

COURT OF SESSION.

Thursday, July 8.

SECOND DIVISION.

LORD ABINGER'S TRUSTEES v.
CAMERON.

Entail—Lease—Powers of Heir of Entail in Possession—“Fair Rent”—Duration of Lease—Warrandice—Entail Powers Act (Rosebery Act) 1836 (6 and 7 Will. IV, cap. 42), sec. 1.

By minute of agreement in 1864 the heir of entail in possession of an entailed estate agreed to let and thereby let for nineteen years from the commencement of that salmon fishing season the sole right of taking salmon and other fish in certain waters, to the person who was then heir of entail in possession of a neighbouring estate, and his heirs and assignees, who on the other part agreed to pay £80 of yearly rent and to let, as he thereby let, for the same period the sole right of taking salmon and other fish in certain other waters, part of his entailed estate, to the first party and the heirs succeeding him in his entailed estate. The minute provided that it should be in the power of either party during their joint lives “to renew the lease from year to year so that the same shall have nineteen years to run from and after the commencement of the salmon fishing season current at . . . the death of the predeceaser of the said parties . . . and the lease hereby constituted shall be held to have been renewed from year to year . . . until a minute shall be endorsed upon this lease and signed by both the parties hereto to the effect that the power of renewal hereby conferred shall no longer be exercised.” There was no clause of warrandice. Possession followed upon the agreement.

Held, in a stated case, (1) that the lease was not binding upon succeeding heirs of entail, as it was not within the powers conferred by the Rosebery Act, section 1, the consideration not being a “fair rent”; and (2) that it was not binding on the grantor's personal representatives, as no warrandice, save at most from fact and deed of the grantor, was to be implied.

Question whether and to what extent the lease might have been considered valid in regard to *subject-matter* and *duration*.

The Entail Powers Act (Rosebery Act) 1836 (6 and 7 Will. IV, cap. 42), section 1, enacts—“. . . It shall be lawful for the respective heirs of entail in possession to grant tacks of any parts of the lands, estates, or heritages therein contained, for the fair rent of such lands or heritages at the period of letting . . . and . . . for any period not exceeding twenty-one years:

Provided always, that nothing herein contained shall authorise any heir of entail in possession of any entailed lands, estates, or heritages, to take any grassum or valuable consideration other than the tack duty or rent for granting any tack.”

The testamentary trustees of the fourth Lord Abinger of Inverloch Castle, Inverness-shire, *first parties*, and Captain Donald Walker Cameron of Lochiel, *second party*, brought a Special Case with regard to a minute of agreement between Donald Cameron of Lochiel, the then heir of entail in possession of Lochiel, and the second parties' predecessor therein, and the third Lord Abinger, then heir of entail in possession of Inverloch, dated 18th May and 8th November 1864.

The minute of agreement was—“The first party agrees to let and hereby lets to the second party and his heirs and assignees, and that for the space of nineteen years from and after the commencement of the salmon fishing season in the year 1864, the sole right of fishing and taking salmon and other fish on these portions of the river Lochy, and also in the salt water of Lochiel and Lochlinne, belonging to the first party, for which causes, and on the other part, the second party agrees to pay to the first party, and that at the term of Whitsunday yearly, beginning the first term's payment at Whitsunday 1864 for season 1864, the sum of £80 sterling of yearly rent, and the next term's payment at Whitsunday 1865, and so forth yearly during the currency of this lease, and also agrees to let, as he hereby lets, to the first party, and the heirs succeeding to him in the entailed lands and estate of Lochiel, and that for the foresaid period of nineteen years, the sole right of fishing and taking salmon or other fish in Loch Arkaig and all streams flowing into it, also in the river Arkaig to its junction with Loch Lochy, belonging to the second party, it being expressly understood that the said first party and his foresaids shall use no cruives or fixed engines on any of the waters thereby let to him on any account, nor shall he or they use any nets except for his or their own amusement, and he or they shall be bound not to sell any fish taken or killed in the said waters: But declaring that notwithstanding the limitation of the duration of this lease to the term of nineteen years from and after the commencement of the salmon fishing season in the year 1864, it is the understanding of the parties, and is hereby agreed, that it shall be in the power of either of them during their joint lives, but not after the death of either of them, to renew the lease from year to year, so that the same shall have nineteen years to run from and after the commencement of the salmon fishing season current at or immediately preceding the death of the predeceaser of the said parties, and it is hereby provided and declared that the lease hereby constituted shall be held to have been renewed from year to year accordingly aye and until a minute shall be endorsed upon this lease and signed by both the parties hereto to

