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unjust to allow the tenant to be affected by what is in substance a sale, merely because the deed conveying away receives the name of a feu-disposition, and there is an annual though illusory reddendo. Besides, although a building-feu may, a sale, in whatever form it may be effected, does not necessarily imply a removing of the tenant. The appellants offered to establish that there was such a practice of granting feus on the Brisbane estate as must have prepared the tenant for the event which has happened. In this offer the appellants failed. The practice merely proved to be what was the common practice in other parts of Scotland, and of course must receive a like interpretation as there is given. Besides, the lease is now expired, and the respondent has removed.

The House of Lords ordered and adjudged, 'that the said interlocutors of the Lords of Session in Scotland, of the 15th January and 3d July 1818, the 5th and 11th February 1820, and the 27th February and 24th November 1821, complained of, be reversed. And it is further ordered and adjudged, that the said interlocutor of the Lord Ordinary of the 23d May 1817, so far as complained of, be affirmed. And it is further ordered, that the cause be remitted back to the Court of Session, to do therein as shall be consistent with this judgment, and as shall be just.'

Appellants' Authorities.—Graham against Rutherford, February 1809, (not reported); Hunter against Craig, 1812, (not reported).

Respondent's Authorities.—Wellwood, 1777, (not reported); Whitton against Duncan, 13th May 1795, (Bell).

J. RICHARDSON—BUTT,—Solicitors.

No. 11. JOHN WILLIAM HENRY, EARL of STAIR, Appellant.

JOHN EARL of STAIR'S Trustees, Respondents.

Trust—Clause.—A party having conveyed to trustees his whole funds, interest and proceeds thereof, to be vested in lands, which were to be annexed to his entailed estate, and bequeathed legacies, of which one was not payable for six months after his death; and his heir of tailzie having claimed the interest of the funds from and after the day on which the truster died;—Held, (affirming the judgment of the Court of Session), That he was not entitled to the interest from that period.

March 29. 1825.

1ST DIVISION. Lord Alloway.

ON the 1st of June 1821, John Earl of Stair died without heirs of his body, having made an entail of his estates in Scotland,

by which he called the appellant as the first heir of entail. He left a trust-disposition of his whole estates, real and personal, excepting his entailed lands, in favour of the respondents, as trustees, for various purposes; and in particular, after paying his debts and legacies, 'to lay out the residue of the trust-funds, and 'interest and proceeds thereof, in purchasing lands in the shires of 'Wigton or Ayr, or stewartry of Kirkcudbright, and at the sight 'and with the advice and consent of the Lord President of the 'Court of Session, and of his Majesty's Advocate for Scotland 'for the time being, to annex the same to my entailed estate, by 'taking the rights and securities of the lands so to be purchased 'to the same heirs of tailzie, and under the same conditions, pro-'visions, clauses irritant and resolutive, contained in the disposi-'tion and tailzie of my lands of Culquhasen and others, executed 'by me.' He thereafter made a testament bequeathing various legacies, of which one was not to be paid till six months after his death, and declaring that the residue of his effects were to be applied to the purposes of the trust-deed. March 29. 1825.

In November 1821 the appellant brought an action before the Court of Session against the respondents, in which he set forth, that 'whereas the said John last Earl of Stair died upon the '1st day of June last without heirs of his body, and the said 'pursuer as his heir and executor has right to the whole interest, 'dividends, and proceeds of the real and personal estate left by 'the said Earl, from and after the day of his death,' and 'there-'fore the said Sir John Dalrymple Hamilton Macgill, Bart., 'Robert Dalrymple Horne Elphinstone, Anthony Goodeve, 'and John Smith, ought and should be decerned and ordained, 'by decree of the Lords of our Council and Session, to hold just 'count and reckoning with the pursuer for the whole interest, 'dividends, and proceeds of the real and personal estate of the 'said John Earl of Stair, that has arisen from and since the said '1st day of June last, or that may arise thereon, and to make 'payment to the pursuer of the balance that may arise upon such 'accounting; or otherwise to make payment to the pursuer of 'the sum of L.10,000 sterling annually, aye and until the ter-'mination of the foresaid trust, and the said defenders are dis-'charged of their actings and proceedings under the same.'

