ferred; and I think, under these circumstances, I must recommend to your Lordships to affirm the judgment in the Court below. June 10. 1829.

Appellants' Authorities.—Kerr *v.* Wauchope, 1. Bligh, No. 1.; Robertson, Feb. 16. 1816, (F. C.); Dundas, Feb. 25. 1783, (15,585.); Gibson, June 20. 1786, (620.); Martin, March 4. 1794, (not reported); affirmed in House of Lords; Henderson, Jan. 31. 1797, (15,444.); reversed in House of Lords, May 29. 1802; Robertson, May 25. 1812, (not reported); Minto, Feb. 14. 1823, (2. Shaw and Dunlop, No. 166.); affirmed in House of Lords, (1. Wilson and Shaw, p. 678.); 2. Vesey and Beames, 125.

Respondent's Authorities.—1. Voet, 4. 19.; 23. 2. 85.; 28. 5. 16.; Voet de Statutis, 9. 2. 10.; 3. Erskine, 2. 39. and 42.; Hay Balfour, March 11. 1793, (affirmed 10. F. C. App. 1.); Dundas, Feb. 25. 1783, (15,585.); Henderson, Jan. 31. 1797, (15,444.); reversed ut supra; Wightman, June 16. 1802, (F. C. App. 1.); Robertson, Feb. 16. 1816, (F. C.)

JAMES CHALMERS—SPOTTISWOODE and ROBERTSON, Solicitors.

JOHN LEE ALLEN, Appellant.—*Sol. Gen.*—*Adam.* No. 28.

JAMES BERRY, Respondent.—*Murray*—*Campbell.*

Lease.—A way-going tenant, whose ish was from the houses and grass at Whitsunday, and from the arable land at the separation of the crop from the ground; and who was bound to consume on the farm the whole fodder, except hay and the fodder of the last crop; and undertook sufficiently to cultivate, labour, and manure the land,—found entitled (affirming the judgment of the Court of Session) to the value of the straw remaining on the farm at the way-going Whitsunday, (not amounting to more than necessary for the purposes of the farm until the possession expired), and to the dung made since last wheat seed time; it having been the tenant's unchallenged practice, and agreeable to the received rules of good husbandry in the district, to preserve the manure for the wheat crop.

THE Appellant, John Lee Allen, Esq. of Errol, let to the respondent, James Berry, two farms, the one called Daleally, and the other Loan of Errol, for 19 years and crops from and after the term of entry, which was declared 'to have commenced at 'Whitsunday 1802, as to the houses, yards, and natural grass, 'and as to the land at the separation of the crop 1802 from the 'ground.' By the lease, Berry bound and obliged himself 'to 'consume upon the ground of the said subjects the whole fodder 'that shall be raised thereupon, except* hay; but the whole 'fodder of the last crop on the farm of Daleally, notwithstanding 'the above restriction, he shall have liberty to dispose of as he 'shall think proper, saving always the landlord's right of hypothec for the rent; and also, the said James Berry binds and June 10. 1829.

2D DIVISION. Lord Cringletie.

---

* In Vol. v. of Shaw and Dunlop, p. 213. for *from* read *except*.

June 10. 1829.

'obliges himself, and his aforesaid, to sufficiently cultivate, dung, 'labour, and manure the lands hereby set, and not to cross crop, 'or in any ways waste or deteriorate the same; but, on the con- 'trary, to use all proper means for meliorating and improving 'the said lands.' It was also declared, that 'the said James 'Berry, or his aforesaid, shall not be at liberty to lay any of the 'dung and straw remaining on the Loan farm, after finishing the 'wheat seed of the last crop under this lease, upon any of the 'lands for the last crop; but the whole of such dung and straw 'shall be reserved for, and delivered over to the proprietor, or 'incoming tenant, at the time of their entry, without any con- 'sideration or recompense for the same.'

When Berry entered into possession, he paid nothing for the straw and manure which was on the Loan farm; but he purchased the straw and manure from the outgoing tenant on the Daleally farm. The practice adopted in the Carse of Gowrie, where these lands lay, seems to have been, on sowing the autumn wheat seed, to apply to the lands the whole dung made since the last wheat seed time, except what had been consumed on the potatoes and turnips in the spring. This mode of cultivation Berry followed in the first year of his lease, and continued to work his farm without challenge, on this or any other account, down to June 1821, the last year of the tack. By this time Berry had removed from the houses, yards, and natural grass, but he was still entitled to the possession of the lands, (under exceptions stipulated by the leases, but which are immaterial to the question at issue), until the separation of the wheat crop from the ground. On the farm of Daleally he had a considerable quantity of straw, the produce of the preceding crop, but not more than was necessary for the purposes of the farm during the remainder of his possession after Whitsunday. He also had a quantity of manure, the surplus of the manure beyond what was required to be laid on the farm since the last wheat seed time. The straw and the manure Berry considered he was entitled to sell either to the landlord or the incoming tenant. The landlord entertained a different opinion, and in June applied to the Sheriff of Perthshire, praying him to order a valuation to be made of the straw and dung left on the possession of Berry at Whitsunday, and to find that the landlord was not liable in the price or value of any of the dung so left by Berry; or, at any rate, of that part thereof which ought to have been applied to the lands with the present crop; and that the landlord was not liable for the straw remaining on the possession, which, in terms

