CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1828.

Colonel GORDON of Cluny, Appellant.—*Wilson—Wright—Pyper.* No. 1.

JOHN ANDERSON, Respondent.—*Keay—T. H. Miller.*

Et e contra.

Tack—Clause.—A landlord having drawn up certain 'articles and conditions' for letting his estate, by which, inter alia, it was stipulated, that 'the whole fodder is '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;' and a tenant having taken a farm by a missive, binding himself to the conditions in another tenant's missive, which referred to these articles; and having also signed a draft of a tack referring to them—but the draft never having been extended, and he not having signed the articles themselves, but having possessed for the full endurance of the lease;—Held, 1. (affirming the judgment of the Court of Session), That the tenant was bound by the 'articles and conditions;' but, 2. (reversing the judgment), That, in conformity to the reversal in the case of Gordon against Robertson and others, 10th May 1826,* he was not entitled to carry away the fodder of the last year.

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1ST DIVISION.
Lord Alloway.

COLONEL GORDON'S father, Mr Gordon, succeeded in 1800 to the estate and barony of Slains in Aberdeenshire. In 1801 the whole barony fell out of lease. Previous to reletting the farms, Mr Gordon, with the view of introducing a new system of cultivation and management, drew up a set of articles and conditions, to be communicated to intending offerers. The document was entitled, 'Articles and Conditions laid down by

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* 2. Wilson and Shaw, (1826–27), p. 115.

Feb. 15. 1828. 'Mr Gordon for letting the estate of Slains,' and consisted of the following heads:—

'1. A twenty-one years' lease to be granted, and the tenant 'tied down to actual residence.

'2. Assignees and subtenants, legal or voluntary, without the 'proprietor's consent, to be excluded.

'3. The farms to be let, and marches lined out and fixed, 'agreeable to Mr Johnston's plan.

'4. Mr Alexander's estimate of the new rent is L.2382, of 'which 128 bolls bear, and 436 bolls meal, valued at 20s. per boll, 'and L.1818 in money. Mr Johnston's estimate is L.2633, of 'which 420 bolls in bear, and 720 bolls in meal, also valued 'at 20s. per boll, and L.1513 in money; the medium of which 'two estimates is 274 bolls of bear, and 587 bolls of meal, all of 'the growth of the estate, and L.1665 in money, making the gross 'of the medium rent, in victual and money, at said conversion, 'L.2517, exclusive of any immediate rise on the parts of Broadly-'hill, and Old Clochtow, and Nether Leask, at present under 'lease, and here put down only at their present rents; and ex-'clusive also of the fishings, not rented at all, and of the com-'mon moss, and 400 acres reserved by Mr Johnston's plan for 'plantations, and 100 acres more for roads, &c. which gross rent, 'under the exception of the fishings, and the farms under lease, 'and those now let by Mr Gordon himself, he makes the rule 'for the whole possessions yet to be let, keeping it in his option 'to take the victual in kind, or the above conversion of 20s. per 'boll; the bear and meal to be proportioned and laid upon the 'farms as best suits them, understanding each kind to be delivered 'of the accustomed weight and measure.

'5. Supposing the above rent is 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.

'6. Mr Gordon allows as much of the first year's rent as, 'when added to the present value of biggings 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, and to be built within three years 'after entry, at the sight of his factor for the time, the tenants 'finding all the carriages, and recompensing the outgoing

'tenant, where he has any claim for meliorations. The dwelling- Feb. 15. 1828.
'house to be slated—the offices to be thatched or tiled, in the
'proprietor's option, and the whole to be kept in good condition
'during the lease, and left so at removal. But in case the tenant
'shall not have erected the said houses when the first year's
'rent becomes payable, he shall have only allowance out of his
'first year's rent to the amount of what he has built, without
'reckoning on carriages; and the balance, to the extent aforesaid,
'out of the next year's rent, if the houses are then completed.

'7. To encourage the tenants to make suitable enclosures, by
'making the outer fences stone-dikes, and the inner subdivi-
'sions 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 en-
'closures are then fencible. But no allowance to be made for any
'enclosures that are not left fencible at the expiry of the lease;
'or if the proprietor incline to make any such enclosures or fences
'at his own expense, the tenant shall pay therefor yearly, along
'with his rent, at the rate of six per cent, and keep them in suffi-
'cient repair during the lease, and leave them so at his removal.

'8. The victual rent to be payable 'twixt Yule and Candlemas,
'and the money rent at Martinmas and Whitsunday each year,
'after reaping and ingathering the crop of that year, with interest
'thereafter during the not-payment,—the victual to be delivered
'at the granary, or at any other place to be fixed by Mr Gor-
'don, as most convenient to estate and market, and to be carried
'from thence to Peterhead, Aberdeen, or any place of the like
'distance, when required.

'9. The tenant to be allowed to give houses, yards, and por-
'tions of land, to such cottars only as are necessary for assisting
'in the culture of the farm; but under no lease, nor exceeding
'eight acres at most on the largest farm, and less in proportion
'on a less farm.

'10. The proprietor to pay cess and stipend, but the tenant to
'pay schoolmaster, ground-officer, moss-grieve, statute labour,
'and all other incidental or parochial burdens or assessments,
'imposed or to be imposed.

