JOHN VANS AGNEW of Sheuchan, Appellant. No. 60.

JOHN BELL, W. S. Assignee of the Earl of Stair and Others, Respondent.

Inhibition—Arrestment.—**An heir of entail having been found entitled to restitution of part of the entailed estate from purchasers; and they having brought an action against him for ameliorations, on which they executed arrestments and inhibition; and the heir having a counter action for bygone rents of a much larger amount;—Held, (reversing the judgment of the Court of Session), That the heir was entitled to have the arrestments and inhibition recalled without caution.**

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2D DIVISION.

THE circumstances from which the present question arose will be found in 1. Shaw's Reports of Appeal Cases, Nos. 50, 51. and 57.; but it may be stated generally, that the House of Lords had ordered certain lands, which had been purchased by the Earl of Stair and others, to be restored to Mr Agnew, as the heir of entail entitled to succeed to them, and their titles to be reduced.

The Court of Session accordingly applied the judgment of the House of Lords; but while the Earl of Stair and the other purchasers submitted to the decree of reduction, they maintained that they had a good defence against the removing, in respect of a claim for ameliorations. On the other hand, Agnew demanded the bygone rents; and after some procedure (during which, of consent, the lands were sequestrated, and a judicial factor appointed) the Court decerned in the removing, reserving all claims for ameliorations and bygone rents, and to Agnew his objections, and recalled the sequestration. The purchasers removed accordingly, and Agnew entered into possession.

The Earl of Stair and others then assigned their claims in trust to Mr Bell, who raised an action against Agnew for payment of these ameliorations, calculated at about L.14,000 or L.15,000, and on the depending action used inhibition and arrestment of the rents of the estates. Agnew prayed the Court to loose the arrestments, and recall the inhibition, without caution; but this the Court refused to do. Agnew then offered caution, 'under reservation of all legal remedies competent to him against the nimious and oppressive use of the diligence in question by the respondent, as well as against the judgment of the Court.' The Court, 31st May 1825, 'in respect that the petitioner (Agnew) has now offered to find caution, and that the respondent has consented that the caution shall be restricted to the sum of L. 6000 sterling, they, upon the petitioner finding sufficient caution to the said amount of L. 6000 sterling, and lodging a bond for the same

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Agnew appealed.

Appellant.—The diligence resorted to is nimious and oppressive. When examined, the charge for ameliorations dwindles into half the amount claimed, and the respondents have the security of the balance in the hands of the factor and tenants, besides other sources, and the personal responsibility of the appellant in the enjoyment of a large estate. But, at all events, the respondents are retaining the bygone rents, and it is impossible that they can do so and at the same time demand ameliorations. The effect of the judgment of the Court below is, by locking up the appellant's funds, to reduce him to beggary, after he has been able, at the expense and toil of years of litigation, to wrest from the respondents the inheritance of which he had been unlawfully despoiled. In such, or indeed under much less glaring circumstances, the Court ought to have interfered and released the diligences without caution, particularly when the chance of success in the action is hopeless.

Respondent.—The Court, by their judgment, have exactly followed the course adopted in all like cases. The respondent's constituents have a right to the ameliorations, and a consequent right to resort to such legal diligence as is necessary for their, as for any other creditor's safety. Besides, the Court do not inquire whether or not there is a probabilis causa litigandi: it is only necessary that the action be raised bona fide. The appellant's personal responsibility is of no value,—he is only proprietor of an entailed estate,—and he is at this moment disputing the respondent's rights to the bygone rents. The respondents have not been actuated by invidious motives; but large properties have been evicted from them without any fault on their part, and it is only the exercise of common prudence to take care that the little they can look for, as indemnification for the productive outlay on the estates which have passed from them, should not be lost by the interference of other creditors, or the appellant's profusion.

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* See 4. Shaw and Dunlop, No. 40.

The House of Lords ordered and adjudged, 'that the inter- July 4. 1825.
'locutor complained of, so far as it requires caution, be reversed.
'And it is farther adjudged, that the arrestments and inhibition
'be recalled without caution.'

