"values brought in this country, under the authority of the statute "of Queen Anne against usury, are subject to the limitation appli- "cable to such penal actions in England, and that the concurrence "of his Majesty's Advocate is not necessary in the present action."

JOHN SCOTT, Writer to the Signet, Proprietor of the Farm of Ormiston, . } *Appellant.*

ALEXANDER BRODIE of Carey Street, London, Tacksman of the Farm of Ormiston, and WILLIAM BRODIE, residing there, } *Respondents.*

House of Lords, 10th March 1802.

LEASE—WAY-GOING CROP—STRAW AND DUNG—CUSTOM OF THE COUNTRY.—This was a question, as to whether the tenant had a right to a way-going crop, under a lease, which bore an entry at Whitsunday, and declared that his removal, on the expiry of the lease, should be at Whitsunday, from the lands, &c., and which bound him to consume the whole straw and dung upon the lands during the currency of the lease, and to carry none of the dung from the farm during the last year. The tenant began to plough, and to lay down a crop to be reaped after the expiry of his lease at Whitsunday, contending, that by the custom of the country, he was entitled to a way-growing crop. The Court of Session altered an interlocutor of the Lord Ordinary, which interdicted the ploughing and laying down of crop. On appeal to the House of Lords, the Lord Chancellor pronounced a judgment, declaring that the tenant, in this case, was not entitled to a way-going crop, and remitted the case for reconsideration.

The lands of Ormiston lately belonged to the Earl of Traquair, from whom they were purchased by the appellant.

They were let on lease, (15th March 1783), by the Earl of Traquair, to William Murray, "for the space "of nineteen years, from and after the term of Whitsunday "(then) next, 1783, which is thereby declared to be "the term of the said William Murray's *entry* to the posses- "sion of the said lands and others, by virtue of these pre- "sents, by which the said William Murray binds and ob- "liges himself and his foresaids, at the expiration of this "tack, which will be at the term of Whitsunday 1802, to "flit and remove from the lands and others thereby set,

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"and to leave the same void and redd, without any previous "warning or process of removing to that effect;" and also, "to consume the whole straw and dung upon the lands set "during the currency of the tack, and to carry off none of "the dung from the farm during the last year of the same."

May 14, 1799. This lease was assigned to the respondent Alexander Brodie, who, being a resident in London, left the management of it to the other respondent—his relation. The lands were thereafter purchased by the appellant for £8400.

In making the purchase, the appellant certiorated himself, on examining the lease of the respondent, that it was only taken to the tenant and his heirs, and seemed to exclude assignees. The assignation was never consented to by the Earl of Traquair; but there were certain documents and settlements of accounts, signed by Lord Traquair, or his commissioners, tending to show that the respondents had been received as his Lordship's tenants. Accordingly, in the action of removing, brought to have them to remove at Whitsunday then next (1800), the Court only decerned them to remove at the term of Whitsunday 1802, being the term of the expiry of their lease.

In the meantime, the respondents having broken new ground, by ploughing and overcropping, in violation of the lease, which limited them to 150 acres of the 873 acres, thus indicating also a purpose to lay down a crop for the year after the expiry of the lease. A bill of suspension and interdict was presented to the Lord Ordinary on the Bills, which prayed to prohibit them from ploughing any part of the said farm, after the separation "of the current crop "(1801) from the ground, or from carrying off the farm any "part of the straw, hay, grass, or other fodder, grown, or "that may be grown upon the farm; or of the dung made, "or that may be made, from the produce of the former or "current crops."

June 20, 1801. The Lord Ordinary "passed the bill, and granted the "interdict, upon caution lodged." Thereupon, a petition was presented to the Court, in which the question for discussion was, 1. Whether the respondents were entitled to a way-going crop? 2d. Whether they can be prevented from carrying away any part of the straw and dung?

The respondents contended, that by the custom of the country, a Whitsunday entry entitles to the flitting or way-going crop, and that, of consequence, he was entitled to that crop, as well as the straw and dung of it. The appellant, on the other hand, contended, 1. That from the situa-

tion of the farm at the time it came into possession of the original tenant, as well as of the respondents, they were not entitled to any way-going crop. 2. That such right, and all custom in regard to it, were excluded by the terms of the lease. 3. And that there was no custom, as alleged by the respondents.

