such evidence to qualify an absolute right of property. Besides, the act 1696, in express words states, that nothing will be sufficient but the "written declaration or back-bond "of trust, lawfully subscribed by the person alleged to be "trustee, or unless the same be referred to the oath of the "party *simpliciter*."

After hearing counsel,

LORD LOUGHBOURGH said,

My Lords:

"I cannot find out where any difficulty lay in this case, so clear and conclusive were the terms of the statute 1696; and I would even have awarded costs against the appellant, but for the consideration that he had obtained an interlocutor of the Court of Session in his favour."

It was therefore

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, M. Nolan, Thos. W. Baird.*
For Respondent, *R. Blair, W. Grant, W. Tait.*

WALTER SIME, Esq., Collector of Customs Aberdeen, - - - - - } *Appellant;*

THE RIGHT HON. VISCOUNT ARBUTHNOTT, *Respondent.*

House of Lords, 27th Nov. 1797.

LEASE, REDUCTION OF—FRAUD AND FACILITY—FORCE AND FEAR.—

A reduction of a lease, granted while a current lease had still many years to run, and made to commence forty-four years after its date, was brought, on the ground of its being unequal and unfair in its terms, and the granter incapable, from facility, and that fraudulent and improper means had been obtained in procuring it. Held, upon proof, that the lease was bad, and reduced accordingly.

This was an action of reduction of a lease granted by the respondent's father to the appellant, in the following circumstances:—

The late Viscount Arbuthnott had always manifested a strong dislike to long leases, and had never been in the practice, up to a certain date, of granting leases for more than nineteen years.

He died at the age of 88, in April 1791. During the latter period of his Lordship's life his mental faculties were impaired, and his bodily strength much weakened. The respondent further stated, that when he succeeded, after his

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father's death, he found, that while labouring under his infirmities, and while without a factor or adviser, he was induced, by improper means, to grant to his tenants, while their existing leases had still many years to run, new leases for a much longer period.

Of the leases on the estate, there were seventy which were made to endure for a longer period than nineteen years. Above forty of the most valuable were obtained while the current leases had a great many years to run. Some of them were to commence at the distance of five years, others at the distance of ten years, and others at the distance of twenty years *from their date.* The lease under challenge could only commence *forty-four years after its date.* Some of the tenants, after his father's death, voluntarily gave them up. He bought up the right of others; but the appellant demanding £3000 for giving up his lease, he was obliged to resist such demands, and to bring the present reduction.

The lease in question was dated 8th March 1786, for *three times nineteen* years after the then ensuing term of Whitsunday (15th May 1786), while there was an existing lease that did not expire until 1830. The rent of the new lease was to be only 58 bolls, 3 firlots of beer, and 4 bolls of meal, and £58. 7s. 1d. in money. While the rent, according to the true value, ought to have been £193.

The grounds of the action of reduction were these, 1st. The great inequality of the bargain, or lesion. 2d. The facility and weakness of mind and body of the granter at the time this lease was obtained. 3d. Imposition and fraudulent means taken to obtain the lease.

The Lord Ordinary, after the disposal of some dilatory defences, ordered first a condescendence and then a proof.

1. Regarding the inequality of the bargain, it was proved, that the true rental of the farm, of that which was partly occupied by Sime, (the rest being possessed by his subtenants,) was £193, that is, about £93 more than the appellant agreed to pay for his lease. And that when the rents which he obtained by the subletting of it were considered, it appeared that the last tack in 1792 to Robert Davidson for the part of the farm subset to him, yielded a rent of £95. 7s. 5d. alone, which was a rent within a few pounds of the whole rent payable to the Viscount for the whole farm. This fact was concealed from the Viscount at the time of granting the new lease.

