[*7th May*, 1849.]

CAPT. JAMES ERSKINE WEMYSS, of Wemyss, *Appellant*.

JOHN DRYSDALE and Others, *Respondents*.

Landlord and Tenant.—Lease.—Under an obligation by a tenant not to remove fodder, &c., produced on the lands held by him (hay, &c., "of the *last crop* excepted"), and a renunciation of the tenant's lease, accepted by the landlord fourteen years before its expiration by effluxion of time, the crop of the year in which the renunciation was accepted is to be treated as the "last crop," in construing the restriction upon the tenant as to the removal of fodder, &c.

IN the year 1841 the Appellant granted Pringle a lease of lands for nineteen years from Martinmas 1839, and in the lease took from him an obligation in these terms: "And the said Hall "Pringle binds and obliges himself and his foresaids not to "remove or dispose of any fodder, straw, or turnips which are "produced on the lands hereby let (hay and fodder of the last "crop excepted), and to lay the whole dung thereby produced "upon the said lands; and he also obliges himself and his "foresaids to leave to the proprietor or incoming tenant at a "valuation, all the dung which may be made on the farm after "the sowing of the last crop: And it is farther provided and "declared that the outgoing tenant shall, at the expiry hereof, "if the landlord or incoming tenant desire it, leave twenty-one "acres of land in summer fallow four times ploughed, and "sufficiently harrowed and cleaned, for which he shall be "allowed such a deduction out of his last year's rent as may be "ascertained by two neutral men to be mutually chosen, or by "an oversman to be named by them in case of their differing "in opinion: And farther, it is provided that the outgoing

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"tenant shall allow the landlord or incoming tenant to sow "grass seeds along with the last crop on all or any part of the "lands hereby let which shall have been in summer fallow or "green crop the preceding year; and the outgoing tenant shall "be bound to harrow and roll in such grass seeds, and shall not "pasture the lands thus sown after the separation of the crop "with which it is sown, for which he is to be allowed by the "landlord or incoming tenant the sum of 2*s.* 6*d.* for each acre "sown with grass seeds."

Pringle fell into difficulties, and on 26th April, 1844, executed a renunciation, which was accepted by the Appellant, and contained the following, among other expressions: "I have "renounced and overgiven, as I hereby renounce, *simpliciter* "upgive and overgive, to and in favour of the said James "Wemyss Erskine, Esq., his heirs and successors, the said "tack and my possession of the several lands and others "foresaid, in virtue thereof, and all claim, interest, or advantage "I could have, or pretend therein, with the whole clauses and "obligements therein contained in my favour, and all that has "followed, or may be competent to follow thereupon for ever."

In the month of August 1844, the Appellant presented an application to the sheriff, praying him to interdict the Respondents, who were creditors of Pringle, "from selling the straw "off the farm, or otherwise proceeding with the sale of the "growing corn," which they were about to do under letters of poinding.

The sheriff granted the interdict, and the case was then carried by the Respondents to the Court of Session by advocation. The Lord Ordinary (*Wood*), on 13th June, 1846, found that Pringle was entitled to remove and deal with as his own property, the straw and fodder of crop 1844, and that the Respondents, his poinding creditors, had right to sell and dispose of the same, and recalled the interdict against them.

The Appellant reclaimed, and the Inner House being

equally divided in opinion, directed the opinions of all the other Judges to be taken. These opinions, by a majority of 5 to 4, were for adhering to the Lord Ordinary's interlocutor, and this was accordingly done by an interlocutor of 27th June, 1848.

Sir F. Kelly and *Mr. Anderson*, for the Appellant, cited Whittaker *v.* Barker, 1 *Cro. & Mees.* 113; Roxburgh *v.* Robertson, 2 *Bli.* 156; Gordon *v.* Robertson, 2 *Wil. & Sh.* 115; in order to show what are the rights of a tenant in regard to the fodder produced upon his lands.

Mr. Bethel and *Mr. Wortley*, for the Respondents, relied upon the terms of the particular clause in Pringle's lease.

