JUNE 5, 1863.

JAMES WILLIAM HUNTER, *Appellant*, *v.* WILLIAM MILLER, *Respondent.*

Landlord and Tenant—Lease—Clause—Construction—Waygoing Crop—*A tenant was bound, by his lease, to farm according to the rules of good husbandry, and*, inter alia, "*never to have more than one half of the arable land in white crop in the same season, nor to take two white crops off the same field without a green or black crop intervening, and to take only one black crop, such as hay, beans, peas, potatoes, and the like, between grass and grass: Further, to leave, at the end of the lease, the turnip or fallow breaks once ploughed for the incoming tenant.*" *The landlord contended, that the expression "turnip or fallow breaks" included all the farm not in white crop; and that, therefore, the tenant was not entitled to any waygoing crop, except a cereal crop from half of the farm.*

HELD (affirming judgment,) *That the tenant was entitled besides to a waygoing black crop from a sixth of his farm, and was bound to hand to the incoming tenant only one sixth of the farm once ploughed as the turnip or fallow breaks of the year.*[1]

The respondent was tenant of farms of 607 acres. His lease bound him to farm according to the rules of good husbandry practised in the county, and not to scourge or deteriorate the farm by undue cropping, "and in particular never to have more than one half of the arable land in white crop, in the same season, nor to take two white crops off the same field without a green or a black crop intervening, and to take only one black crop, such as hay, beans, peas, potatoes, and the like, between grass and grass. Further, to leave, at the end of the lease, the turnip or fallow breaks once ploughed for the incoming tenant."

The Court held, that the lease allowed a six shift rotation, and refused to allow the landlord a proof of his averment, that this would be inconsistent with good husbandry, and hence the tenant was entitled to divide the farm so as to take a waygoing crop the last year corresponding to the division of his farm according to the six shift rotation.

The suspender (the landlord) appealed, and stated in his *printed case* the following reasons:—1. Because, upon a sound construction of the contract of lease between the parties, the respondent, as outgoing tenant, was not entitled to a waygoing crop of any description, other than a cereal crop of wheat, barley, or oats, to an extent not exceeding one half of the arable land in the farms. *Forlong* v. *Taylor's Executors*, 3 Sh. & Macl. 210; *per* Lord Jeffrey in *Davidson* v. *Magistrates of Anstruther*, 7 D. 351; and *per* LORD CHANCELLOR in *Att. Gen.* v. *Drummond*, 1842, 1 Dru. & War. 367; Dickson's Law of Evidence, 121. 2. Because the respondent's claim to a waygoing black crop was illegal and inequitable, in respect, that it involved a sudden and radical change of the system of management and cultivation of the farm followed by himself and his father from the commencement of his lease at Whitsunday 1838, up to crop 1858, and was adopted nimiously and *in malâ fide* to the hurt and prejudice of the appellant and his incoming tenant. 3. Because the respondent's claim to a potato crop from 101·94 acres of the farms in 1859 was, to that extent, a wrongful, fraudulent, and illegal attempt to take a twenty second year's crop from farms for which he fell to pay rents for only twenty one years' cropping. 4. Because the Court below, while they rested the judgments under appeal upon facts as to which the parties were at issue, not only refused to allow the appellant proof *habili modo*, tendered by him with reference to these disputed facts, but proceeded upon evidence which was irregular, incompetent, and *ultra vires*. 5. Because the waygoing crop claimed by the respondent in 1859 was, even upon the principles laid down in Mr. Hope's first report of June 1860, and the state of the facts averred in the respondent's own tabular statement of his cropping, in excess of what he was entitled to claim, to the extent of at least 46·56 acres. 6. Because the judgments under appeal ought not, in any view, to be allowed to stand, as regards the matter of costs.

The respondent stated in his *printed case*, the following reasons:—1. Under the terms of the lease he was entitled to take, in 1859, not only a waygoing white crop of 300 acres, but a waygoing black crop of 100 acres more. 2. The respondent was entitled to take a black crop from a sixth of the farm in 1859, according to the rules of good husbandry and the practice of farming in East Lothian, the district where the farms are situated. The respondent referred to the following cases to shew, that Mr. Hope's report on this point was conclusive between the

[1] See previous reports 24 D. 1011: 34 Sc. Jur. 505. S. C. 4 Macq. Ap. 560: 1 Macph. H. L. 49: 35 Sc. Jur. 605.

parties :—*Dixon* v. *The Monkland Canal Company*, 1 S. 145 ; 1 W.S. 636 ; *Rowatt* v. *Whitehead*, 5 S. 19 ; *Wilson* v. *Struthers*, 15 S. 523 ; *Brown* v. *Love*, 4 D. 386 ; *Lord Blantyre* v. *Glasgow and Greenock Railway Company*, 13 D. 570 : 23 Sc. Jur. 254. 3. There is nothing either in the history of the farm, or the method of cultivation pursued by the respondent during his lease, which can deprive him of his right to the waygoing black crop in question.

