Ordered and adjudged, that the appeal be dismissed, and interlocutors complained of be *affirmed*.

Dec. 14, 1812.

LIFE-RENT.

Agent for Appellant, CHALMER.
Agent for Respondent, MUNDELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

TURNER and WATSON—*Appellants*.
TURNER and another—*Respondents*.

July 1, 1813.

ENTAIL.

ENTAIL, with prohibition against alienation, and against "*letting tacks in diminution of the true worth and rental* "MAY BE PAID *for the said tacks*." Lease of part of the lands for 1000 years, with *growing timber, and mines and minerals*, at a rent below that which was paid at the time of the expiration of the preceding lease of the same lands. This lease was reduced by the Court of Session on the ground that it was an ALIENATION; and the judgment was affirmed by the House of Lords on the ground that it was *in diminution of the true worth and rental* of the lands at the time of the expiration of the preceding lease.

THIS was a question as to the validity of a lease for 1000 years, under an entail containing a prohibition against alienation and letting at a diminished rental.

Settlement in the will of John Turner. 1688.

John Turner, merchant in Dantzic, (a native of Aberdeenshire,) who died in 1688, by his last will and testament, directed certain executors and trus-

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tees therein appointed to invest so much of his property in the purchase of lands in Scotland as might yield *fifty chalders of victual* yearly rent; and ordained them to be entailed on a certain series of heirs, under the conditions and limitations therein specified. The will provided that "whosoever, in "the order settled by the testator, fell to be his heir "and successor of these lands, should be strictly "bound to adhere to the directions of the testator, "under penalty of losing his right of heritage;" and the testator then directed "that his heirs and suc-"cessors should not have the power to sell, poind, "or wadset, or burthen the said lands with debts, or "any manner of way whatsoever; but that the "same lands should in all time coming continue in "the same free estate and condition in the name "of Turner," &c. And he also directed "that they "should not heighten their tenants' rents, nor put "them out of their lands, so long as they duly paid "what they were addebted by their contracts; con-"ditionally, they should be bound to plant one oak "or fir tree in convenient place, that might serve "for decorment to the lands, and, in time coming, "might be useful to their master for building," &c. The testator then directed "his heirs and successors "to pay certain legacies, partly in meal, and partly "in money, out of the rents of the estate, to any "Regent of the University of Aberdeen who should "be of the name of Turner, to maintain two chil-"dren of the same name at school, and four scho-"lars at the University," &c.

Sept. 13, 1693.

The executors first purchased the estate of Rose-Hill, now called Turner-Hall, yielding 41½ chalders

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May 16, 1694.
Estates purchased by executors, &c.

of victual; and afterwards the adjoining estates of Newark and Tipperty, yielding 9½ chalders of victual. This joint estate exceeded the quantity of victual by one chalder, and therefore the institute in the entail (Robert Turner) advanced 100*l.* the value of the excess, and a power was reserved to him to burthen the estate to that extent, which he afterwards exercised in favour of his daughters. The lands of Newark and Tipperty, to which the present action chiefly related, were disponed to the different heirs with and under the burthen of all the irritant, resolutive, and prohibitory clauses therein contained; and among the prohibitions there was the following:—

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Prohibition against letting tacks in diminution of the rental, and against alienation.

"Providing, like as it is hereby specially provided "and appointed to be contained in the infeftments "to follow hereupon, that it shall no ways be law- "ful to the said Robert and John Turners, and "them and the other heirs of Tailzie foresaid, to "sell, *annalzie,* and *dispone the lands, and others* "*above written, or any part thereof,* heritably and "irredeemably, or under reversion, one or mair; "nor to grant infeftments of annual rent, or yearly "duties, greater or smaller, forth thereof; *nor to* "*let tacks of the same in diminution of the true* "*worth and rental may be paid for said tacks,* "without being obliged, nevertheless, to raise the "rental in manner after provided; nor to contract "debt, or burden the said lands, *nor do any other* "*deed whereby the samen may be evicted, apprised,* "*or adjudged from them, or any ways impaired to* "*their prejudice.*" After some other provisions, the

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Irritant and resolutive clauses.

deed contained this clause:—"And if the said Robert and John Turners, or either of them, or "their heirs of tailzie above written, shall contravene, or do in the contrair, in any point of the "premises, then not only shall all such deeds be "void and null of themselves, and no ways binding "or obligater to infer any action, personal or real, "against the next heir of tailzie of the lands, mill "lands, and others foresaid; but also the persons "contravening, and descendants of their body, "shall forfault, amit, and tyne all right, title, and "interest they have, or can pretend, to the lands "and others foresaid, *ipso facto;* and the same "shall pertain, descend, and belong to the next "heir of tailzie, to establish the rights of the lands, "and other foresaid, in his person, by service and "retour, to the person immediately preceding the "contravener, or by way of declarator, or any other "manner of way, without being liable for any "of the contravener's debts or deeds, or the debts "of the predecessors abovementioned."

Sept. 23, 1763. Lease for 1000 years, of part of the entailed lands, from Respondent's father to Appellant's father.

