'he conceived the straw could not be sold, but must be consumed or left 'on the farm, without valuation to be paid by the landlord; but as the 'respondent disputed that point, the appellant proposed that the straw 'should be left, a valuation being put upon it: and the appellant (the 'Duke of Roxburghe) bound himself to pay that valuation in case it 'should appear that the tenant was not bound to consume or leave the 'straw upon the farm. This proposal was rejected by the respondent, 'who threatened to sell the straw. The appellant thereupon obtained 'letters of suspension and interdict. These letters were afterwards brought 'to be discussed before Lord Pitmilly, who pronounced the following in- 'terlocutor:—The Lord Ordinary having considered the foregoing minute 'for the charger, with the answers thereto for the suspender, and whole 'process, repels the reasons of suspension, and recalls the interdict, and 'decerns. A representation being made against that decision, another 'interlocutor was pronounced, in which the Lord Ordinary adhered to the 'interlocutor represented against. A petition was then presented by the 'appellant to the Second Division of the Court of Session, and their 'Lordships having heard the petition, they adhered to the interlocutor 'complained of, and refused the desire of the petition; their opinion be- 'ing, that, notwithstanding this stipulation in the lease, he was entitled to 'carry off the straw produced by the crop of last year.'

My Lords, that case was argued here precisely on the same ground as the present, namely, the custom and usage of the country; and that, therefore, that custom and usage was to control the natural meaning of those words, and that those words were to be made consistent with the usage and custom. On the other hand, it was contended, that usage and custom had nothing to do with it, but that the House must be governed, and the Court of Session must be governed, by express agreement.

The Lord Chancellor pronounced this judgment, which I am the more anxious to read, that your Lordships may see the grounds on which the Lord Chancellor proceeded. After stating the terms of the tack, he says —'The tenant relies upon the provision expressed, that the dung and 'manure is to be left upon the ground, and paid for, according to a valu- 'ation, but that as to the hay and straw, it is not to be left or paid for; 'the absence of any such provision (according to this argument) shows

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'that the tenant was to be at liberty to carry and take away, at the expi-
'ration of the lease, the hay and straw of the last year; that the prohibi-
'tion extends only to selling or giving away, and as to the expression
'which provides that the hay and straw shall be always spent on the
'ground, it is to be construed as applicable only to the currency of the
'lease, and not to an act which takes place at or after its termination. It
'is, moreover, contended on his behalf, that as he, or those in whose
'right he stands, upon their accession to the farm, received no hay or
'straw, which was taken away by the preceding tenant, he will receive no
'consideration for those articles, unless he is permitted to take them
'away; but this is an argument which cannot be admitted to have weight
'against the expressions, or to affect the fair construction of the instru-
'ment which ascertains the right of the parties. Supposing all the facts
'to have been proved which ought to form the ground of such an argu-
'ment, the law requires us to presume a consideration for this sacrifice on
'the part of the tenant, in the nature and conditions of the contract, and
'the amount of the rent to be paid by him. He binds himself by express
'obligation, and it must be inferred and implied, that in his contract, he
'stipulated for some equivalent benefit. In the case of a reciprocal con-
'tract, such as this, a party cannot be admitted to say that he has no con-
'sideration for a sacrifice which he binds himself to make. When a te-
'nant is making such a bargain, is it probable that he should forget his
'interest so far, as not to provide, in the other conditions of the lease, a
'consideration for what he gives up to the landlord?

'The dung and manure is to be left on the ground, and paid for. An
'inference from the provision is drawn, that what, according to the ex-
'pressions of the contract, the tenant is not bound to leave, he may carry
'away. But that is not a conclusive argument, because it is necessary to
'attend to the further provisions of the lease. Nothing is said as to any
'payment for hay and straw; and 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. 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 in-
'strument leave us at liberty to enter into conjectures as to any intention
'except to the last year of the lease.

'The case put for the appellant, of an accumulation of hay and corn
'during three years, or more, which might be found upon the farm, du-
'ring the last year, shows the consequence to which the argument for the
'respondent would lead. The manure is collected and prepared by the
'labour of the tenant, but hay and straw are almost the spontaneous
'growth of the land. It might be reasonable, therefore, that such a dif-
'ference as we find in this contract, should be made as to those respective
'articles.