Solicitor General (Palmer), and *Anderson* Q.C., for the appellant, contended, that the true construction of the lease was, that the tenant was not to be allowed to have a waygoing crop, except a cereal crop on half of the farm—*Shirreff* v. *Lord Lovat*, 17 D. 177 ; 27 Sc. Jur. 66 ; *Brown* v. *College of St. Andrews*, 13 D. 1355 : 23 Sc. Jur. 626.

Rolt Q.C., and *H. Smith*, for the respondents, were not called upon.

LORD CHANCELLOR WESTBURY.—My Lords, I trust that your Lordships will be of opinion with me, that this is a case upon which none, or at all events, if any, very little reasonable doubt can be entertained ; or, if there can be any difficulty in coming to that conclusion, I think your Lordships will come with me to the conclusion, that we ought not to reverse this interlocutor unless we are satisfied that it is wrong ; and I think your Lordships will agree with me, that the appellant has by no means shewn, that there is any error whatever in this interlocutor.

The first question arises upon the construction to be given to the lease, under which 600 acres of land were held by the respondent, in the county of Haddington in Scotland. And the second question that arises is this, that if the matter cannot be determined by the construction of the lease, the question then is, what the course of husbandry, as recognized in the county of Haddington, will require—the second inquiry being perfectly legitimate, because the obligation of the tenant is expressed as being to farm according to the rules of good husbandry established and practised in the county.

Now, the farm consists of 600 acres, and on the face of the lease there is a clear right conceded to the tenant, to keep one half of the farm always in cereal or corn crops, and as to the rest of the farm there is no definite rule given with respect to the keeping of any quantity in certain crops. There is a rule given with respect to the rotation of crops ; but with respect to the crops that may be put upon the farm as to the remaining moiety, the lease leaves a wide range, comprehending black crops and grass, or what we call in England seeds and turnips.

Then, if that be so, it would follow, according to the usual course of husbandry, that undoubtedly an equal part of the residue or remaining moiety of the farm might be put, following the order of rotation every year, part in black crop, part in seeds or grass, and part in turnips. There is nothing, therefore, I think, upon the face of the lease, to prohibit the tenant dividing the remaining moiety of the 600 acres into crops of those three several descriptions.

It is admitted at the bar by the counsel for the appellant, that this might be done during every one of the twenty one years of the lease, except the last outgoing year ; and it is therefore incumbent upon the appellant to shew clearly, that, from the terms of the lease, that, which might lawfully have been done during every year of the term but the last, is clearly prohibited during the last year.

Now, the language that is relied upon for the purpose of arriving at that conclusion is this, that the obligation is thrown upon the tenant to leave at the end of the lease "a turnip or fallow break once ploughed for the incoming tenant." And the mode in which we are desired to construe those words is to reject the words "turnip or," and to give this construction to "fallow break," that every portion of the remaining 300 acres of land ploughed during the year for the purpose of receiving any crop comes under the denomination of "fallow break."

Why, my Lords, it is quite plain to any person acquainted with the subject matter, (and some knowledge of the subject matter is requisite in order to understand the meaning of these terms and definitions,) that, inasmuch as the end of the lease is at Whitsunday in the year, a certain portion of the land would, according to the rules of good husbandry, naturally at that period be in fallow—that is, it would have been ploughed and be without crops at that period of the year, in order to receive the turnip crop, which is universally sown somewhat later than Whitsunday. And, accordingly, the meaning of the word "fallow" is to be interpreted by the word "turnip," in connexion with which it is found : the two words are put equally the one for the other, "turnip or fallow breaks." It would be rather incorrect to call them "turnip breaks," they not having been actually sown with turnips ; and accordingly the word is interpreted "turnip"—that is to say, "fallow breaks," meaning the portion of the land ploughed and left in fallow for the purpose of being planted with turnips. But the proposition of the appellant would exclude entirely the right of dedicating any portion of the land whatever to black crop during the last year of the lease, and it would make the prohibition contained in those words, "turnip or fallow breaks," extend to the whole remaining moiety of the land. I think it is impossible to come to the conclusion, that that prohibition is warranted by the language of the lease.