LORD CHANCELLOR.—My Lords, it has been represented at the bar, that the property respecting which the present litigation has arisen is worth 300*l.*, but it turns out not to be worth anything like 300*l.* The straw and fodder, out of which the contest arose, may be worth that money; but the contest is, what is the right and interest of the landlord and tenant as to the mode in which the produce, which is represented by that 300*l.*, is to be used? It is very unfortunate to find a matter of such small value the subject of such expensive litigation; and it is very much to be regretted, that the matter having come into litigation, there should have been so much difference of opinion among the learned Judges in the Court below, as to have made it indispensable for the parties to come here, not being satisfied with the judgment of the Court below.

My Lords, having considered the opinion of those learned Judges, and having heard the mode in which the case has been argued at the bar, I really cannot myself feel the great difficulty which seems to have been felt in the Court below. It appears to me to be very clear that the interlocutor ultimately pro-

nounced, though by a small majority, does that which the interests and rights of the parties required.

The proceeding originated in an application for an interdict by the landlord, seeking to restrain the tenant from removing from the premises the straw and crop of the year preceding the time when he actually quitted by contract between himself and his landlord. It seems, however, that after that interdict had been discussed, by arrangement, the whole crop, including the straw as well as the corn itself, was sold; and that the matter in dispute now exists in the shape of money, and not of material.

Now, my Lords, two questions appear to me to arise, and those two questions may be determined in a very few words. The landlord (as is usual) restricted his tenant as to the mode in which he should manage the farm; and, amongst other provisions, he bound him "not to remove or dispose of any "fodder, straw, or turnips which are produced on the lands "hereby let (hay and fodder of the last crop excepted), and to "lay the whole dung thereby produced upon the said lands, "and the tenant also obliges himself to leave to the proprietor "or incoming tenant, at a valuation, all the dung which may be "made on the farm after the sowing of the last crop." It was also provided that the outgoing tenant should at the expiry of the lease, if the landlord or incoming tenant desire it, leave a certain number of acres in summer fallow. And then it is provided "that the outgoing tenant shall allow the landlord or "incoming tenant to sow grass seeds along with the last crop "on all or any part of the lands."

The provision amounts to this, that you shall not remove fodder, straw, or turnips grown on the land, hay and fodder of the last year excepted. That, however, is not the whole provision, for it goes on, "And to lay the dung thereby produced "upon the said lands;" obviously showing (as one might expect) that the object of the landlord was to procure a certain

quantity of manure and maintenance for the land, by providing that the produce of the land should be expended on the land, but for very obvious reasons excepting hay and fodder of the last crop, inasmuch as to impose any restrictions as to that would be an interference with the rights of the tenant, who would otherwise be entitled to remove and sell all that the land might produce. And therefore so long as the tenant might have an interest in the land, and therefore an interest in the improvement of the land by the application of fodder, it was provided that he should lay it out on the land; but when that interest ceased, it would have been inflicting a penalty upon him to have compelled him to leave on the land that from the employment of which he would derive no benefit, namely, the fodder and hay and straw of the last crop.

The first question that arises is, What is the meaning of the "last crop?"

The term no doubt is for nineteen years, and in speaking of the term the word "years" we find is used; but why have the parties departed from that, and used the word "crop" in this as well as in the second sentence, where the provision is introduced, entitling the landlord to enter, notwithstanding the non-expiration of the term, and to sow grass seeds upon the tenant's land? Obviously that the landlord might have the benefit of the seed so sown. There also we have the word "crop."

Now it is impossible to say that the straw and fodder in question is not the last crop, for beyond all question it is so. If the word had been the "last year," then there might have been a question whether, although the words "last year" were used, those words did not mean the last year of the tenancy, although by another construction it would be the last year of the nineteen years. But here we have the expression "the last "crop." Those, therefore, who contend that the tenant is not entitled to remove this property must show some ground, to be

found in the instrument itself, for construing the word "crop" the same way as if it had been not only "year," but the last year of the nineteen years. The word "crop" coming by itself, if not affected by any other provision, carries the general crop. Here the contest is respecting the hay and straw of the last year of the tenancy, that is to say the last crop. The last crop the the tenant is to remove from the land. If therefore that be the right construction, there is no ground upon which the case can stand; because then, according to the terms of the original lease, this being the "last crop," he would be entitled to remove it, that is to say, the covenant which prohibits him from exercising the ordinary rights of property over the produce of the whole of the land cultivated by him would not apply, because there is an exception of the last crop.

