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the Court did right as to this, and their judgment is correct accordingly.

"I should therefore move an affirmance of the interlocutors, but for this one difficulty, that, when the ultimate judgment was pronounced, Mrs. Carnegie's heirs were not before the Court.

"Mr. Scott is not only subjected by the judgment to all the expenses to be incurred, but he is directed to do certain acts upon the mill dam, which he could not be justified in doing, unless the Kinnaber family had been parties to the judgment. If, by these operations, the mills should be stopped, I conceive that, as matters stand, Mr. Scott might be liable in damages.

"There is, I think, no other objection to the judgment but this. The Court has imposed upon Scott the burden of the expense of making the necessary alterations on the dam-dyke, reserving to him any claim competent against the other mill owners. I think the Court acted properly as to this, because the injury to be redressed arose from his not maintaining his cruive dyke. I therefore move judgment as below."

(The judgment, after remitting to consider whether Mrs. Carnegie Fullerton's representatives ought to be made parties to the cause, proceeded thus): "And, subject to such directions, it is ordered and adjudged that the interlocutors be, and the same are hereby affirmed. And it is further ordered that the cause be generally remitted back to the said Court of Session, to proceed accordingly."

For the Appellants.— *Wm. Adam, Tho. Thomson.*
For the Respondents.—*Sir Samuel Romilly, John Clerk.*

(Mor. App. Tailzie, No. 15; Dow, Vol. ii.)

WILLIAM DUKE OF QUEENSBERRY'S Trustees and Executors, ... } *Appellants;*
The Right Hon. FRANCIS CHARTERIS, EARL OF WEMYSS AND MARCH, . } *Respondent.*

House of Lords, 10th and 17th Dec. 1813.

TAILZIE—LONG LEASE—ALIENATION.—In the Neidpath entail, there were clauses prohibiting the heirs of entail to "sell, alienate, wad-"set, and dispone any of the said lands,"—but allowing tacks to be made of the lands during the lifetime of the heir, "the same "always being set without evident diminution of the rental." The late Duke of Queensberry granted a lease of Wakefield for ninety-seven years, at a rent of £86. 15s. 2d., receiving at same time from the tenant a grassum of £318. The question was,

Whether this long lease was not an alienation of the lands? Held that it was an alienation. Affirmed in the House of Lords.

The Duke of Queensberry, in 1693, executed an entail with this provision:—"That it shall noways be leisome and "lawful to Lord William Douglas, and the heirs male of "his body, nor to the other heirs of tailzie above mentioned, "nor any of them, to sell, alienate, wadset, or dispone, any "of the said lands, lordships, baronies, offices, patronages, "and others above rehearsed, as well those to be resigned "in favour of the said Lord William in fee, as those reserv-"ed to be disposed of by the said Duke of Qucensberry "in manner foresaid, or any part thereof; nor to grant in-"feftments of liferent, nor annualrent forth of the same, nor "to contract debts, nor do any other fact or deed whatever "whereby the said lands or estate, or any part thereof, may "be adjudged, apprized, or otherwise evicted from them or "any of them; nor by any other manner of way whatsoever "to alter or infringe the order and course of succession "above mentioned." And then afterwards it goes on, "That notwithstanding of the irritant and resolutive clauses "above mentioned, it shall be lawful and competent to the "heirs of tailzie above specified, and their foresaids, after "the decease of the said William, Duke of Queensberry, to "set tacks of the said lands and estate during their own "lifetime, or the lifetime of the receiver thereof, the same "being always set without evident diminution of the "rental."

The late Duke, while in possession of the entailed estates, executed leases to certain persons, and, among the rest, he granted a lease of the farm of Wakefield on the 17th Jan. 1801, forming a part of the entailed estate of Neidpath, for forty-seven years from Whitsunday 1800, at the yearly rent of £86. 15s. 2d., besides which the tenant paid the sum of £301 sterling of grassum or entry-money.

Thereafter, and on 23d Nov. 1802, the Duke granted a new lease of the same farm to the same tenant for ninety-seven years from Whitsunday 1802, at the rent of £86. 15s. 2d., besides which, the tenant paid a premium or grassum of £318. 1s. 2d.; and the question was, Whether this last lease was a lease which it was in the power of the late Duke of Queensberry to make, having due regard to the express prohibition against selling, alienating, and disponing the said lands in the clause of the entail above quoted.

This question was brought by himself, while in life, in order to test the validity of the lease so granted. He died in

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1810, having executed other leases, which form the subject of subsequent appeals.

By the appellants it was contended, 1. That according to the law of Scotland entails were to be construed according to fixed principles of interpretation: That by the Duntreath case and other cases it had been settled in law, 1st, That the heir of entail is considered unlimited proprietor of the estate, unless in so far as he is fettered by the prohibitions of the entail. 2dly, That these prohibitions are construed in the most rigorous manner; and, 3dly, That their meaning cannot be extended by implication from other clauses of the entail. 2. Even if leases could be considered in the law to be alienations, the prohibition that the heir shall not *sell*, *alienate*, *wadset*, *nor dispone*, does not contain a prohibition to grant leases: for, in legal language, these terms merely characterize a sale or conveyance of the estate, and are terms expressive of a total divestiture of the property, an act altogether different from granting a lease.

3d. Even supposing the words of the clause were taken alternatively, yet a long lease is not in law an alienation. Neither in technical nor in common language, is a lease an alienation. It is a personal contract, leaving the feudal right of property where it was.

4th. The general question was settled in the case of Leslie *v.* Orme, where a lease for 76 years, granted by an heir of entail, was sustained.

