1808.

BALDERSTONE, &c. *v.* HAMILTON.

DAVID BALDERSTONE, now of Avontoun, eldest Son and heir of the deceased Alexander Balderstone, Esq., and GEORGE NAPIER, Solicitor in Edinburgh, his Factor *loco tutoris*, ... } *Appellants;*

WM. HAMILTON, Esq. of Westport, . *Respondent.*

House of Lords, 27th June 1808.

FEU—LEASE—CLAUSE.—Circumstances in which, by the terms and nature of a lease of land for 38 years, declaring 'that whatever 'house or houses the said tenant shall build on said lands or gar-'dens made, they are to pay twenty-shillings per acre of yearly 'feu-duty, the same to commence at the expiration of the tack, '*and to have a right of feu accordingly*,' was to be held as a feuing lease, entitling the tenant not only to build houses and gardens, but also to grant feus of the land for these purposes.

May 9, 1765. The appellant's father, of this date, let in lease to John Craig, at that time proprietor of a bleachfield in the vicinity, certain lands, consisting of about twenty acres, belonging to him, for the period of thirty-eight years, at the rent of £6 Sterling for the first year, and £10 Sterling for each of the succeeding years. The tack was conceived in these terms, to John Craig, " his heirs, executors, or assignees, " all and haill that part and portion of land called Justin-" haugh, and the houses therein, and that as the same is " particularly possessed by Alexander Inglis, tenant in Lin-" lithgow Bridge, together with that part and portion of " said lands bounded by Sir William Hamilton's lands, and " Robert Mochrie's possession, gardener in Linlithgow, upon " the east; the King's highway, and part of the said Alex-" ander Inglis' possession upon the south; the road leading " from Borrowstounness to Bathgate on the west; and Alex-" ander Gray's possession, tenant in said Justinhaugh, on the " north parts; and that as the same is presently possessed by " the said David Balderstone, all lying within the parish and " sheriffdom of Linlithgow." In this tack there is the following clause, " And whatever house or houses the said " tenant aforesaid shall build on said lands, or gardens " make thereon, they are to pay for whatever ground the " same shall take up, to their said master or his foresaids, at " the rate of 20s. money foresaid per acre, of yearly feu-" duty, and the same to commence at the expiration of the " tack, *and to have a right of feu accordingly*; and the said

" tenant and foresaids, during the period of this lease, are " to have the use and privilege of the springs from said " Alexander Gray's possession to Linlithgow Bleachfield."

An obligation was said to have been obtained thereafter from the appellant's father, explanatory of the above tack, in the following terms; but the original was never produced,

" That in and by the said tack, and communings there-
" anent, it was *really intended*, at the expiration thereof, and
" upon the said John Craig's fulfilling the obligations there-
" by incumbent upon him, the said David Balderstone and his
" foresaids should be bound to grant, subscribe, and deliver
" to him and his foresaids, a valid, formal, and sufficient
" feu right to such part of the subjects thereby let, upon
" which he or they should build a house or houses, or make
" into gardens, to be holden of and under the said David
" Balderstone, and his heirs and successors, in feu farm, for
" payment of 20s. sterling of feu-duty for each acre thereof,
" and the said feu-right to commence at the expiration of
" the said tack; and that the said John Craig was desirous
" of being more fully secured thereanent, which the said
" David Balderstone was willing to do; therefore the said
" David Balderstone thereby bound and obliged himself, his
" heirs or assignees, duly and validly to infeft the said John
" Craig, or his heirs and assignees, in all and whole, &c. the
" lands and others contained in the said lease; and that in
" *security* to the said John Craig and his foresaids, that, at or
" before the term of Martinmas 1803, when the aforesaid tack
" expires in part, and upon the said John Craig and his fore-
" saids, their having fulfilled the obligations incumbent upon
" him by the said tack, the said David Balderstone and his
" foresaids shall grant, subscribe, and deliver to the said John
" Craig, or his foresaids, a valid, formal, and sufficient feu-right
" of such part of the lands above mentioned, upon which the
" said John Craig, or his foresaids, have built a house or
" houses, or shall have made into gardens, in terms of the
" foresaid tack, with the use and privilege of the springs,
" and the run of the springs from the said Alexander Gray's
" possession to Linlithgow Bleachfield, to be holden of and
" under the said David Balderstone, and his foresaids, in
" feu-farm fee and heritage for ever, for payment of 20s.
" sterling, at two terms in the year, Whitsunday and Mar-
" tinmas, for each acre of the lands upon which the said
" John Craig, or his foresaids, have built a house or houses,
" or shall have made into gardens as aforesaid, and doubling

1808.

BALDERSTONE, &c. *v.* HAMILTON. Dec. 17, 1767. Dec. 24, ——

"the said feu-duty at the entry of every heir, as use is, and "which feu-right shall also contain a clause of absolute "warrandice and other usual clauses." In virtue of a precept of sasine contained in this obligation, Craig was infeft, and this infeftment recorded.

