1780.

HOGG
v.
HOGG.

[M. 15103.]

SIR LAWRENCE DUNDAS, Bart., - - *Appellant;*

HIS MAJESTY'S ADVOCATE, and other OFFICERS OF STATE for Scotland, on behalf of HIS MAJESTY, and PATRICK HONEYMAN, vassals, and Others, vassals of the Crown } *Respondents.*

House of Lords, 14*th December* 1779.

PATRIMONY OF THE CROWN—SUPERIOR AND VASSAL.

For full report of this case, *vide* Morison, p. 15103.

Held, in the Court of Session, that the superiorities and casualties of the Crown lands, in Orkney and Zeatland, formed a part of the Crown's patrimony annexed thereto *jure coronæ*, and could not be alienated or granted away by the Crown—such grants being illegal and unconstitutional, both as regards the rights of sovereign and vassal.

On appeal to the House of Lords. After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same is hereby affirmed.

For Appellant, *J. Mansfield, Ar. Macdonald, Chas. Dundas.*

For Respondents, *Al. Wedderburn, Henry Dundas, Alex. Murray.*

ROBERT HOGG Esq., of Ramoir, - - - *Appellant.*
MARY HOGG, Widow of deceased Robert Gordon, *Respondent.*

House of Lords, 14*th February* 1780.

IRRITANCY OF LEASE—PENALTY.—A lease provided, that if two terms rent were allowed to be "resting and owing unpaid at one "time, the tack should *eo ipso* become void and null," with a fifth part more of termly moiety in case of failure. The tenant fell four years in arrear of rent. In an action brought under the annulling clause in the lease: Held the irritancy purgeable at the bar; and that the penalty, in case of failure of a fifth part more, was not exigible.

Gordon had a lease from Hogg, of the farm of Ramoir, the stipulated rent of the first two years being £160, and for the remaining years of the lease £200. The lease bound the tenant to pay this rent, "and so on yearly there-"after, during the continuance of this lease, together with

" *fifth part* of each termly *moiety of liquidate expenses*, in case " of failure, and the legal and ordinary *annualrent thereof*, " so long as the same shall remain unpaid; declaring always, " as it is here expressly provided and declared, that if two " terms' rent shall be resting and owing unpaid, at one time, " this present tack shall *eo ipso* become void and null."

The tenant fell four years behind in arrear of his rent, and action was raised, reciting the above clause in the lease, stating, that, in terms thereof, he had fallen four years in arrear of his rent, and that the lease was thereby void and null, and concluding to have him removed. The sheriff allowed the tenant to purge the irritancy of the lease, by consignation of the whole arrears of rent, with interest due thereon. Against which interlocutor, an advocation was brought, in which the Lord Ordinary advocated the cause, and " assoilzed the defender from the conclusions of the re- " moving in consequence of the clause of irritancy in the " tack, granted by Robert Hogg to Robert Gordon, libelled; " repels the articles of compensation claimed by the de- " fenders, amounting to £22. 15s. 7d., in respect it appears " from the discharges produced, that these payments were " made to the pursuer for the rents of 1771. Finds the de- " fenders liable in payment to the pursuer Robert Hogg, of " the rents of the lands libelled, with interest of the same, " from the several terms of Whitsunday and Martinmas, at " which payment is stipulated to be made, by the tack libel- " led, and the liquidate penalty as contained in the tack."

April 7, 1776.

July 15, 1778.

Both parties having reclaimed, the Lords found " the pe- " titioner (Mary Hogg) liable annually in a sum equal to " the legal interest of the £22. 15s. 7d. within mentioned, " from and since the term of Whitsunday 1773, and in time " coming, till payment of the bygone rents in question; but " find no interest due on the said bygone rents, and in " case the said rents are paid to the pursuer, on or before " 29th January current, find that the bygone liquidate ex- " penses for each term's failure are not due, or incurred, " and decern; and, with the above variations, adhere to the " interlocutors of the Lord Ordinary, reclaimed against, and " refuse the desire of both petitions." On reclaiming petition the Court adhered.

Jan. 16, 1779.

Jan. 28, 1779.

Against these interlocutors of 15th July 1778, 16th and 28th January 1779, the present appeal was brought.

