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effectual, along with the will, to give the appellants the £4517. 15s., yet they have no right to demand repayment of the sum recovered from the York Buildings Company, because, under a fair construction of the trust disposition, neither these annuity bonds, nor the diligence used upon them, were conveyed, nor meant to be conveyed, to the appellants.

After hearing counsel, it was

Ordered and adjudged that the money received by George Ouchterlony, on account of interest upon Charles Murray's bond to him on the lands of Stanope, ought to be imputed in discharge of the interest, according to the order of time when the same became due, and after satisfaction of all the interest which incurred before Martinmas 1742, the said George ought to be considered as debtor to Alexander, assignee of John Arbuthnot, for a proportional part of the money so received by George corresponding to the interest of £5500. And it is further declared, that whatever money has been paid to the respondent, as and for the interest of the said sum of £5500, from Martinmas 1742 to the death of Alexander, ought to be considered as part of the personal estate of Alexander; and what has been paid to and received by the respondent for interest accrued due upon the said £5500, from the death of Alexander to the death of George, ought to be considered as part of the personal estate of the said George. And it is ordered and adjudged that the interlocutors, so far as they are complained of by the original appeal be reversed. And it is farther ordered, that the cause be remitted back to the Court of Session to proceed therein according to the declarations herein before made. And it is farther ordered, that the interlocutors, so far as they are complained of by the cross appeal be, and the same are hereby affirmed.

For Appellants, *Ja. Montgomery, J. Dunning.*

For Respondent, *Alex. Wedderburn, Alex. Wight.*

 [Mor. 15,200.]

JAMES SCOTT of Comieston, Esq.,	<i>Appellant;</i>
GEORGE STRATON,	<i>Respondent.</i>

House of Lords, 13th May 1772.

LEASE IN PERPETUITY—SINGULAR SUCCESSOR—HOMOLOGATION—IRRITANCY.—A lease was granted to a party, and his heirs and assignees, for nineteen years after the death of a party; and after the expiry of these nineteen years, for a second nineteen years, and after the expiry of the second nineteen years, for the space of other nineteen years, and so forth from nineteen years to nineteen years, so long as the said party and his heirs and successors shall desire to possess. The lease had no definite ish, and the

tenant was bound to pay for each nineteen years an entry or grassum duty to the landlord. This lease having been sought to be reduced by a singular successor, after he had for some years received rents under this lease. Held, that it was a good lease, and affirmed in the House of Lords. The lease contained a clause providing, that if two years rent ran into the third unpaid, the lease was to be forfeited. Objection on this ground repelled.

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Sir Robert Graham granted to the respondent's ancestor, Andrew Straton, in 1620, a lease of the farm of Wardropertown, in the county of Kincardine, with the salmon fishing in the river of Northesk, to endure for the life of Christian Straton, widow of Alexander Bishop of Aberdeen, and for nineteen years after her death, for payment of 108 bolls, half meal and half bear, four bolls of wheat, a barrel of salmon, and six bolls of coals.

Of this date, the son of the said Sir Robert, now Sir Robert Graham, entered into an agreement with Andrew Straton, whereby, for the sum of £27. 15s. 6d., then paid by the said Andrew Straton, Sir Robert ratified the above lease "for nineteen years, after expiring of the years and space of the said Christian Straton's lifetime, and of the said nineteen years after her death; and after the expiry of the first nineteen years, for the space of other nineteen years; and after the expiry of the second nineteen years space thereby prorogate, for the space of other nineteen years, and so forth from nineteen years to nineteen years, so long as the said Andrew Straton, his heirs, successors, or assignees, shall desire to possess the said town and possession, they always paying to the said Sir Robert and his foresaids, the grassum at the entry of ilk nineteen years space, and the tack duty underwritten." And, on the other part, the said Andrew Straton binds and obliges himself, his heirs, executors, and successors, to pay to the said Sir Robert Graham, his heirs or assignees whatsoever, at the entry and beginning of ilk nineteen years, in name of entry or grassum duty, the sum of 500 merks Scots money, together with the ordinary yearly duty foresaid, in all time coming, during the said Andrew and his foresaids, their possession of the same." April 1642.

