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finding the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this finding.

For the Appellant, *Alex. Maconochie, R. Gifford, John Bell, J. H. Mackenzie.*

For the Respondents, *Sir Saml. Romilly, Geo. Cranstoun, Alex. Irving.*

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THE DUKE OF BUCCLEUCH v. HYSLOP.

THE DUKE OF BUCCLEUCH AND QUEENSBERRY, ... *Appellant;*

JOHN HYSLOP, Tenant in Halscar, . . *Respondent.*

House of Lords, 12th July 1819.

[Halscar.]

ENTAIL—PROHIBITORY CLAUSE—PERMISSIVE CLAUSE TO GRANT LEASES—CONTRAVENTION—ACT 1449, c. 17.—A reduction was brought by the appellant, to set aside a lease granted by the late Duke of Queensberry, on the ground that it was granted in contravention of the prohibitions in the said entail; that it was granted for the whole period of the Duke's life, *and* for nineteen years after his death, and, consequently, for a longer period than was permitted by the entail; that the farm was not let at the just avail at the time; and that it was let with diminution of the rental. The tenant contended that he had entered into possession, and put out large sums on the faith of the lease, and that the same was entered into on his part in *bona fide*, and the action against him was, therefore, irrelevant, his lease being protected by the Act 1449, c. 17. The Court of Session sustained the defences, and assoilzied the tenant. In the House of Lords this judgment was reversed.

This was an action of reduction raised by the Duke of Buccleuch and Queensberry, against one of the tenants in the leases granted by the late Duke of Queensberry, as fully detailed in the previous appeal. He had been all his lifetime on the farm. In the year 1786, he had obtained a lease for nineteen years, of the farm of Halscar, for a rent of £30 per annum, and a grassum of £36. In the year 1797, this lease was renewed for nineteen years, at the same rent, but upon payment of a grassum of £28. In 1803 he procured a lease of the same farm for nineteen years, at the yearly rent of £30, the old lease then being unexpired; and, besides, there

was granted an obligation by the Duke to renew this last lease to the respondent annually, for the same period of nineteen years.

The action of reduction was brought by the appellant to set aside the last mentioned lease, as null and void, and as having been granted in contravention of the conditions contained in the entail (quoted in the preceding appeal), the said lease being, in fact, granted both for the whole period of the Duke's life, *and* for nineteen years after his decease, and, consequently, for a longer period than was allowed by the said entail; also that the farm was *not let at the just avail* at the time; as, instead of £30 per annum, it would, if let at the just avail at the date of the lease, have let at £130 yearly; and that, besides, the farm was let with *diminution of the rental.*

The respondent stated, in regard to the lease 1803, that no grassum was paid; and whatever question there might arise between the executors upon the Duke's powers under the entail, he, the tenant, could not be affected by that question. He had no concern with the Duke's management or mismanagement of his estate, nor was he privy to any of his contraventions, or alleged frauds. Under his lease he acquired possession, put out large sums on the faith of it, and the only question here was, Whether the real right which he possessed under a contract strictly onerous, could be reduced as not within the powers of the entail. He concluded that, as against him, the action was irrelevant.

The Lord Ordinary made avizandum to the Court with this and the other action. The Court, of this date, pronounced this interlocutor: "The Lords having advised the mutual "informations for the parties, with the writs produced, and "heard the counsel for the parties, *viva voce,* sustain the "defences, assoilzies the defender, and decern; find the de- "fender entitled to his necessary expenses, and allow an "account thereof to be given in."

Mar. 7, 1816.

Against this interlocutor the present appeal was brought to the House of Lords.

July 10, 1817.

Judgment of House of Lords in first appeal.

After hearing counsel, on Monday the 24th day of February last, upon this appeal, complaining of an interlocutor of the Lords of Session of the Second Division, of 7th, and signed the 8th of March 1816. And consideration being had yesterday and this day, of what was offered on either side in this cause, it is ordered by the Lords Spiritual

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and Temporal, in Parliament assembled, That the said cause be remitted back to the Court of Session in Scotland, to review generally the interlocutor complained of, in the said appeal, with reference to all and each of the grounds upon which the appellant has alleged that the tack to which the cause relates, ought to be reduced, in a question between the appellant and the lessee, as such, after the Court shall have first reviewed the interlocutor complained of, in the cause between the Duke of Buccleuch and Sir James Montgomery and Others, executors and trust-disponees of the late Duke of Queensberry, deceased, in pursuance of a remit to the said Court, in the said cause, of even date herewith: And it is further ordered, That the Court to which this remit is made, do require the opinion of the Judges of the other Division, in the matters and questions of law in this case, in writing; which Judges of the other Division are so to give and communicate the same: And after so reviewing the said interlocutor complained of, the said Court do, and decern in this cause as may be just.

