was made from being liable, that in *that* respect this judgment must be considered erroneous.

"There remains behind the question, what is the extent and nature of the liability of Scotch carriers? Our law, with respect to English carriers, cannot decide that, nor the point how far the regulations of this particular harbour of Greenock, would make the master or owner of a vessel liable. It appears to me that the right course will be to find that the gabbert or lighter called the "Janet," mentioned in the pleadings in this cause, is not to be considered a ship or vessel within the extent and meaning of the statute of 26th Geo. III., c. 86, and with that finding, to refer the cause to the Court of Session to review the interloctutors complained of, and do what is just and right, consistent with this finding. That will enable the Court of Session to find, whether by the law of Scotland, independent of this statute, or any regulations relating to the harbour of Greenock, there is any such liability created, and it will certify to the Court of session, that the liability is not taken away with regard to vessels engaged in this species of navigation, by that statute, which they have considered as a statute applying to this case. I would now move the judgment in the terms I have submitted to your Lordships."

Ordered accordingly.

The Lords find that the gabbert or lighter the "Janet," is not to be considered as being a ship or vessel within the intent and meaning of the statute of the 26th of his present Majesty, c. 86. And it is ordered, that with this finding, the cause be remitted to the Court of Session to review the interlocutors, and do therein as may be just and consistent with this finding.

For the Appellants, *Wm. Clerk, Wm. Buchanan.*

For the Respondents, *Sir Saml. Romilly, J. Cunningham.*

[Fac. Coll. et Hunter's Landlord and Tenant, vol. i., p. 81.]

[General Declarator joined with Harestanes.]

JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS, Esq. of the Strand, London; WILLIAM MURRAY, Esq. of Henderland; and EDWARD BULLOCK DOUGLAS, Esq. of the Inner Temple, Trustees of the late Duke of Queensberry, and ALEXANDER WELSH, Tenant in Easter Harestanes, . . . } *Appellants;*

The EARL OF WEMYSS, . . . *Respondent.*

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MONTGOMERY, &c. *v.* THE EARL OF WEMYSS.

House of Lords, 12th July 1819.*

ENTAIL—PROHIBITORY CLAUSE—POWERS OF LEASING—GRASSUM.—In the Neidpath and March entail, there was no prohibition against granting leases or taking grassums, but there was a prohibition "to sell, alienate, or dispone the lands." There was a permissive clause allowing the heirs of entail to grant leases for "their own lifetimes, or the lifetimes of the "receivers thereof," but "without evident diminution of the rental." The late Duke granted a lease of Harestanes for fifty-seven years, and took a grassum. Held (1), That a lease for fifty-seven years was an alienation; and that it was not in the Duke's power to grant such lease. (2), That a lease, granted with a grassum taken, was also an alienation. Affirmed in the House of Lords.

In 1686, the Earl of Tweeddale by disposition, of that date, sold and disponed the barony of Neidpath to William, Duke of Queensberry, in life-rent, and Lord William Douglas, second son to the Duke, in fee. This disposition contains clauses prohibiting Lord William Douglas and the other heirs of tailzie, therein mentioned, "to sell, alienate, or dispone" the lands, or to contract debt, with a permission to "set tacks "of the lands during their own lifetimes, or the lifetimes "of the receivers thereof, the same being set without evi-"dent diminution of the rental."

In the year 1693, Lord William Douglas, son of William, Duke of Queensberry, having intermarried with Lady Jane Hay, the second daughter of the Earl of Tweeddale, the lands and barony of Neidpath, and various other lands and baronies, lying in the county of Peebles were strictly entailed in their contract of marriage upon Lord William and his