LORD GIFFORD.—My Lords, There is a case which waits for your Lordships' determination,—of John Vans Agnew, Esq. appellant, and John Bell, writer to the signet, trust-assignee of the trustees of John Earl of Stair, and others, respondent. My Lords, in the interlocutor of the Lords of Session, they find,—'The Lords having advised this 'petition, with the answers thereto, mutual minutes put in for the 'parties, in respect that the petitioner has now offered to find caution, 'and that the respondent has consented that the said caution shall be 'restricted to the sum of L. 6000 sterling, they, upon the petitioner 'finding sufficient caution to the said amount of L. 6000 sterling, and 'lodging a bond for the same in the clerk's hands, recall the arrest-'ments and inhibition mentioned in the petition, and ordain this in-'terlocutor recalling the inhibition to be marked on the margin of 'the record, and decern.' Then the question, my Lords, is, whether the Court of Session ought not to have exercised that discretion, which they were at liberty to do, without the security, which I have stated to your Lordships, being given to them?

My Lords,—This proceeding has arisen out of a case which was before your Lordships in 1822; and your Lordships, by your judgment then, determined, with reference to certain lands of Barnbarroch or Sheuchan, the estate in question, 'that all the proceedings in the 'said Court in the said action of declarator and sale, so far as they 'affected the interests of the said minors in the said estates respec-'tively under the deed of the entail in the said Act, and the said pro-'ceedings mentioned, were proceedings without authority for that 'purpose required by the provisions in the said Act of Parliament, 'and were therefore null and void as against the appellant, and the 'several other minor heirs of entail; and particularly, that the sales 'made by the said Court, in pursuance of the several interlocutors 'pronounced by the said Court in the said action of declarator and 'sale, were null and void as against the appellant and the said several 'other minor heirs of entail.' Originally your Lordships determined, that he was entitled, 'on behalf of himself and the said several minor 'heirs of entail, to have the sales made under the several interlocutors 'aforesaid reduced, and to have the lands restored to him, along with 'the rents from the period of his accession to the entailed estates, 'subject to such proceedings as may be had in an action to be insti-'tuted in the said Court, under the authority of the said Act, for the 'purpose of inquiring into and ascertaining the extent and amount of 'the debts owing by the said John Vans Agnew at the time of his 'death.' That part of your Lordships' judgment which related to the

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My Lords,—Upon this case going back to the Court of Session, proceedings were had on the part of the persons who had purchased the lands, for the purpose of resisting the giving the appellant possession of the estate, on the ground that they were entitled to retain possession of the lands until they were compensated for certain improvements or meliorations made on that land. In consequence of a claim on their part, proceedings were had in the Court of Session, which went on till the autumn of last year, and the Court of Session finally adjudged, that the claim of meliorations was no answer to the giving up of the property to him to whom the right had been adjudged by your Lordships. But, my Lords, an action was shortly after instituted by the present respondent, as the trust-assignee of the trustees of John Earl of Stair, and others, on the ground of claims for meliorations for not less, I think, than L.14,000. That action was raised by him asking of the Court of Session to make the present appellant personally answerable for the amount of those meliorations, although some part of those meliorations, it was admitted, had taken place prior to the time at which he was entitled to possession.

In consequence of that action having been preferred, an inhibition and other proceedings took place, and the present appellant thereupon applied to the Court of Session, upon the ground that, under the circumstances of the case, the Court of Session ought not to impose upon him the necessity of paying for those meliorations which had taken place upon the estate. My Lords, I would here state to your Lordships, that a minute was given in for John Vans Agnew in his application for recall of arrestments and inhibition against the respondent, and which was to this effect:—'That the Court having, in this case, been 'pleased to find that the diligences of arrestment and inhibition used 'by the respondent ought to be recalled in hoc statu with caution, 'and the respondent refusing to consent to the recall without caution 'to the extent of L.6000, the petitioner, considering that the whole 'rents are locked up, is advised to offer caution to that extent, or any 'smaller sum which your Lordships may think proper, under reserva-'tion of all legal remedies competent to him against the nimious and 'oppressive use of the diligences in question by the respondent, as well 'as against the judgment of the Court.' My Lords, upon looking into the nature of this consent on the part of Mr Agnew, it appears to have been made under an express protest by Mr Agnew as to his right of bringing an appeal before your Lordships; so that I think you will conceive he has not by that consent precluded himself from contesting the judgment of the Court of Session. My Lords, indepen-

dently of the doubt that may arise upon that judgment, as to which I wish to guard myself by stating, that I do not intend to give any opinion upon it, the question before your Lordships being, as I conceive, whether, under all the circumstances of the case, the Court below would not have better exercised their discretion by removing the arrestments and inhibition? July 4. 1825.

