

[15th August 1834.]*

Lieutenant Colonel GORDON, Appellant.

No. 31.

Sir W. Follett—Shaw.

JOHN ANDERSON and others, Respondents.

Dr. Lushington—Spalding.

Reparation.—Circumstances under which it was found (affirming the judgment of the Court of Session) that tenants were not liable in damages to their landlord for a failure to use the fodder of the crop of the last year of their lease on the farm.

IN the month of May 1801 the respondent, John Anderson, who was then in possession, as tenant, of the farm of Kirktown of Slaines, addressed to the appellant, the proprietor, an offer for a lease for twenty-one years from Martinmas then next, which was made and accepted on the footing that he was to be bound by certain general regulations applicable to the whole estate. One of these regulations (the 16th) was thus expressed:—“ 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.” Anderson continued in possession, in virtue of this lease, and sub-let part of the farm to other parties. Crop 1822 was his last crop; and Anderson having intimated his intention to carry it away, and to dispose of it for his own benefit, the appellant, on the

1ST DIVISION.
Lord Fullerton.

* The true date is 31st August 1835, the case having been omitted to be reported along with those of 1835.

No.31. 6th of August 1822, presented a petition to the Sheriff of Aberdeenshire, praying him to ordain Anderson and his sub tenants “to use the fodder of the present crop
 15th August 1834. “upon the farm of Kirktown and others foresaid, and
 GORDON “in the meantime to prohibit and discharge them, and
 “ANDERSON. “each of them, from carrying off any part of the fodder
 “of the said farms, hay excepted, until parties are
 “heard, and this action decided,” &c. The Sheriff having pronounced judgment in favour of Anderson, the appellant brought the case under review of the Court of Session; and on the 10th of March 1825, their Lordships, after consulting all the Judges, found
 “that the 16th article of the general articles of lease
 “regarding the estate of Cluny (Slaines) cannot be
 “held as applying to the crop of the last year 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 therefore repelled the rea-
 “sons of advocacy, and remitted the case simpliciter
 “to the Sheriff,” and found expenses due. On appeal by Colonel Gordon this judgment was reversed on the 15th of February 1828.*

In the meantime, viz. in March 1823, the respondents, Anderson and his sub-tenants, made the following offer to the appellant, under form of a notarial instrument of protest:—1. “To give over
 “to the said John Gordon, Esq., or, with his con-
 “sent, to the present tenant of the said farms, the whole
 “of the fodder or straw stacked upon the said farms at
 “a fair valuation, to be put thereon by any two respec-
 “table farmers in the neighbourhood—one to be chosen

* See ante, vol. iii. p. 1.

“ by each party; and in the event of difference of opi-
 “ nion, by any oversman to be named by these valuator,
 “ the value so fixed to be consigned immediately there-
 “ after in any responsible banking house in Scotland,
 “ in the joint names of the parties, until the issue of
 “ the cause, when the amount will fall to be paid. Or,
 “ secondly, in the event of the said John Gordon declin-
 “ ing the foresaid offer, they propose that the said fodder
 “ or straw so stacked upon the foresaid farms should be
 “ exposed to public sale after due advertisement,—the
 “ said sale to be conducted and superintended by any
 “ two respectable individuals, one to be named by each
 “ party; and the free proceeds of the sale, deducting
 “ all necessary expenses, to be immediately thereafter
 “ consigned in any responsible banking house in Scot-
 “ land in the joint names of the parties, there to remain
 “ until the final issue of the cause, and thereupon to
 “ be paid over to the successful party. And, lastly, in
 “ the event of both offers being declined, they protested
 “ that the foresaid fodder is at present worth at the rate
 “ of at least 11s. sterling per boll of grain, and that the
 “ said John Gordon, Esq., should be liable to account
 “ to them at the present value thereof;” reserving
 all the pleas of parties.

In answer to this protest Colonel Gordon stated that
 he had long previously “ offered to give them accom-
 “ modation of houses at Kirktown of Slaines for the
 “ consumption of the fodder of the last crop of that
 “ farm, which offer they did not accept, although, if they
 “ had done so, the whole of the said fodder might have
 “ been long ago consumed on the farm; that he is
 “ still willing to give them that accommodation; that
 “ his chief object in view always was to have the fodder

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“ converted into manure upon the farm ; and that, if
 “ they did not choose to do so themselves, they might
 “ sell the fodder by roup, under the express condition
 “ that it shall not be carried off, but be actually con-
 “ sumed on the farm ; and that, if the fodder shall be
 “ sold under that condition, accommodation of houses
 “ shall be given at Kirktown for the consumpt thereof
 “ by the purchaser.”