But then, supposing those words in the lease to be ambiguous, if we go to the other obligation for the purpose of interpreting an indefinite, or imperfect, or ambiguous clause, namely, to see what is the course of husbandry according to the custom of the county, we find that that has been ascertained beyond all controversy. Certainly it was perfectly competent to the Lord Ordinary,

and to the Judges below, to remit an inquiry to a gentleman conversant with the matter, in order to ascertain what the course of good husbandry requires.

I have had often occasion to observe, that there is sometimes not so much skill shewn in drawing up orders in the Courts in Scotland as there might be. The order made in this case certainly is drawn up in a form, that would appear to refer to Mr. Hope not only the question as to what was required by the course of good husbandry as practised in the county, (which was the proper subject of inquiry,) but also to refer to him the question of the construction of the lease. But I think, that that particular part of the reference may be disregarded and set aside, and that it may be taken as if the reference were made to an expert for the purpose only of ascertaining what the course of good husbandry in Haddingtonshire required. The finding of the gentleman to whom this reference was made was, that the rules of good husbandry, as established in the county of Haddington, would admit of 100 acres, that is, one sixth part of the lands in question, being devoted by the tenant to black crop during the last year of the term.

Therefore, upon both of the points which arise in this case, namely, the special one as to the construction to be put upon the words of the lease, and the general one as to what is required by the course of good husbandry in the county, my view of the obligation of the tenant is in perfect conformity with the interpretation of the Court below, which warranted the tenant in devoting 100 acres to black crop during the last year of his tenancy. The interlocutor of the Court of Session has declared, that, under those words of the lease which form the basis of the argument of the appellant, namely, "turnip or fallow breaks," the tenant was under no obligation to leave for the incoming tenant more than 100 acres once ploughed for turnip or fallow break; and that, therefore, that is the extent of the relief to which the appellant is entitled in his process of suspension. And I submit to your Lordships, that this interlocutor ought to be affirmed, and that this appeal should be dismissed with costs.

LORD BROUGHAM.—My Lords, I entirely take the same view of the case as my noble and learned friend. I had some little doubt at first, arising from the course of proceeding in the reference to Mr. Hope, whether some confusion has not arisen from referring the point of law as to the construction of the lease to that farmer. But upon examining it fully, I find, that the substantial reference was as to a matter which the Court had a right to refer. And although Mr. Hope gives an award upon the whole matter, including the construction of the lease, I think, that should be taken as substantially only a report upon the custom of good farming in that county. I very much doubt whether there was any necessity for looking further than to the terms of the lease. The mere construction of the lease is I really think sufficient. I therefore entirely concur with my noble and learned friend, that this interlocutor ought to be affirmed, and the appeal dismissed.

LORD CHELMSFORD.—My Lords, the question to be decided in this case is an extremely narrow one. It is whether the respondent, the tenant, is entitled in addition to the waygoing crop of the moiety of the land, to a waygoing black crop in respect of 100 acres. Now it is admitted, that there is nothing in the lease which prevents the tenant adopting the six course shift, and that, under the six course shift, he would be entitled to have another one sixth part of the land under a black crop. But it is insisted, that, during the last year of the tenancy, he is excluded by the terms of the lease from having such black crop, and consequently from carrying it away as a waygoing crop, the terms of the lease being, the tenant "to leave at the end of the lease the turnip or fallow breaks once ploughed for the incoming tenant, and to sow the breaks that fall to be in grass," with a certain quantity of seed.

Now, it is said on the part of the appellant, that this means, that all the lands which are not devoted to white crop, namely, the moiety of the lands, must be either fallow or grass. But unquestionably there is nothing in the terms of this clause in the lease which renders that at all essential. The words are capable of the interpretation which was suggested in the course of the argument, and which appears to me to have been the clear meaning of the parties, namely, that such portions of the land as in the regular course of rotation should be in fallow, should be ploughed once for the incoming tenant, and that such portions of the land which fall to be in grass according to the rotation, should be sown with seed in a particular manner. I think the case is perfectly clear, and I agree entirely with my noble and learned friends in their opinion, that this interlocutor ought to be affirmed.

Interlocutor affirmed, and appeal dismissed with costs.

For Appellant, Loch and Maclaurin, Solicitors, Westminster.—*For Respondent*, Adam Burn, Solicitor, London.