By an agreement between the said parties, entered into some years thereafter, the right to the salmon fishing was renounced in favour of Sir Robert Graham. Dec. 26, 1656.

In the year 1672, the appellant's father being a considerable creditor of Sir Robert's, adjudged or acquired right by judicial conveyance to the property of the said lands of Wardropertown. About the same time, other creditors adjudged his estate, and these latter adjudications being purchased by the appellant's father, he was infest upon these titles, and entered into possession of the estate in 1672, and afterwards, in 1681, when the legal was about to expire, he obtained charter under the great seal, and was infest, whereby his right became irredeemable. 1672.

Matters remained in this position, the tenant possessing the farm

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under the above lease and agreement, and paying the rent, &c. to the appellant's ancestors until the present action. The appellant brought this action to set aside the lease and agreement on the following grounds:—1. That the contract or deed of prorogation under reduction was a right of an anomalous nature, and not known in law. That it partook of the nature of a lease, also of that of a feu or right of property: That it was of the nature of a perpetual right in some places, and in other parts the right was to have an end, although where that end or ish was, nowhere appeared, it rather appearing to be indefinite as to the term of endurance. 2. That the above contract or agreement could not bind the pursuer or his predecessors, who were singular successors, because the prorogation therein contained was not commenced at the entry of the appellant's ancestor in 1672, and so possession was not then held under them as required by the act of Parliament 1449. 3. That the above deed of prorogation wanted a definite ish or termination, which is an essential part of every lease, and is required by the act of Parliament. 4. Without prejudice to these grounds of challenge, that the deed of prorogation was at an end, by the heir of the tacksman having for the space of years or thereby, lain out and tacitly repudiated his right and possession under it. 5. That an irritancy had been incurred by two terms' rent having ran into the third unpaid, which it was provided by that agreement, should forfeit and irritate the lease. It was answered by the respondent, That perpetual leases were sustained by the Court, against the granter and his heirs, and that therefore such leases must, by the act 1449, be effectual' against singular successors, because the act meant to render effectual against the latter, every lease that was good against the former. Nor do such rights require infestment to make them binding against singular successors, possession being held as sufficient. Besides, the right was confirmed by prescriptive possession, and has been ratified or homologated by the appellant's ancestors, by acquiescing so long in the possession of the lease, and receiving the rents.

Feb. 19, 1771. The Lords, upon report of Lord Pitfour, "sustained the defences "propounded by the respondent, and assoilzie him and decern."

Mar. 8, — And on reclaiming petition the Court adhered.

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

Pleaded for the Appellant.—1. The appellant stands fully vested in the real and complete right and property of the lands of Wardropertown, and is entitled to assume, hold, and enjoy possession of the same, and he cannot be excluded from that possession by the respondent, who has no right or pretension to the property of the lands, and who does not hold possession by virtue of any lease from the appellant, or his ancestors, or by virtue of any lease effectual or binding in law. 2. The appellant's ancestor acquired the lands as an onerous purchaser or successor in 1672, and no leases granted

