1863.
June 4th and 5th.

HUNTER, ... APPELLANT.
MILLER, ... RESPONDENT.

Agricultural Lease—Out-going Crop.—Case in which it was held, upon the construction of a lease, having regard to the rules of good husbandry established in the locality, that the tenant might resort to the six-shift course in the last year of his lease, and take a black crop from a sixth part of the farm.

MR. Hunter, of Thurston, granted a lease for twenty-one years of a farm of 600 acres in the county of Haddington to the Respondent, with entry at Whitsunday 1838, as to the houses, grass, and pasturage, and as to the arable land at the separation of the crop of that year from the ground. The instrument of lease, besides other stipulations, cast the following obligation on the tenant :—

With regard to the management of the said farm, the said William Miller binds and obliges himself and those succeeding him to farm, labour, and manure the same according to the rules of good husbandry established and practised in the country, and not to scourge or deteriorate the same 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. Farther, 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 eight pounds of red clover, eight pounds of white clover, and one firlot of rye-grass for each Scots acre, all of the best quality, and that a fourth part of the said breaks shall not be pastured, but be left for a crop of hay to the incoming tenant, he paying for the seed only; and the said George Miller and his foresaids shall also be bound to allow the said James Hunter and his foresaids, or the incoming tenant, to sow grass seeds along with his last crop in such fields as they shall think proper, and to harrow in the same without any allowance therefor; and, moreover, the said George Miller binds himself and his foresaids to consume the whole straw that shall grow yearly on the said farms of Springfield and Oldhamstocks upon the same, and to apply the dung thereof or to be

made thereupon for manuring the said lands allenarly; and the said George Miller binds himself and his foresaids to leave the whole straw, chaff, and chaffings of the whole lands hereby let of his last or outgoing crop in steelbow, and the dung of the said farms of the last crop but one to be one-half steelbow and the other half paid for by arbitration at the expiry of this lease, or his removal from the said lands, for the use of the said James Hunter or the incoming tenant, and to thrash out and prepare the same in a regular and timeous manner for their accommodation; and the tenant hereby binds and obliges himself and his foresaids to flit and remove himself, and his family and dependents, furth and from the said lands and houses at the expiration of this tack, without any warning or process of removing to that effect, otherwise to pay to the landlord double of the rent above stipulated for every year which he shall possess after the expiry of this lease; but declaring that the tenant shall have right to possess two cothouses and stabling for four horses from the term of Whitsunday 1859 till the day of thereafter.

In March 1859, when the lease was near its close, the landlord presented to the Court of Session a note praying that the tenant should be interdicted from taking any way-going crop, except a white crop to the extent of 302 acres.

The tenant lodged a counter minute, claiming right to take an away-going crop in hay, beans, peas, potatoes, and the like, from 100 acres in addition to the 302 acres of white crop. The controversy was thus as to 100 acres, the produce of which, according to the Respondent's printed statement, was worth, after deducting all expenses, at least 2,000*l*., which was in fact the real topic of litigation (*a*).

The *Lord Ordinary* (*b*) (who had previously granted an interim interdict by consent), before answer, made a remit to Mr. Hope, an eminent agriculturist,

to inquire and report whether the claim of the tenant was or was not according to the rules of good husbandry as practised in the county of Haddington, regard being had to the terms of the lease and the whole circumstances of the case.

(*a*) Supposing the rest of the farm equally productive, the produce of 600 acres would have been worth 12,000*l*.

(*b*) Lord Ardmillan.

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Mr. Hope reported that by the express stipulations of the lease, and also by the rules of good husbandry in the county of Haddington, the tenant was entitled, throughout the lease, to manage and crop according to the six-course shift; that is, to have one-half of the arable land in white crop, one sixth part in grass, one sixth part in black crop, and one sixth part in turnip or bare fallow. The tenant therefore was entitled to retain one sixth part of the arable land for black crop the last year of his lease.

The *Lord Ordinary*, by his Interlocutor of the 9th July 1860, approved of Mr. Hope's report, and found, in terms thereof, that the tenant was bound to hand over to the landlord on removal one sixth part of the arable land on the farm once ploughed for turnip or fallow break; *quoad ultra*, he repelled the reasons of suspension.

