[*22nd June*, 1847.]

THE MOST NOBLE THE MARQUIS OF TWEEDDALE and his COMMISSIONERS, *Appellants*.

DR. JOHN MURRAY and Others, *Respondents*.

Tack.—Lease.—Where the covenant by the tenant for removal from a farm under a liferent lease fixes the removal at a period subsequent to the death of the tenant for life, that does not *per se* entitle the representative of the tenant to cultivate the farm during the period between the death and the term for removal, in the absence of anything else to give a title of possession after the death of the tenant for life.

ON the 27th of September, 1759, the Marquis of Tweeddale let a farm to James Murray, "secluding all assignees of whatsoever kind, and that for all the years and space of three nineteen years, and lifetime of the said James Murray; and in case of the death of the said James Murray before the expiration of the third nineteen years, for the lifetime of his heir who shall be in possession at the end of the said third nineteen years, his entry thereto being hereby declared to have been and begun at the term of Whitsunday last, notwithstanding the date hereof, and from thenceforth to be peaceably possessed, laboured, and manured by the said James Murray or his heirs, secluding assignees, during the haill time and space above mentioned."

By a subsequent clause in the lease, the tenant, after binding himself to pay the rent, keep the premises in repair, and grind his corn at a particular mill, further bound himself, his heirs, executors, and successors, "to maintain and uphold the haill houses belonging to the said roum and lands during this tack, and to leave the same in a good and habitable condition at

"the expiration thereof;" and to pay the rent of the lands at the terms of Candlemas and Lammas in each year, beginning the first payment at Candlemas 1760, and "to flit and remove "themselves, cottars, servants, and subtenants the Whitsun- "day next and immediately after the expiration of their tacks, "without any warning or process of removing to be used to "that effect."

The original tenant possessed the lands during his life, and was succeeded by his son, who died on the 8th of March, 1845. After his death the Respondents, his representatives, were proceeding to plough up and sow parts of the farm, as if the lease were still continuing, when the Appellants presented a note of suspension, praying that they might be interdicted from so doing.

The Lord Ordinary (*Ivory*) granted the interdict asked; but the Court, upon a reclaiming note, altered the Lord Ordinary's interlocutor, and recalled the interdict.

The Appeal was against the Interlocutor of the Court.

Mr. Turner and *Mr. Anderson* for the Appellants.—The rights of the tenant under the lease are to be looked for in the granting clause; there the lands are let for the life of the heir in possession at the expiry of the third term of nineteen years. Upon the tenant for life's death all title is at an end, and there is nothing which in that clause gives any right of possession to his *representative.* There is no demise to him of any kind under which he can pretend to be a continuing tenant from the time of the tenant's death. From that time, whatever may be his right to continue in possession for the purpose of removing his effects, he is a casual possessor, without any better title to the use of the land than an entire stranger, and might be summarily removed.

If there is nothing in the clause of demise which supports the Respondents' claim, they cannot derive any aid from the terms in which the obligations undertaken by the tenant are

expressed. These are in favour of the landlord and against the tenant, and cannot enlarge the terms of the demise, Strickland *v.* Maxwell, 2 *Cro. & Mees.*, 539; Pritchard *v.* Dodd, 5 *Bar* & *Ad.*, 618. But if it were allowable to look at the covenants by the tenant, in order to qualify or enlarge the demise by the landlord, the terms of the covenants would not assist the claim. The covenant is, to remove "the Whitsunday next and imme-" diately *after* the expiration of thir tacks." In terms, therefore, though the removal was to be at Whitsunday, the lease had expired previously, and the expiry cannot be referred to anything but the death of the tenant for life. The purpose obviously was not to give a prolongation of the lease to Whitsunday, for that would have been directly to contradict the terms of the demise, but to fix a definite time at which the landlord should have a right to enter to the lands freed of the tenant's effects, and of his cottars and under tenants, without the necessity of giving any warning. Although since the date of this lease it has been settled that warning does not require to be given to the heir of a tenant for life, Tennant *v.* Tennant, *Mor.*, 13845; Gordon *v.* Representatives of Michie, *Mor.* 13851; Stewart *v.* Representatives of Grinmond, *Mor.* 13853; yet at the time this lease was executed it was thought that this notice was necessary. *Ersk.* II. 6-49.