of the lease, ought to have been consumed on the possession. The Sheriff having appointed inspectors with particular instructions, on receiving their reports, (October 1821), found, 'as to 'the dung left on the farm, that, by the express stipulation of the 'tenant's lease, he was bound to consume upon the ground of 'the said subjects the whole of the fodder that shall be raised 'thereupon but hay, except the fodder of the last crop: Finds it 'reported by the inspectors, that no dung has been made since 'the period of last bear seed time; and therefore, that the whole 'dung in the premises is derived from the fodder which he was 'bound to have consumed on the ground, and which by law he 'was bound to have laid upon the land for its due cultivation, 'and therefore that he is not entitled to any remuneration for it 'from the landlord: Finds, as to the straw, that there is not 'more on the possession than was necessary for the purposes of 'the farm till the fodder of the present crop can be brought in-'to use, and decerns.'* June 10. 1829.

Berry advocated, and maintained, that the landlord was bound to pay the value of the straw and of the dung left on the farm, which the landlord had bestowed on the incoming tenant; and that the value placed on the straw and dung was inadequate.

The Lord Ordinary, before answer, appointed Berry to condescend particularly 'with respect to the rotation of labouring, 'manuring, and cropping, followed by him on the farm in ques-'tion, for the seven years immediately preceding the expiry of the 'lease;' and also as to what took place with respect to the fodder and dung left by his predecessor in the farm at the commencement of the lease,—whether he received the same gratuitously or by a valuation. Thereafter the Lord Ordinary issued the subjoined note,† and directed a more specific statement as to the mode of cultivation.

---

* During these proceedings, the Sheriff, in respect of the sworn valuations, authorized the landlord to take possession of the dung in question, on his finding caution to pay such sum as might be awarded by the Court as the value of the dung;—and the landlord gave possession thereof, and of the straw, to the incoming tenant.

† In this case, the questions are properly, 1*st*, To what quantity of dung the 'landlord is entitled, without paying for it? And, 2*d*, Is he entitled to the straw of 'crop 1820, remaining at Whitsunday, without paying for it?—On this latter point, the 'Sheriff's interlocutor is silent. The obligation in the lease is, that the tenant shall "consume upon the ground of the said subjects the whole fodder that shall be raised "thereupon, except hay; but the whole fodder of the last crop on the farm of Daleally, "notwithstanding of the above stipulation, he shall have liberty to dispose of as he shall "think proper." Nothing is here said about dung; but there follows an obligation

June 10. 1829. On resuming consideration his Lordship, for the reasons assigned in the subjoined note,* and 'particularly that it is asserted