'11. The whole estate to be tied down to a general rotation of
'cropping; that is, to have always the one-third of the whole
'arable in green crop or summer fallow; never to plough the
'same field more than twice for a white crop, without an inter-
'vening green crop of turnip, potatoes, pease, beans, or red

Feb. 15. 1828. ‘clover, or summer fallow; after which, barley or oats, with grass ‘seeds; and never to mislabour, outlabour, or waste the posses- ‘sion—this rotation to commence after the first three years: and ‘the last three years of the lease, one-third of what is arable to ‘be sown down with grass seeds, and to be only one year cut ‘for hay, and two in pasture, otherwise to pay L.4 per acre of ‘additional rent.

‘12. The mills of Brogan and Forvie being abolished as unne- ‘cessary, the whole estate to be now thirled for what they grind ‘to the mills of Collieston and Leask, paying the usual bannock ‘and service, but no multure. The thirlage to each mill to be ‘fixed by the proprietor by the time the leases are ready to be ‘executed.

‘13. Every tenant or cottar to have privilege of firing for their ‘own use from the common moss of the estate, and of marle, shell, ‘or other common manure, but to be restricted and regulated as ‘to their mode of working; and every tenant on whose ground ‘such marle or manure is, shall be allowed surface damage, where ‘the ground is in tillage, or has been improved; the said damage ‘to be ascertained by men to be mutually chosen by the tenant ‘on whose ground the marle or manure is, and the tenant taking ‘away the same, and to be paid by the tenant taking away the ‘same.

‘14. No tenant to sell peats, fuel, lime, marle, or other manure, ‘nor ale or spirits, nor pull bent, nor plough or break up any ‘sward or grass ground, near the sands; in particular, Whiteness, ‘Little Collieston, Mudhole, Cothill, Haddo, Little Forvie, and ‘Waterside, to be laid under said restriction as to the bents.

‘15. Power to be reserved to the proprietor to work and win ‘marle, limestone, freestone, ironstone, and metals and minerals of ‘every kind; make canals, sink pits, straight marches, exchange ‘ground between farms, or with neighbouring proprietors, erect ‘mills or other machinery, or make roads, or convey springs ‘or drains in such direction as he shall think fit; and to make ‘plantations, clumps, or belts, on paying surface damage, and ‘making reasonable allowance for the ground to be taken away ‘for such purposes.

‘16. 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.

‘17. All to be tied down to answer the courts of the barony, ‘and obey and fulfil its acts and regulations, and assist the ‘officers in the execution of their duty.

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'18. As also, a condition, as in all former leases, that if the 'tenant fail in payment of his tack-duty, or transgress or fail in 'the observance and performance of the other stipulations; then, 'and in any of these events, he or she shall be removable upon a 'single warning and decree of removing, in the same manner as 'if the tack had never been granted; and every tenant shall also 'be taken bound to remove without any warning or process of re- 'moving; and in case of disobeying or contravening any of the 'conditions or stipulations in the tack, he shall pay of additional 'rent at the rate of L.4 per acre, over and above performance.

'19. In setting Waterside and Little Forvie, and Mill-town 'of Forvie, power to be reserved to build piers, and make basins 'or harbours, and to reserve or take back, at a reasonable valua- 'tion, two acres of ground or thereby, to lie as a servitude, for 'the use of the tenants upon the estate, to lay down coal or 'other articles, or to build shades, granaries, &c.; and the same 'powers to be reserved at setting the Fish-town of Collieston.

'20. No blacksmiths or inn-keepers to have leases, or to be 'admitted without the consent of the proprietor.

'21. The entering tenant on the leases now to be granted 'shall be obliged to pay the removing tenant for labouring and 'planting the kail yards, and for the grass seeds sowed the year of 'removal, conform to appreciation of men to be mutually chosen.

'These are the articles and conditions referred to in the 'several offers made by us respectively, for different farms on the 'estate of Slains, of the dates hereto annexed to our respective 'subscriptions.'

The tenants, to the number of twenty-one, then subscribed the articles; but they were not subscribed either by Anderson or by George Wilkins; and then they proceeded in these terms:—

'The above are the general articles and conditions on which the 'leases on the estate of Slains are to be granted by me, and to be 'referred to therein, with the following explanation on article 'eighth, as to the meal; that the accustomed weight is, by the 'established usage of the barony, eight stone two pound each 'boll, deliverable at the mill-eye free of mixture: And as to the 'mode of cropping laid down by article eleventh, the proprietor 'agrees, for the accommodation of the tenants, that one-third of 'what shall, according to the foregoing rotation, come under 'tillage, shall be sown down with grass seeds, and to be only one 'year cut for hay, and two in pasture, otherwise to pay L.4 'sterling per acre of additional rent. Declaring always, That if 'the tacksman shall find it also for his accommodation to continue

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'those parts of the farm which have been laid down in grass, after 'the preparation before stipulated, in pasturage for any longer 'period than what is above condescended on, or shall find it 'his interest to enlarge that part of the arrangement of laying 'down to grass, it shall be optional to him to do so, notwithstand-'ing the proportional rotation before prescribed.' In witness 'whereof, I have subscribed these presents, written by James Roy, 'my clerk, at Edinburgh the 5th day of May 1804, before these 'witnesses, Alexander Grant, Esq. writer to the signet, and the 'said James Roy. (Signed) CHA. GORDON.—Alex. Grant, 'witness; James Roy, witness.'

