Mill. As also upon the answer of James Murray, tenant in Flemington Mill, and the answer of Sir James Montgomery and others, trustees appointed by the late Duke of Queensberry, put into the said original appeal; and the answer of the Right Honourable Francis Charteris, Earl of Wemyss and March, put into the said cross 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 therein complained of.

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

For the Respondents, the Executors and Trustees, *Jas. Moncreiff, John Cunninghame.*

For the Respondent, the Tenant, *Jas. Moncreiff, John Cunninghame.*

[Liferent Leases; Whiteside.]

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MURRAY *v.* THE EARL OF WEMYSS.

WILLIAM MURRAY, Tenant in Whiteside, *Appellant;*
The EARL OF WEMYSS AND MARCH, . *Respondent.*

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWERS TO GRANT LEASES—GRASSUM.—(1.) 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. There was a permissive clause to grant leases for the lifetime of the heir, or lifetime of the receiver, the same being granted without evident diminution of the rental. In this case, a lease had been granted in 1788, for fifty-seven years, with a grassum paid. That lease, in 1807, was renounced for a lease for the tenant's life, at the same rent as the former. Held, that this latter tack must be held as merely a substitute for the former, and subject to every objection on the ground of grassum, and that, though the new tack was in compliance with the entail as to endurance, yet, as it was affected by the grassum formerly paid, and as it was granted at the same rent, plus the cess and other rogue money, it was to be held as granted in diminution of the rental. Affirmed in the House of Lords. (2.) The tenant pleaded, that whatever

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might be the result of the question with the executors, it could not affect the tenant entering into the lease in *bona fide*, and that he was protected by the Acts 1449, c. 17, and 1685, c. 22, as the acquirer of an onerous real right; but this plea repelled.

The appellant was tenant of the farm of Whiteside, on the Neidpath and March estate.

The clauses in the Neidpath entail have already been quoted in the preceding appeals.

The farm of Whiteside had been let in 1686, on a lease for five years, at the rent of 800 pounds Scots, or £66, 13s. 4d. This was the rental of that farm at the date of the entail. When the late Duke of Queensberry succeeded, in 1731, the rental of that farm was £68, 8s. 4d., so that, in a period of forty-five years before his succession, the increase of the rental was precisely £1, 15s.

During the possession of the late Duke, the rent of this farm was considerably increased; and, it is admitted, that previous to the year 1807, the farm was let at the rent of £113, 12s. $2\frac{9}{12}$d on a lease which had been granted in 1788 for fifty-seven years, including in that lease the other farms of Flemington Mill, at £90 yearly rent, and Fingland at £50, 10s., with a grassum paid for Whiteside and Fingland, of £400.

In December 1807, a lease was granted by the late Duke to the appellant, of the farm of Whiteside, "for all the days "of the said William Murray's life, from and after the term of "Whitsunday 1807, which is hereby declared to have been "the term of the said William Murray's entry." The yearly rent of £113, 12s. 2d. was agreed to be paid, which was precisely the rent payable by the former lease, and the highest rent for which these lands had, at any former period, been let.

On this lease the appellant obtained possession. He continued in peaceable and undisturbed possession for two years. And, as the entail, not only contained no prohibition against granting liferent leases, but contained an express clause, declaring it to be lawful for the heirs of tailzie to grant leases "during their own lifetimes, or the lifetimes of the receivers "thereof," on the single condition, that they should be let without evident diminution of the rental; the appellant never for a moment imagined that a lease for his own lifetime, and for the highest rent that the lands had ever yielded, could admit of any possible challenge under the prohibitory, irritant, and resolutive clauses, in this entail.

But the respondent brought, in 1809, an action of declarator against the Duke of Queensberry and his whole tenants, specially enumerated, among whom was the appellant.

It was not easy to see what good reasons there were for this summons as against the appellant. His lease had been granted at the full rent, and was, in point of duration, in precise conformity with the entail. The respondent, however, alleged, that he (the appellant) had paid a grassum; which allegation was made to depend on an attempt to connect it with the lease which had previously existed, and on which the appellant's father had possessed from 1788 till 1807, when he renounced it.

In addition to the declarator, the respondent, in 1811, brought actions of reduction and removing against the several tenants, and among the rest, against the appellant. This action, as against him, set forth, that his lease ought to be set aside, because it was *ultra vires* of the Duke to grant the tack in question, the same having been granted in consideration of a fine or grassum paid by the said defender (appellant).