Thereafter, in the month of June, the straw was valued by judicial inspectors at 11*l.* 2*s.* 6*d.*, who reported that it “ would have been worth one third more value, provided it had been properly cured, which it has not been, as it has never been thatched, which it ought to have been at the time it was put up, or when it was thrashed out.”

In October of the same year Colonel Gordon raised an action of damages before the Court of Session against the respondents, setting forth that they “ have failed to use the fodder of said way-going crop 1822 upon the ground of the said lands, in terms of the foresaid articles and regulations, and have prevented the pursuer from using it, or converting it into dung, whereby it is now greatly lessened in value ; and the defenders have thus subjected themselves in damages to the pursuer.” The proceedings in this process were delayed till the issue of the principal cause, and were resumed on the judgment of reversal being pronounced.

In defence the respondents pleaded, that although it had been finally settled that they were not entitled to carry away or dispose of the fodder, yet it had not been decided whether, under the article of the regulations founded on, they were bound to use the fodder upon the ground ; and they maintained that, in fair construction, all that

was incumbent on them was to leave it so that it might be used upon the ground by the appellant or the succeeding tenant; that if any loss had been sustained by the appellant, it had been caused by his own conduct in not acceding to the offers made by the respondents; and that he could make no claim against them, in respect that they were not *lucrati*, and had acted in *bonâ fide* in the judicial proceedings which had taken place.

The Lord Ordinary, “in respect there are raised in “the record questions of law, and in particular as to “the construction of a judgment of the House of “Lords,” reported the cause to the Court on Cases; and on advising them, their Lordships, on the 24th of May 1833, pronounced this interlocutor: — “In the “whole circumstances of the case, find no damages due; “sustain the defences, and assoilzie the defenders from “the conclusions of the libel, and decern;” and found expenses due.*

Colonel Gordon appealed.

Appellant.—It is now a fixed point that the respondents are bound by the articles and conditions, and particularly by the 16th, by which it was stipulated that the whole fodder was to be used upon the ground, and none sold or carried away at any time. It is admitted that during the currency of the lease the fodder was to be used and converted into dung by the respondents, for the benefit of the land; and there is no distinction

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as to the last year of the lease. On the contrary, the obligation is general; and it is expressly provided that the dung shall be laid on the land the last year of the lease. The respondents never alleged, till the issue of the main question, that it was competent for the appellant to make use of the fodder on the ground. Their plea, on the contrary, was, that they were entitled to carry it off, and dispose of it at their pleasure. The Judges in the Court below, in pronouncing the judgment appealed against, gave it as their opinion that the respondents were the parties who were bound to use the fodder on the ground; but, without assigning any specific reason, found that, under all the circumstances, they were not bound to make reparation to the appellant for their failure to implement this obligation. There were no circumstances, however, relevant to relieve them. If they required accommodation for the purpose, they were bound to show that they had applied for and been refused it; but so far from this being the case, the appellant spontaneously offered to give them such accommodation, both prior and posterior to the protest. It is of no relevancy to allege that the respondents are not *lucrati*; it is sufficient that, by their illegal act, the appellant has sustained loss and damage. Neither is it of any relevancy, that they acted in *bonâ fide*. In a question as to repetition of fruits or rents *bona fides* may be of importance, but it is of no materiality in a question of the present nature.

Respondents.—The judgment of this House was not intended to affect, and does not affect, the question as to the construction of the stipulation founded on by the

appellant. If the construction contended for by him were correct, it could not practically have been carried into execution. The crop of the last year could not be reaped till immediately preceding the out-going term; and before it could be thrashed, that term must have expired, and a new tenant have come into the premises. It was thus in the power of the appellant, as proprietor, or of that new tenant, to make use of it, by converting it into dung, and laying it on the ground, but it was impossible for the respondents to do so; and if it had been the intention of the parties that the respondents were to use it on the ground, provision would have been made for enabling them to do so, and they would not have been left dependent on the pleasure or caprice of the appellant as to accommodation for that purpose. In the absence, therefore, of express stipulation, it must be presumed that it was not the intention of the parties that the obligation to consume the fodder was to be performed by the respondents.