2. Regarding incapacity, the respondent submitted that

it was not necessary, in such cases as the present, to prove such an absolute want of understanding as renders the party incapable of doing any deed, or executing any business, in a valid and proper manner; but it was sufficient to prove such a degree of weakness or failing, as to render the party an unequal match for those who may take the advantage of facility. And a person might, in this view, be more facile with regard to one kind of business than with regard to another, in particular circumstances. A sudden change in one's actions or ideas, or modes of life, totally inconsistent with former actions, opinions and habits, may manifest this facility, and may make the individual facile *quoad illud negotium*. Here the failing point was in granting leases of long duration, by one who had all his life approved only of leases to the extent of nineteen years' duration; and the whole and slump manner in which this was done, appears at once irrational—fifty-six leases having been granted as very long prorogations of leases then current; and thirty-seven without any rise of rent whatever. Besides this, it was proved that the Viscount, for about seven years before, had failed much in body and his mental faculties, and was considered incapable of transacting any business. He used to remark to one of the witnesses that his memory was gone, and that he was often imposed upon. Other witnesses spoke to his having forgot what they told him before, and that he asked them repeatedly about the same thing.

3. In regard to fraud and imposition. The butler deponed, that he was quite sure that the Viscount was imposed upon in granting leases. About the time mentioned, after a few leases were granted, he was constantly beset by the tenants for the same purpose. In particular, another witness (the appellant's agent) deponed that it was the appellant who employed him to draw out "the lease in question, "and that he got no instructions from Lord Arbuthnott with "regard to making out the foresaid tack: That after the "scroll was finished, he gave it to Mr. Sime, who returned "it at the distance of some weeks, with some corrections "in Mr. Sime's own handwriting."

Besides, there was a seizure of smuggled wines in his Lordship's cellars, by which the Viscount was thrown into much fear, which gave the appellant, as Collector of Customs, an advantage over the Viscount, which he used to serve his own interest, by obtaining the lease in question.

The case, with the proof, was reported to the Court,

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which at first pronounced an interlocutor for assoilzing the defender, and finding him entitled to expenses. But, upon advising a reclaiming petition and answers, the Lords finally pronounced this interlocutor: "Sustain the reasons of re-"duction, so far as applicable to the additional period or "prorogation given to the defender by his last lease, be-"yond the endurance of his former lease; and reduce, de-"cern, and declare accordingly. Find the pursuer (re-"spondent) entitled to expenses."

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant.—The Viscount Arbuthnott, instead of being facile, was a person of uncommon acuteness, and showed great diligence and attention to his affairs, and retained full possession of his faculties to the last. In these circumstances, the prorogation of the lease was a fair and equal transaction—the £10 of additional rent making the new rent equal, or nearly equal, to the value of the farm. But, supposing the rent, with the addition, to have been below the proper value, a prorogation of the lease, to commence at the distance of 44 years, was of very trifling value, and was only a judicious and reasonable encouragement to the appellant, who undertook to make, and was in the course of making, extensive improvements on the faith of it. 2. In cases of facility, it must be proved, not only that facility existed, but that lesion was enorm. In the cases of minority it is laid down that "if the lesion be *inconsiderable*, restitution is excluded." Any lesion, in the present case, must have been to a very trifling extent; and here a distinction may be made betwixt the case of a sale and that of a lease. In a sale, it must always be the object of the seller to get the highest price he can, and in so far as he does not get so high a price as might have been obtained, he makes a bad bargain; but, in letting a farm, it is not the object of a prudent landlord to get the highest rent he can. On the contrary, rack rents are generally condemned; and it is considered as much more for the interest of the proprietor to accept of an inferior rent from a really industrious and substantial tenant, than to risk the farm in the hands of a tenant at a rent beyond what he can pay. 3. From a fair examination of the proof adduced, it fully appears that no fraudulent or improper means were used by the appellant in obtaining the prorogation of his lease in the present case.

Ersk. Inst. B. 1. tit. 7, § 36.