On the 23d of May 1801 George Wilkins made the following offer to Alexander Grant, writer to the signet, then Mr Gordon's agent:—'I hereby make offer to you, as agent for Mr Gordon of 'Cluny, proprietor of the estate of Slains, for a lease of twenty-'one years of the farm of Milltown of Brogan, according to the 'new proposed boundaries, viz. running from the mill of Col-'lieston, in a straight line, to the loch at Andrew Sharp's, then 'by the mill-road, in the line of march at the east side of the 'Weaver's Croft, down by the south dike of Middle Brogan, 'with a straight to the march of mill of Leisk, the yearly rent of 'L.107. 16s. sterling money, and 26 bolls of meal and 15 bolls 'of bear, good and sufficient of their kind, payable the money 'rent at Martinmas and Whitsunday, by equal portions; and 'the victual rent deliverable, at Yule and Candlemas, at the 'granary, or Peterhead, or the like distance as formerly; my 'possession to commence as at the present Whitsunday 1801 for 'crop 1802. In case my description of the boundaries may not 'be accurate, I understand it to be as delineated on Mr Johnston's 'new plan; and that I am to be allowed a year's rent to enable 'me to build a dwelling-house and set of offices suitable to the 'general plan of the estate; I to furnish the carriages, and to 'maintain said dwelling-house and offices in good condition, 'and leave them so at my removal. The dwelling-house to be 'slated, the offices to be thatched or tiled, as most agreeable to 'the proprietor; and I engage to have the steading completed by 'the time that the last half of my first year's rent becomes due, 'namely, Whitsunday 1803. I understand I am to have my 'share of the proprietor's general allowance of lime for the first 'three years, and that I am to be allowed, at the expiry of the 'lease, the value of such enclosures by stone-dikes as I may erect 'on the farm at the sight of the factor for the time being; the dikes 'to be estimated by mutual appreciators; and that I shall be

'allowed to give houses and yards, and a small portion of land, 'to such cottars as are necessary to assist me in the culture of 'the farm, not exceeding in the whole eight acres, but over 'which I am to give no lease. I agree to the seclusion of assig- 'nees and subtenants, and to actual residence by me and mine 'upon the farm, and to a general rotation of cropping, and any 'other regulations to be laid down for the whole estate. I agree 'to pay schoolmaster, ground-officer, moss-grieve, and statute 'labour, as formerly; but I understand that I am to be liable in 'no cess or stipend, never having paid it before; and to be 'allowed firing for myself and cottars from the common moss of 'the estate, and to submit to the rules of the barony in all other 'respects. I expect I am to be allowed the materials of the pre- 'sent steading of offices, without paying any consideration there- 'for. Lastly, I engage to enter into a lease on the foregoing 'terms, the lease to contain all the regulations intended to be laid 'down for the estate, if by that time digested and ready; and I 'understand the mill of Brogan to be abolished, and not con- 'tained in my offer. In testimony whereof, I subscribe and 'address this offer to you before these witnesses, Walter Finlay 'and Andrew Robertson, both writers in Edinburgh.'

Mr Gordon, to whom this offer had been transmitted, wrote of the same date to Wilkins:—'I agree to the terms therein 'expressed, understanding every thirlage following the mill of 'Brogan to be abolished, in consequence of the new arrangement 'of the estate, and the privilege of moss to be regulated also 'by that arrangement.'

Thereafter John Anderson, on 28th May 1801, addressed to Mr Grant, writer to the signet, Mr Gordon's agent, the following missive:—

'Notes of offer by John Anderson to Mr Gordon.

'1. A lease of Kirkton as possessed by him, with part of the 'lands of Crawley and Muckletown, as delineated on the plan, 'for 21 years from this Whitsunday and Martinmas next.

'2. Money rent L.200, and 100 bolls barley.

'3. L.200 to be allowed on repairing the steading.

'4. The proportion of lime to be allowed with the other 'tenants.

'5. The neighbouring tenants to make and uphold the half of 'the march fences.

'6. The landlord to pay cess and stipend, and the tenant to 'pay schoolmaster's fees, baron-officer, and moss-grieve's dues.

'7. The tenant to be allowed to subset the lands of Crawley

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‘ 8. The proprietor to advance a sum of money for enclosing, ‘ by a stone-dike, part of Seafield farm, as delineated on the plan ‘ by Mr Johnston, for which the tenant is to pay six per cent in ‘ addition to the above offer.

‘ 9. The tenant to be bound to the conditions of Mr Wilkins' ‘ offer, and to be thirled to the mill of Leask for such corns of ‘ the farm as he shall have to grind; understanding that I am to ‘ pay no multure to the proprietor, but to pay the miller for ‘ workmanship, which is called bannock and half. The fore- ‘ going is my highest offer.'