'The tenant, in this lease, was to enter upon the arable lands at the se- May 19, 1826.
'paration of the crop, and to quit at the corresponding period. In such
'a case, where no special provision is made by contract, the law of cus-
'tom may qualify the right of the incoming tenant, and give to the out-
'going tenant certain privileges for the purpose of threshing, after the
'expiration of his lease. That is a question upon the customary law of
'Scotland, which it is not necessary that we should deal with in this case.
'Assuming or admitting the existence of such law, founded on custom,
'we have here to construe a written contract, and if the Scotch laws are
'to be administered on the same principles as English law, or any law
'founded on principle, we must hold that the engagement of parties to
'each other by the express stipulation of a written instrument, exclude all
'consideration of the custom of the country.

'Resting upon such principles for the direction of our judgment, can
'we hold that the words, "at no time shall sell or give away the hay
'and straw, but that the same shall always be spent on the ground," are
'consistent with a right in the tenant to collect hay and straw during the
'last year, or any preceding years, and to carry away what he has col-
'lected at the expiration of the tenantcy?' Judgment reversed.

My Lords, in that case his Lordship felt himself bound to recommend the reversal of the judgment of the Court below, and it was accordingly reversed, taking care to express a declaration to this effect, that according to the true intent and construction of the tack, the tenant was not entitled to sell or give away any of the hay and straw at any time during the continuance of the tack, or at the time of the expiry of the tack.

In this case, the words are almost the same, or similar to those which were used in the Duke of Roxburghe's case; 'and at no time shall the 'said tenant sell or give away any of the hay or straw of the said farm, 'which shall always be spent on the ground.' The language of the stipulation in this case is this: 'The whole fodder to be used upon the 'ground, and none sold or carried away at any time, hay only excepted.'

Now, my Lords, in addition to the judgment as stated in the report, the parties, in some of the papers, have printed what is supposed to be, and probably is, a correct judgment, as taken from the short-hand writer's notes. I do not perceive there is any material difference between the two, though, in point of language, there may be some variation; but I do not perceive, in the shape of arguments, any difference between the two statements of the noble and learned Lord's speech. He there concludes by saying, 'That the very object of having a written contract in some 'cases, is to shut out the custom of the country, and where the landlord 'and his tenant agree that the tenant at no time shall take hay or straw 'off the premises, that can never mean that he shall not do so for twenty 'years, but that in the last year he shall employ himself at any time, from 'the beginning of January, to the last day of December, in taking it off 'the premises.' His Lordship says, 'I remember a case that occurred 'when I was much younger than I am now, on the question of copy-right, 'when this House required the attendance of the learned Judges, and they

May 19, 1826. ‘ were here engaged three days in giving their opinions ; but when it came ‘ to the turn of Mr Baron Perrot, he shortly said, that the statute of ‘ Queen Anne provides, that the author should have a right to his work ‘ for fourteen years, and no longer ; that for the life of him, he could not ‘ construe these words, “ and no longer,” to mean “ for ever,” or any time ‘ beyond the expiration of fourteen years.’ Upon which my Lord Chancellor says, ‘ 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.’

My Lords, therefore, in point of principle, I should say, that no distinction can be raised between the two cases, and, with great deference, I should have thought the one must have been governed by the other. Here is a decision proceeding upon as solemn and sound a principle as can well be stated, namely, when you have a written stipulation between a landlord and tenant, you are to construe that stipulation according to the fair meaning and import of the language used, and that it ought not to be controlled by any supposed custom or usage which might govern the relation between them in the absence of such express stipulation.

There is another circumstance to which I would direct your Lordships' attention, in the argument of the learned Judges in the Court below. In pronouncing their opinion, they take notice, that one of the parties who was about to enter into an agreement for a tack of a similar kind with Colonel Gordon, had his tack regularly reduced into a formal shape ; and it is obvious that that gentleman, fully understanding the object of that stipulation, says, I am not content with it, but I will have a different stipulation inserted in my case, and accordingly your Lordships will find, that in the tack granted to Mr Robinson, there is this stipulation which is stated in Lord Cringletie's judgment : ‘ And the said George and Wil- ‘ liam Robinson further bind and oblige themselves, and their foresaids, ‘ to give actual residence by themselves, or a proper overseer or servant ‘ to manage the farm, and keep sufficient stocking upon the farm hereby ‘ let, and to consume with cattle upon the farm the whole fodder raised ‘ thereon, hay only excepted, and not to sell or carry away any part of the ‘ said fodder at any time during the currency of the lease ; it, however, ‘ being understood and agreed that the said George and William Robin- ‘ son, and their foresaids, are to be allowed, for a reasonable time, the ‘ barns, and other necessary accommodation for threshing out their last ‘ or outgoing crop, and that they shall receive from the landlord, or in- ‘ coming tenant, the value of the straw or fodder of said crop, as the same ‘ shall be ascertained by persons to be mutually named.’ Why, my Lords, the learned Judges seem to think, that that stipulation being inserted in Mr Robinson's tack, shows what is the understanding between the parties as to the nature of that stipulation to which I have called your attention in the original article. My Lord Cringletie observes upon this : ‘ Now, it appears to me quite undeniable that Provost Robinson quite ‘ understood the article in the conditions of lease to mean positively that ‘ the straw of the outgoing crop was to be left without payment for it ; ‘ and, not consenting to that, he agreed to leave it, but stipulated to re-