In defence, the appellant stated, 1st, That the pursuer had not called all the parties interested, as he had not called the executors of the Duke of Queensberry; and 2d, That such lease was not only not prohibited by the entail, but was expressly permitted.

But, from these facts, the pursuer inferred and argued, that the liferent lease of Whiteside, now held by the appellant, was to be considered as a substitute for the previously subsisting lease of that farm for fifty-seven years; that as a grassum had been paid for that lease, some proportion of that grassum must be applied to the liferent lease, and that the lease was therefore liable to challenge on two grounds, 1st, That it was in diminution of the rental; and, 2d, That in so far as a grassum was taken on it, it was to be deemed an *alienation*, and as such, contrary to the prohibitions of the entail.

On advising the cause, Lord Hermand, Ordinary, pronounced this interlocutor, "Having advised the condescen- June 14, 1814.
"dence and answers in the process of declarator, and also
"the condescendence and answers in the process of reduction
"at the instance of the Earl of Wemyss and March, against
"William Murray, and whole processes, conjoins this process
"with the declaratory action between the parties depending
"before the Lord Ordinary, in so far as the declarator is

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" applicable to the present case: Finds it stated in the con-
" descendence, and not denied in the answers, that the whole
" farms whereof the leases are now under reduction, were
" formerly let by the late Duke of Queensberry for fifty-seven
" years, and, with an exception stated by the defender, of the
" lands of Flemington and Crook, under burden of grassums,
" the interest of which bore a considerable proportion to the
" yearly rent: Finds it admitted in the answers, that in or
" about the year 1807, many of the tenants, holding leases
" for fifty-seven years, renounced their leases, and took new
" ones for periods equal to the terms unexpired of the old
" ones, but without paying any grassums for their new
" leases; and that soon afterwards the tenants of all the
" farms as to which the present discussion relates, whether
" they had got new leases of the nature above mentioned, or
" had continued to possess, on their fifty-seven years leases,
" executed renunciations, and accepted of the existing leases,
" for which they paid no grassums: As also, that when the
" tenants renounced their former leases, and took the present
" ones, contracts were entered into betwixt them and the
" Duke's commissioner, Mr Tait, as stated in the condescend-
" ence: Finds, that although it be stated by the respondent,
" that depending on a contingency not explained, but said to
" have existed, these contracts never were acted upon, yet,
" they afforded evidence to show that the new leases were,
" with the exception of the term of endurance, a *surrogatum*
" or substitute for those which had been renounced: Finds,

This clause so written in the original.

" that the rents payable under those renounced leases must
" of necessity have been from the inconvenience and loss
" arising to the tenants from the advance of money, a con-
" sideration of the doubts of the powers of the lessor held
" out in the contracts, and other circumstances, have suffered
" a greater reduction than the amount of the interest of the
" sums paid in name of grassum: Finds, that the entail
" founded on by the parties in this cause, contains a clause
" by which it is expressly provided and declared, 'That, not-
" 'withstanding of the irritant and resolutive clauses above-
" 'mentioned, it shall be lawful and competent to the heirs
" 'of tailzie, therein specified, and their foresaids, after the
" 'death of the said William, Duke of Queensberry, to set
" 'tacks of the lands and estate during their own lifetimes,
" 'or the lifetimes of the receivers thereof, the same being
" 'always set without diminution of the rental:' Finds, that
" the rent payable under the renounced leases, diminished as

" it was by payment of grassums, cannot be considered as " constituting a fair rental, such as is implied in the above " clause: Finds, that the lease under reduction, though it " might be supported by the first part of that clause, as " granted for the lifetime of the receiver, is cut down by the " concluding part of it, being set with evident diminution of " the rental: repels the defences in the declarator, sustains " the reasons of reduction, repels the defences therein, and " reduces, decerns, and declares accordingly."

On representation, his Lordship adhered. July 9, 1814.