July 4, 1801.

Of this date, the Court pronounced this interlocutor:—"The Lords having advised this petition, with the answers "thereto, remit to the Lord Ordinary to alter the interlo- "cutor reclaimed against, and to remove the interdict, "without prejudice to any question that may arise between "the parties, with regard to the straw, fodder, or dung; "find the respondent (appellant) liable in expenses, and "allow an account to be given in."

Nov. 19, 1801.

On further petition, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. As to the interdict against ploughing any part of the farm, after separation of the crop 1801 from the ground, the appellant contends, that the whole farm being in grass at the entry, both of the respondents at the term of Whitsunday 1787, and of the original tenant, from whom they derived right, when he received the same at Whitsunday 1783, it followed that the respondents could not be entitled to a way-going crop, even according to the custom on which they founded, because such custom was based on the principle, that as the tenant had not received possession of the arable land until the separation of the crop from the ground, so he could not be obliged to relinquish the possession of the arable land without being entitled to a way-going crop. Besides, by the lease, what the respondents claim as a way-going crop is expressly excluded. The entry of the tenant is therein stated to be to the whole farm, at Whitsunday 1783. The endurance of the lease is declared to be for a period of nineteen years from and after that term. It is further stated in the lease, that the expiration thereof shall be at Whitsunday 1802, when the tenant obliges himself to remove from the farm. On these grounds, and also seeing the custom alluded to has not been proved, the respondents have no right to a way-going crop.

Pleaded for the Respondents.—A person who, under a colourable title, ploughs and sows the ground, must be entitled to reap the crop, though every interest he had in the land may have ceased between the time of sowing and

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the time of reaping. A tenant entitled to hold during seed-time is entitled to proceed to the last moment in the cultivation of the farm, and to reap the fruits, even though his possession in the meantime should terminate. Sir Thomas Craig lays it down, that a tenant, outgoing at Whitsunday, is entitled to reap the crop then on the ground, and to make use of the barns, &c., for the purpose of so reaping it. This right of the tenant, Craig states, is universally acknowledged. This rule is sometimes supported by custom in particular districts. And it seems admitted by the appellant that the general rule or custom for a way-going crop appears to be against him; but he contended, that the particular terms of the lease showed that the tenant was not entitled to any such. He says, that the entry is at Whitsunday, and the ish binds the tenant to remove at Whitsunday 1802, and that this obligation is absolute. This is all true, if the lease alone were to be looked to, and the general construction of such leases, and the term bearing to be a Whitsunday entry, were to be disregarded. To such a lease, so framed, and of such a farm, the law has annexed a certain right to the tenant, and that is, to a way-going crop from the arable part; and nothing short of waving that right expressly will deprive him of it. In regard to carrying off the straw and dung, undoubtedly, there is a clause in the lease binding the tenant to consume these on the farm, but this is only *during* the *currency* of the lease; and as the lease terminated at Whitsunday 1802, the obligation in the lease could only apply to this period; and therefore the respondents were entitled to carry off the dung and straw subsequent to that period.

After hearing counsel,

Lord Chancellor Eldon said,—

"My Lords,

"This case is important. (Here states what the appellant seeks). The respondents insist that they are entitled to a way-going crop. (This explained). The appellant contends that they have no such right, on this ground, that whatever the law might be, when there is no written agreement on the subject, yet when bound by tack, the Court must look to this alone. The appellant presented a bill of suspension and interdict, on this point, contending that the respondents had no title to a way-going crop, and, consequently, that he had right to interdict them from ploughing the ground, as the tenant could have no right to the crop, and therefore had no right to plough.