The cause having thus returned to the Lords of Session of the Second Division, their Lordships appointed memorials to be prepared, printed and boxed, to the Judges of both Divisions of this Court, and also the Judges of the Outer House, for their opinions. And when this was done, on considering the memorials for the parties, with these opinions, the Lords of the Second Division pronounced the following interlocutor:

Feb. 5, 1818.

" The Lords having resumed consideration of the petition for " the Duke of Buccleuch, with the remit from the House of " Lords referred to, and advised the same, with the mutual " memorials for the parties, and opinions of the Judges re- " quired by the interlocutor of the 12th day of November " last, with the alteration on the opinion of Lord Cringletie, " given in by his Lordship, and heard the counsel for the " parties *viva voce;* and having reviewed generally the inter- " locutor complained of, in another appeal, in the cause be- " tween the Duke of Buccleuch and Sir James Montgomery, " and others, executors and trust-disponees of the late Duke " of Queensberry, deceased; sustain the defences, assoilzie " the defender, and decern; allow the pursuer to give in a " minute of what was stated by his counsel at the bar, with " regard to what had been mentioned in the memorial for the " defender, respecting the rental of the estate of Queensberry,

" and the defender to answer it; find the defender entitled to " his necessary expenses, and allow an account thereof to be " given in."

Against this interlocutor the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.**—1st, By the prohibitions against selling, disponing, and affecting or burdening the estate, the late Duke of Queensberry was disabled from granting leases, not let in the ordinary administration of the estate, nor for annual rents, payable to the heir substitute, having right to the lands at the time the uses and fruits of them were to be taken by the tenants; but which were granted in great part for the anticipated rents, under the name of grassums, paid to his Grace himself, who was not to have right to the estate, when the uses and fruits of it were to be so taken. Among the vast number of leases constituted in this manner, contrary to the prohibitions of the tailzie, was the lease in question, to the respondent. The respondent, in the year 1786, obtained a lease for nineteen years of this farm, for an annual rent of £30, and a grassum of £36. In the year 1797, that lease was renewed for nineteen years, at the same rent, but upon payment of a grassum of £28. It was, therefore, prohibited by the terms of the entail, and rendered void by the provisions of that deed.

2d, The late Duke of Queensberry was prohibited from granting leases of a longer duration, than either for his own life, *or* for nineteen years; but the lease in question having been constituted by an obligation to grant a lease for nineteen years, and to renew the same annually for the same space, each year of the Duke's life; and that obligation being followed by possession, was, by the law of Scotland, a lease for the Duke's life, *and* for nineteen years after his death; that is, it was, in fact, a lease for thirty-two years. It is, therefore, void by the provisions of the entail.

3d, This lease was let in diminution of the rental. For, 1. The rent reserved under it, and available to the heirs of entail, was no more than the annual rent stipulated in the preceding lease; nothing was reserved under it in consideration of that part of the return paid under the lease in name of grassum. There was, therefore, in that respect, a diminution of the rental. But, 2. It was let with diminution of the rental, because the public burdens were imposed upon the

* This is the argument in the first appeal.

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farm, not according to the rent which is payable to the appellant, but according to the computed annual rent, comprehending both the rent stipulated in the lease and the anticipated rents, which, under the name of grassum, had been received by the Duke. In particular, the lands were burdened with payment of a larger stipend to the clergyman of the parish of Penpont, than they would have been, if the apparent rent only had been drawn, and no grassum had been received by the late Duke. 4. This lease was not granted, at the least, at the just avail at the time; the rent stipulated as payable to the heirs of entail being only £30, while the actual value was £130 per annum.