---

'sufficiently to cultivate, dung, labour, and manure the lands hereby set," which, of 'course, as well as the common law, obliged him to dung sufficiently the land for the 'last crop, as well as any other during the lease; and if he did not do so, he is cer-'tainly not entitled to payment of any dung, which ought to have been put on the 'ground, in conformity to the practice of the seven years preceding the expiry of his 'lease; while, on the contrary, he is entitled to payment for all that was left, over and 'above what ought to have been used. It was for this purpose, and to ascertain the 'practice, that the Lord Ordinary ordered the condescendence; and he must say, that 'the order has been evaded, as it is impossible to discover how much of the farm was 'under different crops, during each of the seven years, (*i. e.*) into what breaks or por-'tions it was divided,—what sort of crop was taken from each,—how much was 'manured,—and how many cart-loads of dung were laid on each acre. One thing 'the Lord Ordinary can discover in the confusion, which is, that there were potatoes, 'turnips, and tares, for all which the land was dunged. The quantity of ground is 'not indeed specified, but it must have been considerable, because next year barley 'or oats, or both, would be sown on the ground. But in the last year of the lease, 'twelve acres only are said to have been set apart for potatoes and turnips, and dunged, 'six of which the incoming tenant got. The Lord Ordinary observes, that, by the 'lease, the incoming tenant was entitled to fifteen acres of summer fallow at the term "of Martinmas 1820. This also may have an effect on the question; and, therefore, 'the advocator must comply distinctly with the order contained in the interlocutor, '12th June 1822. One thing appears quite clear, viz. that the interlocutor of the 'Sheriff may perhaps go much too far. It is dated 24th October 1821; and finds, that 'no dung has been made since the period of the last bear seed time; and, therefore, 'that as all the dung on the farm must have been made from the fodder which he was 'bound to consume, " and which, by law, he was bound to have laid on the land for " its due cultivation," he is not entitled to payment for it. This part of the find-'ing may perhaps be quite wrong. Every one in the least acquainted with farm-'ing knows, that the great bulk of the dung made on a farm, is made during the 'winter and early spring months; in summer generally little is made. If, therefore, 'wheat be sown in harvest on summer fallow, and dung be given to it, the advocator 'was not bound to lay all his dung on the land; for this obvious reason, that he was 'bound to remove from the land, on which part of his dung would be used. This, too, 'makes it necessary to know the rotation. 2*d*, As to the straw, it is ascertained that 'no more remained on the farm at Whitsunday 1821, than was necessary for the pur-'poses of the farm; which proves, that the advocator had not unduly saved the straw, 'but had consumed it in the same manner as he used to do during his lease; because 'he must always have reserved, in each year, as much as to serve him till the straw of 'the new crop could be obtained. But it does not from thence follow, that he is 'entitled to the value of that straw. He might have consumed it by additional winter 'cattle; and if he had, he would have had so much the more dung, for which he 'might have received payment. It therefore appears to the Lord Ordinary as equi-'table, that the advocator should receive the value of the quantity of dung which 'might have been made from the straw if it had been consumed, which may be easily 'ascertained by those who saw the quantity of straw. But this he reserves for future 'consideration, when the whole merits are ready for judgment.'

* 'The Lord Ordinary has advised this cause, and will explain his views to the 'parties. Law is a science which must vary with the manners and customs of society,

'by the advocator, that he applied the manure made in his farm 'to the land thereof in the autumn and winter of the year 1820, 'and in the spring 1821, in the same manner as he had done in 'the former years thereof, which is not denied by the respon- June 10. 1829.

'and improvements in any department. And consequently it appears to him impossi- 'ble, that any judgment of this Court, applicable to the mode of agriculture forty years 'ago, can regulate it now when the system is greatly improved, nor that a judgment 'applicable to one sort of land can govern the management of a soil totally different. 'For instance, in many (alas! too many) parts of Scotland, wheat cannot be raised 'with advantage; and, consequently, as all the crops are sown in the spring, the 'manure made in the winter ought to be applied to the land in the spring season, in 'so far as is not necessary for the land under turnips, which are generally sown in 'the end of May and beginning of June. On the contrary, where wheat is a prin- 'cipal crop, it is always sown with dung; and if it be sown in autumn, or be- 'ginning of winter, it is manifest that this dung must have been chiefly raised in 'the preceding winter and spring. Almost no dung is made in summer. To say, 'then, that the advocator, if it was his practice to bestow his dung on his wheat, 'was bound to lay the winter and spring-made dung on his spring crops, is to say 'that the incoming tenant could have no wheat sown the year of his entry to pos- 'session, unless on the ground which had been under potatoes and turnips that year. 'The question at issue is not, whether the advocator's mode of management was the 'best, or whether it was exceptionable? The presumption that it was good is in his 'favour, as there neither was nor is in the petition to the Sheriff any complaint of mis- 'labour. The dispute is respecting the quantity of dung to be paid for by the in- 'coming tenant. The advocator has sufficiently distinctly explained, in his conde- 'scendence, his rotation of crops and his mode of manuring. He says, that to his 'wheat, whether sown in winter, perhaps in spring, but whichever it was, he used on 'it all his dung, except what he applied to turnips and potatoes in spring. This may 'be bad management; but the Lord Ordinary must repeat, that this is not the ques- 'tion. The advocator further condescends, that he used the same quantity of dung to 'the last crop that he did to former ones; and as this is not denied, the Lord Ordi- 'nary holds it to be true. Holding it then to be true, that as much dung was to be 'used by the advocator in the last year of his lease as he used in former years, and 'that he did not vary his practice, the Lord Ordinary denies the conclusion drawn by 'the Sheriff; viz. That the advocator was bound by law to have laid the whole dung 'on the farm in spring on the land. The Lord Ordinary knows enough of farming 'to affirm, without hazard of contradiction, that it is desirable to have a farm put under 'a course of good management, and so as that the incoming tenant, where a change of 'tenants is necessary, can continue the same system observed by his predecessor. In 'this case, the Lord Ordinary presumes the system of the advocator to have been 'good, since there is no complaint of it. Clear it is, that it is a farm on which large 'quantities of wheat grew annually; and if all the dung made in winter and spring 'had been laid on the land, there could have been no autumn or winter sown wheat 'that year; so that the interlocutor of the Sheriff would disturb the regular course of 'management of the farm.' The decision quoted by the respondent, has no applica- 'tion to this cause. In that case (19th February 1808, Forrester *v.* Wright) the 'tenant was explicitly bound 'to eat and consume the whole straw growing on the said 'lands with his bestial, and lay the whole dung thereon the last year of the tack at 'bear seed time.' The judgment, then, was neither more nor less than finding, that 'a tenant must implement his lease; but here there is not a word in the tack about 'dung.'