My Lords,—It is admitted, though I do not mean to say conclusively, but in the proceedings before your Lordships' House a statement was made, that the rents claimed would amount to a sum of nearly L. 60,000; but I believe I may take it, from what has subsequently appeared, at L. 40,000, which has been received by the purchasers since the time Mr Agnew and his ancestors have become entitled to the estate. My Lords, these rents have been claimed in the manner which I have stated, and the purchasers seek to charge Mr Vans Agnew personally for the meliorations—they seek to charge him personally for interest, overcharges, &c. Now, my Lords, under these circumstances, I would, without prejudice to the question that may hereafter arise, say, that this is a case almost of the first impression, an action having been brought for meliorations; and it may be a question, whether in a proceeding for the meliorations, where the parties are seeking to retain rents, on the grounds upon which that action is attempted to be founded, it can be sustained? but, at all events, it is attended with circumstances that shew that it is an action which deserves great consideration in the Court below, both as to its general principle, and—especially considering the particular circumstances of the case—considering the amount of the rents, it is an important question, whether they have or have not a right to retain those rents, and claim meliorations also? Under all these circumstances, I must confess it does appear to me, that the judgment of the Court of Session ought to be reversed. I should propose, therefore, to your Lordships to reverse the interlocutor, so far as it relates to the appellant being called upon to find caution.

My Lords,—I have already stated that this case is one of some novelty; but I have the satisfaction to know, that certain noble and learned Lords, who are in the habit of advising your Lordships in matters of this kind, and with whom I have conferred, agree with me in the opinion I have expressed. I mention this, my Lords, in consequence of the peculiarity of the proceedings, and in justification to myself, under the circumstances in which I am placed, for offering the opinion I have done for your Lordships' adoption.

Lord Redesdale.—My Lords, It is admitted, that the Court of Session has a right, in a case like the present, to exercise its discretion. Now it does seem to me, that if ever there was a case in which that discretion ought to have been exercised in the manner contended for by the appellant in this case, this is that case. My Lords, the object of the present proceeding is upon a sup-

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position that the party who is suing cannot obtain the benefit of his suit; to effect which, proceedings have been taken so as to stop the payment of the rents that are due by the purchasers, or by the tenants from whom the rents are so due, and preventing the appellant receiving that which he is justly entitled to demand; or in other words, preventing him receiving that benefit which he considers himself entitled to by the suit which he had instituted. Now, in this case, my Lords, the question whether the appellant is entitled to the bygone rents of the land for the long period of fifteen or sixteen years, is a question now depending in the Court of Session; and I confess, that question being so depending, it does appear to me a most extraordinary thing, that by an assignment of what would be a set-off against that question, or a distinct substantive demand against the person who has obtained the judgment of the House upon this part of the case, especially in the manner in which this assignment is endeavoured to be made, a conclusion should have been arrived at similar to that under your Lordships' consideration. It may be insisted, that if there had not been a bona fide possession, there could be no doubt that the claimant had a right to recover the bygone rents, as well as the estate itself; and if, on the other hand, there had been a bona fide possession, the question would be, when did that bona fide possession cease—that possession which has now ceased,—the Court having adjudged, with respect to those claims for meliorations, that the party who makes that claim had no right to detention. If it had been a distinct substantive claim against the party, the claimant would have had a right of detention; therefore it strikes me, that the judgment which the Court has pronounced, that there was no right of detention—the Court having decided that, it becomes a question of a very peculiar description, which can only be entered into upon a discussion of the whole subject. With respect to the bygone rents, if the appellant in this case is entitled to bygone rents, then it becomes a question of set-off; but with respect to which, it may be different with regard to every one of the parties; and their rights being necessarily so different, how they can be consolidated in one action is a question which I really find great difficulty in answering; but that is a question to be decided when the case shall come to a hearing upon this action for the meliorations.

My Lords,—With reference to the assertion, that the receipts of rents and profits in the hands of a bona fide possessor ought to go in discharge of meliorations, my Lord Bankton, who is high authority, has affirmed, that there is nothing to the contrary to be found in the law of Scotland, and no decision to the contrary has been cited: there are cases cited in which it has been determined, that, to satisfy an adjudication, the bygone profits by a bona fide possessor shall be so applied, and which seem to me in principle and substance to be the very same case. Reference has been made to the civil law: if your Lordships will look into any writer on the civil law, their authority is clear and precise,