Pleaded for the Respondent.—If the Duke was so expressly restrained by the entail, that he had no power to grant the lease to the respondent, the appellant has a title to challenge it on the terms of the entail, but in the question, whether the Duke had power or not, the extent of the injury to the heirs of entail is evidently quite irrelevant; and, it is absolutely of no importance at all, whether the Duke had granted many such leases, or never had granted any other lease but this one. If the appellant has any claim against the executors of the late Duke for bad management or otherwise, all these statements would be in their proper place, whether relevant or not; but this is the case of a third party, a single tenant, and it is perfectly apparent that the appellant, by pleading the case in this form, and refusing to meet the tenant himself, is striving to change the issue, and to give an effect to his statements, to which they could have no pretensions in any argument against the respondent. His object is, if possible, to bind the whole leases on the estate together, as if they had been one transaction, or one series of transactions, with the same party, and to represent the question in the same light as if the whole leases had been given to the executors gratuitously.

The leading feature of the appellant's argument is, that the taking a grassum is an alienation. He makes out this by saying, that a grassum is just a part of the rent, or an anticipation of the rent; and concludes that, as an alienation of rent, it must be held to be an alienation, or rather, as this appellant is obliged to maintain a *disposition* of a part of the entailed subject within the general prohibition to *dispone.* The respondent shall submit that a grassum is *not rent,* and that no lawyer ever said that it was rent, till the case of the March leases occurred. But the important point

to be now attended to, is, that, supposing that it were rent, the plea, however good against the executors, for obliging them to pay that rent to the heir of entail, or even as a ground for demanding a proportion of it from the tenant, would be utterly irrelevant as a ground for reducing the lease. This is a point which was expressly decided in the case of Denholm of Westshiels, to which the respondent will have occasion to refer.

Denholm v. Wilson, Jan. 16, 1761. Fac. Coll., vol. iii., p. 10; et Mor. p. 15512.

But, it is very necessary to attend to the nature of the respondent's title in the lease which he so holds. The respondent is not here claiming any right in virtue of the *personal obligation* of William, Duke of Queensberry. He is defending himself against an attempt to evict from him a *real right* constituted in the subject of the lease, as good and effectual in its nature as a direct right of property vested by infeftment. Leases were originally, in the law of Scotland, merely personal rights, and the consequence was, that the tenant might be turned out of possession before the expiry of his lease, by any singular successor acquiring the lands; but the mischiefs of this law were perceived at a very early period, and, by Statute 1449, c. 18, "It is ordained for the safetie and favour "of puir people that labouris the ground, that they and all "utheris, that hes taken or sall take landes in time to come fra "lordes and hes termes and yeires thereof, that suppose the "lordes sell or anualy that land or landes, the takers sall "remain with their tackes unto the issue of their termes "quhais handes, that ever thay landes cum to, for sikelike "maill as they took them for."

This important statute, which has been attended with so many advantages to Scotland, is explained by Lord Stair, Mr Erskine, and all the authorities, as securing the tenant, not only against the purchasers of the property, but against all singular successors whatsoever, adjudgers, heirs of entail, &c. The effect of it is to give the tenant a real right to the lands by his lease and possession, to constitute him an onerous purchaser of a real right in the subject, secure not only against the granter and his heirs, but against all other parties whatsoever.

A tenant who obtains a lease from the proprietor in the fee, is not indeed any more than any other purchaser, secure against a challenge founded on *defect of power* in his author. And an heir substitute of entail is to the extent of the restrictions affecting his predecessor, a singular successor. He may challenge the deeds of his predecessor, if he can show that

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they are acts effectually prohibited by the entail, and he may challenge a lease on such grounds. But, when the act of which he complains, is an act on which a real right has been constituted in favour of a third party contracting onerously, the question, whether that act has been effectually prohibited, or rather, whether the power of the heir of entail, as *proprietor* to do it, has been effectually taken away, is materially different from a similar question which may arise where there is no third party holding a real right, and the question is with the granter, and his representatives on his right to do, or his obligation not to do the thing objected to? This is a distinction obvious in principle, and which is expressly recognised by the Statute 1685, c. 22, under which alone any entail can be made, which will be effectual against third parties, creditors, and purchasers. In a question among heirs or between heirs, and the gratuitous donees of an heir in possession, a mere prohibitory clause in the titles of the estate, is sufficient to prevent any deeds contrary to the prohibition, and the less encumbered the entail is with clauses of irritancy and forefeiture, its effect will be the more ample, or the less strict in favour of the substitute heirs. But, on the other hand, it is quite clear, that such an entail is of no effect at all against third parties. At present, the respondent may content himself with stating the undoubted law, that unless the prohibitory clause is fortified, both with an irritant clause, declaring deeds in contravention to be null, and with a resolutive clause, declaring the right of the contravener in the whole estate to be forfeited, and unless the entail is recorded in the register of tailzies, and the whole clauses engrossed in the investiture, it cannot militate against creditors or purchasers.