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* The points of law contended for in the eight following appeals, and which ultimately prevailed, were held at the time to be a novelty in the entail law of the country. The First and Second Divisions of the Court differed on the points, and arrived at different decisions. The doctrines enforced and contended for, were characterised as "new fashioned," as "revolutionary," and as calculated to produce a "convulsion in the entail law." They *may* be conceived to have dealt a heavy blow to the *strictissimi juris* construction of entails, as *then understood.*

heirs male and of tailzie therein-mentioned. In that entail there was a prohibitory clause, prohibiting the heirs of tailzie "to sell, alienate, wadset, or dispone, any of the said haill "lands, lordships, baronies, offices, patronages, and others "above rehearsed, nor to grant infeftments of liferent nor "annual-rent forth of the same, nor to contract debts, nor "do any other fact or deed whatever," &c. There were proper irritant and resolutive clauses in this tailzie to cover these. There was the following permissive clause in regard to tacks: "It is always hereby expressly provided and de-"clared, that notwithstanding of the irritant and resolutive "clause above-mentioned, it shall be lawful and competent "for the heirs of tailzie above specified, and their foresaids, "after the decease of the said William, Duke of Queens-"berry, to set tacks or rentals of the said lands and estate, "during their own lifetimes, or the lifetimes of the receivers "thereof, the same being always set without evident diminu-"tion of the rental."

The late Duke of Queensberry succeeded to the estate in 1731, under the entail; and upon his death, in 1810, he was succeeded by the respondent; the appellants having been appointed his trustees and executors.

During his long possession of the entailed estate, the late Duke, the appellants stated, had always been in the practice of granting leases to his tenants, for terms of years of a considerable endurance. It will be shown, they added, that in granting these leases, he used the best, and, indeed, the only means he had of improving the lands. He had also been in the practice of taking grassums or entry money from the tenants at the commencement of the leases.

The appellants separately stated, that for a century past it had been the practice in Scotland so to let entailed lands.

Of this date, the late Duke granted a lease to Alexander Welsh, of the lands of Easter Harestanes, for fifty-seven years, from Whitsunday 1791, at a yearly rent of £74, 1s., and besides, the tenant paid a further sum of £310 of grassum or entry money. May 23, 1791.

In consequence of the proceedings and decision in the Wakefield case, Welsh brought an action of declarator against the late Duke of Queensberry, the late Earl of Wemyss, and the late Lord Elcho, as next heirs of entail, to have it found that his lease was a good lease for the whole period of endurance then to run.

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Afterwards, the respondent brought an action of declarator at his instance against the Duke and the tenants on the entailed estate, setting forth, that the late Duke had been in the practice of setting tacks for a longer term or period than his own lifetime, or the lifetime of the receivers thereof, the period to which he was restricted by the entail. And that he had let leases to the tenants following. (Here the whole tenants were enumerated, along with Alexander Welsh, tenant of Easter Harestanes.) The summons further set forth, "That it should be found and declared, that it was not "competent to, nor in the power of the said William, Duke "of Queensberry, to set or grant any tacks, or leases of any "part of the entailed lands and estate before written, to "endure for a longer term or period than his own lifetime, "or the lifetime of the tenants, receivers thereof; except in "terms of and under the provisions of the Act of the 10th "of our reign, cap. 51, for encouraging the improvement of "lands in Scotland, held under settlements of strict entail, "nor to grant any tack of the said lands and estate, in con-"sideration of fines or grassums, and thereby diminish the "rental; and that all such tacks or leases so granted, either "for a longer period than prescribed by the said entail, "(unless they are in terms of the said Act of Parlia-"ment), or upon payment of grassums by the tenants, are "void and null, and should be declared to be of no force or "effect in prejudice of the pursuer, as heir of entail afore-"said."

This action also contains conclusions for damages.

Dec 16, 1809. Both these actions were conjoined and avizandum made to the First Division of the Court. Mutual informations were ordered and lodged; and soon thereafter William, Duke of Queensberry, died; upon which an action of transference was raised at the instance of the respondent, Lord Wemyss, and decreet transferring *in statu quo* against the appellants as trustees and executors of the late Duke.

Nov. 12 and 13, 1812. The case having been reported, the following interlocutor was pronounced by the Court, of this date: "Upon report "of the Lord President in place of Lord Woodhouselee, "and having considered the informations for the parties, the "Lords sustain the defences in the process of declarator at the "instance of Alexander Welsh against the Earl of Wemyss "and others, substitutes under the deed of entail, and as-"soilzie the said defenders from the conclusions of the libel, "and decern; and further, remit to Lord Hermand as Lord

" Ordinary, in place of Lord Woodhouselee, to hear parties " on the conclusions of the said libel for damages, and to do " therein what he shall see just. And with respect to the " process of declarator, at the instance of the Earl of Wemyss, " against the late Duke of Queensberry and John Anderson " and others, tenants of the tailzied lands and estate of " Queensberry and others, the Lords remit the said process " to Lord Hermand, as Ordinary, in place of Lord Wood- " houselee, to hear parties on the conclusions of the same as " applicable to the cases of the several defenders, and to do " therein as he shall see just." On reclaiming petition the Court adhered. May 25, 1813.

