ciation of former tacks which were made partly for rent reserved, and partly for sums and prices paid to the Duke himself, are to be considered as tacks made partly for rent reserved, and partly for sums and prices paid to himself, and that such tacks are not to be considered in questions between the parties claiming under the entail, as let without evident diminution of the rental: and it is ordered, that with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

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

For the Respondent, *Sir Saml. Romilly, Geo. Cranstoun, H. Brougham.*

[Edstoun.]

ROBERT SYMINGTON, Tenant in Edstoun, . *Appellant;*

THE EARL OF WEMYSS AND MARCH, . *Respondent.*

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWER TO GRANT LEASES—GRASSUMS—ISH.—In the Neidpath entail there was no express prohibition against granting leases, or taking grassums, but there was a prohibition to alienate the lands, or any portion thereof. A lease was granted for fifty-seven years, at a rent of £155, 7s., and a grassum paid of £300. This lease, before its expiry, was renounced for a new lease, at the same rent, for the term of 31 years, or 29, 27, 25, 23, 21, or 19 years, whichever it might be held the Duke had power to grant. In a declarator, at the instance of the tenant, held that the last mentioned tack must be held as a substitute for the 57 years lease, and subject to the objections pleadable against it, and, therefore, that the conversion of any part of the rent into a sum instantly paid, was to the injury of the substitute heirs of entail, and an alienation *pro tanto*, and struck at by the prohibitory clause to alienate. In the House of Lords, held that a tack granted for rent partly reserved and partly paid to the Duke, fell under the prohibition to alienate, and was in diminution of the rental.

In 1731, when the late Duke succeeded to his entailed estates of Neidpath and March, as detailed in the preceding appeals, the farm of Edstoun was let for a rent of £83, 10s. In 1756, it was let for £85, 12s. In 1769, it was let for 19 years, at the rent of £149; and a grassum was then paid of £193, 7s. 4d.

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The last lease expired in 1788; and in 1792 a lease was granted to the appellant, for fifty-seven years, at an increased rent of £155, 7s., and for a grassum of £300. On this lease the appellant obtained possession, and continued to possess, without any change of circumstances, or any doubt concerning his right, for fifteen years. Thus, he held a real right, perfect in its nature while it subsisted, and undoubtedly acquired, on his part, in the clearest *bona fides*.

In the year 1807, some discussions took place in the Court of Session, in an action which had been brought by the Duke of Queensberry against the Earl of Wemyss, the next heir of entail, for having it declared, that a lease which the Duke had granted to Alex. Welsh, for ninety-seven years, was ineffectual. Before that time it had been the general, if not the universal opinion, that, where an heir of entail was not expressly prohibited to grant leases of extraordinary endurance, he had power to do so; and in the case of Leslie *v.* Orme, a lease for *four nineteen years*, granted by an heir of entail, had been expressly sustained. But in that action, the Court of Session sustained the defences of the Earl of Wemyss, thereby finding that he had no power to grant a lease for ninety-seven years.

In these circumstances, the Duke, upon the appellant's renouncing his fifty-seven years' lease, granted a new one for thirty-one years, from and after Whitsunday 1807, or, if he had no power to grant such a lease, then for 29, 27, 25, 21, or 19, from the term of Whitsunday 1807. The rent was the same as paid under the former lease; but no grassum was paid on this new lease.

The declarator of Lord Wemyss against the Duke of Queensberry, and all his tenants, being remitted to Lord Hermand, the pursuer now proceeded farther in that process, and in his reductions; and, in particular, he insisted for reduction of the appellant's lease, and of the lease which had been granted to Wm. Murray for his lifetime, at the standing rent, and for a grassum. Lord Hermand pronounced an interlocutor, which is quoted in the preceding appeal; and, on reclaiming petitions, the Court pronounced the two several interlocutors in the preceding appeal.

Vide Appeal. June 14, 1814. Feb. 3, 1815. Nov. 1815.

Against these interlocutors the appellant brought this separate appeal to the House of Lords.

Pleaded for the Appellant.—1st, The appellant obtained his lease, as a third party, *bonâ fide* contracting with the late Duke of Queensberry, the proprietor in the fee. By this

lease and possession, he holds a real right, in terms of the statute 1449, c. 17; and the merits of his right, so established, are not affected by any considerations that are personal to the Duke of Queensberry or his representatives, or by the nature or effect of any other leases which he may have granted to other persons.