But the consequence of this manifestly is, that the appellant, in challenging this lease, must found his title on the Statute 1685, and must make out that by the Act complained of, the late Duke of Queensberry forfeited his right to the whole estate under the resolutive clause, and through that *forfeiture*, the real right of the third party, the tenant, is a nullity under the irritant clause. It is apparent, therefore, that attending to the nature of the respondent's title by his lease, the question, whether the Duke of Queensberry had power to grant it effectually or not, is a question essentially different from any question concerning the personal obligations of the Duke of Queensberry, or his representatives, to the heirs of entail. The respondent does not represent the

Duke of Queensberry; he is not liable for his acts and deeds; he is not responsible for his views and intentions; he is not accountable for his disposal of any price which he may have taken for a right given. He has no concern with his general management of his estate, and his designs or his prudence in regard to the advantage of the future heirs, can have no effect whatever on the rights of the respondent. The single point in which the respondent is interested, is whether the act of granting this lease is, in *express* words, prohibited under pain of irritancy and forfeiture or not. If it is not, it is nothing to the respondent, what else the Duke of Queensberry may have done, or intended, or what obligations he or his representatives may have incurred to the heirs of entail.

After hearing counsel upon this appeal, as also upon the answer of John Hyslop, tenant in Halscar, put into the said appeal; and due consideration being had of what was offered on either side of the cause: It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled; that the said interlocutor complained of in the said appeal be, and the same is hereby reversed; and the Lords find, That the late Duke of Queensberry had not power by the deed of entail founded upon by the parties in this cause, to grant the tack in question in this cause, the same having been granted upon the surrender or renunciation of a former tack unexpired, and which former tack had been granted by the Duke at the same rent, and also for a sum or price received by him; and the said tack in question, therefore, having been granted partly in consideration of the rent reserved thereby, and partly in consideration of a price or sum as before paid to the said Duke himself, and of the renunciation of the said former tack: and find, therefore, that this tack of the 30th of December 1803, ought to be considered in this question with Hyslop, as let with diminution of the rental, and not for the just avail. And it is further 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 Appellant, *Alex. Maconochie, R. Gifford, John Bell, J. H. Mackenzie.*

For the Respondent, *Jas. Moncreiff, J. A Maconochie.*

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NOTE.—The speeches of Lord Chancellor Eldon and Lord Redesdale in disposing of the *whole* of these appeals in the Neidpath and Queensberry entails will be found reported in Bligh, vol. i., p. 340.

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THE DUKE OF ROXBURGHE v. WAUCHOPE, &c.

DUKE OF ROXBURGHE, . . . *Appellant;*

JOHN WAUCHOPE, W.S., and OTHERS, Trustees and the Legatees of the late John, Duke of Roxburghe, . . *Respondents.*

House of Lords 25th May 1820.

DEATHBED—REDUCTION.—A reduction was brought by the appellant, to set aside a certain settlement of the Duke of Roxburghe, on the head of deathbed. Held him to be barred from challenging the deathbed deed, 1804, by the previous *liege poustie* deed of 1790, which had not been expressly revoked.

John, third Duke of Roxburghe, by a *liege poustie* deed of settlement executed in 1790, conveyed his unentailed lands to his sisters, Ladies Essex and Mary Ker, as will be seen from the report of their case arising out of the same matters, vol. v., p. 559.

By this deed, he reserved full power to alter or revoke, even on deathbed.

Part of these lands had, by the previous investitures, stood destined to the person or persons who should succeed as heirs of entail to the Roxburghe estates. These were the lands of Kelso; but by this deed they were expressly conveyed to Ladies Essex and Mary Ker, whom failing, to the heirs of tailzie having right for the time to the earldom and estate of Roxburghe. This deed was followed by a trust-deed in 1803, by which he conveyed his whole unentailed heritable property, as well as his moveable, in favour of the respondents as trustees, for the purpose that they might dispose of the same, and, after paying his debts and legacies, the residue was to be "made and conveyed over or applied or employed "by the said trustees to, and in favour of such person or "persons, or for such uses and purposes as I have directed "or shall direct, by any deed executed or to be executed by "me for that effect, at any time of my life and even on "deathbed."

In March 1804, he executed a deed of instructions to the