On the 2d of June following, Mr Gordon answered by letter,—

‘ I have received and considered your offer to Mr Grant, of ‘ 28th May, for Kirkton and Seafield, according to the new ‘ arrangement, as delineated on Mr Johnston's plan, of which ‘ offer the prefixed is an exact copy; and I accept thereof on the ‘ footing of Mr Wilkins' offer, and the general conditions laid ‘ down by me for the whole estate; and at your request, and to ‘ oblige you, I further agree to accept of your victual, 60 bolls ‘ in bear, and 40 bolls in meal, and to enclose your part of the ‘ Crawley and Muckletown, if you require it—you paying at the ‘ rate of six per cent along with your rent for the expense of ‘ said enclosure, and keeping it fencible and in good condition ‘ during the lease, and leaving it so at your removal, and leaving ‘ that farm in three years' grass, and Seafield the same, and on ‘ same terms if enclosed by me; your removal from each, in ‘ that event, to be at Martinmas instead of Whitsunday: and if ‘ you find me a good tenant for the farm of Crawley, enclosed ‘ or unenclosed, I shall either accept of him and relieve you in ‘ so far, or allow you to subset it to him yourself, understanding ‘ that he is to have a proportion of my allowances for building, ‘ and for lime, &c., and to be liable to all the other conditions ‘ imposed on the other tenants. A lease to be prepared and ‘ executed as soon as the other leases of the estate can be got ‘ ready.'

Anderson had been already, under the old lease, in possession of the farm, and now continued it.

Afterwards, a draft tack between Mr Gordon and the tenants of Slains was drawn in the following terms:—‘ It is contract- ‘ ed, agreed, and ended, betwixt Charles Gordon of Cluny, ‘ Esq. heritable proprietor of the estate of Slains, of which the ‘ lands and others after-mentioned are a part, of the one part,

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'and . of the other part, in manner and to the
'effect following:—That is to say, the said Charles Gordon, in
'consideration of the yearly tack-duty of money and victual
'underwritten, and of the other prestations, conditions, stipula-
'tions, and reservations specified and contained in a separate
'paper of general articles, subscribed by him as relative to his
'leases of said estate, and to be held as part of these presents,
'hath set, and in tack and lease let, as he hereby sets, and in
'tack and assedation lets, to the said and
'his heirs, secluding assignees and subtenants, legal or voluntary,
'without the express consent of the proprietor, all and whole
' lying in the parish of Slains, and
'county of Aberdeen, as the same have been marched and
'bounded according to a new arrangement and plan of said
'estate, made by Thomas Johnston, land-surveyor, subscribed
'by the said Charles Gordon, and already subscribed, or to
'be subscribed, by the said
'with which contents and boundaries he holds himself satisfied,
'and that for the space of 21 years and crops from and after
'the term of Whitsunday 1801, which is hereby declared to
'have been the commencement of this tack, and the term of
'the said his entry: which tack,
'with and under the several prestations, conditions, stipulations,
'and reservations, before and after specified, and in the articles
'referred to, the said Charles Gordon binds and obliges him-
'self, his heirs and successors, to warrant at all hands: For the
'which causes, and on the other part, the said
'binds and obliges himself, his heirs and successors, not only to
'adhere to, obey and perform, the whole articles, conditions,
'stipulations, and others, contained in the general articles re-
'garding said estate, herein [before] referred to, and held as part
'of these presents, but also to pay to the said Charles Gordon,
'his heirs or assignees, or to any factor to be appointed by him
'or them, for the years of the present lease yet to run, the money
'and victual tack-duties underwritten; viz. the sum of
'sterling of money rent each year, by equal portions, at two
'terms, the first Martinmas and Whitsunday after the separation
'of each year's crop from the ground, beginning the first half-
'year's payment at Martinmas 1804, for that year's crop, and
'the next term's payment for said crop at Whitsunday 1805,
'and so furth yearly and termly thereafter, during the currency
'of this tack, with a fifth part more of each term's payment of
'liquidate penalty in case of failure, and the legal annualrent

Feb. 15. 1828. ‘ of the said termly payments from the time that the same be-
‘ come due during the not-payment; as also to pay and deliver
‘ to the said Charles Gordon, Esq. or his foresaids, the number
‘ and quantity of bolls of bear, and
‘ bolls of oatmeal, good and sufficient victual; the meal to be of
‘ the accustomed weight of the barony, being eight stone and two
‘ pound weight each boll, and the bear of the accustomed mea-
‘ sure of the best of the growth of the farm, seed only excepted,
‘ and to be dressed and cleaned to the satisfaction [of the person
‘ receiving the same];* the meal to be delivered from the mill-eye
‘ free of mixture, between Yule and Candlemas each year, and
‘ the bear [also] each year, betwixt [Yule and] Candlemas, and
‘ that at the granaries of the said Charles Gordon upon the
‘ estate of Slains, or at any other place on said estate to be fixed
‘ by him, and from thence, and at his the tenant's own expense,
‘ to transport the same, at any time required, to Newburgh, Peter-
‘ head, Aberdeen, or any other place or port of the like distance:
‘ And the said further obliges himself and his
‘ foresaids, at the expiry of this tack, to flit and remove them-
‘ selves, and their families, servants, cottars, and dependants, and
‘ whole goods, stocking and effects of every kind, from the pre-
‘ mises, and to leave the same void and redd, without any warn-
‘ ing or process at law to that effect; wherein if he fail, he shall
‘ be liable in triple the said yearly rent, for each year he con-
‘ tinues thereafter: And both parties oblige themselves and their
‘ foresaids to implement and perform their respective parts of
‘ the premises, and of [said] separate articles to each other, under
‘ the penalty of L.100 sterling, to be paid by the party failing
‘ to the party performing, or willing to perform, over and above
‘ performance; and consent to the registration hereof, *and of the*
‘ *said separate articles, as part, in the books of Council and Ses-*
‘ *sion, Sheriff Court books of Aberdeen, or others competent,*’† &c.