'ceive its value, and took a lease to himself, departing so far from the 'stipulation in the articles of lease; whereas the tenant, in this case, 'possessed in virtue of the articles.' Therefore he says, and I own it appears to me that the conclusion is well founded, that, looking to Robinson's stipulation, which he insisted upon having in that lease, that without that stipulation, he was bound to leave the straw belonging to the waygoing crop; but he was at liberty to say, as this tenant might say, that he would not consent to such a contract unless paid for the value of the straw by the incoming tenant. Now, my Lords, you will observe, that it is not, as the learned Judges think, that that stipulation enabled him to carry away the straw; but he felt that that stipulation bound him to leave the straw, and therefore he says, I will contract to receive from the landlord, or the incoming tenant, the value of the straw or fodder of such outgoing crop; therefore, if any argument is to be drawn from the stipulation in Mr Robinson's tack, it bears against the general reasoning of the learned Judges. May 19, 1826.

Upon the whole, my Lords, it appears to me, that, acting upon the sound principle laid down in the Duke of Roxburghe's case, and looking at the express stipulation entered into by these parties, conceiving, as I do, and as it is admitted by the learned Judges, that it is competent for parties to make this stipulation, contrary to, and in spite of, any custom or usage against it, I cannot arrive at any other conclusion than that the tenant is bound not to carry off the crop at any time during the continuance of that lease.

My Lords, I may just read to your Lordships the last part of my Lord Cringletie's judgment, where he is commenting upon the language of the stipulation in the case of the Duke of Roxburghe *v.* Roberton. He says, 'Compare the present case with that of Roberton, and the conclusion 'will be found to be identically the same. The clause in the articles is 'thus conceived: "The whole fodder to be used upon the ground, and 'none sold or carried away at any time, hay only excepted, and all 'the dung to be laid upon the farm the last year of the lease." There is 'no question about the dung in this cause; the only debate is concerning 'the straw; and such being the point at issue, I cannot see the smallest 'shade of distinction between this case and that of Roberton.' He also says, 'I cannot agree that the last year of his lease formed any exception. 'It was excluded by the words "at no time." This Court thought other-'wise, but the judgment was reversed in the House of Lords; and I con-'fess that I assent to every word that is contained in what is given to us 'as the opinion of the noble Lord on the woolsack; it is in precise con-'formity to what I consider to be the true interpretation of the clause in 'Roberton's lease; it is in precise conformity to the practice of Berwick-'shire, East Lothian, and must be so whenever such a stipulation is made.' Therefore, his Lordship concludes with saying, 'It is with the utmost de-'ference, as well as it is with reluctance, that I presume to differ from so 'many of my brethren, but I feel myself emboldened to do so by seeing 'a judgment in the highest Court of the kingdom identically the same in

May 19, 1826. 'conformity to my opinion; and when I feel perfect conviction that the 'tenant, in this case, must have understood the stipulation in the articles 'under which he possessed his farm to have the same meaning that I have 'affixed to it, I cannot permit him to give it a different determination, in 'order to put into his pocket the price of the straw.'