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

Pleaded for the Appellants.—In granting the lease in question, and the other leases of the same nature, the late Duke of Queensberry only continued the practice of his predecessors, and the general practice of Scotland in cases of the like kind. The endurance of this lease may be considered as beneficial to the estate, in so far as it tends greatly to the improvement of the lands, which being strictly entailed, cannot be improved but by means of leases of a considerable endurance. The grassum is taken from the tenant at his entry, in conformity with the ancient custom of this and many other estates. The lease was not granted in dimunition of the rental, as the rent paid by Welsh is greater than any former rent paid for the same lands, and far exceeds the rent of these lands in the rental before-mentioned, signed by the Duke of Queensberry and Earl of Tweeddale, which was only six years prior to the tailzie.

It appears from various documents which have been preserved, that it was a long established custom in the management of this estate, and most other estates in that part of Scotland have been managed in the same way, to take grassums or entry money, when the leases were renewed. It was not usual to raise the rents, unless there was some particular reason for doing so, and the grassums taken were in proportion to the length of the leases. The accounts which were kept by Mr Montgomery of Macbiehill, chamberlain upon this estate during the minority of the late Duke, show that grassums were regularly received when leases were granted. They were also taken by the Tweeddale family when the estate was in their possession, before the year 1686; and during the whole period since the Queensberry family

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came into possession, it has been the practice to let leases for terms of years, and not during the lifetimes either of the granter or receiver.

As to the length or endurance of the leases granted by the Duke, he had the example, not merely of his own predecessors, the proprietors of this entailed estate; but also that of the landholders of Scotland generally, whether their estates were entailed or unentailed, excepting where the tailzie contained a special prohibition of leases to endure beyond a certain period of time. It has for a century past been extremely common to great leases for fifty-seven years, of which there are numberless instances in every part of the country. And it is remarkable, that such leases have been commonly granted, not only by proprietors of entailed estates, who sometimes use, for their own benefit, what they conceived to be their powers, without much regard to the interest of the succeeding heirs of entail, but by proprietors of unentailed estates, who, generally speaking, cannot be suspected of any other motive in granting these leases, but a wish to improve their estates, by giving a proper and necessary encouragement to their tenants. Where such men grant leases of this description, it is, at least, a proof of their opinion, that they cannot do anything more wise and provident in the management of their estates, for their own benefit and that of their heirs. In their opinion, it is not a waste and dilapidation of the estate, but a prudent act of administration, by which they expect that the value of it will be increased, and at the same time rendered more permanent and secure.

Long leases were formerly considered in Scotland as disadvantageous to the landlord; because, while they debarred him from the natural possession and enjoyment of his property for a long period of time, he had no reason to expect that this disadvantage would be compensated by any improvements of it, that could be made by tenants, who had little knowledge of agriculture, no capital, no enterprise, and no industry. He had every reason to fear that the tenant, at the end of a long lease, would leave the land in a worse condition than he found it; but the circumstances of the country have materially changed. During a long period, farms have been taken as the means, not of procuring a precarious subsistence for the poor labourer of the ground, the words by which a tenant is described in the Scotch Statute 1449, but of vesting and securing an extensive and active capital, under the management of a man of skill and intelligence, holding

a most respectable rank in society. Leases of a considerable length granted to such persons, have produced a degree of improvement in Scotland, which otherwise could never have existed; as it is fully ascertained by experience, that no improvements are so solid or so lasting as those which are made by the independent exertions of the tenants themselves, who have a security for receiving a return for their skill and industry, and for an enterprising outlay of capital, sunk in the undertaking in which they have engaged.

2d, At the date of the lease granted to Welsh, and long afterwards, the power of a proprietor of an entailed estate, where the entail contained no special prohibition as to the endurance of leases, to grant a lease for fifty-seven years, without diminution of the rental, and to take a grassum from the tenant at his entry, had been acknowledged by the custom of Scotland, for ages, and held by every lawyer to be unquestionable.

