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FORDYCE v. CREDITORS OF YORK BUILDINGS CO.

[M. 8380.]

Dr. FORDYCE - - - - - *Appellant.*

THE CREDITORS of YORK BUILDINGS Co. - *Respondents.*

House of Lords, 16*th April* 1779.

BANKRUPTCY.—Circumstances in which a lease held reducible on the head of bankruptcy, at the instance of the granter's creditors. Affirmed in the House of Lords.

THE York Buildings Co., while their creditors were taking
Dec. 1744. steps against their estates, and between the date when a petition to sequestrate the same, and the order pronounced
June 15, 1745. sequestrating the estates, granted a lease for 39 years, while the old lease was still subsisting, and had yet five years of its term to run. The lease was dated 24th April 1745, and set forth:—" Whereas the said Governor and Co. are willing " to continue their tenants or lessees, who take proper care " of the lands, and pay duly the stipulated rents thereof, " and are also inclined to have their rents improved and paid " to them in the city of London, and have resolved to grant " a further term of thirty-nine years, after the determina- " tion of the said present lease, to the said Mr. David For- " dyce, (appellant's father,) his heirs and assignees; and " the said Mr. David Fordyce being willing, without hurt or " derogation to the lease, or prorogation above mentioned, " presently subsisting, to accept the said further term of " thirty-nine years, at the rent, upon the conditions, and with " the reservations therein mentioned, and likewise to pay " the additional rent therein mentioned: Therefore, they " set and let the lands of Belhelvie, &c. for the space of five " years then to run, from the term of Whitsunday 1745, of " the aforesaid last mentioned lease, thereby renewed and " confirmed, and for the further term of thirty-nine years " now granted, making in whole forty-four years, from Whit- " sunday 1745."

There was an increase of £25 of yearly rent; but it was alleged that this was trifling, and that the rent of £525 was far below the real value. The proven rental in 1719 was £557. 4s. 7d. after all deductions. The rental in 1776 was £1090, whereas the increased rent paid was only £525. It was alleged that Fordyce had paid the governor of the company a gratuity of £130 for the lease; and in the petition for sequestration, it was stated, that the company were in the course of granting leases and renewals of old leases, at

rents far below their real value; and the Court, by their interlocutor 15th June 1745, prohibited the company from granting leases.

Possession followed upon this lease.

The creditors having brought a reduction of the lease, and also a removing, on the ground that as the company were insolvent, and a ranking and sale of their estates, and an application to have them sequestrated pending, they were not entitled to let leases of their estates. That Fordyce could not plead ignorance, at the time this lease was granted, that an application for sequestration was then before the Court, as there was not only notorious bankruptcy and diligence of every kind, with the above process of sale, but the very lessees or tenants of these estates, among whom Fordyce was one, were in Court in a multiplepoinding at their instance, and summons of mails and duties against them, so that he was not in *bona fide* in taking the lease in such circumstances. Besides, it was granted while the former lease was yet unexpired, and manifestly at a rent far below its value.

On report of Lord Braxfield, Ordinary, the Court pronounced this interlocutor: July 7, 1778.

" Sustain the reasons of reduc-
" tion of the lease, or prorogation of the lease of the lands
" of Belhelvie, and reduce, decern, and declare in terms of
" the libel; and find that the defenders must remove from
" the possession of the lands contained in the above men-
" tioned lease; but of consent of the pursuer's procurator,
" suspends the term of removal to the term of Whitsunday
" next to come, and decern in the removing accordingly;
" and of consent of the pursuer's procurators, find that the
" subtack granted by the defenders before commencing this
" action, and whereon possession was obtained, does not fall
" under this reduction, but must remain good to the sub-
" tacksman for the years yet to run of the respective terms
" therein contained, not exceeding the term of endurance of
" the principal lease or prorogation now reduced; and of
" consent of the pursuer's procurators, find that the defen-
" ders are not liable for any higher rent during their posses-
" sion, than the rent due by the said lease now reduced."

On reclaiming petition the Court adhered. July 23, 1778.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The only question here is, Whether at the time the lease was granted (April 1745) the

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York Buildings Co. had power to grant leases, and whether, in granting this lease, they have exercised that power in a legal manner. It is quite clear, as proved by the record, that the company were under no prohibition to grant leases prior to the 15th of June 1745, when the interlocutor of the Court was pronounced, prohibiting them from so doing; and the question is, were they under any other restraint from so doing before that interlocutor? The very interlocutor itself presupposes that they were not under such restraint, because, how would it judicially prohibit, if the company were already debarred from so doing? And it is therefore clear that the inhibitions, the adjudications, and the ranking and sale, all of which existed prior to the application to the Court, could not operate as a prohibition, otherwise why did the creditors apply to the Court after the dependence of all these proceedings, for a judicial prohibition? But even supposing the ranking and sale effectual to restrain, in ordinary circumstances, the granting of such lease, yet as that process, in this case, had been cast from informalities, and the second ranking and sale raised by the annuitants taken out of the way by an agreement with them, so that these rankings and sales have become ineffectual for that purpose. Nothing therefore remains but the embarrassed circumstances of the company, and the plea of litigiosity set up, in respect that before this lease was granted, a petition to sequestrate was before the Court. But these circumstances were not sufficient to divest the company of their right; and so long as they were undivested there is no principle in the law of Scotland for holding that they were debarred from granting such lease. There was, besides, no fraud—no unreasonable term of endurance, and no inadequate rent; but a full rent, increased by £25 per annum.