June 10. 1829.

'dent; advocated the cause, altered the interlocutor of the 'Sheriff, and found that the advocator is entitled to be paid' for the fallow grass and dung left to his successor in the farm, according to the average of the three inspectors' reports, with expenses. The landlord represented, and relied on various decisions, establishing, as he maintained, that the manure made before bear seed time was his property. Thereupon the Lord Ordinary issued an explanatory note,* and ordained Berry to

---

* 'The Lord Ordinary has observed, that law being calculated to preserve the fair 'and honourable conduct of mankind to each other, must in every case, wherever that 'conduct does not depend on fixed and immutable principles, vary with the im- 'provements made in the course of knowledge, extended by experience; and nothing 'can afford a better illustration of this than the application of law to the practice of 'agriculture. The law says, that a tenant shall act tanquam bonus vir. This is an 'immutable principle: But what is the conduct boni viri, required by the law, de- 'pends on the practice of agriculture, and the improvements made on it. The repre- 'senter quotes cases without attending to this. For instance, that of Trotter of Mor- 'tonhall against Finnie, 27th June 1767, fifty-six years ago, is appealed to. But this 'just demonstrates the truth of the doctrine above inculcated. Finnie removed at 'Michaelmas 1764 from the farm of Swanston, on the north side of the Pentland 'hills, leaving a quantity of dung, for which he demanded payment; and he was 'found entitled to payment of all the dung that had been made after bear seed time in 'that year, but not to the payment of what had been previously made. It appears 'that Finnie pleaded, that he had been in the practice of using his dung on the wheat 'land in winter; that he laid none of it on his bear land in spring; and that, in the 'last year of his lease, he had not altered the practice of former years. But the 'Court must have disbelieved this; for, according to the report of the decision, it ap- 'pears that the grounds on which Mortonhall claimed the dung were, 1*st*, That 'Finnie ought to have laid all the dung collected between Martinmas and bear seed 'time on the bear land, which he had not done; 2*d*, That he was bound to labour the 'land the last year of his lease in the same way as in former years, which he had not 'done; 3*d*, That the farm was a steelbow farm, so far as respected the straw, and 'therefore the tenant was, not entitled to the price of the dung made of that straw. 'It is clear that this last reason did not influence the Court; because they found him 'entitled to payment of the dung made after bear seed time, which was made of that 'straw, as well as the rest,—which they could not have done, if they had been moved 'by the straw being steelbow. They must, therefore, have been satisfied, that it was 'the custom to lay the dung on the land for bear, and that Finnie had deviated the 'last year of his lease from his mode of cultivation in the former years of his lease. 'But the Lord Ordinary will take it on himself, from personal knowledge, to affirm, 'that this is not the practice of the present day; and, consequently, although the dung 'may be ordered to be left on the farm of Daleally, it will certainly not be on the 'ground, that, by the modern system of good husbandry, it ought to have been laid on 'the ground intended for bear or barley. With regard to Lord Kames's reason for 'the decision of Finnie, viz. that dung not being a proper subject for being sold for 'payment of rent, the proper use of it being to meliorate the land,—'*ergo*, if not 'used, it goes with the land to the new tenant,'—it is, with deference to that great 'man, fanciful, when he states it so broadly without qualification, and is actually con- 'tradicted by the judgment itself, which allowed Finnie to be paid for the dung made 'after seed time, which, according to Lord Kames, ought to have been left to the new

say 'whether he sowed wheat in the first year of his entry to 'the farm of Daleally? whether, if he did sow any, he laid 'dung on the land for it? and whether he purchased that dung, 'and from whom?' A proof followed, establishing the affirmative; and that the purchase had been made from the outgoing tenant. The Lord Ordinary then, 'in respect of the reasons 'formerly given, and, in addition thereto, that if Berry shall 'not be paid for the dung left on his farm, his successor, the 'incoming tenant, will get a crop of wheat at Berry's expense,' adhered. To this interlocutor the Court adhered, but remitted to the Lord Ordinary to consider the principle on which the valuation was to be ascertained, and a claim of interest.* June 10. 1829.