the effect that the power of renewal hereby conferred shall no longer be exercised, and that the lease is to terminate at the end of nineteen years from and after the commencement of the salmon fishing season then current at or immediately preceding the date of said minute. It is further agreed between the parties that should the second party or any authorised person acting for him place any cruipe or permanent obstruction at or above the Falls of Muccomer for the purpose of stopping the fish from ascending into the Arkaig after the first of June in any year, and should such obstruction not be removed, the first party shall then have right to reseil from this lease on the expiry of one year from the end of the fishing season during which said cruipe or permanent obstruction shall have been placed as aforesaid, provided always that the said party shall give one year's notice in writing to the other party of his intention to do so; And lastly, both parties bind and oblige themselves to enter into a formal and valid lease in terms of this agreement, and to renew the same from time to time upon the requisition of either party."

The case stated—"Possession of the subjects let duly followed on said agreement, and continued unchallenged until the death of the late Lochiel as after mentioned. At the date of said minute of agreement both Lochiel and Lord Abinger were heirs of entail in possession of their respective estates. . . . (3) In the year 1892 the third Lord Abinger died and was succeeded by his son the fourth Lord Abinger, who thereafter disentailed his Scottish estates. The fourth Lord Abinger died on 11th December 1903, leaving a trust-disposition and settlement dated 27th November 1899, and relative codicil dated 30th November 1899. His trustees are the present holders of the Scottish estates, and are the first parties to this case. (4) The late Lochiel died on 30th November 1905, and was succeeded as heir of entail by his son Captain Donald Walter Cameron, now of Lochiel, who is also residuary legatee under his father's trust settlement, dated 9th November, and recorded in the Books of Council and Session 12th December 1905. The said Donald Walter Cameron of Lochiel is the second party hereto."

The questions of law were—" (1) Does the said minute of agreement constitute a good and valid lease of the subjects in question binding upon the second party as heir of entail? In the event of the previous question being answered in the negative— (2) Is the second party as residuary legatee of his father liable to the first parties under any implied warrandice in respect of the said minute of agreement."

Argued for the second party—It was very doubtful whether the minute of agreement was a lease at all, but even if that difficulty were got over it did not bind the second party. (1) The minute of agreement was not a valid exercise of the powers conferred on heirs of entail by the Rosebery Act. It was therefore not binding on the second party as heir of entail—*Gillespie v. Riddell*,

1908 S.C. 623, 45 S.L.R. 514 and (in House of Lords), November 10, 1908, 46 S.L.R. 29. It exceeded these powers in respect of duration, subject-matter, and consideration. No doubt the Rosebery Act gave power to an heir of entail to let salmon fishings for twenty-one years. But here, if the lease had not come to an end in 1883 after nineteen years, and was since that date merely from year to year, it was a lease for life and nineteen years. Again this was a lease not only of salmon fishing, which were a "heritage," but also of trout fishing which was not. A lease of trout fishing was merely the grant of a personal privilege, and could not bind an heir of entail—*Earl of Galloway v. Duke of Bedford*, June 10, 1902, 4 F. 851 (Lord Kinnear at 865), 39 S.L.R. 692. Lastly, the lease was not granted for a "fair rent." Rent consisted of money, fruits of the ground, or services—*Ersk. Inst. ii, 6, 20*. A right of fishing was not money, fruits of the ground, or services, nor could it be turned into money, for it implied a *delectus persone* and could not be sub-let—*Earl of Fife v. Wilson*, November 29, 1864, 3 Macph. 323. It could not be maintained that because there was a money payment to the second party, that was sufficient to bind him, for there could not be a mutual contract where one of the parties was not bound, and Lord Abinger got no money payment, and his heir of entail could not therefore be bound. (2) The second party was not liable as his father's personal representative. There was no warrandice. Both parties knew that as they were heirs of entail the minute of agreement might not be binding. It was absurd to suggest that each warranted the other that if the lease was held to be bad they would pay damages. When a lease was granted by an heir of entail a warrandice clause was construed as binding only the grantor and his succeeding heirs—*Duke of Bedford v. Earl of Galloway*, July 8, 1904, 6 F. 971, 41 S.L.R. 804. This case was a *fortiori*, as there was no warrandice clause.