by the former proprietor could be binding upon or effectual against him or his heirs, unless they were true or proper leases, such as are allowed by the act of Parliament 1449, which the deed of prorogation in 1642 was not. For, first, it sometimes bears the marks of a lease, sometimes of a feu-right, without being either the one or the other ; and it is not even properly a mutual contract, for the proprietor is bound to continue the lessee in possession, but the lessee is not made bound to possess or to give up possession. Second, the lease is devoid of the essential requisites of the act 1449, in respect of wanting possession upon it prior to the purchase, and also wanting a definite ish, or certain term of endurance. Third, The lease therefore was not binding on the appellant's ancestor, at least no longer than till the expiry of the prolongation of nineteen years current at his entry, so it cannot be binding upon the appellant by prescription. If the deed is considered as containing distinct leases or prolongations, there are not *termini habiles* for the plea of prescription, either positive or negative. If, on the other hand, it is considered as a perpetual lease, the positive prescription cannot have place, because there is no sasine or infeftment, as required by the act 1617, which regulates the law of prescription ; and, besides, as the deed in the above view is void as to the appellant's ancestor, it cannot by the principles of the law of Scotland be secured by the lapse of time, because *quod initio vitiosum tractu temporis convallescere non potest*. The negative prescription cannot take place because the respondent cannot plead the *positive*, and because the appellant and his ancestors might safely allow the lessee to continue in possession for any length of time, it was optional in them to do so, or to turn them out of possession ; and *res mercæ facultatis non prescribuntur* ; besides, the negative prescription can take off only extrinsic legal objections, but cannot remove intrinsic defects, and the deed in the present case is intrinsically void as against the appellant's ancestor. Nor can that deed become binding or effectual by the homologation or ratification of him or his ancestors, because there is no evidence that the respondent's possession was held under the deed of prolongation, but there are strong legal presumptions to the contrary, arising from the deed of prorogation itself, and from the circumstances that none of the special conditions contained in it was ever performed— from the discrepancy between the rent actually received and the rent *due* by the deed, and from the general nature of the discharges, which refer to no right whatever ; and, 2nd, because, though the *possession* and payment of the rents had been entirely agreeable to the deed, yet there is no evidence that the appellant's ancestors knew of the right, or had such a perfect knowledge thereof as was necessary to constitute homologation, they being constantly abroad on military duty. But, even though homologation was made out, it could only render the lease good for the prolonged term of nineteen years then current at the time he acquired. And the respondent, by absenting himself

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four years after his father's death, must be held to have derelinq-
 quished the possession, consequently to have abandoned and dis-
 charged the deed itself. 4th. The deed is farther irritated, by allow-
 ing two terms' rent to run into the third unpaid. The lease ex-
 pressly provides that it shall fall if such irritancy take place ; and on
 this ground alone it ought to be set aside.

Pleaded for the Respondent.—1. The lease under which the re-
 spondent claims, and by virtue of which he and his ancestors have en-
 joyed the lands in question for upwards of 150 years, is formal, regu-
 lar, and a proper lease, from nineteen years to nineteen years, so long
 as the lessee and his heirs paying the rent, and performing the cove-
 nants, shall choose to possess the farm. And leases of this kind are
 most undoubtedly binding on the granter and his heirs. 2. Though
 latent leases, upon which no possession had been obtained, may not
 be effectual against purchasers or singular successors ; yet that can-
 not apply to the present case. The lease in question was not a
 latent deed ; but the right upon which the respondent's ancestors
 were in possession of the lands, at the time of the appellant's prede-
 cessor's entry in 1681, and under which the possession has been,
 uniformly and uninterruptedly enjoyed since that time downwards,
 and therefore cannot now be set aside at this distant period, but must
 remain a good title in possession to the respondent and his heirs, so
 long as he choose to possess, and continue to perform the covenants
 of the lease. 3. Whatever ground of challenge might have been
 competent to the appellant's ancestors in 1681, for setting aside the
 lease in question, yet *post tantum temporis*, no such challenge is
 now competent to the appellant, his ancestors having from that time
 downwards acquiesced in and homologated the right to possess, upon
 which the respondent claims, and which is now secured to him by
 the positive prescription ; and any right of challenge formerly com-
 petent to the appellant's ancestor is lost and cut off by the nega-
 tive prescription. 4. The respondent's right cannot in the least be
 affected by his not entering into possession *immediately* after his
 father's death. His being abroad on the king's service rendered it
 impossible for him to take up the possession, and it was sometime
 before he could know of the death of his father, and of his own right
 to the lands. The irritancy alluded to arose solely from the appel-
 lant refusing to take the rent when offered him.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the
 interlocutors be affirmed, with £60 costs.

For Appellant, *Ja. Montgomery, Dav. Rae.*

For Respondent, *Alex. Wright, Andrew Crosbie.*