Pleaded for the Respondent.—1. The lease obtained by the appellant was altogether unequal, and that to a degree as to afford intrinsic evidence that the advantage obtained by the appellant must have arisen from ignorance and imbecility on the one part, and improper influence or deception on the other. The rent payable was only £100; but the surplus rents drawn by the appellant from subsetting are upwards of £140, after paying the principal rent. This of itself was sufficient to strike strongly against the lease. 2. At the time when this lease was gone into, the Viscount was so much failed, from old age or other infirmities, as to be exceedingly liable to imposition, and very unfit to enter into any extraordinary transaction of this kind. The facility of the Viscount has been proved, not merely by the direct testimony of those witnesses who had the best opportunity of observing him, but by a great number of facts and circumstances, from which any person who is informed of them. can form an opinion, though the witnesses had not given any opinion on the subject. Total incapacity or want of understanding is what the respondent never alleged, and what, therefore, he is not called on to prove. What he offered to prove, and what he conceives to be sufficient to prove is, that in the latter years of the Viscount's life, when these leases were granted, he was failed in a very great degree, both in body and mind, so as to be unfit to enter into contracts of this nature, and an easy pray to private importunity and solicitation. What rendered this peculiarly the case with regard to leases, was his Lordship's sequestered mode of living, his inability to go over his estate, and his total ignorance of the extent or value of his farms. These, joined to his bodily infirmities and declining years, made him liable to imposition. But when all this is added to the direct evidence of the failure of his mental faculties, afford the most incontestable evidence of his being incapable. 3. The presumption that undue means were used by the appellant, is strongly borne out by the direct proof adduced. The definition of fraud, or "*dolus malus*," is "*quævis caliditas fallacia, machinatio, ad circumveniendum, fallendum, decipiendum alterum, adhibita.*" And surely under this description, such influence as that used by the appellant must be included.

Dig. L. 2, § 2, De Dolo malo.

After hearing counsel,

LORD CHANCELLOR LOUGHBOROUGH said:—

"My Lords,

"I think the proposal on Mr. Sime's part to the late Lord, for

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an extended period of his then existing tack, which only expired in 1830, for thirteen years, at such a distance of time; for which he was only to pay an additional rent of £10 yearly, was such an impudent proposal, that it would have been rejected at the *first blush* by a person capable of understanding it.—I am of opinion too, with the Judges of the Court of Session, that this reversionary interest was thus acquired without consideration for it, by means of the fear Lord Arbuthnott had of losing his pension from the seizure of the wine. This matter has been too tenderly handled in the Court of Session; but the Judges must have been much impressed with the conduct of the appellant, when they loaded him with the whole expense of the litigation, which has been conducted in a most intolerable manner, and which in all probability they would not otherwise have done.

Appellant's Case 23 pages of print; Respondent's Case 28pages.

"It is impossible not to take notice of the length of the cases in this cause; they are three-fourths full of matter totally irrelevant. These cases, and others like them, I believe are drawn in Scotland, and sent here ready drawn; but it is the duty of the gentlemen who practise here, when they receive such cases, to redraw them."

It was therefore

Ordered and adjudged that the appeal be dismissed, and that the interlocutors of the Court below be affirmed.

For Appellant, *Sir J. Scott, J. Anstruther, J. Clerk.*

For Respondent, *R. Dundas, T. Erskine, W. Grant, J. Dickson.*

(M. 2673.)

RICHARD HOTCHKIS, W.S., Trustee on BERTRAM, GARDNER & Co's Bankrupt Estate, - - - - - } *Appellant;*

ROYAL BANK, - - - - *Respondents.*

House of Lords, 28th Nov. 1797.

COMPENSATION—RETENTION—BANKRUPT.—The Royal Bank of Scotland found entitled to retain stock of an insolvent proprietor, for payment of debts due to the Bank by a Company of which he was a partner, against the trustee on the bankrupt estate.

Adam Keir was a partner of Bertram, Gardner & Co., bankers in Edinburgh, who having failed in 1793, the appellant was appointed trustee on their sequestrated estates. In proceeding to make available the estate of the company, as well as of the individual partners, he found that Mr. Keir