John Craig thereafter became bankrupt; and the lease, together with his other property, having been exposed to public sale, was bought by the respondent in 1783.

Neither John Craig nor his creditors ever built any houses, or made any gardens upon these lands, nor did the respondent attempt to do so for fifteen years, until within four years of the expiry of the lease, when he began to grant feu-charters for building to a variety of persons, as if he had been already the absolute proprietor, and thereafter to lay down whole fields in the temporary form of gardens, for the express purpose of demanding a perpetual feu-right to them at the end of the lease, for the rent of 20s. each acre.

On this being attempted, the appellant brought a suspension and interdict, and also declarator, to have the matter of right settled in Court. Interdict was granted *ad interim*, and the bill passed to try the question; and, after the suspension and interdict was conjoined with the declarator,

Jan. 14, 1801. Lord Glenlee, Ordinary, pronounced an interlocutor unfavourable for the respondent's claim, which was reclaimed against by him to the Court.

It was contended for the appellant, that the clause in the lease was only meant to secure to the tenant a perpetual right to such houses and gardens as he might have lawful and necessary occasion for, in the ordinary course of his business, during the currency of the lease; but that it was grossly fraudulent and illegal to make it a cover for obtaining such a right to the whole property, by pretending to lay it down in the form of a vast garden, for the formation of which, in such a situation, there was no imaginable or assignable inducement. For the respondent, it was maintained, That the lease was nothing more but a right of feu. That a right of feu, in the law of Scotland, was just a lease in perpetuity. The ground let is in the neighbourhood of Linlithgow, a large and extending town; and, in getting the lease in question, John Craig had a building speculation in view. He was entitled to avail himself of the clause in the lease in any way that might be most for his advantage, and

therefore he admitted distinctly that his object in the operations complained of, was to entitle himself to demand a feu-right to the whole ground in his possession, and maintained that the lease enabled him to do this, if, in point of fact, it should be occupied with houses and gardens at the expiration of the lease.

Of this date, the Lords pronounced this interlocutor:— June 11, 1801. "Alter the interlocutor reclaimed against, remove the interdict in the suspension, and find the letters orderly proceeded; and, in the declarator, assoilzie the charger from the conclusions thereof, and decern." On reclaiming petition the Court adhered. June 30, 1801

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded by the Appellants.—The obligation upon which the respondent founds, was never produced nor put in evidence. And, for ought that appears, it might be defective in legal form, or otherwise void in law. But even supposing it an existing valid deed, the words of the obligation are limited to houses then built, and are further controlled by the clause in the lease, by which he is to have a feu-right only "of such part of the lands above mentioned, upon "which the said John Craig, or his foresaids, have built a "house or houses, or shall have made into gardens, in terms "of the foresaid tack." And, therefore, the clause was never intended to confer a right to seize upon the whole property, to the great detriment of the landlord, and without any possibility of profit on his part. In construing, besides, the writing, the principle of a fair construction must obtain, such as will sustain the obligation on the one hand, and include nothing which it does not expressly include on the other. In the first place, then, the clause only says that the tenant shall have a feu-right to *such parts* of the land as he may build on or make into gardens; but his claim is for a *right of the whole*. 2. The clause says merely, that the tenant shall have a feu-right to such houses and gardens as the said tenant himself shall build or form on the grounds. The respondent, however, has not built a single house, nor laid down a single garden on the property; but he has taken upon him to grant feu-charters to a variety of persons, by whom some houses and gardens have been constructed. These acts are beyond his power, and the charters null and void.

1808.

BALDERSTONE, &c. *v.* HAMILTON.

Pleaded for the Respondent.—The obligation in question, though it has not been produced, has been put on record. Sasine has followed upon it, and that sasine appears in the register of sasines. Both the words of the tack and the obligation are unlimited in their terms, to the extent of the lands conveyed. And from these it clearly appears that it was the distinct understanding of the parties at the time, and from the express words used, that John Craig, and his heirs and assignees, should be entitled to a feu from the landlord, of the whole of such parts of the lands let on lease as, at the termination thereof, should be built upon, or converted into gardens. The appellant, Mr. Balderstone, argues that the clause should receive a strict interpretation, because it was in all respects an unfavourable, and therefore an inequitable bargain for the landlord; but such an argument cannot for a moment be listened to, if, in point of fact, such has been the nature of the bargain between the parties. He further argues, that it was only such house or houses as the tenant should himself build for his own purposes, or the purposes of his bleachfield. But how the turning of this ground into houses and gardens could aid the purposes of his bleachfield is not so easily apparent; or how a feu-right should be bargained for in reference to the same. Such theories are quite untenable, and only disclose the groundlessness of this action. For the rights conferred by the tack and relative obligation are clear and express, and therefore the respondent cannot be restrained in the exercise of the right now vested in him.

After hearing counsel, it was

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

For Appellants, *Sir Sam. Romilly, F. Jeffrey, Henry Brougham.*

For Respondent, *Henry Erskine. John Connel, Francis Horner.*

NOTE.—Unreported in the Court of Session.