But even if it were to be held that it was incumbent on them to do so, still, under the peculiar circumstances of this case, there are no just grounds for finding them liable in expenses. Both the Sheriff, and all the Judges of the Court of Session, were of opinion, not only that the respondents were not bound to consume the fodder on the ground, but that it belonged to them in property, and that they were entitled to dispose of it for their own benefit. It is true that this House arrived at an opposite conclusion; but in the meanwhile the respondents had done every thing in their power to provide against the possibility of loss, and the appellant had rejected all their propositions. He has himself, therefore, to blame, if the fodder, which was of a perishable

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nature, has been lost or depreciated in value, and he cannot be allowed to make that loss effectual against the respondents.

LORD BROUGHAM.—My Lords, there are one or two circumstances in this case upon which I should take time for consideration, not only as to the arguments urged to-day, but how far the Court below was right in the construction which it put on the order of your Lordships; and indeed what construction their Lordships in the Court below did put on that, for I think that remains in a state of considerable doubt, after all that I have heard on either side of the bar. It has been ably argued on both sides; and as far as we have any lights upon it from the documents in the cause, those lights have been taken advantage of by the learned counsel; still I should wish to have further information; and if I continue to have any doubt (it is important the thing should be distinctly understood) I shall be obliged, as I frequently have been before, to have communication with the Learned Judges in the Court below. That is always however to be avoided if it can be; I always wish to be able to decide a case, or rather to advise your Lordships to decide a case, here without the necessity of that course; because, though I endeavour to give my view of the case, and to give the arguments used on both sides as distinctly and fairly as I can in my correspondence with the Learned Judges, it is quite clear I do not give them exactly in the way in which either of the counsel, if they were heard before those Learned Judges, would be inclined to give them. I give them according to my sense of them, perhaps differing from the learned counsel in their view of their own arguments;

consequently I avoid this as much as possible, chiefly confining those communications to my own doubts, without the necessity of stating the arguments of counsel ; and above all to remove my doubts as to the meaning of the Learned Judges, from the imperfectness of the report, or from their giving short judgments, which their Lordships perhaps are too much in the habit of doing.

My Lords, there is another reason why I wish to have this well considered, and to have that communication, if consideration should render it necessary or advisable ;— and that is, that I do not quite understand the sort of language used by some of the Learned Judges respecting the decisions of this House. It is quite clear that they are bound to submit to the decisions of this House, and they ought to submit in silence. It is not sufficient for a judge in the Court below to say, I submit by force, but I tell all the liege subjects of the kingdom that the House of Lords have decided wrong, that they are perfectly ignorant of Scotch law,—which they are not, for they keep the Scotch judges right. We have reversed three or four important Scotch cases, and the Learned Judges were unanimous in their decisions which we altered, and the Learned Judges themselves admitted that the House of Lords were right. In the Duntreath case Lord Mansfield reversed a decision on the law of real property in Scotland which the courts had come to ; they thought it wrong, and struggled a little against the judgment here ; but every Scotch lawyer, within five years after that judgment was pronounced, admitted that it restored the Scotch law. Many believed the Herbertshire case, which I decided, restored the Scotch law. My opinion is, that the Herbertshire case was com-

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pletely a deviation from the Duntreath case; and if it had remained in the books it would have injured the Scotch law. It was the opinion of the judges that we were right in that case; just as much as we were right in the Herbertshire case we were right in the Duntreath case. My Lords, I think there are exaggerations in these reports of what fell from the Learned Judges. I do not think it is fair to those learned persons to suppose they used the indecorous expressions which sometimes counsel are instructed to put into their mouths. It is one thing for a judge interlocutorily to say a few words respecting a judgment,—and God forbid that the House of Lords any more than any other court should be exempt from having its decisions questioned,—but it is another thing in a formal judgment for a judge below to say, I am bound by the decision above, and I submit to it, but it is compulsory; and one of the judges is represented to have said, that if the House of Lords decided it a thousand times over he should still retain his own opinion; but I cannot believe that any learned judge could so far forget what was due to this court, and that court, as to use such language, because it is the duty of a learned judge not to hold up the law of the land which is made by the Court of Appeal,—it is the duty of the learned judge, to obey cheerfully, and repress his objections when giving judgment, and not to say that he will retain his opinion if the court above, which is a court of competent jurisdiction, make the law by declaratory judgment; it is the duty of the learned judge in silence to give obedience; he may give a reluctant obedience, but he must not publish to the world that the Court above is wrong, and that he as an individual is right. It certainly requires a very great