‘ N. B.—*The clause of subscription should bear, that, of the date*
‘ *of the tenant's subscribing, he has got printed copy of the separate*
‘ *articles, and the articles should be recorded as a probative writ,*
‘ *and the tack bear the date of registration.*’

Written on the back thus:—

‘ The seven preceding pages is the draft of the tack which we
‘ agree to enter into for our respective farms on the estate of
‘ Slains, with this exception, that such of us as have separate

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* The words circumflexed were interlined.

† The words in italics were in a different handwriting from the rest of the draft.

'writings from the proprietor, for giving us further allowance 'for buildings than specified in the general articles, the terms of 'such separate writings are to be engrossed in our tacks.— 'Slains, 12th May 1804.' Feb. 15. 1828.

The document was then subscribed by 21 tenants, including Wilkins, but not Anderson. He, however, afterwards did so, under this qualification:—

'Mr Anderson agrees to the above, with this difference only, 'that his tack was a Martinmas entry. (Signed) JOHN ANDER-'SON.—Aberdeen, Aug. 30. 1806.'

The draft was never extended, or formally executed.

Anderson remained in possession of his farm until the termination of the stipulated endurance; and Colonel Gordon, understanding that he contemplated carrying off the whole straw of the waygoing crop when he removed, presented an application to the Sheriff of Aberdeenshire, praying him to ordain Anderson and his subtenants 'to use the fodder of the present crop 'upon the farm of Kirkton and others foresaid, and in the mean 'time to prohibit and discharge them, and each of them, from 'carrying off any part of the fodder of said farms, hay excepted, 'until parties are heard and this action decided.' The Sheriff granted interim interdict, which, however, he afterwards recalled, and allowed the tenant to appropriate and remove the fodder in question. Colonel Gordon advocated, and the Lord Ordinary, 'in respect of the decision of the House of Lords in the case of 'the Duke of Roxburghe against Robertson, 17th July 1820,' ordered Informations to the Court; and his Lordship added in a note,—'In a case of this nature, where the practice which has 'so long subsisted in Scotland is said to be totally subverted by 'a judgment of the Court of Review, it is necessary that both 'landlords and tenants should be speedily acquainted with the 'construction to be put upon such clauses as are now in question, 'and that some measures should be adopted to protect the rights 'of the tenants, as, if they shall be compelled to consume the 'fodder of their last crop upon the ground, the landlord must 'surely be compelled to find the means of doing so, as it fre-'quently happens, even in more southern parts of Scotland than 'where the barony in question lies, that it is difficult to get the 'grain into the barn-yard before the term of removal at Martin-'mas. If, therefore, a new practice be introduced, as to the 'consumption of the fodder of the outgoing crop, it may be a 'matter of the most serious importance for the country and for 'the Courts, whether some new construction of the clause, as to.

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'the tenant's removal, may not be devised, so as to allow them 'to continue in possession until Whitsunday, by which time the 'fodder might be consumed; and it is supposed that the land-'lord must then pay them for the value of the dung formed of 'that fodder, otherwise he would have a very considerable part 'of last year's crop of every tenant removable at Martinmas, as 'the tenant could not, by that term, have the means, either of 'thrashing out the corn, or consuming the fodder, which, at the 'time the contract of lease was entered into, could not have been 'in the contemplation of either landlord or tenant.' At this time Colonel Gordon had not produced any evidence of Anderson having subscribed the regulations, and the Court, on the 8th of July 1823, found, 'that the regulations referred to not 'having been signed by the tenant, or even adjusted at the date 'of the missives of lease in question, the general reference made 'thereto, as in the offer of Wilkins, is insufficient to render the 'said regulations effectual and binding on the defendants in 'this case, to the effect of obliging them to consume on the farm 'the fodder of the last or waygoing crop, as contended for by 'the pursuer;' and therefore remitted simpliciter.

Colonel Gordon petitioned, and produced the draft of the lease, signed by Anderson; and the Court, on the 28th November 1823, 'upon the petitioner making payment to the respon-'dent of the whole previous expenses,' appointed the petition to be seen and answered.

In the meanwhile, the same question of construction of the clause in the regulations had been under discussion before Lord Cringletie, with a tenant named Robertson. His Lordship had, in respect of the judgment of the House of Lords in the case of the Duke of Roxburghe against Robertson, remitted to the Sheriff to recall his interlocutor allowing the tenant to appropriate and remove the fodder; but the Court required the opinions of the other Judges upon the legal construction of the clause; and their Lordships being unanimously (with the exception of Lord Cringletie) of opinion, that the tenant was, under that clause, entitled to dispose or carry off the straw of the waygoing crop, a judgment was pronounced to that effect;* and on advising Anderson's case, the Court, on the 10th March and 17th May 1825, 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

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* See 3. Shaw and Dunlop, No. 440.

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'of the lease; and that the rights of the parties respecting the 'same must be regulated by the common law and usage of the 'country;' and remitted simpliciter, with full expenses, for which they decerned on the 25th of June.*

Colonel Gordon appealed, and the judgment in the House of Lords in Robertson's case having been reversed,† Anderson cross appealed on the specialties in his own case.

