SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

JAMES Duke of ROXBURGHE, &c..... *Appellant.*
JOHN ROBERTON, late Tenant in Newton of Roxburghe .... } *Respondent.*

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A TENANT, by a clause in his lease was bound, "at his re-"moval, to leave upon the land all the dung and manure "of the preceding year, the value to be paid by the suc-"ceeding tenant, &c.; and at no time to sell or give away "any of the hay or straw of the said farm, which shall "always be spent on the ground."

Held, on appeal, (reversing the judgment below) that the tenant, under this contract, is not entitled to take away or sell (or semb. to have value for) the straw of the last or way-going crop, and that the lessor is entitled to have and maintain letters of suspension and interdict if the tenant threatens to sell the straw.

The custom of the country can have no operation where there is a contract with provisions applicable to the point in dispute.

IN 1790, a farm, called Newton, being parcel of the entailed estate of Roxburghe, 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 fore-"saids, *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 ascer-

"tained 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.*"

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This lease expired in 1811; but by agreement with Mr. Swinton, the judicial factor,* to whom the entailed estate of Roxburghe had been committed by authority of the Court of Session, the Respondent obtained leave to possess, until Whitsunday, 1815, on the same terms as in the lease, which was to be held as continued to that period.

In the year 18—, the Appellant established his right as heir of entail, and obtained possession of the entailed estates of Roxburghe.

The Appellant, by a written intimation from the Respondent, in August, 1815, was informed that he meant *to sell the whole straw of that crop,* unless the Appellant would take *the crop,* both corn and straw, at a valuation. The Appellant 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 bound himself to pay that valuation, *in case* it should appear that the tenant was not bound to

* The right to the entailed estates of Roxburghe was under litigation, pending which a manager was appointed.

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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 interlocutor:—" The Lord Ordinary " having considered the foregoing minute for the " charger, with the answers thereto for the suspen- " der, and whole process, repels the reasons of " suspension, and *recals the interdict*, and decerns."

Dec. 28, 1815. First interlocutor of the Lord Ordinary appealed from.

A representation against this interlocutor having been lodged, and followed by answers, his Lordship, on the 29th of February, 1816, pronounced the following interlocutor:—" The Lord " Ordinary having considered this representation, " with the answers thereto, and whole process, " refuses the desire of the representation, and ad- " heres to the interlocutor represented against; " finds the Respondent entitled to expenses, and " allows an account thereof to be given in, and to " be taxed by the auditor."

Second interlocutor of the Lord Ordinary appealed from.

The Appellant then presented a petition to the second division of the Court of Session, on advising which the Court pronounced the following interlocutor:—" The Lords having heard this " petition, they adhere to the interlocutor com- " plained of, and refuse the desire of the petition."

May 30, 1816. First interlocutor of the Court appealed from.

On the 28th of June, 1816, the Appellant presented another petition to the Lords of the second division of the Court, which, on advising, their Lordships refused.

June 28, 1816. Second interlocutor of the Court appealed from.

An account of the expenses incurred by the

Respondent having been put in, and taxed by the auditor of the Court, the Lord Ordinary, of this date, pronounced the following interlocutor:—"The Lord Ordinary approves of the auditor's "report; and, in terms thereof, modifies this account to *35l.* 16*s.* 3*d.*; decerns for the same, "and the expense of extract, and allows the decreet for expenses to go out and be extracted "in the name of Alexander Douglas, writer to "the signet, the charger's agent."

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July 8, 1816. Third interlocutor of the Lord Ordinary appealed from.

Against these several interlocutors the Duke of Roxburghe appealed to the House of Lords.

For the Appellant—*The Attorney General* and *Mr. Bligh.*

For the Respondent—*Mr. C. Warren* and *Mr. Wetherell.*

For the Respondent, it was argued, that the words did not apply to the last year of the lease; that the custom of the country, in the absence of stipulation to the contrary, gave right to the Respondent; that the straw of the last year could not be consumed on the land by the Respondent, because he was to quit at the separation of the last crop; that, as a price was, by the agreement, to be given for the dung, it was not probable the straw was to be left without recompence; that the clause, obliging the tenant to leave the hay and straw, must be limited in construction to the currency of the lease, which ceased to be binding on both parties at the same time: that the obligation, to spend hay and straw on the ground, could only apply to the period of the tenant's possession, when he had the power of spending them; and that

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the landlord ought not to receive rent for a crop which the tenant has not reaped.

