1819.

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

expiry, the prolongation of the lease seems to have been but a reasonable return for the advantage thus derived to the estate.

3d, There was in this case no diminution of rental. The appellant has maintained the reverse; because, as he contends, no sum has been added to the present rent, to answer for the grassum for £115, paid in 1780. This is assuming that grassum is rent taken by anticipation. The respondents maintain that it is a payment altogether different and distinct from rent. But it would be improper to enter more fully into the discussion of that point, as it is fully argued in the cases of Whiteside and Edstoun, before referred to.

Vide Judgment at the end of next case.

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

For the Respondents, *James Moncreiff, John Cuninghame.*

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[Case of the Executors; Farm of Crook.]

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

EARL OF WEMYSS AND MARCH, . *Appellant;*

SIR JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS of the Strand, in the County of Middlesex; WILLIAM MURRAY, Esq. of Henderland; and EDWARD BULLOCK DOUGLAS, Esq., Trustees and Executors of the late Duke of Queensberry, ... } *Respondents.*

House of Lords, 7th April 1819.

The respondents lodged a separate case in this appeal, in which, after stating the circumstances as detailed in the preceding appeal, they

Pleaded for the Respondents.—The lease in question, restricted as it has been by the interlocutors appealed from, to the length of twenty-one years, was competently granted by the late Duke of Queensberry, in virtue of the powers which he enjoyed as proprietor of the estate, and is struck at by no prohibition or limitation contained in the entail.

The First Division of the Court has, no doubt, found that the Duke had no right to take grassums, but this judgment

has been appealed from, and the question will come fully before your Lordships in the leading cases of Whiteside and Edstoun. If your Lordships shall then see cause, as the respondents trust you will, to reverse the decisions of the Court in these cases, the objection of grassum will fall to the ground. But even, should this not be the case, there is no room for holding the present lease, to have been granted for a grassum, either directly or indirectly. It is impossible, on any fair view of the circumstances, to connect it with the lease 1780. If it is competent at all to look back beyond the present lease, it can only be done for the purpose of getting at the true nature of the whole transaction betwixt the parties. But, taking matters in this light, what the Duke really did in granting the lease 1791, was to extend, for an additional period, the lease, upon which Johnston, the tenant, was then possessing. The fair and equitable way of viewing the transaction, is to hold the first fourteen years of the new lease to be the remainder of the old lease, to which, of course, the grassum might be applicable, and the subsequent part of the period to be an additional term, granted in consideration of the improvements made by the new buildings.

Whenever the fourteen years had run, therefore, that portion of the lease of 1791, which had any reference to the grassum received in 1780, was at an end; and the objection of the grassum can no more be applicable to the remaining portion than it could have been, had the lease of 1780 been allowed to expire naturally in 1805, and a new lease for forty-three years had been granted. But the present lease was not entered into till 1807, two years after the lease of 1780 must have been at an end.

But, it is said that here there was also a case of diminution of the rental. This objection rests on an assumption, that a grassum consists of a part of the rent taken by anticipation. But, the respondents maintain that it is a payment altogether distinct from, and independent of, the rent. If the entail prohibits diminution, it does not require any augmentation of the rental. It was *competent, therefore, for the Duke to keep the rent stationary*, and, if a lease at the old or former rent had come to be a favourable one for the tenant, he was entitled to take what consideration he could obtain, in return. The grassum is a price given for the beneficial lease; it makes no part of the rent, or annual prestation payable under it, and the Duke was not guilty of diminishing the rental, because he did not augment it as far as he might have done.

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Journals of the House of Lords.

After hearing counsel upon the original appeal, and appeal of the Right Honourable Francis Charteris Douglas, Earl of Wemyss: and likewise upon the cross appeal of Margaret Johnston, tenant in Crook, and John Hutchison, her husband, as also upon the answer of Margaret Johnston *alias* Hutchison, and her husband foresaid; and the answer of Sir James Montgomery, Bart., and others, trustees appointed by the late Duke of Queensberry, put to the said appeal: and consideration being had of what was offered on both sides in these causes, it is ordered by the Lords Spiritual and Temporal in Parliament assembled, that the said causes be remitted back to the Court of Session in Scotland, generally, to review the interlocutors complained of.

For Respondents, *Alex. Irving, Geo. Cranstoun.*

[Farm of Flemington Mill.]

1819.

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

The RIGHT HON. FRANCIS, EARL OF WEMYSS, ... *Appellant;*

Sir JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS of the Strand, in the County of Middlesex; WM. MURRAY, Esq. of Henderland, and EDWARD B. DOUGLAS, Esq., Trustees and Executors of the late Duke of Queensberry, ... } *Respondents.*

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWER TO GRANT LEASES—ISH—GRASSUM.—In the Neidpath entail, there was a lease granted in 1788, for fifty-seven years, at a rent of £90, no grassum being then paid for it. This lease was, in 1807, renounced for a new lease for thirty-one years, or such other term of 29, 27, 25, 23, 21, and 19, as it might be found the Duke had power to grant it for. The rent stipulated was £93. Held, in respect no grassum was paid for this lease, that the same was good for twenty-one years. In the House of Lords, the case remitted for reconsideration.

The late William, Duke of Queensberry, possessed the estate of Neidpath, under an entail executed in 1693, by his