Allen appealed; and Berry having died, his representatives were sisted in his place.

Appellant.—1. The judgments complained of are inconsistent with the stipulations of the lease. These entitle the appellant, without value, to the straw and manure arising from the tenant's crop, 1820. There is no question as to the straw of 1821. As to the straw of 1820, the tenant was bound to consume it, as well as the straw of all previous years, on the land; and if he did not so consume it, or could not, still he is

---

'tenant. With regard to the other two cases appealed to, both occurring between the 'Earl of Wemyss and his tenants, the latter were bound, in both cases, to lay the 'whole dung on the land, which is not the case here; and the former of these cases 'seems to have occasioned difference of opinion. It was the fault of the tenants to 'make such a bargain; and, in doing so, the Lord Ordinary thinks, that if their farms 'produced wheat, they would have done an injury to their successors if they laid on 'the whole dung in spring. The Lord Ordinary desires it to be distinctly understood, 'that he does not mean to justify, nor ever will give his sanction to the plea of any 'tenant using pretexts to cover unfair conduct in withholding manure from his farm, 'in order to sell it. His reason in this case was, that there has been no accusation of 'mislabour, nor any allegation that the respondent (Berry) has cultivated his farm the last 'year of his lease in any way so as to withhold from it the manure it received in other 'years. The representer's plea is, that he should have laid dung in spring on the 'ground destined for oats, for barley or peas, although he never did so before; the 'consequence of which would have been, that the incoming tenant would have had no 'dung to put on his land sown with wheat in the autumn and winter of that year, and 'thereby must have either lost altogether a crop of wheat, or had a bad one. The 'Lord Ordinary must be allowed to think, that this is a mode of management which 'is neither desirable for landlord or tenant; and, if the respondent paid for dung to 'his wheat the first year of his entry, would be doing injustice to him.'

* 5. Shaw and Dunlop, No. 129. p. 212.

June 10. 1829. not entitled to its value, or to take it away: it remains the property of the landlord. The case is equally clear as to the manure. The only purpose and object of an obligation against the tenant to consume all the straw upon the ground, is to secure a supply of manure. The manure must follow the stipulation applicable to the straw. In point of fact, manure is but the straw in another shape; and if the manure be not laid on the land, the landlord's object would be defeated. 'The tenant, therefore, can neither take the manure away, nor require its value from the landlord or incoming tenant.

2. But, independent of contract, the appellant's claims as landlord are founded on the common law, and recognized by decisions almost applicable in terminis to the present case. Wherever a lease does not expressly regulate the rights and interests of parties in the manure that may remain upon the expiry of the lease, all the manure made prior to bear seed time must be consumed on the land that season, or remain for the landlord; and the tenant has only claim to the manure made after bear seed time. This is a safe and expedient rule; and even if inconveniences had attended it, as may happen with all general rules, it is wisdom to adhere to fixed principles. 'The tenant,' said the Court, (Finnie *v.* Trotter and Mitchell, January 27. 1767), 'shall receive no 'value for any manure which was upon his farm, but was not 'used, at his last spring seed time.' The tenant wished a new rule to be adopted; but the Court would not disturb existing practice. The doctrine, that the tenant is only bound to cultivate, and to apply the manure, tanquam bonus vir, would lead into endless inquiries in each individual case, and utterly destroy the salutary rule 'stare decisis.' The case of Finnie is not inapplicable because the straw was steelbow. In point of fact, it is very questionable if it was steelbow; and still more, if the Court were moved by that specialty, if true. But the qualification of steelbow cannot affect the question. The appellant admits the tenant's right to what manure was made after bear seed time; but it is only as to that, that steelbow can make any difference; for whether steelbow or not, the straw of all previous crops, and manure made each year before seed time, must be laid on the grounds. To contend that there has a new practice arisen in husbandry, and that the Dale-ally farm, from locality and nature, requires a different treatment, is an assumption which the appellant does not concede, and the tenant has not proven.

Respondent.—1. The manure of the preceding year was laid on the ground, for the seed crop to be reaped in autumn 1821; but the manure which accumulated after, was reserved, according to custom and good management, for the incoming tenant, with exception of what was necessarily used with the spring green sowings. To have cast all on the ground in spring, because the respondent's term of lease was expiring, would have been destructive to the crops, and ruinous to the incoming tenant, who had no means of procuring manure to lay down his wheat land with. As to the straw, the respondent was clearly entitled to what remained at Whitsunday, when he quitted the houses and grass, for it amounted to no more in quantity than what he could consume before he finally quitted the farm; and he was equally entitled to dispose of it to the incoming tenant. If it had been consumed, and converted into manure, it would, even by the appellant's admission, have belonged to the respondent. As to the manure, there is no stipulation that more than what was necessary, by the course of good husbandry, should be laid on the lands. On that principle the respondent acted; and that he was right, is proved by the clause in the Loan lease prohibiting him from doing what the appellant now most inconsistently requires, viz. laying down on the ground in spring the dung calculated for the wheat seed. June 10. 1829.