To this action defences were returned on the part of the trustees, that 'it was understood to be Lord Stair's intention, and 'that intention the defenders conceive is clearly and legally de-'clared, that they should lay out the residue of the trust-funds, 'and whatever interest should arise from the trust-funds while

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'under their management, in the purchase of lands; and they 'submit to the Court, that the deed, according to the principles 'of the law of Scotland, cannot admit of any other interpretation. 'They have already purchased some land, which was conve- 'niently situated for the estate; and they intend to make other 'purchases without any unnecessary delay, some of which are at 'present under consideration.' Thereafter the appellant amended his summons, by deleting the words 'heir and executor,' and substituting these,—'is nearest lawful heir of tailzie and pro- 'vision served and retoured to the said Earl, conform to retour 'of his special service expede before the Sheriff-depute of Edin- 'burgh, dated 15th September 1821, by which service the pur- 'suer has right to the said lands of Culquhasen and others, and 'procuratory of resignation contained in the deed of tailzie 'thereof, and has thereupon obtained a charter of resignation of 'the said lands of Culquhasen from himself as superior of the 'same, bearing date the 19th day of November 1821, and as 'such has right under the said trust-deed.' Lord Alloway, after hearing parties, pronounced this interlocutor:—'Finds, that by 'the trust-deed in question, executed by John Earl of Stair, his 'trustees the defenders are directed, "after my debts and lega- 'cies are all paid, and a sum is set apart for payment of the an- 'nuities, or the same are otherwise well secured, I appoint my 'said trustees, or their foresaids, to lay out the residue of the 'trust-funds, and interest and proceeds thereof, in purchasing 'lands in the shires of Wigton or Ayr, or stewartry of Kirk- 'cudbright; and, at the sight and with the advice and consent 'of the Lord President of the Court of Session, and of his Ma- 'jesty's Advocate for Scotland for the time being, to annex the 'same to my entailed estate, by taking the rights and securities 'of the lands so to be purchased to the same heirs of tailzie, and 'under the same conditions, clauses irritant and resolutive, con- 'tained in the disposition and tailzie of my lands of Culquhasen:" 'Finds, that the pursuer is heir of entail, served and retoured to 'John Earl of Stair, conform to retour of his special service, by 'which he has right to the said lands of Culquhasen and others, 'and the procuratory contained in the entail thereof, and upon 'which he has obtained a charter of resignation from the superior: 'Finds, that it is only in this character of heir of entail that he 'has any claim under the trust-deed executed by the late Earl, 'and that the trustees are bound to convey to him merely in that 'character the lands purchased by them with the residue of the 'trust-funds: Finds, that John Earl of Stair died upon the 1st

'June last, and that no delay or tardiness has been pointed out 'upon the part of the trustees in the execution of their trust: 'Finds, therefore, that in hoc statu there is no claim upon the 'part of the pursuer for any interest that may have arisen upon 'the funds of the late Earl, from the time of his death upon the '1st June last; reserving to the pursuer to be heard in case any 'improper or unnecessary delay take place, whether he may not 'then be entitled to claim the interest of the residue of the funds 'not vested in land, as a surrogatum for the lands so directed 'to be purchased and entailed upon him and the other heirs; 'and to the defenders their defences as accords.' On advising a representation, his Lordship reported the case to the Court; and their Lordships, on advising informations on the 12th of February 1823,* sustained the defences and assoilzied the respondents. Lord Stair then appealed, but the House of Lords 'ordered and adjudged, that the appeal be dismissed, and the 'interlocutors complained of affirmed.' † March 29. 1825.

LORD GIFFORD.—My Lords, In a case in which the Earl of Stair is appellant, and Sir John Dalrymple Hamilton Macgill of Cousland, Baronet, and others, are respondents, it appears that the late Earl of Stair, being possessed of a considerable estate in Scotland, under an entail, and being desirous of increasing that estate, by a trust-deed and settlement executed by him, December 1815, gave, granted, and disponed, 'to and in favour of Sir John Dalrymple Hamilton Macgill,' and the other respondents herein, or such of them as should happen to survive him the said John Earl of Stair, and accept of the trust, and to the survivors or survivor of them, and to the assignees of the trustees, all and sundry lands and heritages (other than, and excepting, those contained in any deed of entail executed by him); and also, all and sundry debts and sums of money, heritable and moveable, owing to him in England, or in Scotland, or elsewhere, in rents of lands, goods, gear, and moveable effects whatever, then pertaining and belonging to him, or that should pertain or belong to him at his death; with all writs relative to the same, (excepting therefrom the furniture in his house at Culhorn); and that in trust, for certain uses and purposes therein mentioned; viz. for the payment of all debts that should be resting and owing by him at his decease, and his funeral charges and expenses; and for payment of an annuity of L.50 sterling to Margaret Ferguson, daughter of the deceased James Ferguson of Craigdarroch, Esq.; and of another annuity of L.80 sterling to Jean Coilly, his late servant, and other several

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* 2. Shaw and Dunlop, No. 187.