For the Appellant the argument * was to the following effect:

The words of the lease directly prohibit any sale of hay or straw, and provide that they shall be spent on the ground. The tenant is at *no time* to sell, and the straw is *always* to be spent on the ground. If the last year of the lease may be considered *a time*, or comprised in the word "always," the clause applies to the last as much as to any other year of the lease. The custom of taking away the straw of the last crop was never general, and has been long abolished as inconsistent with good husbandry. If the custom were universal and certain, it could have no effect against express agreements. It may be true, that, according to the provisions of the lease, the straw could not be spent by the tenant—that is not contemplated by the agreement. The provision and expression is that "it shall be spent on the "ground." Whether the Respondent did or did not receive straw at his entry is immaterial, and the fact doubtful. He had allowance in the rent, and stipulated, in other beneficial terms of the lease, for the value of the straw which he might leave at the last crop. The stipulation as to price for the dung, and the omission as to straw, creates a presumption the very opposite to that for which the Respondent contends.

The words of the lease are clear, and *in claris non est locus interpretationi.* If they were doubtful, there is strong corroboration of the Appellant's construction in the context.

* Upon the opening and in reply.

For, in the very sentence next to that immediately preceding the clause founded on by the Appellant, there is special mention of the last or way-going crop: and in the sentence immediately preceding that founded on by the Appellant, there is special mention of *a time*, viz. *the time of removal of the Respondent.* After that follows the agreement, that *at no time* shall any straw be sold, or given away, but always be spent on the ground.

From the connexion of these sentences, it is demonstrable that the parties in the lease must, in the last sentence, have contemplated the way-going crop, and time of removal.

The interpretation of the Respondent would entitle him to accumulate straw for any number of the years of the lease, and take it away at the expiration of the term.

If a construction were to be forced upon the clause, from views of hardship, and the notion of an imperfect expression of intention, this conjectural and equitable construction could never go farther than the insertion of a clause allowing to the tenant value for the straw which he left. But that would not support the interlocutors under appeal. It would only have entitled the Respondent to a claim for value, but not to sell the straw; and therefore the suspension, at the instance of the Appellant, must have been well founded, and the reasons of suspension ought to have been sustained.*

* Upon the question whether the custom of the country was not excluded where an agreement expressed the terms of the tenancy, and whether an omission to provide by the lease for

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The Lord Chancellor. This case arises upon a lease made between John Duke of Roxburghe and John Roberton, bearing date the 11th and 19th of February, 1790, by which it is contracted, on the part of the Duke of Roxburghe, to set for the rent, and upon the conditions therein mentioned the farm, called Newtown, with its appurtenances, for the term of twenty-one years, from and after the said John Roberton's entry, which it was thereby declared should take place at the term of Whitsunday then next, old style, with regard to the houses, grass, and pasture ground; and with regard to the arable land and corn, at the separation of the crop, 1790, from the ground. With respect to the management of the farm, the following provisions are made:—

"John Roberton obliges himself and his heirs, "first, to keep in grass during the tack, and, at "the expiry thereof, one-third part at least of the "arable lands; secondly, that, of all the land kept "in tillage, one-fifth part at least should be in fal- "low or turnip yearly, and both sufficiently ma- "nured; thirdly, that whatever land should be laid

payment of a given article did not furnish a presumption that no payment for that article was intended, where payment for other articles was provided for by the lease, the case of Webb *v.* Plummer was cited. In that case, by the custom of the country, the outgoing tenant was entitled to an allowance for foldage from the incoming tenant. The lease specified certain payments to be made by the incoming to the outgoing tenant at the time of quitting the premises, among which there was not included any payment for foldage. It was held that the terms of the lease excluded the custom, and that the outgoing tenant was not entitled to any allowance in respect of foldage. 2 B. and A. 746.