2. The only rule when the case is left to common law, which regulates questions of the present nature, is, that the tenant shall, tanquam bonus vir, duly cultivate the farm, according to the rules of good husbandry known and practised in that part of the country. He is not, therefore, entitled to adopt any mode of cultivation which will deteriorate the lands, or render them less valuable to the incoming tenant; nor can he alter the course of cultivation, where that alteration will prove prejudicial to those who follow. The case of Finnie *v.* Trotter and Mitchell was circumstantial, and not intended to lay down a general rule. It related to a farm situated on the high sterile range of the Pentland Hills, and contained the distinctive specialty, that the straw on the farm was steelbow. Certainly it affords no authority for the sweeping principle, that, in all cases, while the manure made after bear time belongs to the tenant, all the manure made before bear time belongs to the landlord. The aim of the appellant, in collusion with the incoming tenant, is nothing less than obliging the respondent to pay for manuring the ground, of which not the respondent, but the incoming tenant, is to reap the crop and benefit.

June 10. 1829. The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, with L. 100 costs.

LORD CHANCELLOR.—In the case of Allen *v.* Berry, some time since argued at your Lordships' Bar, it is my intention to move for your Lordships' judgment. Although not of much importance in point of amount, it is of considerable importance in point of principle, as it relates to the agriculture of Scotland.

Mr Allen was owner of certain lands in the parish of Errol. He granted a lease of those lands to James Berry, the respondent, for the term of nineteen years, to commence in the year 1802, at Whitsunday, as far as related to the house and the natural grasses; and from the severing of the crops, as far as related to the arable land. There are only two clauses in the lease to which it is necessary I should direct your Lordships' attention. They are in these terms:—(His Lordship then read the clauses already cited, ante, p. 417.)

The lease related to two farms, the one called Daleally, and another farm called the Loan farm; and the stipulations are such as I have stated, namely, that the tenant was not to be allowed to remove any part of the fodder from the Daleally farm, but was to consume the whole of it upon that farm, with the exception of hay, and the fodder that might be the produce of the way-going crop; that the lands were to be sufficiently cultivated and manured; and, with respect to the Loan farm, none of the manure which should be made after the wheat seed time of the preceding year was to be laid out or expended upon the farm in the spring, but the whole of it was to be kept for the proprietor, or the incoming tenant, at the expiration of the term.

I think that your Lordships are entitled, from a consideration of all the circumstances of this case, and the shape which the cause has taken from its outset, to assume, that this farm, independently of any question of law, was cultivated according to the due course of husbandry in that district. No dispute or doubt has been raised on that point. Offers of proof were made; and the parties were not called upon to prove that fact. Your Lordships are entitled, then, to hold that, independently of any positive rule or point of law, practically this farm was cultivated according to the rules of good husbandry in that district.

My Lords,—It appears to me, that during the nineteen years that the tenant, James Berry, possessed this farm, he pursued precisely the same course of cultivation which he adopted in the first year. He never laid, at the spring time, any manure upon the ground, except what was required for the green crops, but reserved the manure for the wheat crop; because in that district the wheat crop is the crop to which the tenant looks for the payment of his rent, and it cannot be raised in that district without the proper application of manure. This course was followed during the nineteen years he continued tenant of this farm, without any complaint or any remonstrance from his landlord; and it

appears that in this district, the Carse of Gowrie, this is the uniform system of cultivation among those persons who are most competent to the cultivation of land. It appears also, by referring to the lease, that as far as relates to the Loan farm, which is a farm of the same description, the landlord had expressly stipulated with his tenant, that no manure should be laid upon the farm in the spring, but that it should be reserved until the expiration of the term, in order that it might be handed over to the incoming tenant, to be employed for the wheat crop of the next season. We are therefore to take it, my Lords, upon the statement of the facts and circumstances, as a point in the cause, that, independently of any positive rule of law, the farm was well cultivated.

