1801.

PLASKETT, &c. *v.* STEWART, &c

THOMAS PLASKETT and Others, Creditors of the York Buildings Company, and also the York Buildings Company, and JAMES BREMNER, W.S., Common Agent on the Co.'s estates, } *Appellants;*

DAVID STEWART, Esq., and JOHN MORRISON, W.S., Trustee on his Sequestrated estate, } *Respondents.*

House of Lords, 18th June 1801.

EVICTION OF LEASE—DAMAGES—PROCESS.—(1.) Circumstances in which it was held by the Court of Session, that a tenant, whose lease was reduced, and his possession evicted from him, was entitled to damages against the grantors of the lease. Reversed in the House of Lords, on the ground that there was fraud in the transaction from the beginning. (2.) In this claim of damages, and before any sum was declared to be due, the Court, on motion to that effect, decerned in terms of the conclusions of the libel, to the effect of allowing adjudication to be led against the heritable estate, reserving all objections *contra executionem*.

This was a claim of damages brought by the lessee against the lessor, for the eviction of his lease, which was reduced

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consider the case with reference to the pursuer's title, the propriety of that course was acknowledged by many of the judges in again considering the question, and was justified by the result, because their Lordships altered their former interlocutor on the question remitted. Besides, on the first consideration of the cause before the Court of Session, it was anxiously pressed by Lord Swinton, one of the judges, thus: "The question here relates to the defender's title "to exclude; but I think there is a previous question, viz. the pur- "suer's title to insist, which should be first considered, as, in case it "shall turn out the pursuer has no title to insist, what signifies con- "sidering whether the defender has a title to exclude?" And there are strong grounds for believing that this want of title on her part lay at the basis of the Lord Ordinary's famous interlocutor, for, according to the notes of what he said, on advising it before the whole Court, (Dec. 1796), the following appears: Lord Justice Clerk M'Queen,

Lord Swinton's own notes in Compiler's possession.

"The judges have settled that the minority of the first sub- "stitute upon whom the settlement would fall or devolve, is "to be deducted. This construction is just on the act 1617. "But I cannot admit that Mrs. Fullerton is next substitute. Her "right must first be declared." No doubt, at this stage of the cause, it might have been held, what undoubtedly had actually taken place, that Mrs. Fullerton's title had already been disposed of by the Court below, both because *that* is the usual

and set aside, at the instance of creditors, on the ground of covin in the transaction, and fraud to the prejudice of creditors. The case is reported supra, Vol. ii. p. 500. 1801. PLASKETT, &c. v. STEWART, &c.

The York Buildings Company's estates in Scotland became the subject of a ranking and sale; and, in this process, the whole creditors were ordered to produce their respective interests.

At this stage, and of this date, the Duke of Norfolk, and other creditors, presented a petition to the Court, setting forth, that it was the interest of all the creditors, that the estates should be managed in a proper manner,—the Dec. 1744.

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course in such actions, and also because the discussion of the title to exclude necessarily involved the discussion of her pretensions to be nearest heir substitute. This was pleaded to Lord Thurlow, but his Lordship could not understand how this could warrant the Court below to assume, that Mrs. Fullerton possessed that *status*, and to proceed upon that assumption, against the facts stated in her summonses, which did not warrant that assumption. Had it been a fact assumed, until proof of the fact was established, there would have been principle to support it; but here, where Mrs. Fullerton stated her facts in her summons, and deduced her title from those facts, it was thought that every thing was patent and ripe for immediate consideration of that point, without proceeding upon any *postulatum* of assumed fact or law.

The question itself, Whether a first heir substitute of entail may plead minority? was left precisely where it stood before the Bargany cause,—with this difference, that a majority of the Court, on two most deliberate considerations of the subject, and after a thorough examination of the previous decisions, came to the conclusion that the first heir substitute of entail may plead minority. The Lord Justice Clerk M'Queen, who was the Lord Ordinary that pronounced the interlocutor finally adhered to, confessing, on the last advising, that this was a just construction of the act 1617. So, at least, the notes taken by one of the judges in the compiler's possession set forth; and they do not in substance differ from the notes published as an appendix to Wilson and Shaw's Appeal Cases, Vol. I., where he is declared to have said:—"The point was somewhat puzzling; but our courts of law, upon a mature consideration of the whole case, adopted a modification of the act 1617. They found that the deduction of minority was to be allowed only to the *verus dominus*, or to the heir apparent who is *entitled immediately to take up* the estate; but not to substitutes under an entail, whose interest is merely contingent."

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farms and estates let at proper rents, not below value,—and the rents levied therefrom, applied in extinction of the preferable debts, none of which were attended to under the present management;—that, in particular, the Company continued in the practice of granting leases, and the petitioners are "informed there are at present subsisting several "leases of the Company's estates at an under rent, obtained "by favour of the manager; and that, by the same method, "prorogations of the subsisting leases have also been ob-"tained." And therefore praying the Court to sequestrate the estates, and to name a factor with the usual powers.