On reclaiming petition to the Court, the following interlocutor was pronounced, " The Lords having advised the said Feb. 3, 1815. " reclaiming petition, and having heard the counsel for the " parties at great length, in their own presence, on the whole " pleas and points in the cause, they find that the entail in " question contains a strict prohibition against alienation, " but a permission to grant tacks 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: Find, that in the year 1769, the peti- " tioner's father obtained a tack of Whiteside, for nineteen " years, at the rent of £109, for which he paid a fine or " grassum of £132, 18s. 10d.: Find, that in the year 1775, " the petitioner's father obtained a tack of the farm of Fing- " land for twenty-five years, at the rent of £50, 10s., for " which he paid a grassum of £480: Find, that in the year " 1788 he renounced this lease, of which twelve years were to " run, and obtained a new lease for fifty-seven years, of the " said farm of Fingland, and also of the farms of Whiteside " and Flemington, at the rent of £260, 16s. 4d., being the " amount of the old rents, payable under the former tacks, " with the additions of the cess, and rogue, and bridge, money, " amounting to £11 odds, for which he paid a grassum of " £400, which was declared to be for Whiteside and Fing- " land only: Find, that in the year 1807, the petitioner's " father renounced the said tacks, and took new tacks to him- " self and sons for their lifetimes, at the rents payable under " the tacks renounced: Find, that this current tack must be " held merely as a substitute for the former ones, and sub- " ject to any objections on the ground of grassum, diminu- " tion of rental and otherwise, which were competent against " the tacks renounced: Find, that in estimating the rents of " Whiteside and Fingland, the value of the fines or gras- " sums paid at the commencement of the former tacks, ought

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" to have been added to the annual-rent: Find, that this " was not done, and that the new rent was made the same " as the old rent, plus the cess and bridge money: Find, " that this was not equal to the value of the grassum taken, " and, therefore, that the said last tack of Whiteside and " Fingland was set with evident diminution of the rental, " and in violation of the said clause in the entail: Further, " find that the conversion of part of the new rent into a fine " or grassum of £400, was to the manifest prejudice of the " succeeding heirs of entail, and operated as an alienation " *pro tanto* of the uses and profits of the estate: Therefore, " although the said tacks in point of endurance, do fall " within the permission of the entail above referred to, Find, " that they are struck at by the clause prohibiting alienation, " as well as by the condition in the said permissive clause, " against evident diminution of the rental: Therefore, in the " process of declarator, repel the defences, and in the process " of reduction repel the defences; sustain the reasons of re- " duction, and reduce, decern, and declare accordingly, so far " as concerns the tacks of Whiteside and Fingland; but in " regard no grassum appears to have been taken for the " farm of Flemington, and that by the tack renounced, the " rent has been raised, they so far sustain the defences in " the process of declarator, and in the process of reduction " assoilzie from the conclusions of the libel therein, and " decern."

On reclaiming petition the Court adhered, excepting in so far as concerned Flemington Mill, in "respect the ques- " tion concerning it, was not regularly before the Court at " the date of the said former interlocutor, they recall the said " interlocutor so far as relative to the said lands and Mill of " Flemington, as not duly pronounced."

Nov. 29, 1815.

Vide separate appeal as to it.

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

Pleaded for the Appellant.—1. The appellant obtained the lease of the farm of Whiteside, as a third party contracting onerously, and in *bona fide* with the Duke of Queensberry, on the faith of the records. By this contract of lease, followed by possession, and the payment of rent, he holds, in terms of the statute 1449, c. 17, a real right in the lands as a purchaser of the said lease, effectual, not only against the granter and his representatives, but against all singular successors in the fee, in so far as the granter had power to make it. And the question in this action for reducing the lease, is

precisely the same question which might have been raised by the respondent, if this had been the only lease created by the late Duke of Queensberry, or the only lease objected to by the heir of entail, and if the Duke had left no separate funds or estate, and were not represented universally by any party whatever.

The statute 1685, c. 22, regulating entails, enacts "that it "shall not militate against creditors *and others singular* suc- "cessors, who shall happen to have contracted *bona fide* with "the person who stood infeft in the said irritant and re- "solutive clauses in the body of his right."

It is under this statute alone that the respondent can challenge any lease in the person of a tenant, as in contravention of the entail. And your Lordships will perceive, that the statute itself draws a marked line between the case of gratuitous deeds or acts of contravention, which personally affect the contravener, and the case of onerous transactions, where the interest of a third party is to be cut down. This is so clear, that there may be a case where the heir will forfeit his whole right in the estate, and yet the right of the party in whose favour the deed was made will stand secure. Generally, the prohibitory clause alone, without irritant or resolutive clauses, and without registration, is sufficient to bind personally the heir in possession. But nothing can affect third parties but express conditions or prohibitions, fortified by irritant and resolutive clauses, and all appearing in the procuratories of resignation, precepts of sasine, and infeftments of the estate, and also in the register of tailzies. And it is evident, that in laying down this distinction, the statute does, in so many words, declare that the person so possessing an entailed estate is not a mere liferenter, but the *proprietor in the fee*, and to be esteemed the *absolute* proprietor of it, except in so far as his powers are expressly limited by clauses appearing in the records, in terms of the statute.