Pleaded by the Appellant.—1st, The first question is, whether, in terms of the lease, the appellant is entitled to

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exact interest on the arrears of rent, and the liquidate penalty for expenses. The lease itself provides that the tenant shall be bound to pay the rent, and "the legal and ordinary annual "rent thereof, so long as the same shall remain unpaid." Under this clause, there was an express right given to the landlord, by the agreement of parties, to exact interest on arrears. But, apart from such express agreement, and on the soundest principles of justice and law, interest ought to be allowed *nomine damni*. Nor is it any answer to this to say, that the respondent was always ready to pay the rents, and had actually offered payment, as evidenced by the letter offering to do so, because that offer being conditional, upon being allowed retention, or deduction of certain unfounded claims, was not a free tender of the money. 2d. Separately, the irritancy of the lease is incurred and not purgeable, and therefore the Court ought to have decreed in the removing, and not assoilzed the defender from the conclusion therefor. On the tenant falling two years into arrear, the tack was *eo ipso* to become void and null, "and in that event the said "Robert Gordon binds and obliges himself to flit and re-"move himself." Where, therefore, as here, there is an express declaration in the lease itself, that it shall be, on non-payment of two years rent, *ipso facto* void and null, the irritancy cannot be purged at the bar, a doctrine laid down by the best authorities. In such a conventional irritancy, it requires no decree to declare the irritancy incurred. The nullity is settled and declared by the lease itself. And the tenant ought therefore to be removed, as his lease is at an end.

Pleaded for the Respondent.—1st, By the law of Scotland, penal irritancies are never interpreted with rigour, and every equitable consideration is admitted to negative their exaction. Here a counter claim was the cause of the tenant refusing his rent, payment of which was offered, on condition of retention being allowed for it. He was, besides, prohibited from paying his rents, by an action raised by the superior, to compel the landlord to enter vassal with him, or to forfeit his right, which action being served on Gordon, was equivalent to an interpellation from paying the rent to him. The interest and penalty, in name of expenses for such year's failure, ought not therefore, in these circumstances, to be demandable. 2d, The irritancy contained in this lease, is the most rigorous that can be devised, or attempted to be enforced. If two years rent become in arrear, it declares the

lease *eo ipso* void and null, and thereby forfeited; and the appellant contends that this is enough, without any decree of declarator of the irritancy. But the rule of law, that all irritancies are purgeable at the bar, necessarily supposes that all irritancies, to be effectual, must be judicially declared, and consequently, that the bare clause in the deed does not of itself annul the right. This seems according to principle, because it may often happen, that the non-performance is owing to some obstinacy on the part of the landlord. The tenant, in the present case, is willing to pay, and ought not to have penalties and interest exacted from him; and any failure or contumacy on his part, while prohibited from paying, ought not to be so visited, and by a landlord who refuses to receive payment. Both of these facts apply here.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For the Appellant, *Henry Dundas, Dav. Rae.*
For the Respondent, *Ilay Campbell.*

NOTE.—This case not reported in Court of Session.

ANDREW WAUCHOPE, Esq. of Niddry, *Appellant;*
EARL OF ABERCORN, and SIR JOHN HOPE, *Respondents.*

House of Lords, 21*st Feb.* 1780.

LEASE OF COAL—RIGHT OF PROPERTY—SERVITUDE—*OPUS MANUFACTUM*—RECOMPENSE.—Circumstances where the level of a pit was communicated by the lessee to a neighbouring colliery, with *proviso* of the proprietor, that the level should not be communicated into any other neighbouring collieries, for the purpose of working the coal, to the prejudice of his original property; Held, on communication of the level to the neighbouring collieries, that the appellant was entitled to have it shut up; also held, in consequence of such communication, that the recompense due to him must be adequate to the benefit which has been enjoyed by the use of such level. There was a thick wall left in working the Niddry coal, which divided it from the coal of Woolmet, which stood higher up. The wall, consisting of porous coal, did not prevent the water from flowing down from the Woolmet pit to the Niddry coal. The proprietor of the latter was proceeding to make downsets to prevent this, when Sir Archibald Hope brought a suspension, contending that the Niddry coal, being the inferior