degree of confidence; and I am bound in justice to Lord Eldon,—I am bound in justice to Lord Gifford,—and I am bound in justice to your Lordships House,—to add, that it requires a most extraordinary share of confidence,—I say no more,—of confidence in his own opinion, for any judge in the Court below to take upon him to say that Lord Eldon is wrong,—that Lord Gifford is wrong,—and that the House of Lords have been wrong, and that if they were to decide a thousand times over he should retain his own opinion. It is a degree of confidence which I do not think can be said to be a happy confidence, and I still less think that it is decorous for a learned judge, if he feels it, not to suppress it.

I am bound to make these observations, which I shall repeat as often as I ever hear it represented at that bar that such things have been said in the Court below. This House is the court of appeal; by the law of the land it has the appellate jurisdiction; it never was better advised,—it never was more diligently attended to,—the appeal business was never more learnedly or ably conducted,—than it was during the twenty-five years my venerable, noble, and most learned friend, Lord Eldon, occupied the woolsack; and whenever I hear it said, by any Judge whatever, that he will not regard that most Learned Judge's decisions, even upon questions of Scotch law, I shall remind that Learned Judge that the law of the land is against it, that his oath of office is against it, that he does not do his duty if he does not yield a respectful obedience to the decisions of this high Court.

My Lords, I will add, that Lord Eldon's decisions

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gave infinite satisfaction to the Court below; that they gave almost uniform satisfaction. I will add, that Lord Gifford's decisions, during the two years that he sat here, were as carefully prepared,—were as diligently considered,—were as laboriously worked out, in each case, (I attended during the time as counsel at the bar,) as those of any Judge that ever sat in any court; and I will further add, that I know, from my communications with some of the most Learned Judges in Scotland, they have borne ample testimony,—and to me, in private friendship, gratifying testimony,—to the great ability and learning with which that excellent Judge delivered his judgments. My Lords, there was one exception; I have said Lord Eldon's decisions gave almost uniform satisfaction; the exception I allude to is in the Roxburgh and Queensberry cases. I argued those cases here for the purpose of showing (though there were most able and learned Scotch lawyers here,) the bounds which separated the principles of the English law and the Scotch law. We thought at the bar that Lord Redesdale was taking an English law view of a question, materially differing in the principle on which it proceeded. I endeavoured to show that it was not only unlike in its frame and constitution, but that it had gone, in process of time, in so different a direction, that, instead of being nearly unlike, the principle might be said to be opposite with respect to powers and fetters, and so on. We were dissatisfied with the judgment; it was against us. We thought Lord Eldon had yielded too much to the English law view of the case taken by Lord Redesdale. The Scotch Judges held their own opinion; but not saying they would not submit, and not professing to submit with

reluctance,—no such thing,—but in private learnedly and respectfully discussed the subject, and sometimes admitted that they thought the House of Lords had taken a true view of the law. My Lords, I have reason to know that that opinion is changed. I have reason to know, though it took a longer time than the Duntreath and the Herbertshire cases,—I have reason to know, that in the course of some years, somewhere about ten years, they came to be exactly of the same opinion with the House of Lords; but I should say, that I could name two learned judges, who do not now acquiesce, upon re-consideration, and upon more deliberate and calm consideration, in the opinion of the House of Lords, and of Lord Eldon and Lord Redesdale; but as one of those learned judges who does not now acquiesce was counsel in the case, and argued it at the bar, he may be allowed to retain some bias in favour of his own view of the argument.

Now, justice to Lord Eldon and Lord Gifford required me to say thus much; and I do hope I never shall again have occasion, as long as I sit here, to make any such observations, for it is painful to me. My Lords, it is only bare justice to one judge, so impeached, that makes it necessary to offer an observation against any other judge. Where one is in such a situation as to appear to acquiesce on the one side, I must say, I feel the lesser of the two evils to be stating this, and protesting against it, than keeping silence. I believe, as I said before, it is more the report of the learned judge than that he really did use such expressions. I believe it is something like the report we had of another learned judge, who was reported to have said, if it

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

G. W. POOLE—DEANS and DUNLOP, Solicitors. `