3d, The late Duke of Queensberry had power to grant the lease in question, and this is proved by the decided cases. (Here the case of Leslie *v.* Orme was referred to.) *Ante*, vol. ii., p. 533.

4th, The judgment of the Court of Session, if it is allowed to stand as a precedent, would produce the most ruinous consequences to very numerous classes of persons in Scotland, who, trusting to the received practice of the country, to professional opinions of the highest authority, and to the decided cases in similar questions, have relied, with implicit confidence, upon the validity of leases of a considerable endurance, granted under strict entails.

As a small specimen of the great number of leases of long endurance, which had been granted in the ordinary management of the estates, the appellants produced in the Court of Session, a list of many hundreds, collected from accidental information, in a very short time. That list is now before your Lordships, and there cannot be the smallest doubt, that there are now existing at least as many thousand leases as there are hundreds in the list, in virtue of which the tenants are actually in possession.

5th, The entail in question does not, according to its legal construction, prohibit the granting of leases for fifty-seven years. The Duke held the estate under the strict entail, which contains prohibitions that are usual in such deeds, against selling, contracting debt, or altering the course of succession, and these prohibitions are properly guarded by irritant and resolutive clauses; but, there are no words in the

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entail by which the heirs are expressly prohibited from granting tacks or leases of any description whatever.

It has always been held, that an heir in the fee of an entailed estate, has a right that is absolute and unlimited, in so far as it is not restricted by express and direct words of a known, precise, and definite meaning. But the entail in question contains no prohibition of leases in express words, though certain general words in it were said to comprehend a qualified prohibition of that sort, which ought to be so construed against the heirs of entail, as to prevent them from granting tacks or leases of a long endurance. It was not pretended that the entail forbids leases of a *short endurance*, or of any endurance that was not of an extraordinary length, but only of such length as was common and usual in the management of estates, whether entailed or unentailed, and, of consequence, it was admitted that the heirs of entail had power to grant such leases.

The clause relied on by the respondent, as amounting to a prohibition, is, where it prohibits heirs of tailzie "to sell, "alienate, wadset, or dispone any of the said haill lands, "lordships, baronies, offices," &c. And the argument of the respondent is, that this lease was granted in contravention of the prohibition to alienate. Then the point to be considered is, whether the lease was an *alienation*, and as such, a contravention of the tailzie, and voidable at the instance of the respondent, in virtue of the prohibitory, irritant, and resolutive clauses in that deed.

Now, in common language, no person would say that the Duke had alienated this property by granting the lease; nor can it be pretended that, even in the language of the law, that has been used for much more than a century, such a lease has been termed an alienation with reference to any question whatever. Much less has it been termed an alienation with reference to the prohibitory clause against sale, disposition, or alienation, in an entail.

6th, If the lease granted to Welsh is not voidable under the entail, on account of its length, it cannot be objected to, either on account of the smallness of the rent, or on account of the grassum. In effect, these two objections may almost be considered as one and the same; for, as it has not been alleged that the late Duke of Queensberry made a bad bargain for himself, it must be understood, that if the grassum had not been stipulated, the rent would or might have been a little higher than it was; and if the rent had been higher,

no grassum would have been received. But, though there is in substance but one objection, it may be considered under its double aspect, and when so considered, the appellants contend, 1st, That the rent was not too low, but a fair rent as far as could be got; and, 2d, That the taking of the grassum was not illegal, and that there was no clause in the entail prohibiting the taking of grassums.

[In an additional appeal lodged for the appellants, to supply what had only been slightly pleaded in the preceding argument, namely, the effect of the Act of Parliament, 1449, in favour of the tenant, and the fact of a grassum having been paid, the following was further submitted.]

1st, The appellant, Welsh, in his action, sought to have his possession secured by a declaration, that the lease granted in his favour, by the late Duke of Queensberry, for a term of fifty-seven years, was a valid and sufficient title in his, the appellant's, person, for the whole of that term, and to induce that conclusion, he pleaded that the Duke was not prohibited by the entail under which he held the estate, whereof the appellant's farm is a part, from granting such a lease, and that the possession under it was protected against challenge by the Act of Parliament 1449, c. 17, entitled "The "buyer of land should keep the tacks set before the buy-"ing."