Now, my Lords, there are two questions that have been raised,—first, with respect to the straw; secondly, with respect to the manure. If any straw had remained at the expiration of the tenancy, which had been the produce of the crop of the preceding year, or any of the preceding years, it is perfectly clear that that straw would have become the property of the landlord, without his being required to make any payment,—not from any rule of husbandry,—but from the express stipulation of the lease; because it is expressly provided, and in distinct terms, that all the fodder, with the exception of hay, shall be consumed upon the ground; and if the tenant had neglected to consume any part of the fodder upon the ground, he could have no right afterwards to remove it, or to call upon the landlord to make a payment for that straw, which ought to have been so expended. He could not have profited in this respect from his own wrong. I am speaking of any straw that remained at the expiration of the tenancy. To what took place with respect to the straw, I shall again, by and bye, advert.

With respect to the manure, that is subject to a different consideration. There is no stipulation in the clause with respect to the manure. It is not required, in terms, that the manure shall be laid upon the land in the last year of the tenancy,—it is not required, in terms, that it shall be made use of for the spring seed,—that it should be laid on the bear land, to make use of a Scottish term as applicable to this subject. The only stipulation applicable to the manure is this: 'The tenant 'binds himself to cultivate, labour, and manure the land properly, and 'according to the rules of good husbandry.' There is no other stipulation with respect to the manure. But it is contended, in the first place, that, from the stipulation with respect to the straw, if the manure be not expended upon the land in the last year of the tenancy, it becomes the property of the landlord, because, it is said, the stipulation with respect to the straw or fodder (that it shall all be consumed upon the farm) is a stipulation for the benefit of the landlord; and as the landlord can only profit by that, by the circumstance of the fodder being consumed on the land, and converted into manure, that therefore it is clear that he is entitled to the manure without paying any thing for it. My Lords, I think that this consequence does not follow. This species of argument was adopted by one of the learned Judges

June 10. 1829.

in the Court below; but I think that the inference does not follow. In this particular district, the Carse of Gowrie, if the manure were removed from the land, the consequence would be, that the succeeding tenant would not be able to raise a crop of wheat in the succeeding year; because it would be impossible, except at a most enormous price, to bring to the land sufficient manure for that purpose. If, therefore, it be a stipulation in the lease that the fodder shall be consumed upon the land, and if the landlord has an opportunity of purchasing that manure, he will from that circumstance derive a most important benefit; because by making that purchase he will be in a condition to raise a wheat crop in the succeeding year. It is not necessary, therefore, to infer from the stipulation with respect to the fodder, that the manure becomes the property of the landlord without payment. It is sufficient to say, that that stipulation is beneficial in another shape, namely, that the manure is ready produced, and that the landlord has an opportunity of taking it at a valuation. Therefore I think that no argument, or at least no satisfactory argument, can arise in consequence of the stipulation to which I have adverted, and which was insisted upon in the Court below, in respect of the regulation as to the fodder.

But, my Lords, it is said, that by the common law of Scotland, the manure which is provided between the wheat seed time and the bear seed time, must be laid upon the land at the bear seed time; and the case of Finnie *v.* Trotter, (which was relied upon in the Court below by one of the learned Judges, and was relied upon at your Lordships' bar), has been cited for the purpose of establishing that proposition. My Lords, I think that the case of Finnie against Trotter is by no means conclusive with respect to this point. I do not think that the argument built upon it applies to the present question. The farm was of a very different description. It was a farm called Swanston, in the neighbourhood of Edinburgh, upon the Pentland Hills, the nature of the soil of which is widely different from that of the Carse of Gowrie; and that which might be very good husbandry in the Carse of Gowrie, might be very bad husbandry in the Pentland Hills; and *vice versa*. It was observed by one of the learned Judges in the Court below, that in the case of Finnie *v.* Trotter, no offer was made to prove, in the proper stage, that the tenant had cultivated the farm in a course of good husbandry, but that he made that offer in a subsequent stage, and the landlord did not assent to that offer. It does not appear, therefore, that the course of treatment of the land, in that case, was according to good husbandry. And again, it was a steelbow farm, as far as related to the straw. The straw was therefore the property of the landlord; and if that straw were converted into manure, that manure would equally become the property of the landlord. You cannot, therefore, apply the case of Finnie *v.* Trotter, arising on a steelbow farm, to this which is not a steelbow farm, and where the straw is not the property of the landlord, but he has only a right to that which shall not be consumed upon the farm. The case of Finnie

against Trotter does not, therefore, appear to me to govern this decision; and I agree in the distinction taken by the learned Judges below, when that case was cited, and which has been since cited, and so much relied upon at your Lordships' bar. June 10. 1829.