The general principle of law, that a tenant contracting for a lease, with the proprietor in the fee, for onerous causes, and obtaining possession upon that lease, has a real right, by express statute, good against all singular successors; that he is in an entirely different situation from the granter of the lease and his representatives; and that the principles applicable to any question concerning the validity of the tenant's right, are entirely different from those which regulate questions regarding the obligations of the granter of a lease, or his representatives, has been fully explained, in an appeal case for Wm. Murray, to which the present appellant begs leave to refer. And, it is there, at the same time, shown that the respondent, throughout his argument, has entirely lost sight of this distinction, and has argued the case on principles and assumptions which have, truly, no application to the case in issue. At the time the fifty-seven years' lease was gone into, the belief was prevalent that long leases were permissible. There could, therefore, be no fraud; and the *bona fides* of the contract could admit of no question. In so far, therefore, as the case depends on the lease granted in 1792, there is no pretence for stating that it was not as fair a transaction on the part of the tenant as ever took place, or for denying him the character of a *bona fide* purchaser. On the faith of this lease so obtained, he was fifteen years in peaceable possession before any serious doubt arose concerning the validity of his lease. He employed his capital, and bestowed his labour, in the reasonable belief that it was unchallengeable.

2d, The late Duke of Queensberry was the absolute proprietor of his estate, in every particular in which he was not laid under restrictions by the express words of the entail. And it is a rule of law, that the limitations of an entail, more especially in all questions with third parties, are *strictissimi juris*, and that no such limitations can be raised up by implication.

3d, The entail under which the Duke of Queensberry possessed the estate of Neidpath, contains no prohibitions against taking grassums in the leases to be granted. And, where an entail does not prohibit grassums in express words, it has

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always been held as clear law, that the heir of entail is not restrained from taking them.

4th, The lease, besides, is not liable to reduction as an alienation, in respect of its endurance. When your Lordship shall have disposed of the question of grassum, the only question which remains concerning the appellant's lease is, Whether the heir of entail is entitled to set it aside, in respect of the period for which it is granted? And it is of importance to observe, that more particularly the question which ought to have been decided under this ground of reduction, is, Whether it is absolutely void and null in all points, or to all effects, and cannot subsist even for nineteen or twenty-one years? The question, then, is, Whether the lease granted to the appellant for thirty-one years, or, at least, and alternatively for 29, 27, 25, 23, 21, or 19 years, or for whichever of these periods the granter had power, or was not prohibited, to make the lease, is an *alienation* of the property, and so expressly prohibited by the prohibitory clause in this entail? It must be conceded, that a lease for nineteen years is not prohibited by the prohibition to alienate. It is not worth while here to take notice of the untenable argument by which the pursuer has attempted to prove that every lease is an alienation. As an argument, in a question of law, this is no better than a play upon words. The undeniable truth is, that the heir of entail cannot challenge every lease, on the allegation that it is an alienation. Confessedly, he cannot challenge a lease for nineteen years, on the statement that it is an alienation, in respect of its endurance. Why not, then, is a lease good which has an alternative period which embraces nineteen years. The respondent, no doubt, maintains that the lease cannot be restricted—that the Court has no power to do so—and that an alternative lease makes an indefinite ish, and, as such, is bad. But this plea is untenable. There is a great difference between an alternative or conditional ish, and an indefinite ish. This is not the case of an indefinite ish, but of a lease having alternative periods of duration, each of which periods having a definite ish, and, therefore, the lease is good.

Pleaded for the Respondent.—1st, The lease of Edstoun was prohibited by the general prohibition of the entail.

2d, It was not granted in the fair and legal exercise of the power of granting leases, contained in that entail.

After hearing counsel,

The Lords Spiritual and Temporal in Parliament assembled: Find that the Duke of Queensberry had not power under the entail, founded upon between the parties in this cause, to let tacks, partly for rent reserved, and partly for sums and prices paid to himself; and that tacks granted upon the renunciation of former tacks, which were granted, partly for rent reserved, and partly for sums and prices paid to the Duke himself, are to be considered as tacks made, partly for rent reserved, and partly for sums and prices paid to the Duke himself; and that the tack in question having been granted, partly for rent reserved, and partly for a sum or price paid to the Duke for a former tack renounced, for which a sum or price had been paid, besides the rent reserved, the same is to be considered as a tack, partly for rent reserved, and partly for a sum and price paid to himself, and ought not to be considered in a question with the tenant claiming under the said tack, as let without evident diminution of the rental. And it is ordered that with this finding, the cause be remitted back to the Court of Session, to do therein as is just and consistent with this finding.

Journals of the House of Lords.

For the Appellant, *James Moncreiff, Fra. Horner.*

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

[Crook.]

THE RIGHT HON. EARL OF WEMYSS AND MARCH, ... *Appellant;*

MARGARET JOHNSTON, Tenant in Crook, and JOHN HUTCHISON, her Husband, . *Respondents.*

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWERS OF LEASING—ISH—GRASSUMS.—In the Neidpath entail there was no express prohibitory clause, either against granting leases or against taking grassums, but there was a prohibition to *alienate.* There was a permissive clause to grant leases for the granter's lifetime, or the lifetime of the receiver thereof, always without evident diminution of the rental. A lease was first granted for twenty-six years, at £12 of yearly rent, with £115 grassum paid. This