At all events it is now necessary, as it was at that time, to give warning to the under tenants, and the covenant for removal at Whitsunday without warning was framed evidently with a view to prevent all questions as to warning, either by the heir of the tenant or by his representatives, and at the same time to afford convenient time for removing, so that while the use of the lands was to cease with the tenant's life, actual removal from them was to be delayed until the Whitsunday following, and that is all that the tenant's heir can claim under the lease.

Mr. Stewart and *Mr. Hunter* for the Respondents.—The entry to the farm was to be at Whitsunday, 1759, and the first

payment of rent was to be at Candlemas, 1760. The tenant, therefore, paid rent at Candlemas, 1840, and his representative would be bound to pay another half-year's rent at Lammas, 1845. If the doctrine of the Appellants prevails, the tenant would not have any use of the land in order to provide for this last payment; but the House will not, unless compelled, yield to a construction which would operate such injustice.

Although the particular year in which the lease was to terminate could not be ascertained, the *period* of the year was ascertained by making it at the same tèrm as that with which the lease commenced, and the object of this was obviously to give the tenant a right to sow the land for the last year of his possession, as he had not had any crop for the first year. The lease therefore is to be read as commencing at Whitsunday, 1759, and ending at Whitsunday after the death of the tenant for life; as a lease for whole years and not for portions of a year, with a corresponding obligation for payment of rent for entire years; so that if the tenant died on the 24th of May, his possession would end with his life, but if he died on the 27th of May, the possession by his heir would continue until the Whitsunday following, and the payment of rent would be accordingly.

No doubt the leasing clause is limited to the life of the heir in being at the end of the third nineteen years, and if there had not been more, unquestionably, upon the heir's death, his title of possession would have been at an end, and his representatives would have been liable to summary removal. But to prevent this consequence, which would be as unjust as it would be inconvenient to the tenant, the obligation to remove is put at a term, which, in whatever year the tenant might die, would continue the possession by his representatives till the end of that year. The entry was at Whitsunday, and the removal was to be at Whitsunday.

Till Whitsunday, then, the tenant was not bound to remove,

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and of course till Whitsunday he was entitled to possess, and being entitled to possess, he was also entitled to enjoy by ploughing and sowing the land. The covenant is not to remove from the houses alone at Whitsunday, and from the lands at an earlier period; the covenant is to remove from the whole farm at Whitsunday; there is nothing, therefore, upon which to found an argument for a qualified possession between the death and Whitsunday.

If this be so, there is nothing in the Appellant's argument as to the terms of the demising clause; it is not necessary that the different parts of a lease should be arranged according to a particular collocation; it is enough if the matter relied upon is to be found within the instrument. The lessor, like the lessee, is party to the whole instrument. The lessee grants the covenant to remove at Whitsunday, but the lessor accepts it. It may well, therefore, be read along with and as part of the leasing clause, to shew the lessor's meaning of the terms used in that clause.

The cases cited for the Appellants establish that, in simple liferent leases, the representatives of the tenant for life are liable to be summarily removed upon the death of the tenant, though the death should occur between terms, the title of possession expiring with the life. If the lease, therefore, was intended to expire with the life of the tenant, there was no necessity for a covenant to remove; but in order to provide against this obvious inconvenience, the covenant to remove at Whitsunday was inserted in the present lease. The case of the Appellant in *Hay*, 17 *Scot. Jur.* 198 shews, moreover, that the Appellant was in the habit of having similar clauses introduced into his other leases, and that the object of doing so was that which has been stated. That Whitsunday, and not the death of the tenant for life, was to be the expiry of the lease, is further shewn by the covenant to uphold the houses, and leave them in a habitable condition "at the expiration" of the lease.

This could not be meant to be the death of the tenant for life, for unquestionably the representatives of the tenant were entitled to possess the houses until Whitsunday following the death, and if that had happened one day after Whitsunday, there would have been a year until the following Whitsunday, during which the tenant would not have been under any obligation to uphold or repair—a state of things which plainly could never have been intended.

