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SIR JAMES RIDDELL, Bart., . *Appellant;*
JAMES GROSSET, Esq., . . *Respondent.*

RIDDELL v. GROSSET.

House of Lords, 23d March 1791.

LEASE—ERROR IN SUBSTANTIALIBUS—PAROLE.—Circumstances in which a lease of land was entered into for 31 years, specifying a yearly rent of £600 per annum, and also a prescribed rotation of cropping. Nothing was mentioned in the lease about the number of arable acres of land; but the tenant understood that there were, as had been represented, 600 acres of arable land; and, as he was taken bound by the lease to have 300 acres in tillage, each year of the lease, which proceeded on the footing that there were 600 acres of arable land, he insisted that the lease should be reduced and set aside, in consequence of there not being that quantity of arable land on the farm. The Court of Session held him liable for the full rent.—Reversed in the House of Lords, and lease reduced and set aside, and held him only liable at the rate of £450 per annum for the three years during which he possessed the farm.

The respondent took in lease from the appellant, for a period of 31 years, the house and lands of Mains, at a year-

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tion of the rent which is allowed him. The entail dispones the estate in his favour as institute; and he is apparent heir of investiture. The possession of the trustees is his possesion; and civil possession is sufficient. But the objection is, that his title is defeasable, as the trustees may sell to a purchaser, who may execute the procuratory. The renunciation of little consequence, as it only binds them personally, and it is not recorded in the register of sasines; and even if it was, I doubt if it be a feudal method of securing Sir Alexander in the superiority. But, independent of this renunciation, can it be said that he is divested of the right of apparency, by a settlement in his own favour, or, which is the same thing, in trustees for him, the *dominium directum* still remaining *in hereditate* untaken up? The objector must be able to show that a trust conveyance, for the purpose of management, and for the heir's own behoof, *quoad* the reversion, is an alienation from the heir.

" Sir Alexander is entitled to take a charter upon the procuratory in the entail, or, which is the same thing, as to third parties, to be served upon the former investitures, and so to complete the feudal right in his person, which is not inconsistent with the feudal right being also in the trustees. Query: Would not his wife be entitled

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ly rent of £600 per annum, the said lease fixing the rule of rotation and cropping the lands; and providing that in each year there should always be 300 acres in tillage. This com-

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to her terce, or to the jointure allowed by the entail, upon his making up such titles? Frazer of Lovat in a similar situation. Suppose the trustees also infeft upon a charter from the crown, would this entirely denude him of the feudal right of his estate, and his wife of the terce? What if Sir James was living, and had put his estate under trust in his own life, would this have been a good ground for turning him off the roll? Case of Sir Lud. Grant is very much in point, also case of Crawford in Renfrewshire, who was in worse circumstances. Infeftment is really in security till a sale actually takes place, which will of course denude him, but, in the meantime, the estate belongs to nobody but him.

"As to the valuation, the division in 1740, if done by a private meeting, was done without evidence of any kind. The procedure in 1753 more regular, and has continued the rule for near forty years. See case of Shaw Stewart 1780, Wight, p. 201, where twenty years' acquiescence was held sufficient against a much worse objection. But there is no *ex facie* objection to the decree of 1753, and therefore it must continue the rule until it is reduced. The original valuation was *in cumulo*, and doubt if the division 1740 could be regarded. The Commissioners of Supply entitled to act to the best of their judgment, and not tied down to such rigorous rules."

LORD JUSTICE CLERK.—"As to the valuation, I must say that it brought him under £400. As to whether it be null, may take under consideration the valuation books. I incline to think it was a public meeting. But the question in 1753 was, how they should proceed? But, having the whole before them, judge it better to take original *cumulo* valuation. They judged rightly. The proceedings in 1740 were null for want of proof. Supposing they had been wrong, yet, as it has been acquiesced in for thirty-seven years, objection elided."

LORD ESKGROVE.—"The division in 1740 is clearly null, but that of 1753 continued the rule for 37 years, which bars objection."

LORD DREGHORN.—"Of same opinion."

LORD JUSTICE CLERK.—"As to trust, I am clear that there is nothing in the objection. In adjudications, the reverser has the substantial right and interest, till the property is evicted. In rights in security the same rule holds.—A power to sell is common, but makes no difference. The possession of the creditors and trustee, is the possession of the truster. Every shilling that is uplifted, goes to the payment of Sir Alexander's debt."

LORD MONBODDO.—"Of same opinion."

putation of 300 acres proceeded upon the footing, as stated by the tenant, that the ploughable land consisted of 600 acres.