Now suppose instead of the words "last crop," the word "year" had been used, and the word "year" were to be considered not as the last year of the tenancy, but as the last year of the nineteen. Then what has happened is, that for reasons sufficiently good, no doubt, an agreement has taken place between the landlord and the tenant. The tenant it appears was not able to go on with the cultivation of the farm, and the landlord, for very good reasons (having ascertained this fact), was very glad that he should quit the farm, and the tenant was very glad to get rid of the encumbrance of a farm which was beyond his power to manage. Therefore the renunciation took place; and by the renunciation it was agreed that the tenant should quit at Martinmas. There is nothing in the renunciation about this particular provision; the only part which affects it is, that he upgives and overgives to and in favour of the landlord the whole of the clauses and obligements contained in the deed in his favour, and that should follow or might be competent to follow thereupon for ever; and he binds himself to flit and remove his servants, cottars, and dependants on or before the term of Martinmas next.

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The result, therefore, is, that instead of the tenancy being to be continued for nineteen years from the date of the lease, it is to be at an end at Martinmas 1844. There is no special provision; and those words, that he renounces all clauses in his favour, could hardly be made to apply to the present case. In one part, however, of the argument which has been urged on the part of the landlord, it has been contended that this is an obligation in his favour. But it is not an obligation in his favour; it is an exception from the obligation in favour of the landlord, because the covenant is a restriction of the common right which the tenant would have of dealing with his own property. It is not an obligation, therefore, by which the tenant undertook anything, but one by which the landlord limits the right of the tenant by contracting with him.

Then it does in fact come merely to this: that the renunciation alters the period at which the tenancy was to determine. The term is determined by contract between the parties at Martinmas 1844, instead of running for the whole period of nineteen years. For the present purpose I am considering the words "last year," as meaning the last year of the nineteen. Does not that of necessity make every provision limiting the term, speak as of Martinmas 1844 as it would speak of the end of the nineteen years, as if nothing had happened between the parties to determine it. It is still the "last crop." We know very well that if a tenant holds under a lease and holds over, the lease being expired, the lease contains the contract between the parties. It is gone as to time, but it remains obligatory as to the special provision; and the parties making no other contract, it is assumed that that which was the contract for one period continues, as between them, to be the contract for the protracted period; and the landlord permitting the tenant to occupy and the tenant occupying, although the lease has expired, the provisions of the lease are binding on both.

Then, as some of the learned Judges put it, if the contract

had been that it should extend to the period that is held over by the tenant, that is precisely the same thing. In the case put there would be an express contract. But here instead of holding over, they come to an earlier determination; but a different rule is not applicable to the one case from that which is applicable to the other. All that the parties have done has been to alter the term, but not to alter the contract.

Then observe the extreme absurdity of the consequence which would follow from the opposite construction. What is to become of the property? It is said at the bar, that the parties can ascertain their interests, and that they may agree among themselves. That is not the way in which the courts of law are to administer the rights of parties. If the parties do not agree among themselves, I should like to be informed what mode there is of coming to any decision as to their rights. The interdict, I suppose, would stand, and we are considering the case as it stands, upon the contract between the parties with the interdict operating upon that contract. The tenant cannot remove this 300*l.* worth of straw. The landlord, of course, is entitled to possession; his new tenant will hold possession under him. But it was said at some period of the discussion below, that the landlord has no property in this hay and straw. It is quite clear he has no property in it, because he has only a right to insist on the tenant using it in a certain way. The incoming tenant has no property in it, the outgoing tenant is turned out of his farm, and he has a property in it; and the only person who has property is prohibited from making use of the property, because he cannot come upon the land after quitting it to do anything with the property. The interdict prevented his removing it, and therefore, although it is the property of the tenant, he is prohibited from doing anything with it, with the object of converting it to the usual purposes of property. It seems to me to be confined entirely to a question of property, and the result of the interdict would be to prevent the tenant

removing the property without giving any one a right to do anything with it.