Appellant in principal appeal, (*Colonel Gordon*).—The general point as to the construction of the clause in question has been decided, and the respondents do not dispute that the judgment of the Court must be reversed.

Respondent in principal appeal, (*Anderson*).—The general point must certainly be ruled by the decision in the case of Robertson.

Appellant in cross appeal, (*Anderson*).—Independent of the question of construction, the inquiry remains under the cross appeal, Whether the respondent ever put himself under the operation of this clause? It is hard and rigorous in its essence, and contrary to practice. Slight evidence will not yield the presumption that the tenant exposed himself to it. This is not a matter of regulation, which a tenant may be supposed to have assumed by a general reference, but a condition which a tenant would not have accepted had it been distinctly brought before him. It is conceded, that possession will cure informality; and, therefore, Anderson having entered on the missive, the contract was binding. Now, had the question occurred in 1802, would he have been bound by the clause? The reference to Wilkins' lease is general; and that of Wilkins is not more particular. At that time, it does not appear that the regulations were in existence; at any rate, they were not signed by either Anderson or Wilkins. The only other evidence relied on by Colonel Gordon is merely a draft of a lease full of blanks and interlineations, and improbative. Not only that could have been healed by possession, but the tenant did not possess on the lease, but on the missive on which he had already entered. Neither was there any rei interventus to bar the tenant from resetting.

Lord Chancellor.—You are assuming in your argument that this was an entirely new contract.

Keay.—We maintain that the tenant could not have been

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* See 4. Shaw and Dunlop, No. 12.

† 2. Wilson and Shaw's Appeal Cases, (1826-7), p. 115.

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obliged to have acceded to this clause. To make him liable, it was necessary to have a new contract. But the document containing the new contract not being probative, and no possession having followed on it, the contract is not obligatory.

Lord Chancellor.—Certain regulations are referred to. Where are they if these be not them?

Keay.—We admit that we would be bound by mere regulations. But this is not a regulation or a clause which a tenant could have contemplated.

Lord Chancellor.—It appears to me to be a regulation, and one advantageous to the property. Some regulations were clearly intended, and we see a paper signed by a number of tenants, all of whom must have regarded this clause as a regulation; and the appellant himself signs the draft lease adopting the regulations; and he hardly would have signed, if he had not known generally what the regulations referred to were; nor can he now protect himself by saying, he did not know what were the regulations he had thus deliberately adopted. The draft lease was not a new, but part of an old contract.

Miller.—We contend, that although the tenant referred to certain regulations, he did not refer to this unusual clause, which did not relate to a mere matter of regulation. The tenant not having signed the regulations, did not assume the obligation in the clause in question; and the draft lease being improbative, and not followed by possession, did not bind the tenant. Besides, the system laid down by Colonel Gordon was so preposterous, that with his full knowledge it was departed from by all the tenants on the estate. It is quite clear that the interlocutor finding Colonel Gordon liable for the expenses up to the date of his petition with which he produced the draft lease, must stand. It was his duty to have originally come forward with the strength of the case; and the draft lease was, or must be held to have been, in his possession.

Respondent in cross appeal, (Colonel Gordon).—The obligation to grant a lease is identical with granting a lease; and Anderson's notes and missive being followed by possession, became binding. In it, he referred to the conditions of Wilkins' offer; and Wilkins refers to regulations. It is not pretended that there are any other regulations than those in question; and it cannot be believed that any of these tenants would refer to what they were, as Anderson pretends he was, utterly ignorant of. Colonel Gordon's acceptance is quite conclusive.

Lord Chancellor.—Colonel Gordon distinctly describes the conditions as 'laid down,' not merely as regulations to be afterwards framed. Feb. 15. 1828.

Wilson.—Then we have the draft lease signed by Anderson and Wilkins—the former adding a condition to his signature, proving he had carefully weighed the regulations. This draft has been possessed on since 1804. It distinctly refers to the regulations as pars contractus, and as already in existence. It is quibbling to say, that the possession cannot be ascribed to the lease, but to the missive. The possession was continuous, and applicable to both. In truth, the tenant had been in the farm under his old lease, and never ceded possession to re-enter on the missive. The argument, that, in consequence of the system being irrational, Anderson departed from it, shews that he knew what were the regulations. But there is no ground for such a statement; and if the tenants departed from the system contained in these regulations, they did so in breach of their covenant, and in the ignorance of the landlord. There is nothing rigorous in the clause itself. Indeed, it is introduced into the leases of the richest agricultural districts of Scotland, and where the best farming prevails. The previous expenses ought not to have been laid on Colonel Gordon. The tenant must have known of the existence of the draft, and ought not to have argued his case on the assumption that none such had ever been drawn. In point of fact, the draft was in the hands of a person who formerly had been agent for Colonel Gordon, and who only accidentally recovered it after the Court had pronounced their judgment of the 8th July 1823.