The tenant, soon after entering the farm, discovered that there was not more than one half of this quantity of ploughable land on the farm; the other part being in a state not fit for tillage, and consequently, as he stated, it was impossible for him to implement the conditions of the lease. In consequence, he brought an action of reduction to set aside the lease, on the ground of error in substantialibus of the lease, and false and fraudulent representation.

The landlord (appellant) stated, that nothing could be fairer than the manner in which the whole bargain for the lease was gone into.—That he had never stipulated, either in the lease or otherwise, that the farm contained 600 arable acres. The tenant came and carefully inspected the whole lands, staying for a whole week, and perambulating the grounds day after day to ascertain both the quality and extent of the land, and that at the end of that period he had expressed himself satisfied, and had desired to enter into articles in regard to the lease;—had actually written out the agreement with his own hand, and had thereafter a whole year to think of it before any regular lease was executed and signed between them.

To this action were subsequently added another, at the respondent's instance, praying the Court to declare, that the rent of the said lands of Mains and others, contained in the lease, should be £300 yearly for the three years during which it had been possessed, and, upon payment thereof, that he should be freed and discharged of all rents prestable by him, as tenant for the said three years. Also for £1000, in name of damages, in consequence of the said Sir James Riddell having, by false and feigned representation, induced him to enter into said lease, and to come with a large family from a foreign country, at a great distance, to take possession of the said lands at considerable loss and expense.

The appellant also brought an action, stating the lease,

Lord Gardenstone.—"Of same opinion."
Lord Eskgrove.—"Of same opinion."
Lord Swinton.—"Of same opinion."
Lord Rockville.—"Of same opinion."

Vide President Campbell's Session Papers, Vol. lix.

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and the several agreements therein contained, and praying that the Court would order and decree the respondent to make payment to him of the rent of the farm of Mains, at the rate of £600 Sterling per annum, in equal moieties. And also to make payment of the sum of £3 of additional yearly rent for each acre he had cropped the farm contrary to the stipulations of the lease, during these three years, and for £3000 as damages for failing to implement the stipulations and conditions of the lease.

In the course of these suits, the landlord and tenant came to an agreement to void the lease for the remaining period thereof, without prejudice to these actions.

A proof was allowed, as to the extent of the arable land; and as to the tenant's having all along understood that there were 600 acres arable.

The respondent founded much upon the fact, that, by a plan and survey of the lands made by one M'Cartney, it appeared there were only 290 acres, 1 rood, 35 falls arable; 92 acres, 3 roods, 25 falls meadow; 86 acres, 23 falls doubtful. In all, amounting to 439 acres, 2 roods, 3 falls. These facts were also spoken to by witnesses.

On the other hand, the appellant contended that the respondent had failed in proving:—"That he had understood, or been made aware there were 600 acres of arable land; that he proceeded to crop the lands upon that footing: Or that, in fact, there was not more than one half of that number of arable acres on the whole farm.

Dec.18, 1789. The Court, of this date, pronounced this interlocutor:

"Conjoin with the process of reduction, the relative pro-
"cesses brought at the instance of James Grosset, the pur-
"suer, against Sir James Riddell; and also the process at
"the instance of Sir James Riddell against James Grosset;
"and having advised the state of these conjoined processes,
"with the testimony of the witnesses adduced, writs pro-
"duced; the Lord's assoilzie Sir James Riddell from the
"process of reduction: Find James Grosset is not entitled
"to any abatement of the stipulated rent, for the three
"years during which he possessed the farm in question;
"and assoilzie Sir James Riddell from the claim: Find that
"Sir James Riddell is not entitled to interest on the arrears
"of said rent, nor to damages or penalties, and assoilzie Mr.
"Grosset accordingly. Find no expenses due to either
Jan.27, 1790. "party."—On reclaiming petition the Court adhered.

Against these interlocutors the appellant brought an appeal,

in so far as they refused him interest on the rents as they became due, damages, or the penalties in lieu thereof, and the expenses of process. And the respondent entered a cross appeal against so much of the said interlocutors as assoilzies Sir James Riddell from the process of reduction, and finds that he is not entitled to any abatement of stipulated rent for the three years. And also, in so far as they do not find him entitled to damages and expenses of process.