But now, what is the nature of the interdict which the landlord and tenant have, supposing the lease to continue, and the year 1844 to be the last of the nineteen? The produce is to be laid out (for that is the obvious meaning of the provision) in the shape of manure. Then the tenant, of course, if he continued to hold, would have the whole benefit of his own property, and of the mode in which he had used that property; but the landlord does not choose that the tenant should exercise that discretion, however beneficial to himself, and he says, "I, "too, have an interest in having the land kept in a proper state, "and I therefore insist that that which is your own property "shall be used in such a mode as to enure to the benefit of the "farms you are about to occupy under me." That is a very usual, natural, and proper provision. But when you come to the end of the term, whenever that may arrive, it is quite clear that the landlord derives a benefit, but the tenant loses it, if the covenant enures that he should lay out this produce in the shape of manure. That must be limited. It is not contended that it is to continue. The covenant for *leaving* continues, it is said, but the covenant for *using* is necessarily assumed not to be in operation. But it is all one provision. Why is he not to remove it during his occupation? Because he is to use it as manure. Why is he to be permitted to remove it in the last year? Because compelling him to leave it on the land for manure would be taking from him that which is his property.

A case has been referred to in which there was a provision that the tenant should leave all produce of this kind at the end of the term. To be sure, a man may so contract if he please; he may contract that he shall leave any other part of his property on a farm. The whole that that decision comes to is this, that having so contracted, he cannot go from it. But here the contract is just the reverse, for he has contracted that he shall

not be compelled to leave the last year's produce on the farm. That case, therefore, can have no application to the present.

The case of Whittaker *v.* Barker, which was decided in the Court of Exchequer, has been referred to, and I have looked to that case for the purpose of seeing whether it touches at all on the present. There were, in that case, three claims. The tenant was to pay 95*l.* for coming in, which he never paid, and there was another claim for some buildings, which were not applicable to the farm which he occupied, and which, therefore, did not arise, but he was paid those when he quitted the farm. Now it is quite immaterial whether your Lordships should think that decision was right according to the facts as they were proved. The only important part of that case is, whether the principle laid down by the Court is applicable to the present case, and whether it can have any effect upon the decision which your Lordships ought to pronounce. Mr. Baron Bayley says, "it "seems to us that he is not entitled under the circumstances "under which he quitted. He quits without his landlord being "apprised by any bargain, that he is about to quit; and we think "that such a quitting is not a quitting under the terms of the "tenancy. It was in reality a running away, and if a tenant "runs away he entitles his landlord to take possession, without "making him compensation for the improvements which he "may have made upon the lands. The ground of our judgment "is this: there is no bargain made at the time when the tenant "left the farm that he should be paid for the improvements; "and as the case does not, for the reasons stated, fall within the "terms of the written agreement, he cannot claim for the "improvements under that agreement."

Certainly a man who runs away from his contract can hardly come and ask for the benefit of that contract. That case differs from the present in the most essential points as constituting the ground of the tenant's claim; namely, that in this case he does not run away, he does not quit the farm without the landlord's

consent, but the landlord and the tenant agree, that, instead of holding the farm for the whole period of nineteen years, he should quit in the year 1844; and one may rather assume, from the language of Mr. Baron Bayley, that if those facts had appeared in that case, if there had been a contract by which the tenancy was determined, he would have been of a different opinion.

My Lords, it does appear to me that nothing could be more unjust than continuing this interdict, which, in effect, would be to take from the tenant the whole of the produce of the last crop,—although not within the terms of the original lease,—and if it had been within the terms of the original lease, the terms of the renunciation of the contract entered into between the landlord and the tenant permit the removal by the tenant of his property in the last year, and the produce of the last year of his tenancy, though not the last year of the nineteen. I move, therefore, that the interlocutor be affirmed.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. It is to be regretted that there should have been such great difference of opinion in the Court below, the learned Judges having been almost equally divided in their opinion on this subject. I consider that there cannot be anything more clear than that the words "hay and fodder of the "last crop excepted" is not a stipulation in favour of the tenant, but is only an exception of the obligation by him entered into in favour of the other party—the lessor. If it had been taken as a stipulation or a clause in favour of the tenant, then upon the terms to the renunciation, it might very fitly and logically have been contended, and with perfect accuracy, that he had given up and renounced the benefit of that stipulation, or the benefit of that clause in the lease in his favour; but it is not a clause in his favour, it is not a stipulation made by him as against his landlord, it is merely an exception, and a most rea-

sonable, and natural, and just exception in the tenant's favour, no doubt out of the obligation which, by the rest of the clause, by the words "not to remove or dispose of any fodder," and so forth, he had entered into in the other parts of that clause.