Argued for first parties—(1) The lease was good. It was a lease of salmon fishing. That was plain, as the 19 years began at the commencement of the salmon fishing season. The case of *Earl of Galloway v. Duke of Bedford*, June 10, 1902, 4 F. 851, 39 S.L.R. 692, was different, for there the trout fishing was a most important factor. This was therefore not a sporting lease, but was the lease of a heritage within the meaning of the Rosebery Act. Further, the lease was not for too long a period. The parties entered into a lease for 19 years at Whitsunday 1864. A year later they renounced that lease and entered into another for 19 years. And so on year by year to the death of Lord Abinger in 1892. Such a course of conduct was within the powers of heirs of entail—*Queensberry Leases*, 1819, 1 Bligh. 339 (L. C. Eldon at 404). The lease therefore was for 19 years from the Whitsunday preceding Lord Abinger's death. In *Lord Galloway's* case (*sup. cit.*) there was a series of leases; for 3 months in each year the lessor could

resume possession. The statutory requirement of a "fair rent" had been complied with. What the Act struck at was the taking of a grassum. The ordinary case of unfair rent was where the heir in possession was taking something more than his successor would get. Here salmon fishings were exchanged for salmon fishings. These might be sublet, and were thus capable of yielding a money rent. (2) If the lease was invalid, the second party as general representative was liable in warrandice. If the view maintained by the second party on this point were correct, an heir of entail was never responsible for the title he gave. In all except a few points an heir of entail had the powers of a fee-simple proprietor, and he was not in an exceptional position as regards warrandice. There was no rule of law that warrandice was limited to the heirs of entail—*Riddell's Executors*, June 19, 1909, 46 S.L.R. 815. In *Lord Galloway's* case, 6 F. 971 (Lord Kyllachy at 973), 41 S.L.R. 804, there was a clause of warrandice which expressly limited liability to the lessor's successors in the entailed estate. If no warrandice was stated in a lease the warrandice that was implied was absolute warrandice—Prof. Bell's Lectures, vol. i, p. 215; *Middleton v. Megget*, November 27, 1828, 7 S. 76.

LORD LOW—This case raises some questions both of difficulty and novelty, but in the view which I take of it it is capable of very simple solution. I confess that I have very great doubt whether the cross leases which were contained in the agreement under construction can be held to have been validly granted for a longer period than nineteen years from the date of granting, but that is a question upon which it is not necessary to express any concluded opinion. The ground upon which, however, I have no hesitation in deciding the case is that the leases upon neither side were granted in consideration of what is ordinarily described as rent. The salmon fishings which were let by Lochiel to Lord Abinger are, it is true, let partly for a consideration of £80 sterling, but that is not the whole consideration, because the remainder of it consists of a lease which is granted to him by Lord Abinger of salmon fishings. Upon the other hand, the salmon fishings which are let by Lord Abinger are let in consideration of no rent at all but of the lease which he had already granted to Lochiel. Now I very much doubt whether these contracts can be properly regarded as contracts of location. They seem to me rather to be of the nature of an excambion. However that may be, I think that they are not leases within the fair reading of the first section of the Rosebery Act, under which it is contended that the leases were competently granted. The Act provides that notwithstanding any of the prohibitions contained in an entail "it shall be lawful for the respective heirs of entail in possession to grant tacks of any parts of the lands, estates, or heritages therein contained for the fair rent of such lands or heritages at the period of letting." Now

pausing there, I do not think it is a natural or permissible reading of the words of the section to say that the "fair rent" may consist, not of a rent in the ordinary sense of the word, but of a counter lease. That, I think, is made clear by the proviso which follows the enactment which I have read: "Provided always, that nothing herein contained shall authorise any heir of entail in possession of any entailed lands, estates, or heritages, to take any grassum or valuable consideration other than the tack duty or rent for granting any tack." Now that, I think, is really an interpretation of what is meant by the words "fair rent" in the enacting part of the clause, for here it is described as "tack duty or rent," which cannot include the counter grant of a lease of another property. I am therefore of opinion that this lease is not enforceable against succeeding heirs of entail, and that the first question should be answered in the negative.

Then there is a question raised as to whether in the event of this lease being set aside and held not enforceable against the present proprietor, the second party, as his father's personal representative, is not liable upon an implied warrandice under the lease or agreement. Now our answer to the first question in the case virtually amounts to a reduction of the lease, and if the lease is reduced it is difficult to see how any warrandice in respect of it could be left. But putting aside that consideration, the lease contains no express clause of warrandice, and the question comes to be, What warrandice was implied? I take it that that is always a question of intention to be gathered from the nature of the lease or other document and from the circumstances in which it was granted. Now the agreement here was one between two heirs of entail in possession, who were both bound by the fetters of their entails, and who were making an arrangement in regard to their respective salmon fishings. It is plain that they knew perfectly well that there was a question whether or not the arrangement would be binding upon succeeding heirs of entail, and that they endeavoured so far as possible to make it binding, but they must both have known that they took their chance of the arrangement being held to be *ultra vires*, and in such a case I think that no warrandice would be implied at all, or at all events only warrandice from the fact and deed of the granter. I therefore advise your Lordships that the first question in the case should be answered in the negative, and the second in the negative also.