The length of the lease cannot be considered an alienation; and the lessee is protected against all the world by force of the statute. The statute does not protect alienations under the colour of a lease; but, the appellant maintains with confidence, that there is no difference between a lease granted by one who holds in fee simple, challenged by a singular successor, as not within the statute, and one granted by an heir of entail, not specially restrained in the exercise of the power of leasing, when challenged by the next heir, which the heir can only do in the character of singular successor, or not representing the lessor. The question in the present case is, therefore, of the utmost importance, as affecting every lease for such a term in Scotland, and shaking the security afforded to tenants by that most salutary statute.

The appellants are confident, they may assume that the permission in the entail of the March estate to grant liferent leases, is not to be construed as a *prohibition* to grant leases for a term of years; that the entail is to be taken as if there were not a word in it respecting leases; and that the power

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of the heir in possession to grant leases is unlimited, unless they are such, as by the construction of law, amount to an alienation of the estate, or are struck at by the prohibition to alienate, which the entail contains.

The appellants hold it to be settled law, that one holding under an entail may exercise every lawful act of ownership not prohibited by that entail. This is not only consonant to principle, but is clearly deducible from the terms of the Act 1685, from whence entails derive their authority. That act makes it lawful for his Majesty's subjects to tailzie their estates, and to substitute heirs in their tailzies, *with such conditions and provisions as they shall think fit;* and, therefore, wherever a condition or restraint is not imposed, the fair, as well as the legal inference is, that the entailer intended to leave the heir at liberty in the particular omitted. It has been argued that, as the Act allows tailzies to be affected by irritant and resolutive clauses, *whereby* it shall not be lawful for the heirs to sell, annailzie, or dispone the estates, unless the granting of long leases, for inadequate rent, came under the one or other of those terms, the object of the law might be defeated, and that, in fact, no authority was given to prohibit leases of any sort; but, this argument can have no weight, when the preceding sentence of the statute is attended to, which allows every condition and provision the entailer thinks fit to be inserted.

The words in the Act which protect the tenants are: "It is "ordained, for the safety and favour of the poor people that "labour the ground, that they and all others that have taken, "or shall take lands in time to come, from lords, *and have* "*terms and years thereof*, that, suppose the lords sell or an- "nailzie the lands, the takers shall remain with the tacks "until the issue of their terms, whose hands soever the lands "come to, for sic like maill (*i. e.* the same rent) they took "them for." It will not be contended that an heir of entail is in any better situation than a purchaser, as the only ground on which such heir can challenge the acts of his predecessors is, that he takes as a singular successor, *per formam doni.* The appellant, Welsh, therefore pleads the statute 1449, in bar of the respondent's declaratory action.

2d, The second objection stated is, that there was a grassum paid. It will not be disputed that the taking of a grassum has been customary, and has been recognised as something distinct from rent, from earliest times. Craig says, "Gras- "sumas dicimus summas pecuniæ quæ in principio *assedationis,*

"aut solventur aut permittuntur supra *annuum mercedem*." The common law has not held that taking grassum is equivalent to the assignment or sale of rent, or to the tenants retaining part of the rent in security for money advanced to the landlord, or substantially the same as a loan. It is not held as an anticipation of the rent, having none of the qualities of rent; for neither sterility nor irritancy *ob non solutum canonem*, nor any other course which determines the lease during its currency, affects the grassum, nor can it be recovered by hypothec or sequestration, nor does it create any of those preferences competent to the landlord for recovery of rent.

Pleaded for the Respondent.—1st, The endurance of the lease. On this point, it is to be considered, first, that leases are "real rights," constituted by transferring from the lessor to the lessee, nearly the whole right of property for the term of such leases. The right of property is nearly all included under the description of a right of exclusive using and taking of the fruits of any subject. Now, a lease transfers all this out of the lessor into the lessee, during the time of its continuance. Leases in Scotch law were, anciently, not real rights, but effectual only against the granter and his heirs. But, by the statute 1449, cap. 17, it was provided "for the "safety and favour of the poor people that labours the ground, "that they and all others that has taken, or shall take lands "in time to come, from lords, and has terms and years "thereof, that suppose the lords sell or annailzie that land "or lands, the takers shall remain with their tacks unto the "issue of their terms, into whose hands soever the lands "come, for 'sike like maill' (*i. e.* same rent) as they took "them for." This rendered a lease with possession valid, against any future acquirer of a right of property in the land.