Pleaded for the Appellant.—1. The pursuer, Grosset, having abandoned and given up his original pleas of fraud and imposition, the Court did wrong in allowing a parole proof, in opposition to the evidence of the written contract of lease, it being a principle recognized in law, and confirmed by your Lordships' decisions, that where a contract or agreement has been fairly entered into, and legally executed, no parole proof shall be admitted to contradict the terms of such contract or agreement. The proof therefore ought to be laid out of the cause, and the case judged of according to what appears on the face of the lease. Now, one clause in that lease, besides stipulating a rent of £600 per annum, also stipulated four shillings of penalty, for each pound of principal in which he failed in payment of said rent, as also the legal interest of the said rent from and after the said terms of failure. This being a fixed and certain covenant, the interest and penalty is as much due to the appellant as the rent itself. And so, in like manner, is the stipulation of £3 per acre, for every acre that was cropped contrary to the rotation laid down in the lease, in consequence of the respondent not pursuing the mode of husbandry laid down therein. Besides, the appellant conceives, he is well entitled not only to the penalty of £1000, stipulated by the lease for breach of covenants, but also to expenses of process. The respondent set out with an allegation of fraud, which he afterwards abondoned. He has failed to prove the smallest article which he alleged as to the extent of the arable land or otherwise, and therefore costs ought to fall on him. 2. As to the cross appeal, the Court were unanimous that there were no grounds for voiding the lease. Whether he might have been mistaken in the quantity of the arable land is not the question. The agreement for the lease was fairly and deliberately made. Mr. Grosset, his son, and Mr. Theed, were four days on the farm, examining it with the utmost care and attention; he himself made the offer of the rent, and drew up the agree-

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ment, and there was an interval of 12 months between the commencement of the treaty and his executing the lease, during all which time he had it in his power to make any further inquiries he might think necessary.

Pleaded for the Respondent.—If the matters had remained on the footing they were when the respondent commenced his action of reduction, the lease must have been set aside, on account of the error in the substance of the contract, or because what the appellant professed to let, and the respondent to take, did not exist. That this is founded in the principles of the law of Scotland, was laid down by all the judges, and that the doctrine applied to the facts in this case, was allowed by them all, one only excepted. The subject matter of the contract was a farm, in which there were included 600 acres of arable ground, capable, in the usual course of husbandry, of being cropped and managed in the way pointed out by the lease. The covenants with respect to the succession or rotation of cropping, with the limitation, *that not above* 300 *acres were to be in tillage in any one year*, necessarily imply, that there were 600 arable acres. Four years of culture were to be succeeded by four years of hay or pasture, and therefore it is demonstrably plain, that the grounds so converted, must have been meant to be supplied by an equal, or nearly equal quantity to be put under crop, otherwise the stock and occupation of the farmer must have been changed every four years. Now, is it any refutation of this to observe, that there was no obligation on the tenant to have constantly 300 acres under crop, and that the rotation might have been followed though the arable lands were much under 600 acres, or with any given number? When it is considered that the mode of cultivation was in favour of the lessor, in order to keep the whole in a regular course of husbandry, and to insure its being left in that state at the termination of the lease, it will be perfectly obvious that mentioning 300 acres as the amount of what was to be at any one time in tillage, observing the rotation, was precisely tantamount to saying that 300 acres was the moiety of the ploughable land. No farmer who read this lease, and (without knowing of the dispute which has arisen) was asked how many arable acres the tenant, who was bound to the conditions it contained, must have had, could hesitate in answering. It being therefore undeniable that the subject bargained for did not exist, the lease ought to be set aside and voided, as founded on error *in essentialibus.* Assuming

the lease to be void, it was somewhat inconsistent in the Court below to make that lease the rule of fixing the rent during the respondent's three years of possession. The ground the Court went upon was, that the deficiency of the arable acres could not be felt by the tenant, till an after period, which, with great submission, is plainly wrong; for the total rent covenanted to be paid was, in respect of the whole farm, according to the idea erroneously entertained, and therefore the deficiency operated to the tenant's prejudice from year to year. Besides, it has been proved by the witnesses adduced by both parties, that upon a lease for 31 years, the farm was worth no more than £357 per annum.

After hearing counsel,

The Lord Chancellor stated his reasons for differing with the Court below, and reversing in part.—(No note of the reasons has been preserved.)

It was therefore ordered that the interlocutors complained of, so far as they assoilzie Sir James Riddell from the process of reduction, and so far as they find that James Grosset is not entitled to any abatement of the stipulated rent for the three years during which he possessed the farm in question, and assoilzie Sir James Riddell from the claim, be reversed; and that the tack mentioned in the summons is hereby reduced, rescinded, cassed and annulled from the beginning, and that the same is now, and shall be in all time coming, void and null, and of no avail. But, in respect that the said James Grosset occupied the lands mentioned in the said tack for the space of three years, find and decree that he ought to pay for the same at the rate of £450 by the year, and that the said James Riddell is not entitled to any further or other damages in respect of the said tack, or the occupation of the lands therein mentioned. And it is ordered and adjudged that, with this variation, the said interlocutors be affirmed. Ordered that the cause be remitted back to the Court of Session to proceed accordingly.

For Appellant, *Sir J. Scott, Robert Dallas.*
For Respondent, *T. Erskine, W. Grant.*