"A way-going crop depends on the lease, and on the law as to the interpretation of it. It depends upon whether, by the lease, a way-going crop is given; and whether, in this case, it is to be sown crop, or dung or straw that the tenant may take away, after the expiry of the lease, or whether the landlord is entitled to prevent him from ploughing. During the currency of the lease, I am quite clear (and there are many cases to support it), that the landlord cannot prevent the tenant from ploughing; but if ploughed, it is still more clear, that after expiry of the lease, the landlord could not enter to take the crop. Courts of justice here would not hinder from ploughing, if the tenants were not so hindered by the lease.

"It is important, therefore, on this point, specially to guard, as this law was not argued at the Bar. It would stand as a precedent hereafter if nothing were said,—that if the tenant is not entitled to a way-going crop, the landlord can interfere in the management of the farm, though nothing be said of this in the lease.

"The landlord here prays for too much; for not only does he seek interdict against ploughing for Whitsunday crop, but also for that out of husbandry, which might be taken off before Whitsunday 1803, therefore this is too large.

"The merits contain matter for serious consideration. It is much to be lamented, that when parties settle by contract of lease, the parties should be left to usage, to which parties, on entering into the contract, in no degree refer themselves, although, if they did intend so to refer, it is perfectly easy so to do; but, with all the laxity allowed in this country, it could not be construed, as argued at the Bar, to mean what the respondents contend for.

"Here the entry to the houses and lands by the lease is at Whitsunday. By it the parties contemplate possession of houses at that term of entry, and the case of leaving houses in repair at the end of the lease, that being Whitsunday, is provided for. Then it expresses the expiry of the lease as to the lands, and declares expressly, that the tenant shall leave the same void and redd at the same time with the houses. It seems impossible to construe this lease, as the tenant does, in order to spell out of it, a way-going crop.

"But it may be matter of grave doubt, whether a Scotch lease may not be construed very much otherwise. Whether, for example, a general or particular custom of country, county, or parish, can *affect* the *express terms* of a lease? The Court are unanimous on this subject, and hold that it may. Though there were nothing in the lease, yet is the law to be taken as the tenant contends for?

"On these grounds, I hope you will not think it wrong to have discussed so much of the subject, and then to adjourn for a week.

"On the 10th of March, his Lordship proposed the following judgment:"—

It was ordered and adjudged, that in this case the tenant

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will not be entitled to a way-going crop. And it is therefore ordered and adjudged that the cause be remitted back to the Court of Session to review the interlocutors complained of.

For Appellant, *William Alexander*, *M. Nolan.*

For Respondents, *Wm. Adam*, *J. H. Forbes.*

NOTE.—Under this remit back to the Court of Session, their Lordships (11th June 1802), found "In respect of the judgment "of the House of Peers, alter their two interlocutors of the 4th "July and 19th November 1801 ; and remit to the Lord Ordinary "to adhere to his interlocutor of 20th June, passing the bill of "suspension and interdicting the tenant." The case then proceeded, first, before the Lord Ordinary, and then before the Court, the discussion of the question being attended with much difficulty, as to whether the judgment of the House of Lords had foreclosed discussion upon the question of a way-going crop, and was thus exhaustive of the merits, or had left that open to be reviewed. The Court ultimately came to the conclusion (2d March 1803) to give effect to the judgment of the House of Lords, declaring the tenant not entitled to a way-going crop.—Mor. App. Tack, No. 8.

[Mor. 15444.]

GEORGE WILSON, Grand Nephew of the deceased WALTER BOWMAN of Logie, being the Grandson of JEAN BOWMAN, eldest Sister-germain of WALTER BOWMAN, — *Appellant;*

ROBERT HENDERSON, Bookseller in Cupar, Grandson of ISABEL BOWMAN, the youngest Sister-germain of the said WALTER BOWMAN, - - - - — *Respondent.*

House of Lords, 29th March 1802.

DEED. — IS A DEED DEFECTIVE IN SOLEMNITIES GOOD AS AN OBLIGATION TO CONVEY? — REVOCATION. — APPROBATE AND REPROBATE.—In 1757 a party executed a deed or procuratory of resignation of his land estate in Scotland in favour of particular heirs, valid in all respects, reserving power to alter at any time during his life, and even on deathbed. He afterwards, in 1763, executed a new deed, with a variation in the destina-