Moreover, although assignees are secluded by the terms of the lease, subtenants are recognised, both in the thirlage and the removal covenants. They would not be bound to remove until Whitsunday, and as to them also, if the lease expired at the death, there would, in the case supposed, have been a year during which they could have avoided the thirl. Nay, if the tenant had died within forty days prior to Whitsunday, so that warning for that period anterior to Whitsunday could not have been given, the subtenants would have been entitled to possess until the Whitsunday following, for the covenant to remove would not entitle the landlord to eject *brevi manu*, without giving forty days warning specified by A. Sed. 1756, or the statute 1756; Perth *v.* Andrew, *Hume's dec.* 562; Lockhart *v.* Twaddell, *Hume's dec.* 564.

LORD CHANCELLOR.—My Lords, The facts of this case lie in a small compass. The main question is, what is the construction which is to be put on the lease of 1759? I have looked into the lease and into several cases which have been referred to, some of which bear materially upon the question now to be decided, and it appears very clearly that this case depends entirely upon the construction to be put upon the lease.

There are rules of construction of universal application, shewing that where terms are used, which may be full of ambiguity, they can have no meaning put upon them inconsistent with the other parts of the instrument—that the one part of an

instrument cannot be construed to be opposed to the other. These rules are applicable in this case, and the two parts of this lease cannot be construed inconsistently with each other. It appears to me, therefore, that notwithstanding the great authority of the three learned judges whose opinions have been expressed in favour of the Respondents, there can be no difficulty, applying the principle of those general rules of construction, in your Lordships' coming to a safe conclusion upon the matter of this appeal.

It must be borne in mind that the earlier part of this lease is a taking by the tenant of this farm, which he is to rent for a certain time. By the latter part, the tenant obliges himself to do certain things. By the terms in the former part of it, the lease is made to continue "for all the years and space of "three 19 years, and lifetime of the said James Murray, and "in case of the death of the said James Murray before the expi- "ration of the third 19 years, for the lifetime of his heir, who "shall be in possession at the end of the said third 19 years, his "entry thereto being hereby declared to have been and begun "at the term of Whitsunday then last, notwithstanding the "date hereof." By the second part of this lease, James Murray bound himself, his heirs, executors, and successors, to pay a certain annual rental during the respective first, second, and third terms of 19 years, and lifetime. "And the said James "Murray thereby bound and obliged himself and his foresaids "to flit and remove themselves, cottars, servants, and sub- "tenants the Whitsunday next and immediately after the ex- "piration of their tacks, without any warning or process of "removing to be used for that effect."

The question as to the construction of this lease, is whether it expired with that life in March, or whether it continued until Whitsunday following. This is apparently a very unimportant question, but practically it is one of great importance, because upon that depended the right of the tenant to put

crops into the land in the month of March, so as practically to make the lease continue during the time of the growing of those crops sown in March, and until the tenant had an opportunity of reaping them.

Now, the question we have to consider here is, when the landlord granted that lease to expire. He granted the lease for the term of three 19 years, and the lifetime of the tenant's heir who should be then in possession, and he granted no more. The question is, whether that was strictly what was meant, because the event of the death of that life-tenant must have been contemplated to happen, and it must necessarily have been, that when this life dropped (unless Whitsunday fell on the very day of his death) some period would elapse between the cropping of the land and the subsequent Whitsunday. Did the parties then mean that the lease should continue after the expiration of that life, until the next Whitsunday? Because if so, I apprehend the grant would not have been simply for the life of the heir of James, but the grant would have been to the heir of James and until the Whitsunday next following. But in that portion of the lease which professes to grant to the tenant, there is no reference to the continuance of the lease beyond the expiration of the 19 years and the lifetime of the heir. But on the other hand, the tenant agrees (and here the undertaking is from the tenant) for himself and his foresaid, "to flit and remove "themselves, cottars, servants, and subtenants, the Whitsunday "next and immediately after the expiration of their tacks," the Whitsunday that shall follow after, not the death of the tenant for life, but the Whitsunday that shall follow after the expiring of the tack.