Dec. 1744. Pending this application, and between the date thereof and the interlocutor pronounced thereon by the Court, of

June 15, 1745. this date, prohibiting the granting of leases, and sequestrating the Company estates, several leases of the nature of prolongations were granted, and, among the rest, one to Dr. Fordyce, which gave rise to an action of reduction. The lease was reduced by the Court of Session, and their judg-

April 16, 1779. ment, on appeal, was affirmed in the House of Lords.

After this decision, Dr. Fordyce took no step until 1794, when he raised the present action of damages for eviction of his lease, reciting the lease granted in April 1745, and his own possession and that of his predecessors under it, until the term of Whitsunday 1779, also reciting the action of reduction and removing raised by the creditors, issuing in the judgment of the Court of Session reducing the lease, as affirmed in the House of Lords; and setting forth, further, that in consequence of said judgment, so affirmed, the lessee was removed from possession of the said lands in the year 1779, when there was ten years of the lease so granted still to run—that the complainer, as heir to his brother, was entitled to succeed to the lease, and to hold and enjoy the lands until the expiry of the same; but, in consequence of the lease being reduced, the lands let were evicted from him, and as, by the terms thereof, the York Buildings Company came under absolute warrandice of the lease, the pursuer was entitled to damages for the loss sustained by this eviction, and concluding against the Company for £12,000 sterling of damages.

After the disposal of some dilatory defences, the Lord

Nov. 16, 1797. Ordinary "decerned against the defenders, conform to the "conclusions of the libel, *reserving to the defenders all ob-"jections contra executionem*, and answers thereto, as ac-"cords." On reclaiming petition, the Court pronounced

this interlocutor:—" In respect that by the interlocutor " reclaimed against, nothing is determined with regard either " to the validity of any claim of damages upon either side, " or to the amount of such claims, refuse the petition, and " adhere to the interlocutor of the Lord Ordinary."*

The Company acquiesced in this interlocutor, as its effect was only to enable the pursuer to lead adjudication to be produced as an interest in the ranking, leaving the merits of the claim to be afterwards determined. The pursuer having entered his claim accordingly, he there maintained, that both by the implied warrandice which existed in every lease, and by the clause of absolute warranty contained in the lease itself, the York Buildings Company were liable to the lessee, or his representatives, for the damage and the loss he had sustained by the possession having been evicted from him, prior to the stipulated termination of the lease,—that although the lease of Belhelvie was reduced upon objections stated by the creditors, yet the Company would not avail themselves of these objections, because they were equally implicated with Fordyce, and no one can found on

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* Opinions of the Judges :—

LORD PRESIDENT.—" This is a claim of damages on the warrandice of a tack, which was set aside. The objections are very strong, as the reduction took place on acts of litigiosity, collusion, &c. This strong against both parties. The application to sequestrate, and to take the power of setting leases out of Company's hands, was then in dependence. The petition was lodged in December 1744, was advised with answers in January 1745.—Remitted to enquire into manner of letting leases on 19th January. Minute 16th February. Interlocutor 14th June 1745. The petition was intimated to Strachey, who drew the lease as attorney for Fordyce. But the present question is, Whether the petitioner may not be allowed to take out decree of constitution *quo periculo*, to the effect of adjudging, all objections being reserved? I think he may. At same time, his adjudication for a random sum of damages will be of little avail. If damages are at all due, it is a question if it be not against the managers of the Company, not the Company itself. The managers exceeded their powers, and acted illegally and fraudulently, the subject being then litigious; and the objection of litigiosity applies not only to the one party, but to the other. If not, the transaction would be good, and the lessee would be safe, though the granter of the lease might be liable in damages to the parties hurt by it. But it is a question, whether all this goes any further than the interest of the creditors; and whether *quoad* the Company itself, the lease may not still be considered as good."

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his own fraud. In answer, it was stated, that where a lease had been obtained by the lessee through fraud on his part, and the lands evicted through that fraud, the tenant could have no recourse against the landlord—and that the lease entered into was a fraudulent and collusive transaction, by which the Company's managers had it in view to defeat the right of their lawful creditors, and Professor Fordyce, aware of the circumstances in which the Company were placed, availed himself of the opportunity to obtain a profitable lease to their hurt and prejudice.

March 5 and 8, 1799. The Lords, of this date, pronounced this interlocutor:—"Repel the objections pleaded for the York Buildings "Company, and find them liable in damages to the claimant, "David Stewart, upon the warrandice contained in the "lease in question, and remit to Lord Meadowbank, in "place of Lord Monboddo, to hear parties procurators upon "the *quantum*, and also how far the claimant has a prefer- "ence upon the funds of the York Buildings Company to "any class of creditors, or can only operate his payment "out of the Company's reversion." An appeal was taken, but afterwards withdrawn, and another reclaiming petition was presented, but the Court adhered.* Dec. 17 and 21, 1799.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The lease with Fordyce was a fraudulent and collusive transaction betwixt the Company's manager and him, whereby he obtained an unfair advantage in the lease in question, to the prejudice of the Company. And as the lessee cannot reap the benefit of his own fraud, he is not entitled to any damages against the Company for eviction of that lease at the instance of the Company's creditors. The lease was reduced on the special ground of fraud and collusion, which is shown from the reasons of reduction on that head being sustained. And although it may be ad-

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* Interlocutor 17th December 1799.