† See Reports of a subsequent case between the same parties, Vol. II. p. 414. (where the authorities will be found), and p. 614.; and 5. Shaw and Dunlop, 248.

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legacies; and then he directed, by this instrument, that his trustees, and their foresaids, shall lay out the residue of the trust-funds, and interest and proceeds thereof, in purchasing lands in the shires of Wigton or Ayr, or stewartry of Kirkcudbright, and at the sight, and with the advice and consent, of the Lord President of the Court of Session, and of his Majesty's Advocate for Scotland for the time being, to annex the same to his entailed estate, by taking the rights and securities of the lands so to be purchased to the same heirs of tailzie, and under the same conditions, provisions, clauses irritant and resolutive, contained in the disposition and tailzie of his lands of Culquhasen and others executed by him; and his Lordship appoints his said trustees, and their foresaids, to expede charters and infeftments thereon in favour of the heirs of tailzie, and under the conditions aforesaid, and to get the dispositions thereof recorded in the Register of Tailzies. Then, for the more regular management of the trust, he authorized and empowered the trustees to appoint cashiers and factors under them, and to give salaries to each of them, and such gratifications to any other persons that might be employed by them in relation to the premises, as they should think fit; and for the encouragement of the trustees to accept of the trust committed to them, he declared them not to be liable for omissions, or in solidum for one another, but each to be liable only for his own actual intromissions; and he declared that they were to be paid out of the trust-estate all expenses disbursed by them, or any of them, in relation to the trust, and for which payment the account and receipt by the trustee disburser should be a sufficient voucher to the trustees, or their factors or cashiers; and he thereby nominated and appointed the trustees, and their foresaids, in trust, for the uses and purposes foresaid, to be his sole executors, universal legators and intromitters.

My Lords,—After the execution of this trust-deed, the Earl of Stair executed some other instruments, by which he directed legacies to be paid to the persons named in those instruments; and in the year 1819 he executed an English will, by which he gave and bequeathed L.3000 to the Right Honourable Hugh Elliot, Governor of Madras, to be paid within six months after his death; another legacy to the Earl of Lauderdale; and then, as to all the rest, residue, and remainder of his personal estate in England, which should not consist of real or government securities, he directed his executors to convert the same into money, and, after payment of his just debts, to invest such money in government securities; and then he gave and bequeathed all such stock, together with all other stocks, funds, and securities, of which he might be possessed at the time of his death, to such uses, and for such purposes, as his Lordship had in and by a certain deed and writing, prepared according to the Scots form, executed by him, and bearing date the 18th day of December 1815, which is the instrument I first stated to your Lordships, declared of and concerning his personal estate: and as to all estates which at the time of his death should be vested in him

for any trusts whatever, or by way of mortgage, he thereby gave, devised, and bequeathed the same unto the same trustees, according to the nature and quality thereof, upon the trusts, and subject to the equity of redemption, which, at the time of his death, should be subsisting, or capable of taking effect therein; and he also, by the same document annexed to that instrument, gave other legacies. March 29: 1825.

My Lord Stair died about June 1821, and in the following month of November an action of count and reckoning was raised by the present Earl of Stair, claiming, as heir of entail, an account from the trustees of the proceeds of Lord Stair's property, and claiming to be entitled to the interest and dividends thereof from the time of Lord Stair's death. I say, my Lords, he claimed it in the character of heir of entail;—he certainly did not do so by his first summons; but by the subsequent summons he so claimed it.