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"down in grass should be sufficiently sown with "sound grass seeds for the fallow crop; fourthly "that during the last year of the tack, one-fifth part "at least of the lands in tillage should be left in "one or two brakes for the incoming tenant to "fallow; fifthly, that John Roberton and his "aforesaids should give the due changes of seed, "that is to say, they shall not sow wheat after "wheat, nor wheat after rye or oats; nor oats "after wheat or rye, nor oats after oats; neither "shall they sow more wheat on the land, in any "one year of the three last years of the tack, "than what they have been in the practice of "sowing annually during the preceding years of "the tack."

And it was further covenanted between the parties that no "meadow ground, on any part of the "lands thereby set, should ever be fallowed or riven "out, but always kept in grass; and that no turfs "or divots should be cast on any part of the land, "which, on no pretence, should be pared or "burnt."

Then follows this provision:—

"Whereas the rent hereinbefore covenanted was "specially ascertained and agreed upon between "the parties, and in the view and upon the con- "dition that the lands should be managed, cropped, "and cultivated after the method, and according "to the rotation specially above set forth; there- "fore, in case the said John Roberton shall, during "the currency of the tack, depart from the method "of labour or rotation before described, without "leave in writing given by the said noble Duke or

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"his chamberlain; in that case, John Roberton "obliges himself, &c. to pay, &c. 3*l.* sterling additional rent yearly for each English acre so differently cultivated contrary to the covenant, "and that the lessor, notwithstanding this provision for additional rent, should have power to "prevent such cultivation."

And it was thereby specially provided and declared

"That the proprietor or incoming tenant should "have power and liberty to sow grass seeds, in due "time, upon any part of the corn lands of the said "farm, with the *last or way-going crop*, and that "without any allowance to be made to the outgoing "tenant for the same; and that John Roberton, "&c. at *the removal* from the said lands, should "leave upon the ground all the dung and manure of the preceding year, but that the value "thereof should be paid, &c. by the succeeding "tenant, as the same should be ascertained 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. And in case "the said John Roberton or his foresaids shall "not remove from the said lands, at the said term "of expiry hereof, but shall continue to possess "by tacit relocation, or by any other title, or "under any pretence, other than a new agreement in writing, then it is hereby stipulated and "agreed, that, as long as the said John Roberton "or his foresaids shall continue to possess, they "shall be holden and obliged to pay to the said "noble Duke or his foresaids a yearly rent of "450*l.* sterling in place of the said rent of 225*l.*, "and that besides performing and fulfilling the "whole other conditions and prestations hereby "incumbent on them."

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Out of this instrument arises the question upon which the House is now to give judgment.

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 valuation; 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 his argument) shows that the tenant was to be at liberty to carry and take away, at the expiration of the lease, the hay and straw of the last year: that the prohibition 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 instrument which ascertains the rights of the parties. Sup-

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posing all the facts to have been proved, which ought to form the ground of such an argument, 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 contract such as this, a party cannot be admitted to say that he has no consideration for a sacrifice which he binds himself to make. When a tenant 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 that provision is drawn, that what, according to the expressions 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 instrument leave us at liberty to enter into conjectures as to any intention to except 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 during 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 difference, 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 separation 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 custom may qualify the right of the incoming tenant, and give to the outgoing tenant certain privileges, as the right to enter, for the purpose of thrashing, 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 law is to be administered on the same principles as English law, or any law

* See note next page.

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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 collected at the expiration of the tenancy.

Judgment reversed.

July 17, 1820. It is declared that the Respondent, according to the true intent and construction of the tack, is not entitled to sell or give away any of the hay or straw upon the farm at any time during the continuance of the tack, or upon the same at the time of the expiry of the tack. And it is ordered, that, with this declaration, the cause be remitted back to the Court of Session to review the interlocutors complained of, and further to do in the cause as is just and consistent with this declaration.

[For the principles of interpretation to be applied to contracts and statutes, see Ersk. B. 3, tit. 3, s. 87, B. 1, tit. 1, s. 54 and 56; and, for the law as to the right of the tenant to the straw of the way-going crop, by custom and the common law of Scotland, with the exceptions to the rule, see Bell on Leases, pp. 265 et seq.]