Such being the nature of leases, it appears that they must fall under a prohibition of alienation of any subject, because all grants of any part of the right of property must fall under a prohibition. In such a prohibition, the word has always been used to express any conveyance of any part of the corporeal subject, or of the *right thereto*. On other occasions, *alineate*, or *alienation*, may be used to designate nothing less than the fullest transmission of the whole subject or right. Thus, in a sale of a subject, or obligation to sell it, if the party "alienates," or agrees to "alienate," it is understood he transfers, or agrees to transfer, all right that is in him. For there his obvious intention is to designate nothing less than the fullest and most entire transmission. But, in a prohi-

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bition of alienation, the obvious meaning is to designate every thing, more or less, which is at all of the nature of alienation, whether it relates to the whole or a part of the corporeal subject, or of the right.

According to the civil law, it appears that a prohibition of alienation applied to all transmissions of any part of the real right. Thus, in the title of the code *De Rebus* alienis non alienandis, &c., there is preserved the following rescript of Justinian: "Sancimus sive lex alienationem inhibuerit, sive "testator hoc fecerit, non solum dominii alienationem vel "mancipiorum manumissionem esse prohibendam, sed etiam "usufructus dationem, vel hypothecam, vel piquoris nexum "penitus prohiberi. Similique modo, et servitutes minime "imponi, nec emphyteuseos contractum nisi in his tantum- "modo casibus, in quibus testatoris voluntas qui alienationem "interdixit, aliquid tale fieri permiserit."

There can be no doubt that prohibitions of alienation have, in Scotland, always, and universally, been regarded as sufficient to prohibit the transmission of the right of property, in whole or in part, by granting real rights out of it. Thus, to pass over entails at present, alienation of land is prohibited in Scotland by persons on death-bed, where the land is annexed to the Crown, where it is held by church beneficiaries (under certain provisions), where it belongs to persons who are *obærati*, or to persons inhibited or interdicted. In none of these cases is there any evidence that it ever was held competent to grant any real right out of the property, materially diminishing it.

Such being the case, why should not such prohibitions apply to leases, as well as to other real rights? Leases are real, and they convey out of the granter for a time, which may be very long, almost the whole right of property. Of all real rights, not absolutely transmitting the entire property, none seem more clearly to fall under such prohibition.

There is, however, a very material peculiarity, which, from the earliest periods of the Scotch law, has been applicable to leases, and which is not applicable to most other real rights. This is, that leases, to a certain extent, are necessary for the advantageous management of landed property. The proprietor of a landed estate cannot, in general, cultivate it himself. For this reason, he is under the necessity of leasing to other persons for rent. It became the practice, therefore, to lease for a period of more than one year, as fairest for the tenant, and also for the landlord. That this was the ordinary

practice at the date of the statute 1449, appears with certainty from the terms of that statute. This being the case, however, if prohibitions to alienate had been so enforced as to prevent all leases, they would have injured the proprietor, without benefiting any person. Nay, they would have injured the person in whose favour the prohibition was made. An equitable limitation of the effect of such prohibitions appears always to have been admitted in favour of such leases as were necessary for ordinary management or administration. That this principle was well known in Scotch law, is proved by a clear and strong instance, that of such leases let on lands which afterwards fell to the Crown by forfeiture. The nature of this instance will appear from a passage in the institutions of Lord Stair. Lord Stair says, "Forfeiture confiscateth the forfeited person's whole estate, "without any access to his creditors; yea, without conside- "ration of dispositions, infeftments, *or other real rights* granted "by the forfeited person, since or before the committing of "the crime of treason, for which he was forfeited, which fall "and become null by exception."

Stair, B. iii., tit. iii., § 30.

In the management of the temporal property of the church, the same principles prevailed, as also in that of royal demesnes, and of the property of the burghs and other lay corporations.