The House of Lords ordered and adjudged, 'That the said 'several interlocutors of the Sheriff-substitute and Sheriff-depute 'of Aberdeenshire, also the several interlocutors of the Court of 'Session of the 8th July and 13th December 1823, and the 17th of 'May and 25th June 1825, complained of in the said original 'appeal, be, and the same are hereby reversed. And it is farther 'ordered and adjudged, that the said interlocutor of the Court of 'Session of the 28th November 1823 be, and the same is hereby 'affirmed. And it is farther ordered and adjudged, that the said 'interlocutor of the Court of Session of the 10th March 1825, 'also complained of in the said appeal, be, and the same is here-'by reversed, except so far as the same recalls the previous 'interlocutor of the Court of Session of the 8th July 1823. 'And it is farther ordered and adjudged, that the cross appeal 'be, and the same is hereby dismissed by this House, and that

Feb. 15. 1828. ‘ the said interlocutors therein complained of be, and the same are ‘ hereby affirmed. And it is farther ordered, that the said cause ‘ be remitted back to the Court of Session, to proceed therein in ‘ such manner as is consistent with this judgment.’

LORD CHANCELLOR.—My Lords, There is case which was argued on a former day at your Lordships' Bar, of Anderson against Gordon, in which there was an appeal, or indeed appeals, from the Courts of Scotland. One of the appeals related to the construction of a particular clause in a lease, or rather a clause contained in certain articles and conditions referred to and adopted in a lease. The clause was in these terms:—‘ 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 question that was intended to be argued, related to the interpretation of that clause. It was contended on the part of the tenant, that it did not refer to the last year of the lease. When the case was called on at the Bar, the Counsel very properly abandoned that part of the case; and they abandoned it, on the ground that the very point had been previously decided by this House; and therefore it is unnecessary that I should trouble your Lordships by making any farther observations upon that part of the case. It is admitted that the judgment of the Court below, in that respect, must be reversed.

But another question arose, and a material and important question for consideration, which was this, Whether the clause in question was binding on the tenant Mr Anderson? It was contended, that it was not binding on the tenant Mr Anderson; that he had not subscribed it; and that he had never seen it when the lease was granted, and when he had taken possession of the farm. It is necessary, therefore, that I should call your Lordships' attention to the documents. It appears that Mr Gordon was the proprietor of an estate of the name of Slains, which was divided into several parts; and that in the year 1801 he was about to relet to different tenants the whole of this property. Among the persons who appear to be allowed to take a farm, was a person of the name of George Wilkins. George Wilkins, it appears, wrote a letter, dated the 23d May 1801, in these terms:—‘ I agree to the exclu- ‘ sion of assignees and subtenants, and to actual residence by me and ‘ mine upon the farm; and to a general rotation of cropping, and any ‘ other regulation to be laid down for the whole estate;’—that was, the whole estate of Slains, which was to be taken by a number of tenants. Lastly, he said, ‘ I engage to enter into a lease in the fore- ‘ going terms. The lease to contain all the regulations intended to be ‘ laid down for the estate, if by that time digested and ready.’ So that if the regulations which were proposed were digested and ready, —I mean those regulations which were to apply to the whole estate of Slains,—those regulations were to be contained in the lease.

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Mr Anderson, who is one of the parties to this appeal, a few days after the letter to which I have referred, entered into this agreement, or made this proposal:—'Notes of offer by John Anderson to Mr Gor-'don. A lease of Kirkton as possessed by him, with part of the lands 'of Crawleys and Muckletown, as delineated on the plan, for 21 years 'from this Whitsunday and Martinmas next;' and then the offer being divided into distinct heads, the ninth is in these terms:—'The tenant 'to be bound to the conditions of Mr Wilkins' offer,'—that is the Mr Wilkins to whose letter I before referred your Lordships,—'and to be 'thirled to the mill of Leask for such corns of the farm as I have occa-'sion to grind; understanding that I am to pay no multure to the 'proprietor, but to pay the miller for workmanship, which is called 'bannock and half.' This letter is dated 28th May 1801; and in four days afterwards, namely, on the 2d June 1801, Mr Gordon writes as follows, addressed to Mr John Anderson in Kirkton of Slains:—'Sir, '—I have received and considered your offer to Mr Grant, of 28th 'May, for Kirkton and Seafield, according to the new arrangement as 'delineated on Mr Johnston's plan, of which offer the prefixed is an 'exact copy, and I accept thereof on the footing of Mr Wilkins' offer, 'and the general conditions laid down by me for the whole estate.' So that he refers distinctly to the proposition made by Mr Wilkins, which had been accepted by Mr Gordon, and which was to include the general conditions laid down for the whole estate.

Now these general conditions laid down for the whole estate, were contained in a separate paper, entitled, 'Articles and Conditions, laid 'down by Mr Gordon, for letting the estate of Slains.' Those conditions are 21 in number, and the 16th is the condition referred to. 'The whole fodder to be used upon the ground, and none sold or car-'ried away at any time, hay only excepted; and the dung to be laid 'upon the farm the last year of the lease.' Thus the matter stood when this came originally before the Court below; and the case was argued at considerable length as to the construction of this clause, and with reference to the point, to which I have called your Lordships' attention, whether it applied to the last year of the lease; but the Court did not think it necessary at that time to decide the general question, because they were of opinion that, upon the documents to which I have referred your Lordships, there was not sufficient to satisfy the Court that these regulations had been adopted by the tenant Mr Anderson. He did not subscribe this paper; and there was no evidence that he had seen it. Under these circumstances the Court were of opinion in favour of Mr Anderson, and they gave judgment accordingly. Afterwards, however, another document, to which I shall presently call your Lordships' attention,—a draft tack signed by both Mr Wilkins and Mr Anderson,—was produced by Mr Gordon; and Mr Gordon, on the ground of the production of this instrument, which had been signed by the tenant, and by which those regulations, as he contended, were adopted, applied to the Court to recall its former judg-