LORD ARDWALL—I agree with everything your Lordship in the chair has said, and I think that the ground of judgment which your Lordship proposes is the sound and proper one in the circumstances. At the same time, I wish to add that I hope this decision will not be considered as countenancing in any way the idea that this lease or minute of agreement was within the powers granted by the Rosebery

Act as regards time; my present impression is that if it is a lease at all, it is one for more than 21 years. I do not think the present case is on all fours with the *Queensberry* case, but as it is unnecessary to decide this point I shall not go into it further.

LORD DUNDAS—I agree in thinking that both the questions ought to be answered in the negative. The case as presented to us was not entirely without difficulty, for questions were raised and argued by counsel which lie at all events on the fringes of difficult branches of law; but I agree with your Lordship that the matter may be satisfactorily decided upon the brief and simple grounds on which your Lordship has proceeded.

The LORD JUSTICE-CLERK was absent.

The Court answered both questions of law in the negative.

Counsel for the First Parties—Lord Kinross. Agents—Dundas & Wilson, C.S.

Counsel for the Second Party—Macphail. Agents—Lindsay, Howe, & Company, W.S.

Tuesday, July 13.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

M'GRATH v. GLASGOW COAL COMPANY, LIMITED.

Reparation—Negligence—Action Laid at Common Law and Alternatively under Employers' Liability Act 1880 (43 and 44 Vict. cap. 42)—Relevancy—Specification—Discrimination between Grounds of Common Law Liability and Grounds of Statutory Liability.

A miner, who was injured while at work by an explosion of inflammable gas in the mine, raised an action against his employers concluding for damages at common law, or alternatively for a certain sum under the Employers' Liability Act 1880. The pursuer made general averments to the effect that the accident was due to the fault of the defenders or those for whom they were responsible; that the defenders and the superintendents and foreman on duty in the mine at the time of the accident failed to take any steps for the removal of inflammable gas which they knew had collected at the place where the pursuer was sent to work; that the defenders failed to arrange for a proper inspection and that no proper inspection of the mine was made before the beginning of the shift, as was enjoined by the Coal Mines Regulation Act 1887; that the pursuer was not prevented from going down before a proper inspection was made; that the foreman was in fault in not making a proper

inspection; that the air courses for the ventilation of the part of the mine where the accident occurred were, in the knowledge of the manager, superintendents, and foreman, choked up by some obstruction, and that the failure to keep them free was a contravention of the Coal Mines Regulation Acts. The averments in support of the common law claim were not distinguished from those in support of the Employers' Liability Act claim, and the two pleas-in-law were both applicable to either claim.

The Court *dismissed* the action as irrelevant, on the ground that the pursuer had failed to state specifically what were the grounds of the common law claim, and what were the grounds of the statutory claim.

Bernard M'Grath, who was employed as a brusher in the Kenmuirhill Colliery, Lanarkshire, belonging to the Glasgow Coal Company, Limited, was injured while at work on 21st June 1908 by an explosion of inflammable gas. He raised an action in the Sheriff Court at Glasgow against the Glasgow Coal Company concluding for £350 in name of damages, or, alternatively, for £200 under the Employers' Liability Act 1880 (43 and 44 Vict. cap. 42).

The pursuer averred—“(Cond. 3) . . . The pursuer worked under the orders and supervision of John M'Kernan and John Paterson, foremen in the employment of the defenders, who were superintendents in the sense of the Employers' Liability Act 1880. The fireman in said pit was Patrick Vaughan, and the pursuer also worked under his superintendence, and was bound to conform to his orders. On the night of said date the pursuer started work at the coal face in the ‘Vertreewell’ section under the orders and superintendence of the foresaid superintendents and fireman, and while he was in the act of boring a hole in the brushing face an explosion of inflammable gas occurred, knocking the pursuer down and injuring him as after mentioned. . . . (Cond. 5) The accident to the pursuer was due to the fault and negligence of the defenders and those for whom the defenders are responsible. In particular, the defenders and their said superintendents and fireman knew that inflammable gas had collected in said pit prior to the shift in which the pursuer was employed starting work that evening, but notwithstanding this they failed to take any steps to have the gas removed. It is the invariable practice in mines when gas is discovered to have it removed by causing a current of air to circulate through the part of the pit where the gas is discovered, this being done by widening the air course, or by causing a draught by means of a screen of brattice cloth fixed in the pit workings, and the defenders failed to set up in said pit in the road or place where said inflammable gas had collected a current of air for the purpose of causing a draught, or to adopt any other means of ventilation for the purpose of removing said gas, as they were bound to do in