In regard to the Entail Act 1685, it has been generally held, looking to its whole contents, that, however effectually an entailer may bind his heirs by all sorts of prohibitions and injunctions, yet that, with respect to third parties, the power of rendering deeds null and invalid, must be limited by the terms of the statute. But the statute is silent as to any direct mention of leases, and yet it has been invariably held, that prohibitions on that subject are effectual under the statute against third parties; and it must have been so held upon the general ground, that a prohibition to alienate comprehends, as one of its varieties, a prohibition to grant leases beyond those of ordinary administration. Had not the word *alienation* been understood at the time as sufficient for the purpose, it cannot be imagined, that in framing this important statute, the legislature would have overlooked one of the common and obvious modes of dilapidation, by which the residuary interest of posterior heirs may be so deeply injured.

But, it is objected, that prohibitions of alienation in entails differ from all other prohibitions of that kind; that entails are odious, and, therefore, to be strictly construed, whereby it is said that the narrowest meaning of the word alienation

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is to be taken, in which it is limited to conveyances of the property or right integrally. In answer to this, it is submitted, that even strict construction could never so operate upon a known style of prohibition when transferred into an entail, as to change its nature and render it nugatory. It is impossible, therefore, that by any construction, this established style could be deprived of its fixed meaning and effect in law.

But the truth is, there has been great exaggeration of the odiousness of entails, and the strictness of interpretation bestowed on them in Scotch law. On this point, it appears to have been argued, that in regard to entails, though statutory, the grand rule of interpretation *ut res magis valeat quam pereat*, is to be reversed; and that Courts are to adopt any construction, the rather because it makes the deed imperfect or nugatory; and that fraud against entails is fair and legal, if only it be "cleverly done," or rather be not so grossly bungled as not to be a fraud at all. But, it appears a paradox to say, that such maxims can possibly be applicable to deeds expressly authorized, *in terminis*, by the legislature, and a very few remarks will be sufficient to show how little ground there is for imputing such an absurdity to the law of Scotland.

There can, therefore, no longer be any doubt in general, that under the prohibition of an entail (and of the Neidpath entail) against *alienation* leases are included, with the exception only of such leases as are not beyond the bounds of "ordinaria et necessaria administratio." And the only question remaining on this point in the present case is, whether a lease for fifty-seven years, be in a different situation from one for ninety-seven years, and whether it falls within the exception of ordinary and necessary administrative leases? The respondent contends that the lease must fall under the same category as the ninety-seven years, and, therefore, does not fall within the ordinary and necessary administration of the entailed estate. Mr Erskine does not venture to extend the leases, which he lays it down as competent for an heir of entail to grant beyond nineteen years, or the life of the tacksman. In the case of Bogle, the lease reduced *ex capite lecti* was a lease for thirty-eight years.

B. 3, ch. 8, § 129.

2d, But, besides, the lease in question is prohibited because it was granted for a grassum. There are various grounds on which this proposition may be rested.

Grassum.

There is one view which appears to supersede the necessity

of examining whether a lease with a grassum be strictly and technically an alienation or not. In order to understand this, it is only necessary to observe, that whatever dispute there may be as to the powers, or the limitations of the powers, in other particulars, of an heir possessing, under a complete Scotch entail, at least this is perfectly clear, that such heir is liable to this general and comprehensive limitation, that his interest in, and his power over the estate, are bounded by the period of his life, and that he has neither right nor power to dispose of any fruits or profits that may arise after his death, or to put into his own pocket the price of that possession which he must then leave to his successors. In law, and in common sense, this proposition is equally clear and indisputable upon the bare statement of the case, and without reference to any of the particular prohibitions or words of the entail. The heir in possession is, no doubt, proprietor of the estate while he is in possession; but he is not proprietor of the crop that is to grow fifty or five years after his death, and has no right to dispose of that crop or any part of it. He may commit waste, it may be, in his own time, and take such uses of the property while it is in his own possession, as he thinks fit, without regard to the interest of succeeding heirs. But the waste must be committed in his own lifetime, and the uses confined to the period of his actual possession. He may cut down wood, it is contended, however unfit for cutting, or however essential to the shelter or ornament of the lands; but he cannot sell wood to be cut down after his death. He cannot pocket the price of the wood which he finds on the estate, or transmit it to his executors, and at the same time reserve to himself the enjoyment of its protection and beauty during his own time, and then let in the purchasers to sell every tree before the face of the succeeding heir. In the same way, he may let the lands for his own life, on the most ruinous principles, and with the most pernicious powers and privileges to the tenant; powers to cut wood, for instance, or to exhaust minerals, and may, consequently, draw a greater rent than could have been otherwise obtained; but he cannot give such powers for a period beyond his own life; and far less can he stipulate for an extraordinary rent in consideration of granting them, and at same time provide that their exercise shall be suspended during his possession, and only be indulged to the prejudice of his successor. Finally, and to come near to the case in hand, he cannot, even in an ordinary lease,

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stipulate for a high rent during his own life, and a low one thereafter.