Consequences of material importance in the present argument necessarily result from these undeniable doctrines of law. One consequence is, that, though in all cases of entails with irritant or resolutive clauses, whether in questions with the proprietor himself, with his gratuitous donees, or with creditors or purchasers, the restrictive clauses must be strictly interpreted, and not extended, by implication, beyond the legal import of the words employed, yet this rule applies with double force, and for additional reasons where the question relates to the rights of third parties contracting onerously. It is perfectly evident that the heir of entail may have a good

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cause of complaint, and even legal claims of damages against the heir in possession, or his representatives, and yet have no relevant ground of reduction for setting aside the lease of any tenant. Where there is a prohibition to sell the estate, but this is not fortified with irritant and resolutive clauses, a sale is good to a purchaser. And yet it has been held that, in that case, the heir who sells is liable in damages. Some doubts have recently been entertained about this doctrine; but these do not affect the present argument.

2. The late Duke was therefore proprietor of the estate, fully invested therein, and enabled effectually to exercise all the powers which belonged to any other proprietor, except in so far as he was *expressly restrained* by plain and explicit words in the body of his infeftment. No prohibition can be raised by implication. There is no prohibition against grassums. There is no prohibition against granting leases of any kind of endurance. It is, therefore, raising a prohibition by implication, to say that taking a grassum is an alienation; and that granting a lease for the lifetime of the receiver is an alienation, although this latter kind of lease is expressly permitted by the entail.

Pleaded for the Respondent.—The appellant has attempted to found upon some plea to favour as a *bona fide* onerous contractor or acquirer of the lease. It is quite unnecessary to go into any detailed answer to his arguments. There are two considerations, either of which is perfectly and obviously conclusive against this plea. In the first place, the entail of Neidpath was duly recorded, after which, no party is entitled to plead *bona fides*, in accepting any right granted in contravention of that entail. Parties contracting in contravention of a recorded entail, are no more entitled to plead *bona fides*, and to complain of hardship, than if they had contracted in contravention of a registered inhibition. The second consideration is, that in this particular case, it is certainly and manifestly false in point of fact, that the present appellant had any *bona fides* in accepting his lease. It is unnecessary to resume the narrative of the facts of the case. It is sufficient to say, that the complete notoriety of the whole proceedings and views of the late Duke of Queensberry, rendered it impossible for any of his tenants to be ignorant *de facto*, that there was an entail; and that he was anxious to defeat, as far as possible, the rights of the succeeding heirs under that entail. The tenants in general (tempted by the hopes of large profit), there can be no doubt,

deliberately, and with a full knowledge of all the circumstances, joined in this attempt; and as to the appellant, William Murray, in particular, considering the renunciation of the lease of Flemington by his father in 1788, and the grassum paid upon that occasion for the lease of the three farms jointly, the subsequent renunciation of the fifty-seven years lease in 1807, and acceptance of *pro forma* separate leases, with conditional extension for ninety-seven years by additional contract, it is an absurdity to talk of *bona fides*. It is palpable, that the appellant, William Murray (for his father, the true party) had not one atom of *bona fides* more than the Duke himself.

After hearing counsel,

The Lords, Find, that William, late Duke of Queensberry, had not power, by the entail founded upon by the parties in this cause, to grant tacks, partly for yearly rent, and partly for a price or sum paid to the Duke himself; and that tacks granted by him upon the renunciation of former tacks which had been granted, partly for yearly rent, and partly for prices or sums paid to the Duke himself, ought to be considered as partly granted for rent reserved, and partly for sums or prices paid to the Duke himself: and the Lords further find, that the tack in question ought to be considered in this question with the tenant, as granted, partly in consideration of rent reserved, and partly in consideration of a price or sum before paid to the Duke himself, and of such renunciation as aforesaid, and as a tack set with evident diminution of the rental. And it is ordered, that with these findings, the cause be remitted back to the Court of Session, to do therein as is just and consistent herewith.

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

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

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[Declarator as to Whiteside, &c.]

SIR JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS, Esq.; WILLIAM MURRAY, Esq. of Henderland, and EDWARD BULLOCK DOUGLAS, Esq., Barrister-at-Law, Trustees and Executors of the late William, Duke of Queensberry,[1] } *Appellants;*

EARL OF WEMYSS, . . . *Respondent.*