LORD PRESIDENT CAMPBELL.—"This interlocutor is right. *Vide* former notes. The York Building's Company were no parties to the reduction of the lease. It is not so much as pleaded that it was reducible *quoad* the Company. There is no fraud; but strong circumstances of homologation on their part, and, on that ground, the Company are liable; yet it has been said, this does not operate against creditors. Here all parties acquiesced for thirty years. Adhere.—Session Papers vol. 64.

mitted that absolute warrandice in a lease, whether expressed or implied, attaches to the acts or deeds of the landlord, or to the defects in his right; and that if the possession is evicted from the tenant, in consequence of such acts or defects, the landlord is bound to give him an equivalent for the loss he sustains by being deprived of such possession; still, the appellants hold it to be equally clear, that if the possession is evicted from the tenant on account of his own fraud in obtaining the lease, as in the present case, the landlord is not liable in warrandice. The Company may not be entitled to reduce the lease in consequence of their participation in the fraud, but it does not follow that they are liable in warranty to indemnify the lessee for the evicted possession, as if he were an innocent party, and the fraud which had been committed not one of his own seeking. But even supposing he were entitled to indemnification, it could not be on the footing here claimed,—namely, of demanding the whole sum of the stipulated rent which was known to be under the real value. Such might be maintainable where a grassum was given, but all that was here paid by Fordyce was a petty bribe to Mr. Pembroke, which was one of the proofs of fraud. In effect, this would be to give him £500 of rent for every year of the lease.

Pleaded for the Respondent.—At the time the lease was granted, the situation of the Company, from diligence used against their estates by their creditors, was such as to render a lease by them, at that juncture of time, challengeable, though not such as to render every lease of theirs void, as appears from the judgment of your Lordships sustaining the lease of Fingask, which was of the very same date. The principal feature by which the lease of Belhelvie differed from that of Fingask, was, that the former was a prorogation, or a renewal of a subsisting lease, of which five years were yet to run. When a prorogation lease of this kind is granted, it is as good as any other lease against the lessor; and when successfully challenged by a third party having interest, the lessee's recourse against the lessor is entire, under the warrandice, to the full extent of the damage sustained. The objection which the law of Scotland has always sustained to prorogation leases, granted in circumstances like the present, is only where *third* parties challenge the right; but it never has been held that such objection is competent to the lessor himself. The grounds on which the lease was reduced in this case, were not fraud and collusion, but the state of the Company at the time the lease was

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granted. The diligences of inhibition, adjudications against the estate, &c. were the sole grounds. There is no evidence of fraud—the length and endurance of the lease did not amount to such, because, in the case of Fingask, a lease of 99 years was sustained in similar circumstances. Nor was there any evidence that Dr. Fordyce was apprised of the diligence out against the Company, but, even supposing he had been informed, there was nothing to prevent him from going into a lease with the Company, who knew as much as he did of its own affairs, and who was in perfect *bona fide* in the transaction, in so far as the Company was concerned. No constructive fraud, therefore, can be maintained, and no actual fraud is proved, although dark hints of it, such as their officer taking a bribe, have been averred. Nor is such fraud established by the inadequacy of the rent in the lease, as this affords no ground to question the lease. On the whole grounds, therefore, the obligation of the Company to indemnify the lessee for the eviction of the lease under their warrandice of the same, must stand unquestioned.

After hearing counsel,

LORD CHANCELLOR ELDON said,

My Lords,

" This is a case, the particulars of which are, (Here his Lordship enumerated the particular circumstances of the case.)

" The predecessor of Mr. Stewart had obtained a lease of the estate of Bellhelvie, and which lease was charged by the appellants as fraudulent and covinous, and, on these grounds, the original lessee had been evicted, by interlocutors of the Court of Session, and affirmed on appeal, in the year 1779.

" The interlocutors now complained of, have sanctioned a claim of damages for the eviction of the lease, as against the York Buildings Company, on the ground of a covenant of warranty in the original lease so set aside; but, as I cannot assent to hold, that any claim of damages arises in this case, I move your Lordships to reverse the interlocutors, on the ground that the claim arose out of an unjust and unhallowed transaction from the beginning."

LORD ROSSLYN concurred.

It was ordered and adjudged that the interlocutors be, and the same are hereby reversed, and that the defenders be assoilzied.

For Appellants, *J. Mitford, R. Dundas, John Clerk.*

For Respondents, *W. Grant, R. Hodshon Cay, W. Erskine.*

NOTE.—The first part of this case is reported Mor. 12,244, but the question of damages is not reported.