The parties could not possibly have entered into a deed like this without having had present to their minds the fact that the lease was to expire at a given time. Then there are two constructions which are put upon this—the one, that the lease expired immediately upon the death; the other, that the intention

was, that the lease should run till the Whitsunday following the death. But the early part of the lease, which is to be regarded as giving the interest derived from the landlord, is totally silent upon this latter point, and is not only silent upon it, but in terms expresses that the occupancy shall be until the death of the tenant for life, or of his heir. There is found therefore upon the face of this deed, a provision totally inconsistent with the idea of its continuing after the death of that life until the Whitsunday next following. The very clause upon which the Respondents rely, that which constitutes the only ground they have for the argument for the continuance of this lease, assumes that the period of the removal of the tenant is to be at the expiration of the tack. The latter part of the clause is that the removal shall be "the Whitsunday next and immediately after "the expiration of their tacks," which, in the former part of the lease, is stated to be "in case of the death of the said James "Murray before the expiration of the third 19 years, for the "lifetime of his heir who shall be in possession at the end of "the said third 19 years." So that, in point of fact, it can hardly be said that the main points of the deed are inconsistent with each other, because the expiration of the lease is as consistent with the one part of the deed as with the other.

On the other hand, is there anything inconsistent with the rest of the lease in providing that although the lease should expire at the time specified, and, therefore, that the tenant *qua* tenant should no longer have any fixed interest in possession under the lease after the expiration of the lease, yet he shall not be called upon to remove himself, (which, at a moment's notice, might be attended with great inconvenience,) for a certain time. That is not only not inconsistent with the provisions of the lease, but it is common to all leases in this country; but it is confined to the permission to occupy a certain portion of the land, for a period subsequent to the expiration of the lease, for the convenience of the tenant, to enable him to remove his

property and other matters, without being obliged personally to remove at the particular day. And that is of the more importance here as this lease was to expire not upon any day the tenant might be provided for, and where, therefore, he might be called upon without any notice to give up possession of the farm and remove himself and family. I see no inconsistency in making such a stipulation. The very terms of the provision show that what was in contemplation was a time to be fixed at which the property was to be cleared and given up. And no question appears to be raised as to the next heir to the tenant remaining merely in residence on the farm till Whitsunday after the death of the life-tenant, but the question raised is as to his actually entering upon the cultivation of the farm.

The lease contemplates the event of a part of the land being underlet, and if that land were underlet then, notwithstanding the tenure of the tenant for life, the tenant upon the land so underlet would not be subject to removal without warning. The provision is one fixing the time at which the party concerned as under-tenant, or claiming under him, should personally remove from the property. Now it has been considered that this provision was tantamount to a contract for retaining the possession of the farm, but I do not find any phrase in this provision which connects itself with the possession of the farm as such; they are to quit and remove themselves, their cottars, servants and subtenants, and they are to give up possession of the farm at and from that period.

But it was asked if the lease was to expire in March or at any other time, and the tenant was to remove and give up possession, and the period at which he was to leave the farm was a period subsequent to the expiration of the lease, was he during that interval to keep the property in repair? The words do not mean, as I understand them, that the next heir shall quit personally the possession and leave the premises, but that he shall surrender, give up, and quit possession, that he shall, upon

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the expiration of the lease, leave the farm, that is, hand it over to his landlord in a proper state of repair. That is quite consistent with a provision whereby the landlord wishes to guard himself against the necessity of giving warning, that at a particular period the tenant should not be permitted longer to remain.

In endeavouring to make the different parts of the lease consistent with one another, I have felt the force of the doubt that suggested itself to the minds of the learned Judges below, but I am of opinion that it is inconsistent with the terms of the lease to consider that they operated so as to entitle the tenant to retain possession for the purposes of another crop. Therefore, for the reasons I have stated, I have to move your Lordships that the decision of the Court below be reversed, and that the Interlocutor of the Lord Ordinary be restored.

G. and T. W. WEBSTER—SPOTTISWOODE and ROBERTSON, Agents.