Now, if an heir of entail, being eighty years of age, lets a farm for fifty-seven years for a grassum, can it be disputed, that he disposes of the fruits and profits of the estate for fifty years after his own death? Does he not substantially sell and pocket the price of part of every crop that is to grow for that period, and enrich himself and his executors at the expense of the next succeeding heir? Most assuredly he does.

In the next place, however, it is submitted, that a lease for a grassum is directly and technically within the prohibition against alienation. This proposition is established by the same arguments and authorities which apply to long leases. It was shown that leases were, in their own nature, conveyances of part of the right of property, viz., the real right of using and taking the fruits of the subject for a time, and, therefore, they fell under prohibitions to alienate, with the exception of such as were necessary for due management. That, accordingly, leases of a length exceeding that necessary for beneficial management, as well as leases of mansion-houses, are void where alienation is prohibited. In like manner, leases which, on account of the consideration received for them, are foreign to ordinary good management, must, for that reason, be prohibited, under a prohibition of alienations. A lease for a grassum is just a lease, partly for annual-rent, but partly without annual-rent, for a price paid down to the granter. It is much more manifest that a lease of this sort is out of the bounds of necessary or ordinary management, than that a long lease, or a lease of a mansion house is so.

But, it has been said, there has been a practice of taking grassums under prohibitions to alienate or dispone. But, when this alleged practice is examined closely into, it will be seen that the cases quoted in the list refer to cases of proprietors taking grassums, who held their lands in fee-simple, not under any restriction at all. But, in regard to entails, it is certainly important that no instance of this practice is adduced until towards the middle of last century, near 100 years after the first introduction of strict entails; and the origin of that practice had likely arisen from confounding fee-simple estate and entailed estate.

No doubt, there is a possessive clause to grant leases to a certain extent, in this entail. This part of the question falls to be considered under two distinct heads. In the *first* place,

when taken by itself in its plain and incontrovertible meaning, it may be held to import a limitation of the power of granting leases for longer terms of endurance than those of the lives either of the granter or of the tenant. In this the respondent has no occasion to resort to any tacit implication, by which one species of prohibition is to be extended to another of a different species. He would require no more than a fair interpretation of the clause. Of course, the permissive clause bears an express reference to the preceding prohibitions, irritant and resolutive clauses, and sets forth, in language not to be misunderstood, that by the unrestrained operation of these prohibitions, it would not be in the power of an heir of entail to let leases for the lifetime of the receiver thereof; and the sole object of the permissive clause, is, for the avowed purpose of modifying the previous clauses, that this provision and declaration on the subject of leases has been introduced. After all that has been now said on the subject of long leases, as importing a species of alienation, it surely cannot admit of a moment's doubt, that the prohibition more immediately referred to, in this permissive clause, is the prohibition against alienation; the effect of the clause is, therefore, to demonstrate that under the term *alienation*, the entailer intended to include all those acts which technical usage authorised him to consider as the species of that genus; and that, in particular he held it to be a prohibition of all leases. The general prohibition, taken in connection with the permissive clause, is just a prohibition of all alienations, with exception of leases of a certain endurance, and other qualities. Under such a prohibition, it is obvious that, unless the word alienation be utterly incapable of including leases, they must be included, because the context demonstrates that the entailer intended to include them, and used the word with that meaning.

After hearing counsel,

It was ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of be, and the same are hereby affirmed. Journals of the House of Lords.

For the Appellants, *Sir Saml. Romilly, Mat. Ross, Henry Brougham, John Clerk, Fra. Horner.*

For the Respondent, *John. Leach, F. Jeffrey, J. H. Mackenzie.*