Being, therefore, of that opinion, the only question is, whether those words, "hay and fodder of the last crop excepted," apply to that which is the last crop according to the terms of the lease, namely, the crop of the nineteenth year, or whether they apply to that which becomes the last crop in whatever way. I am clear of opinion that it is not rational or sensible to give it any other construction than the latter of these two, namely, that it applies to the last crop, whatever that may be which legally is the last crop. Now that last crop, had it not been for the renunciation, would have been the crop of the nineteenth year; but the renunciation, and the acceptance of that renunciation by the landlord, make that the last crop which the tenant had said was to be the last crop, and which the landlord had consented by accepting that renunciation to make the last crop. If the landlord had intended to have bettered himself in that respect as a condition of accepting the renunciation, he might (which would have been a very obvious course) have said, "be "it always remembered, that, although I accept this renunciation, "and I determine your holding in five years instead of thirteen, "I do it on condition that you shall not have the benefit of the "exception of the last crop, because I mean that that exception "shall only be applied to that which by the terms of the lease "shall be the last crop, and I am now letting you off earlier than "that by fourteen years." I do not say that it would have been very fair to have done so in the case of an insolvent tenant, but, at all events, he might have done so. It is sufficient to say that he has not done so, and, therefore, that which he has suffered to be treated as the last crop, namely, the fifth year's crop, must by us be considered to be the last crop.

I really do not think there is any application whatever in

the cases which have been cited. I think my noble and learned friend has well dealt with them, and has thrown them very justly out of our consideration.

I cannot help lamenting very much that this case should have undergone so much litigation, both below and here, and particularly that it should have been brought here; for when it is said that this is a question of 300*l.*, it is nothing like 300*l.*; it is a question with respect to the rights of the two parties touching their different share of that 300*l.* which may be half as much; it can be no very large amount; and I may observe here, that had it been for the whole 300*l.*, it is one of those cases in in which it is, unfortunately for the Court, and not for a jury or any person acting as a jury to decide as if it were a matter of fact, because our practice has always held (and many lawyers as well as law-givers have been of opinion have too strictly held) that the construction of a written instrument is always matter of law, and is for the Court and not for a jury. But if the question is, what is the meaning of parties in using certain words in a written instrument, I must say that comes so very near a question of fact, that I have not mental organs enough to ascertain how little is the difference between that and a question of fact, and I cannot so nicely weigh the matter or deal with it so astutely as to ascertain it; but, nevertheless, the law says, and the practice of the Court is, that it is a question of law and not a question of fact. Consequently, all such questions of construction of instruments are withdrawn from the jury and are dealt with by the Court alone; but, nevertheless, this is only a question of fact, because the question is what the parties intended by the use of these words. It is neither more nor less than a question of fact. The decision in this case never can decide any other case than this; it never can be taken to rule any point of law or to touch or illustrate any principle in the world. It illustrates no principle but this, namely, the great nicety which prevails in our Courts in distributing the province of the Court and

of juries, or of Judges acting as juries, namely, between the province of law and the province of fact. Therefore, I very much regret that, in a case of this sort, which is in substance and effect that kind of case which in all the practice attaching both to the appellate jurisdiction and to the Scotch judicature, it was meant to exclude from appeal, namely, questions of mere fact—I am very sorry that this, owing to the nicety of the law in that respect, has been considered (which it is, no doubt) as a question for the Court, and that it has been brought here by appeal; but being brought here, I have no manner of doubt whatever that the Court below, although doubting upon it and differing in opinion very much upon it, have come to the right conclusion, agreeing with the Lord Ordinary and differing with the Sheriff Substitute in favour of the tenant and not of the landlord, in favour of the Respondent and not of the Appellant. I am therefore of opinion, with my noble and learned friend, that we have nothing to do but to advise your Lordships to affirm the judgment appealed from with costs.

It is Ordered and Adjudged, That the said Petition and Appeal be, and is hereby, dismissed this House, and that the said interlocutors therein complained of be, and the same are hereby, affirmed: and it is further Ordered, that the Appellant do pay, or cause to be paid to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant: And it is also further Ordered, that unless the costs certified as aforesaid shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby, remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

G. and T. W. WEBSTER—RICHARDSON, CONNEL, and LOCH.