Pleaded for the Respondent.—The York Buildings Co., at the time of granting the lease, were notoriously bankrupt—their estates were attached by inhibition, by adjudication, and by ranking and sale; in short, almost every mode of diligence and execution known in law. In these circumstances, it was not in the power of Court to grant a right over the estates to the prejudice of their creditors. But, separately, the transaction respecting this lease was collusive and unfair, made five years before the expiration of the subsisting lease, and when no reason is assigned or pretended for renewing it at this critical period; but that the

lessee, knowing the embarrassment of the company, and the known disposition of the managers, took that opportunity to obtain a lease greatly to the prejudice of the creditors. The present lease, though not of long endurance, as the Fingask estate was, yet is sufficiently long to shew the purpose for which it was granted, namely, to deprive the creditors of an increased rent at its expiry. The lease was granted for a rent far below its value, and a lease so granted cannot stand in competition or prejudice the rights of inhibiting adjudging creditors.

After hearing counsel,

LORD MANSFIELD, who moved the House to affirm the judgment, said:—"Though I am satisfied with the decree, I rise to give your Lordships my reasons for thinking this case different from that of yesterday, (case of Dr. Thriepland,) and which I can collect from the minutes of the opinions of the judges. On the point of law, I continue of opinion, that in 1745, the debtors, notwithstanding the incumbrances to their possession, continued in the administration of the estates, so as to have the power of granting leases; but void, if made under covin, fraudulently, and to the prejudice of their creditors. I see several circumstances noted, in the opinions of the judges, wherein the two cases differ; and it is surprising they did not put their judgments upon these. In the last case, there was no evidence of notice to the lessee; no evidence that it was in consequence of the proceedings in the Court of Session that he applied for his new lease. He gave evidence from his letters of secret correspondence, that he looked upon it as a disadvantageous bargain, and prayed an abatement of rent, on account of ruinous houses; but, from affection to a family estate, being the heir of the family, he renews his lease, notwithstanding that it was a disadvantageous bargain. It appeared that he gave no gratuity or fine, but refused to give any; so far no covin. But here, in this case, Mr. Strachey is the attorney employed for getting, and who executes this new lease; formal notice is given to Strachey's agent. All the cases put by Mr. Rae of private knowledge don't apply. There is here an *evidentia rei* that it was in fraud of his own knowledge; and that this knowledge operated after the proceedings on the petition: there was no application for the lease before April."

Dr. Thriepland's case.

"There comes a circumstance last, of itself decisive. What is this grassum? A gratuity and corrupt price for the lease, not to the company at large, but to their officers; not appearing on the face of the lease, but given with notice of the complaint to the Court. I said yesterday, if there had been a fine, it would have made a material difference. There is another material circumstance in the minutes of the judges' opinions, that this was a lease in reversion, to take effect at the end of five years. It is not necessary, in the ad-

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ministration of an estate, or in the usual course of business, to grant a reversionary lease. Here, where acts or settlements give power of leasing, all the leases are in possession. This lease applies to the prayer of the petition, that the company should not grant leases. A sequestration would have had the same effect, and been granted to prevent this lease. This makes a material difference between the two cases."

" Another circumstance occurring in the former case, was, that besides the private correspondence, they produced the tenants' receipts for the first twenty years; and from the price of grain in that period, there was but a trifling advantage, and the length of the lease was accounted for. There was not a single bidder, (as my Lord Advocate observed,) who offered as a bidder to purchase these estates. The heir took them at neat fee-farm rent, a most eligible thing for the Company. But there is here no evidence *what* the estate did produce. There is proved now to a great excess of rent, about £500, and this lessee was an absolute stranger; and therefore no affection can be supposed to have operated for him."

" A great circumstance in which the two cases differ, is the acquiescence and ratification. Every person interested to make an objection, which may lie to a deed, may waive it by tacit consent, or by express words; the other lease was many ways notorious. There was a solemn and public circumstance, the action brought in 1756, complaining of the hardships on the part of the lessee. The trustees for the annuitants, who were ranked in the first place, Sir John Meres in the second place, the Duke of Norfolk in the third place, and the trust deed creditors in the fourth place, appeared and litigated with him, and insisted that he should be bound by his lease; and that the Court found him bound accordingly. This is a very strong circumstance of notoriety, and called on every body to challenge the lease. In this case, there is no notoriety or change of possession. There is a subsisting lease for five years. The registering the lease is not noticed. I don't know but it is a circumstance against the appellant; the lease being recorded in the register of probative writings the *very day before* the order of the Court to stop the company granting leases. It is no notice to the creditors. Indeed, the circumstance of the grassum is alone sufficient to decide this cause against the appellant. I am therefore for affirming."

It was therefore ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Al. Wedderburn, Dav. Rae.*
For Respondents, *Henry Dundas, Ar. Macdonald, Ilay Campbell.*