M. 15536; et Paton's App. Cases, vol. ii. p. 533.

5th. But here leases are expressly allowed for the liferent of the granter. Thus liferent leases are allowed; and being allowed, they may be granted for any term of endurance within 100 years. The respondents contended,—That though a lease was not an alienation in its own nature, when granted within fair and ordinary administration, yet, if granted for a considerable length of endurance, and for an illusory rent, it was, in point of law, an alienation. The law of Scotland had always distinguished between long leases and those of ordinary duration, by refusing to allow the former, and by sustaining the latter. Wherever there was a prohibition therefore against alienating the estate, these long leases were held to be alienations. Even by the law of England a lease is classed with the modes of alienation, Black. B. ii. c. 38.

The Court holding that, under the prohibition to alienate, long leases were comprehended, pronounced this interlocutor, "Sustain the defences, assoilzie the defenders from the "conclusions of the declarator, and decern." On reclaiming petition the Court adhered.

May 14, 1806.

Nov. 17, 1807.

Opinions of the Judges :—

Lord Justice Clerk (Hope).—" If this interlocutor is altered, it opens a door to destroy the whole law of tailzies. There must be room for interpretation of the laws, as there is no law so perfect as to apply *in terminis* to all cases; and construction must often be regulated by the practice of the country. As, for instance, an obligation in a tack to labour according to good husbandry. I don't mind the clamour against entails. (His Lordship here gave some general remarks on the benefit of entails.) I must construe this tailzie by the language used at its date. *That* included long leases under the prohibition to alienate; in other words, under such a prohibition to alienate, long leases were included. Nay, it is the law still, as Mr. Thomson has pleaded. It is admitted, that a very long lease is an alienation. One for 1000 years certainly is so. It is hardly denied that one for 100 years would be so. It is also allowed, that a long lease for the purpose of sub-setting, is struck at. But all long leases end in sub-setting. The tenant becomes a gentleman, and subsets. I can see no difference between ninety-seven years and 100. As to the term to be fixed on, we must go on the usage of the country at the date, as in a question of management and economy as it is at the time. If a long lease is not an alienation, the prohibition is not authorised by the act at all, which enumerates the forbidden acts. If he may grant such a tack, we must sustain an assignation of the whole surplus rents for 100, or 150 years, which will be much more valuable than the principal rents. Farther, the special clause here allowing a liferent lease, *necessarily implies* a limitation, *quoad ultra;* for it would be a mere quibble to say that this does not virtually prohibit all other long leases beyond the value of a liferent."

Lord Meadowbank.—" The holders of long leases are a bad species of proprietors. This tack is an alienation in the sense of the statute. It is a sale of the rents for a grassum, and therefore a disposal of the interest of the succeeding heirs in the estate. It may be more difficult to fix the precise term (of a lease that shall not be held an alienation) before hand. As in other cases, we shall come to it by degrees. But in this case, which is an extreme one, I have no doubt whatever that it is an alienation."

Lord Craig.—" Long leases would destroy the law of tailzies. The whole difficulty lies in fixing the line (between leases that are and leases that are not alienations.) Further, the special clause here is itself a strong ground. It really amounts to a prohibition of a tack beyond the value of a liferent."

Lord Hermand.—" I do not think so much of the special clause. It no doubt shows that he intended and believed that he had limited the power. But in this case, as the Duke takes a grassum, I think his tack is substantially a sale of the future rents. I won't go at present so far as the general doctrines of my brethren would go, and it is not necessary to do so."

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DUFF v. MAGISTRATES AND TOWN-COUNCIL OF INVERNESS.

Ante vol. iii. p. 666.

LORD PRESIDENT CAMPBELL.—"This lease is not silent as to the matter in hand. But I shall speak to general doctrines. Is a very long tack within the statute 1621? I have looked at all the authorities, even the case of Scott *v.* Straiton, which was sustained in the House of Lords, though it was a lease from nineteen years to other nineteen years, and so on for ever. But the ground of the judgment there was homologation, and long possession for more than eighty years, so that it was safe by prescription. In Hopeton's case, the judgment went on a personal objection—on the clause of warrandice undertaken by him. In Belladrum (?) was a question with *heirs*: So held both here and in the House of Lords. So I hold that a tack must have an ish to prevail against purchasers. At same time, I should have difficulty to say that a tack for two, three, four, or five, nineteen years, is not good. At same time, that question is not the same as this. It is allowed that a very long term will not be good."—Vide Hume's Collection of Session Papers.

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

After hearing counsel,

It was ordered and adjudged that the appeal be, and the same is hereby dismissed, and that the interlocutor complained of be, and the same is hereby affirmed.

For the Appellants, *Alex. Maconochie, J. H. Mackenzie.*
For the Respondent, *Sir Samuel Romilly, G. Cranstoun.*

NOTE.—This case was decided on the endurance of the lease alone, independent of the grassum. Accordingly, a subsequent question was raised on the Wakefield lease, of this nature: Admitting it to be bad as a lease for ninety-seven years, but no otherwise objectionable, except on account of its duration,—Whether it could be sustained for any shorter period, and for what term,—the entail having conferred power to grant leases during the lifetime of the heir of entail? This question was involved in the subsequent declarator and reduction, as to the leases granted for grassums, and for alternative periods of duration.—Vide Infra.

HUGH ROBERT DUFF, Esq., . *Appellant;*

MAGISTRATES AND TOWN-COUNCIL of Inverness, ... } *Respondents.*

House of Lords, 13th December 1813.

PROPERTY—COMMON—BOUNDING CHARTER — POSSESSION. — Circumstances in which the appellant claimed a piece of ground, near to the burgh of Inverness, as his absolute property. The respon-