But two other cases were referred to;—the Earl of Wemyss *v.* Wright, and Forrester *v.* Wright. My Lords, in my opinion they have no application whatever to the present question; because in the case of the Earl of Wemyss, there was a distinct and express stipulation, that the manure should be laid upon the ground. There was also a similar stipulation in effect in the case of Forrester; and therefore, whatever might be the rules of good husbandry, that question did not arise in either of these two cases, because the parties were bound by their express and positive stipulation. It appears to me, therefore, that there is nothing whatever to shew that there is throughout Scotland a universal rule, considered as the common law of Scotland, that, in all cases, the manure, which has been made subsequently to the period of wheat seed in autumn, is to be applied for the purpose of raising the spring crops; and I apprehend, that the law of Scotland must, according to all common sense, be in that respect like the law of England. The rule must differ, according to the particular district, and the nature of the soil; and all that could be required of the tenant is, that he should cultivate the grounds according to the rules of good husbandry,—that being regulated by the nature of the soil of which that farm consists.

Now, my Lords, the stipulation in the lease, as to the manure, was merely that the tenant should 'sufficiently cultivate, dung, labour, and 'manure the lands let to him, and not to cross-cut, or any way dete-'riorate the same, but, on the contrary, to use all proper means for 'meliorating and improving the said lands.' According to the evidence in the cause, it appears to me, that if he had laid the manure upon the land at bear seed time, he would not have cultivated his land according to a good course of husbandry, and that it was incumbent upon him to omit laying the manure upon the land at that time, in order that there might be a sufficient supply of manure for the purpose of raising a wheat crop the subsequent season. My Lords, I agree therefore with the majority of the learned Judges of the Court below, as to the principle on which they have decided this part of the case.

With respect to the straw, I stated to your Lordships that I would again advert to that. It was provided in the lease, that all the straw should be consumed upon the farm; and if any straw, therefore, had been left at the expiration of the lease, undoubtedly the tenant would not have been entitled to be paid for it. But, my Lords, the lease, as far as it regards the house and the natural grasses, terminated at Whitsunday;—as far as relates to the arable, it did not terminate until the severance of the crops. Before the termination of the lease, the landlord insisted upon taking possession of the manure and the straw; and he was allowed to take possession of the manure and the straw upon a

June 10. 1829. valuation being made, and upon a security being given. Now, the Sheriff has found, that there was no more straw upon the farm at that time than was requisite for the foddering of the cattle up to the period when the lease expired, on the severance of the crops. The tenant, therefore, was entitled to have retained possession of that straw for the purpose of foddering his cattle during the interval; and, according to what I have stated, if he had done so the manure would have been his property: it follows therefore, as a necessary consequence, that if the landlord chose to take possession of that straw at Whitsunday, and to convert it to his own use, he is bound to pay the value of it; and the Court below so thought. Upon both of these points, therefore, which have been considered as very important points by the learned Judges in the Court of Session, I must recommend to your Lordships to affirm the judgment of the Court of Session. I think that it is not at all inconsistent with any of the authorities which have been relied upon, and that it is a sound decision to which the Court came; and your Lordships will be more satisfied at arriving at this conclusion, when you are informed, that nineteen years ago, when this tenant took possession of this farm, he paid, as incoming tenant, to the outgoing tenant, for the value of the manure at that time on the premises. On these grounds I would recommend to your Lordships, that this judgment be affirmed, with L.100 costs.

Appellant's Authorities.—Duke of Roxburgh, 2. Bligh, p. 165.; Gordon, May 19. 1826, (2. Wilson and Shaw, p. 115.); Finnie, Jan. 27. 1767, (15,260.); Pringle, June 30. 1796, (6575.); Earl of Wemyss, June 16. 1801, (App. Tack, 7.); Forrester, Feb. 19. 1808, (App. Tack, 16.)

Respondent's Authorities.—1. Stair, 11. 4.; 2. Ersk. 6. 12.; 3. Ersk. 1. 18.; 1. Stair, 15. 6.; 2. Stair, 9. 31.; Haddo, Feb. 6. 1663, (7539.); 2. Bank. 9. 21.; 2. Ersk. 6. 39.; Bell on Leases, 3d Edit. p. 258.

SPOTTISWOODE and ROBERTSON—MONCREIFF, WEBSTER, and THOMPSON,—Solicitors.

No. 29. COMMERCIAL BANKING COMPANY OF SCOTLAND, Appellants. *Sugden—Lushington.*

JOHN POLLOCK'S TRUSTEES, Respondents.—*Adam—Stevens.*

Mutual Contract—Master and Servant—Reparation.—Where it was stipulated in the contract of a Banking Company, that the manager should be removable by two-thirds of the joint committee of management;—Held, 1. (affirming the judgment of the Court of Session), That the Company were entitled, by a resolution of two-thirds of the Committee, to remove a manager who was named and appointed in the contract; and, 2. (reversing the judgment), That the Company were not bound to shew proper cause for having done so, or liable in damages if they could not do so.