that the rents in the hands of a bona fide possessor must be so applied, and in the manner in which the fruits that have been received have been consumed, as in these meliorations: if there were meliorations beyond the bygone rents, that might be another question, supposing the question did not arise with respect to personal obligation with reference to the person who is the appellant in this particular suit. My Lords, it seems to me therefore, that, independently of that consideration, the Court of Session was very much called upon to exercise its discretion upon this subject, and to have discharged the arrestments. But, my Lords, when it is considered with a view to the personal liability of the present appellant, it does seem to me to be a most important question; because what has been done amounts to this, that if Mr Vans Agnew had died within a few months after he had obtained your Lordships' decision in his favour, he benefiting nothing by that decision, the decision being of no value whatever to him, he would have been personally answerable for meliorations to the amount of L.10,000 or L.12,000; because, by his death, the interest in the estate would have ceased, and he would have had no enjoyment whatever. Your Lordships know, with respect to the question that has been raised, what has been the consequence with regard to the property of the late Duke of Buccleuch? The late Duke of Buccleuch impeached the validity of certain leases. He did not live to the very day when the judgment of your Lordships' House was obtained in his favour. He died shortly before the judgment was pronounced, and which judgment was afterwards given in favour of his son. The question of bygone rents was there agitated, and it was said, that the lessees were bona fide possessors; and the representatives of the late Duke, though entitled in law to a reduction under the deed, the judgment in that case would have become a nullity, if there had been meliorations to a considerable extent, and if the representative of the late Duke, after your Lordships' decision, had been compelled to have become personally answerable for meliorations. July 4. 1825.

Now, my Lords, I think the claim made for these meliorations by an assignee taking an assignment of different persons, is a question so extremely difficult, that if there ever was a case in which the Court assumed a discretion with respect to the claim now made, this was one in which it ought to have been exercised. My Lords, the amount of the rents during the time are not precisely ascertained, but they have been represented in the course of these proceedings, and the fact is not denied, that they amount to L.60,000, the rents received by the persons who have assigned this demand for meliorations, which was L.10,000; that the rents they have received during the time they have been in the perception of them, and therefore enjoying all the benefit of the estate during that time, amount to L.40,000,—that is, very nearly four times the amount of what they demand for meliorations. Under these circumstances, therefore, it does appear to me, as the Court had a discretion, it was a proper case for the Court of Session

July 4. 1825. to have exercised its discretion, especially when it is considered what is the probable effect, in a case of this description, by the Court coming to the conclusion they have done, namely, suspending the whole income to which this party is entitled, and thereby, in effect, might prevent this person prosecuting his demand, for want of the means of doing so. Under these circumstances it does occur to me, that we ought to reverse the judgment of the Court below, without caution, there being most probably a large sum in the hands of the persons themselves to meet any demand which can possibly be made against them.

I see that the parties go before the time that Mr Vans Agnew was entitled to possession of the estate. During that time, it seems to me, that person can no more claim these meliorations than Mr Vans Agnew's father could have claimed them. Unquestionably, if they had proceeded regularly under the statute, the case might have been different; but not having proceeded under the statute, he can stand in no better situation than Mr Vans Agnew's father himself could have stood. For these reasons, my Lords, perfectly concurring in the opinion that the noble and learned Lord who preceded me has expressed,—considering that this was a case in which the Court of Session ought to have exercised its discretion, I think your Lordships ought to discharge the arrestment without caution.

Appellant's Authorities.—2. Stair, 1. 22.; 2. Ersk. 1. 25.; Morr. Dict. 7. Bona et Mala Fides, p. 1770. et seq.; 1. Bank. 8. 25.; Hamilton, March 4. 1823, (2. Shaw and Dunlop, No. 241, 242. and ante, No. 43.)

Respondent's Authorities.—Duke of Gordon *v.* Innes Binning, Jan. 18. 1676, (13,401.); Rutherford, Feb. 28. 1782, (13,422.); Creditors of Brough, Nov. 26. 1793, (2585.); 1. Stair, 8. 6.; 3. Ersk. 1. 2.; 4. Stair, 50. 21.; 2. Ersk. 11. 3.; 1. Bank. 7. 134.; 3. Stair, 1. 33.; 3. Ersk. 6. 12.; 3. Bank. 1. 37.; Earl of Stair, Dec. 21. 1822, (2. Shaw and Dunlop, Nos. 105. and 106.)

J. FRASER—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 61.

ALEXANDER GRANT, Solicitor in London, Appellant.
Brougham—Rose.

JAMES PEDIE, W. S. Respondent.—*Adam—Wilson.*

Jurisdiction—Forum Originis.—The Court of Session having sustained their jurisdiction against a Scotchman domiciled in England ratione originis,—the House of Lords reversed the judgment, and remitted to inquire on what other grounds, appearing on the pleadings, jurisdiction could be sustained, and having regard to a suit depending in Chancery when the summons in Scotland was raised.