My Lords, looking carefully at this case, I do not see how it can be distinguished, either in its circumstances or upon principle, from the case of Roxburghe *v.* Roberton; and, considering it to be of the utmost importance, in the administration of the law, that your Lordships' decisions should be followed up (for otherwise the greatest uncertainty must prevail); and much as I lament differing from so many learned persons, who have pronounced their opinions upon this case hostile to the interests of the appellant, yet, as it appears to me that that decision manifests great opposition to the principle in the case of the Duke of Roxburghe *v.* Roberton, I feel myself bound to come to the conclusion (notwithstanding that conclusion leads me to advise your Lordships to do that which was done in the case to which I have first alluded), namely, to reverse the judgment, accompanying it with a declaration that the tenant was not entitled to sell, or carry away, any of the straw of the last or waygoing crop; and that, with such declaration, it should be remitted back to the Court of Session, and, further, to do that which, in this case, should be just and necessary.

My Lords, as I have already stated, it will be distinctly understood by the Court below, that I do not profess to understand what the usage in Scotland is; but, my Lords, if this had been a question turning upon what the usage is in Scotland, and whether the tenant had conformed to that usage or not, you would have had that distinctly ascertained by evidence laid before you for that purpose; but I would say, in this case, as the Lord Chancellor said in the Duke of Roxburghe's case, whatever the custom and usage may be, in the absence of express stipulation, I give my opinion upon the express stipulation. This contract, which appears to be quite unambiguous and clear, contains a stipulation, which was competent for the landlord to require, and the tenant to give; by which the tenant bound himself not to remove any straw during the time he took the farm under these articles, and consequently prevented him removing it during the last year of his possession.

My Lords, there is another case on the same subject, arising out of the same transaction, and between the same parties, in which I apprehend your Lordships' judgment must be the same as in that I have just asked your opinion. In that case, the judgment was adverse to the claim of Colonel Gordon; but if your Lordships think that the judgment must be reversed in the other case, the same decision must follow in this, namely, to reverse the judgment, and to remit both the causes back to the Court of Session, with that declaration which I have suggested to your Lordships.

Appellant's Authorities.—4 Stair, 42. § 21. 1 Ersk. 1. 50. 3. 3. 87. Duke of Roxburghe *v.* Roberton, 28th June 1816, reversed in the House of Lords, 17th July 1820. (2 Bligh's reports, 156).

Respondents' Authorities.—1 Bell on Leases, p. 323, (Edit. 1825.) Hamilton, 15th Jan. 1824.—2 Shaw and Dunlop, No. 586. Gordon *v.* Falconer, 8th March 1822—1 Shaw's Reports, No. 440. Wemyss, 16th June 1801, (No. 7. ap. Tack.) Forrester, 10th Feb. 1808, (No, 16, ib.) Fraser, 7th March 1823. 2 Shaw and Dunlop, No. 256. May 19, 1826.

J. CHALMERS, J. CAMPBELL, Solicitors.

DAVID CARRICK BUCHANAN, Esq. Appellant.—*Bosanquet—Keay.* ROBERT MORRICE and Others, Respondents.—*Murray—Tindal.* No. 16.

Society.—Circumstances in which it was held (affirming the judgment of the Court of Session) that certain shipments of goods to the Continent of Europe, during the war between France and Britain, made by an individual partner of a company, who was a citizen of America, belonged to him exclusively, and that his partner, who was a subject of Britain, had no claim to them, in consequence of letters written by him, disclaiming all connexion with the goods, although he alleged that these letters were written to deceive the enemy.

May 19, 1826.

2d DIVISION.

Lord Craigletie.

DAVID CARRICK BUCHANAN, a native of Britain, and resident in London, was connected in several commercial copartneries in Virginia, with Robert and Allan Pollok, and Thomas Tredway. These houses were managed by the latter individuals; but there was also a London establishment connected with them, which was conducted by Buchanan, under the firm of David Buchanan. In this establishment he and Robert Pollok were alone partners.

Robert Pollok, who was an American citizen, made shipments of tobacco from Virginia to Holland, twice by the ship Mount Vernon in 1806, by the Alonzo in 1807, and again by the Mount Vernon in July 1807, during which time Britain was at war with Holland, then under the dominion of France, and the British Orders in Council were in force. These cargoes, which were taken by Pollok from the stock of the company at the regular prices, were sold in Rotterdam, and the proceeds remitted to Buchanan. Pollok having died in 1811, his representatives raised an action of compt and reckoning against Buchanan, in which the inquiry arose, whether the profits accruing upon these several shipments belonged to Pollok's representatives, or to the house of David Buchanan? In support of this claim, they founded on various letters by Buchanan to Pollok, declaring that he could have nothing to do with the cargoes, as he could not lawfully join in the adventure, and stating that they must be at the risk of Pollok alone. To this it was answered, that