It was admitted at your Lordships' Bar, that the question raised in this case was not one which had occurred in any Scotch Court, on which there had been any decision:—The question raised being of this nature,—Though the property bequeathed by Lord Stair was, as I have stated to your Lordships, to be converted into land, and that land to be settled according to the entail of his estate of Culquhasen, and, therefore, not to be enjoyed in that shape by the parties to possess this property until so converted; it was contended on the part of Lord Stair, that it was not necessary for him to wait till that had taken place, but that being entitled as next heir of entail, he was entitled to the interest of this property before it was laid out in land. That question appeared to be untouched by any case in the Scotch Courts, and therefore reference was made to cases in the English Courts; and particularly to a case before the present Lord Chancellor, the case of Sitwell *v.* Bernard, in which it was contended, that, by analogy to that and the other decisions, my Lord Stair was entitled to the interest from the death of the late Earl of Stair. My Lords, it is true that this is purely a Scotch case; but, as it depended upon the general principles of equity, it was thought that recourse might be had to those decisions which have taken place in this country, proceeding on the general principles of equity. But, my Lords, unfortunately the analogy which my Lord Stair attempts to draw from those cases, does not bear out the proposition for which he contends; for, according to those cases, particularly that of Sitwell *v.* Bernard, the courts of equity in this country have proceeded upon this principle, that though no particular period has been limited by the testator or the granter within which a conversion should be made, and although it may appear upon the face of the will, that, until that conversion, the interest and proceeds of the property should be applied as a principal fund in the purchase of land; yet, with a view to the general interest to be benefitted by the will or the instrument, as a rule of convenience the Courts here have said, that they will take the period of a twelvemonth after the death of the testator, as a reasonable period within which the trustees

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or executors may have been enabled to collect the property; and that, therefore, at the end of that twelvemonth, though the land may not have been actually purchased, they will consider it for the purposes of the will as invested, so as to give the benefit to those for whom the land was to be so purchased. In this case, my Lord Stair, though he has professed to proceed on these English cases, instead of waiting even to that period which, according to the English cases, is the proper period at which the beneficial interest of the party under the will is to commence, has raised his action within five or six months after the death of the late Lord Stair, contending, by this action, that he is entitled to the interest on this residue, not from any particular period after the death of the late Lord Stair, but from the very moment of his death. It is a little singular, my Lords, that he so proceeded, because I observe one of the instruments under which he claims title is the English will, and by that will one of the legacies is not to be paid till six months after his death; and if that is considered as an English will, the other legacies would not be payable till twelve months after the death of the testator. It is difficult, therefore, supposing that the analogy is to hold in this case of these English decisions, how Lord Stair can, on the principles of these decisions, contend that he is entitled to this from the death of the testator. No one can look into this instrument, without seeing that my Lord Stair contemplated that some period must elapse before this money was converted into land; for he directs that it shall be laid out, not in the first instance in land, but in government securities, and that the produce of these government securities shall afterwards be applied in the purchase of land. I think, looking at the whole of these instruments, no one can doubt that the late Lord Stair contemplated that this could not be immediately converted into land, so as to give an immediate benefit to his first tenant in tail.

But then it has been said at your Lordships' Bar, that although the action in this case does claim the property from the time of the death of the late Lord Stair, your Lordships might, under these circumstances, prospectively declare from what period he shall be entitled to the interest in this residue; and, my Lords, I have, in consequence of that view being presented, considered very attentively whether that can be done; but I do not see how your Lordships can, in this state of the case, be called upon so prospectively to decide. I observe by the defences, the respondents say, that, at that period, they had laid out only a part of this in the land. Your Lordships are in ignorance what may have been done in the remaining part of that year, which, according to the English cases, was to be allowed to those trustees for realizing the property, and laying it out in land. Your Lordships have no case before you on which you would decide that question, even if you could with propriety be called upon to decide it.