Feb. 15. 1828. ment. The Court, under these circumstances, did that which I am sure your Lordships will approve of—the Court did recall its former judgment; but they also added this condition, which I think your Lordships will also think a very fit condition to be added,—that as the case had now assumed a new shape, as Mr Gordon had not originally produced it before the Court, and as judgment had been pronounced against him in consequence of the defect of the case he himself had brought forward, if he was at this stage to be allowed to supply the defect, it should be on condition that he should pay the expenses. I think your Lordships will be of opinion, that was a proper condition to be imposed upon Mr Gordon. If your Lordships should be of that opinion, that will be an answer to one of the objections urged at the Bar on the part of Mr Gordon, that Mr Gordon should not pay those expenses. I think your Lordships will be of opinion that he ought.

The next question is, whether there was sufficient evidence to shew that the articles had been adopted. The instrument to which I have referred, was produced after this judgment had been pronounced, and was in these terms:—'It is contracted, agreed, and ended, betwixt 'Charles Gordon of Cluny, Esq. heritable proprietor of the estate of 'Slains, of which the lands and others after-mentioned are a part, and ' of the other part, in manner and to the effect following; 'That is to say, the said Charles Gordon, in consideration of the yearly 'tack-duty of money and victual underwritten, and of the other pres- 'tations, conditions, stipulations, and reservations specified and con- 'tained in a separate paper of General Articles, subscribed by him as 'relative to his leases of said estates, and to be held as part of these 'presents, hath set, and in tack and assedation let, as he hereby sets, 'and in tack and assedation lets, to the said 'and his heirs, secluding assignees and subtenants, legal or voluntary, 'without the express consent of the proprietor, All and Whole.' The paper of separate articles, which is here referred to, is the articles and conditions to which I have called your Lordships' attention, and which were entitled, 'Articles and Conditions laid down by Mr Gordon for 'letting the estate of Slains.' This draft tack was signed by the tenants, and among others by George Wilkins, who was a party to the original contract to which reference was made in the contract between Mr Gordon and Mr Anderson, and by which terms Mr Anderson was to be bound; and the draft tack was also signed by Mr Anderson himself in these terms:—'Mr Anderson agrees to the above, with this dif- 'ference only, that his tack was a Martinmas entry. (Signed) JOHN 'ANDERSON.' The Court below was of opinion, on the production of this paper, that these articles were adopted by Mr Anderson, and that the original defect, which had led the Court to pronounce the judgment to which I have referred, was completely supplied. I think your Lordships will be of the same opinion. It was stated in argument at the Bar, and I believe was contended below, that this was a new contract; and that if a new contract, then, not having been entered into according

to the forms and ceremonies required by the law of Scotland, it could not be binding upon the parties. It was said that Mr Anderson was in possession of the property as a tenant under the original agreement; and that if this were an entire new contract, not being executed in the manner required by the law of Scotland, it could not have varied the original term: but I think your Lordships will be of opinion, as the Court below appears to have been of opinion, that this is not to be considered a new contract; that it is nothing more than a completion of the first contract. There were certain terms and stipulations by which the estate was to be held by the tenant, Mr Anderson; these terms and stipulations were also to be binding on Mr Wilkins. There was a reference by one contract to the other. If those are not the terms and stipulations, there are no terms and stipulations existing with respect to the farm; but Mr Anderson, by having subscribed this paper, though it was not subscribed till four years or three years after he entered on the farm, has identified it as containing the regulations by which he was to be bound. I think, therefore, if your Lordships will be of opinion that it is not to be considered as an entire new contract, that it is to be viewed as nothing but a recognition by Mr Anderson that those are the regulations referred to in this contract, namely those regulations which were to be binding upon him, in as much as they were for the general regulation of the estate of Slains. If your Lordships are of that opinion, the judgment of the Court below must, in that respect, be affirmed. I should therefore submit to your Lordships, that the judgment of the Court of Session, as to the construction of this clause, having been abandoned at the Bar, the judgment in that respect must be reversed; and I should submit to your Lordships, for the reasons I have stated, that your Lordships will be of opinion, that the judgment of the Court of Session with respect to the other question, namely, whether or not these terms and regulations were binding on Mr Anderson, must be affirmed. At the same time I also submit to your Lordships, that as this instrument was not produced in the first instance, the expense thrown upon Mr Gordon in the Court below is properly thrown upon him; and that part of the judgment must also be affirmed.

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Respondent's Authorities, (Colonel Gordon).—Countess of Moray, July 23. 1772, (4392.); Grant, July 10. 1788, (15,180.); Bell's Treatise on Leases, vol. i. p. 307.

STRACHAN and GAVIN, Appellants.—*Sol.-Gen. Tindal—John Campbell.*

G. PATON and Others, Respondents.—*Lushington—Keay.*

No. 2.

Mutual Contract—Reparation—Expenses.—Ship-builders having agreed to repair and lengthen a whale ship at a certain rate of wages, and to make use of English oak; and, during the currency of the operations, the rate of wages of carpenters having,