The landlord reclaimed to the Second Division, who, before answer, on the 21st November 1861, remitted to Mr. Hope to reconsider the subject and to report specially:

First, whether under the lease preventing or allowing a six-shift rotation, the landlord's interests would be prejudicially affected by the tenant following a four-shift or five-shift rotation during the whole years of the lease till the last, and then laying out and dividing the farm for the last crop as under a six-shift rotation; and, secondly, whether the landlord's interests had been or might be prejudiced by the manner in which the land had been divided and cropped, having regard especially to the cropping of last year.

Mr. Hope in obedience to this remit, reported as follows:

If the lease allows a six-shift rotation, the landlord's interest would not be prejudicially affected by the tenant following a four-shift or five-shift till the last year, and then laying out the farm as under a six-shift rotation; secondly, the reporter is of opinion that the landlord's interest has not been prejudiced by the manner in which the land has been divided and cropped throughout the entire lease, and, in particular, not by the crop taken during the

last year, whether judged of by the lease, the rules of good husbandry, or the custom of the country.

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The Lords of the Second Division, on the 30th May 1862, pronounced the following Interlocutor:

Recal the Interlocutor reclaimed against: Approve of the two reports of Mr. Hope: Find, in terms thereof, that the tenant by the lease was bound to hand over in the last year of the lease to the incoming tenant one sixth part of the farm once ploughed, as the turnip or fallow breaks of the year: To this extent and effect sustain the reasons of suspension, and declare the interdict perpetual: *Quoad ultra*, repel the reasons of suspension, and recal the interdict, and decern: Find the tenant entitled to expenses, &c.

Against this judgment the landlord, Mr. Hunter, appealed, and was represented at the bar of the House by the *Solicitor-General* (*a*) and Mr. *Anderson*, who contended that the question was properly determinable by the construction of the lease under which the Respondent, as outgoing tenant, was not entitled to any way-going crop, other than a cereal one, and to an extent not exceeding one-half of the arable land. They cited *Low's Elements of Agriculture* (*b*), and *Stephens on Agriculture* (*c*). The Respondent's claim involved, as they alleged, a sudden, and so far as the landlord's interests were affected, an injurious change of system towards the close of the lease; and, thirdly, they insisted that the tenant's claim to a potato crop in 1859 was an attempt to take a twenty-second year's crop out of a twenty-one years' lease.

Notwithstanding these reasons, the Lords, without hearing the learned Counsel for the tenant, Mr. *Rolt* and Mr. *Harry Smith*, proceeded forthwith to deliver the following opinions:

Lord Chancellor's opinion.

The LORD CHANCELLOR (*d*):

My Lords, I trust that your Lordships will be of opinion with me that this is a case upon which no doubt,

(*a*) Sir Roundell Palmer. (*b*) 3rd. edit., pp. 164, 199, and 205.
(*c*) Vol. i. p. 616. (*d*) Lord Westbury.

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or at all events, if any, very little reasonable doubt can be entertained. 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. And if the matter cannot be determined by the construction of the lease, the second question is what the course of husbandry, as recognized in the county of Haddington, will require, this second inquiry being perfectly legitimate, because the obligation of the tenant is expressed by the lease as being to farm according to the rules of good husbandry established and practised in that county.

Now, 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 according to the usual course of husbandry 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, 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 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 or outgoing year. And it is therefore incumbent upon the Appellant to show clearly that from the terms of the lease that which might lawfully have been done during

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every year of the term but the last, is clearly prohibited during the last year.

Now the language 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 purposeof receiving any crop comes under the denomination of "fallow break."

It is 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 dedica-

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ting 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 country, 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 shown 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 country (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,

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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.

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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 country, 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's opinion.

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 with reference to Mr. Hope, whether some confusion has not arisen from referring to him 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, includ-

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ing the construction of the lease, I think that should be taken as substantially only a report upon the custom of good farming in that country. 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's opinion.

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 way-going crop of the moiety of the land, to a way-going black crop in respect of no more than 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 way-going 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

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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.

LOCH & MACLAURIN—ADAM BURN.