But I must confess to your Lordships, that this is a most important

question in the law of Scotland, Whether Lord Stair is now in a situation to call upon the Court of Session,—or whether he was, at the end of twelve months after the death of Lord Stair, entitled to call upon the Court of Session? I think that that question should be well considered in the Courts of Scotland, before your Lordships are called upon to pronounce a decision, which, it is admitted on all hands, would be a new decision in the law of Scotland; and whenever that question shall come before the Court of Session, I think it will be well deserving the consideration of the Court of Session, whether they may not think it right to adopt some such rule as has been adopted in this country, with a view to the general convenience of all parties having interests in such a disposition as this; because, looking attentively at the very elaborate and most able judgment of the Lord Chancellor in that case of Sitwell *v.* Bernard, it appears that the Courts in this country have applied that rule to all cases, seeing the difficulty of applying a rule to each particular case, to determine whether the trustees have been guilty of negligence in the disposition of the property. The difficulties of deciding in every particular instance have been found to be such, that the Court have felt it to be necessary, if I may use the expression, to cut the knot,—to lay down a general principle applicable to all cases,—thinking it more convenient so to do, than to enter into the circumstances of each case, and to determine each upon its circumstances. My Lords, that is a question which deserves the consideration of the Court below, whenever it is properly raised; but, in this case, looking to the form of the summons, which looks to the death of the testator, and the action brought at a period which no principle established by the English cases can justify, your Lordships cannot, I think, in this case, be called upon to decide that case hypothetically. If the question arises in this, or any similar case, it is most fitting that it should receive all the consideration it can receive in the Courts of Scotland; who may, for reasons which I may not be at present aware of, think that, though it may be convenient to lay down a general rule, the rule laid down in the English Courts cannot apply. I think, therefore, that your Lordships, by affirming the decision of the Court of Session, will not preclude Lord Stair from raising that question, which I will not now enter into, not knowing whether the trustees have yet laid out the whole of this residue or not. If Lord Stair shall be advised to bring another action, raising the question as to the period of twelve months, or any other period farther than that he has already made, that is, five months after the death of the testator, that question will be left quite untouched by your Lordships' affirmance of this interlocutor.

After the best consideration I have been able to give to this case, I can offer no other advice to your Lordships, than that the interlocutor of the Court of Session shall be affirmed; which sustains the defences for the trustees, assoilzies the defenders from all the conclusions of the action against them, and decerns. The judgment of your

March 29. 1825. Lordships will be applied to the state of the cause at that time; and therefore, by affirming this decision, your Lordships will not preclude Lord Stair from raising any other question. I would, therefore, humbly propose to your Lordships to affirm the interlocutor pronounced by the Court of Session.

No. 12. MARY and ELIZABETH TURNBULLS, Appellants.—*Abercromby:* JOHN TAWSE, W. S. surviving Trustee of Mrs ELIZABETH ANNE HAY or TURNBULL, Respondent.

Trust—Fee or Spes Successionis.—A mother who was vested in the fee of certain subjects, having conveyed them to trustees for the purpose, inter alia, of paying a specific sum of debt, an annuity to herself, and conveying the free residue to her children nominatim, on which infeftment followed; and having thereafter executed a supplementary trust-deed, authorizing the trustees to dispose of the subjects for a larger debt than that specified in the first deed;—Held, (reversing the judgment of the Court of Session, and affirming that of the Lord Ordinary), That she was not entitled to execute the second deed, and that her children were entitled to have it reduced.

April 15. 1825.

2D DIVISION. Lord Cringletie.

THE late Colin Campbell bequeathed a legacy of L. 500 to his niece, Mrs Hay, wife of James Hay, exclusive of his jus mariti, for behoof of herself and children. With this money Mrs Hay purchased certain tenements in Edinburgh, the titles of which she took to herself in liferent and her children in fee. She had an only daughter, Elizabeth Anne, who married John Turnbull, merchant in Edinburgh; and on occasion of their marriage, Mrs Hay, on the 3d of August 1773, granted a disposition of the above subjects ‘ to and in favour of myself in liferent, during all the ‘ days of my lifetime, for my liferent use allenarly, exclusive of ‘ the said James Hay, my husband, his jus mariti, and unaffect- ‘ able by his debts and deeds, and to Elizabeth Anne Hay, my ‘ daughter, and her heirs and assignees whatsoever, in fee, herit- ‘ ably and irredeemably, all and whole,’ &c. On the same day a contract of marriage was executed between Mrs Turnbull and her husband, by which, after certain provisions had been made in her favour, Mrs Turnbull disponed the subjects ‘ to and in fa- ‘ vour of herself and the said John Turnbull, her future husband, ‘ in liferent, for the liferent use of the longest liver of them two, ‘ and to the child or children of the marriage in fee; whom fail- ‘ ing, to the heirs and assignees of the said Elizabeth Anne Hay, ‘ all and whole, &c.; but providing and declaring always, that ‘ the rents, mails, and duties thereof, shall neither be subject to ‘ the said John Turnbull's jus mariti, nor diligence, nor affectable