In 1763, John Turner, one of the heirs of entail, executed to George Turner, of Menie, the Appellant (Turner's) father, a lease of the lands of Newark and Tipperty for 1000 years, reserving a rent or tack duty of 950 merks Scots, of which 850 were to go towards the payment of the mortifications upon the estate. The lessee also agreed to pay the 100*l.* and interest which had been charged on the estate as above, and the non-entry duties, which a former heir of entail had neglected to discharge. The extinguishing of these burdens was stated in

the lease to be in the name and by way of grassum. The lease gave the growing timber, and mines and minerals, to the tenant, and contained a precept of seisin for infefting him and his heirs in the lands. It appeared that immediately after the execution of this lease, the lessee, having acquired right to the above-mentioned sum of 100*l.* and interest, deduced an adjudication of the lands of Newark and Tipperty, and obtained a charter of resignation and adjudication under the great seal.

At the expiration of the previous leases, (1766,) George Turner (before the death of the lessor) entered into possession of the lands; and, at his death, was succeeded by the Appellant, his son and heir, who subset the lands to one Keneth Mackenzie for fifty-seven years; and this sub-lease was purchased by the Appellant Watson, who, it was stated, with the full knowledge and acquiescence of the heirs of entail, laid out about 9000*l.* in improving the farm.

Sub-lease to one Mackenzie, of whom Appellant Watson purchases.

On the death of John Turner, in 1802, an action of reduction of the lease in question was raised by his son, Keith Turner, father of the Respondent, John Turner. The material reasons in the summons of reduction were:—" 1st, The tack, or feu-" tack, and right of infeftment, is so very far be-" yond and different from the usual nature and du-" ration of leases, that it is, to all intents and pur-" poses, an absolute alienation of the lands, &c. " 2d, The tack and right of infeftment was granted " in defraud of the subsequent heirs of tailzie, for " far less rent than the value of the lands, or even " the actual rent thereof, at the date of the same " and since."

1802. Action of reduction of lease.

Reasons of reduction.

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Preliminary objections to reduction.

Certain preliminary objections were stated on the part of the Appellants:—

1st, If the Respondent's grounds of reduction were correct, his father had forfeited for himself and his descendants; and the decisions of the Court of Session in *Little Gilmour v. Caroline Hunter*, and *Dick v. Drysdale*, were cited in support of this objection. The answer was, that as no action had on this ground been brought against the alleged contravener, none such was competent after his death against the next heir of entail; and in support of this answer, the case of *Mackie v. Dalrymple* was cited. But further, in order to get rid of this objection, Thomas Andrew Turner, the next heir of entail, failing issue male of the Appellant (Turner's) father, brought another action jointly with Keith Turner.

March 6 & 7, 1801.

Mackie v. Dalrymple, Nov. 23, 1798.

2d Action, Oct. 21, 1804.

2d, Prescription (as against the joint action.) To this it was answered, 1st, That though the lease was dated 1763, possession had not been taken till 1766; that prescription only began to run from the latter period; and that therefore the time (forty years) had not elapsed before the commencement of the joint action. 2d, That though the prescription were to be considered as having begun to run from the date of the lease, it had been interrupted by the previous action of Keith Turner, and by the minority of Thomas Andrew Turner. (*Vide Mackie v. Dalrymple.*)

Erskine, b. 3. t. 7. s. 41.

The Lord Ordinary at first refused to sist proceedings in the previous action till the other came into Court, and repelled the reasons of reduction; but afterwards, on representation, he recalled the

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interlocutor, conjoined the actions, and ordered informations. Upon report of the Lord Ordinary, and advising the mutual informations, the Court pronounced an interlocutor "sustaining the right "of Keith Turner and Thomas Andrew Turner to "pursue in the present action, repel the defences "pleaded for Robert Turner and his sub-tenant, "and find that the tack under reduction is an "alienation of the estate, and contrair to the entail; "and therefore reduce, decern, and declare in terms "of the rescissory conclusion of the conjoined libels "of reduction, and, *quoad ultra*, remit to the Lord "Ordinary, &c. &c." The Court, on advising a reclaiming petition and answers, adhered to this interlocutor; whereupon the Appellants appealed to the House of Lords:—

May 14, (15.) Interlocutor of the Court of Session, reducing the lease on the ground of alienation.

1st, Whether this lease was an alienation?

Mr. Adam and *Sir S. Romilly* (for Appellants.) The will contained the instructions for the entail, and the heirs were only bound by the entail in as far as it was conformable to the will. The object of the testator was merely that the heirs of entail should have fifty chalders of victual yearly rent. There was no prohibition against leases of any duration, if granted without diminution of the existing rents. Entails were "*strictissimi juris*, so that no "prohibitions nor irritancies were to be inferred by "implication." (Ersk. b. 3, t. 8, s. 29.—*Duntreath* case, 1769; decided in Dom. Proc. April 15, 1771. —*Stewart v. Home*, July 7, 1789; Dict. vol. 4, p. 339.—*Tillicoultry* case, 1799—1801. Fac. Coll.

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No. 99.) Since, then, there was no express prohibition here against leases of any duration, it ought not to be implied. It was said, however, that long location was considered by the law of Scotland as alienation; and therefore this lease for 1000 years came under the prohibition to "sell, *annalzie*, and "dispone." But these words referred to the alienation of the property; and the grant of a tack, and the alienation of the property, were, in both legal and popular acceptation, acts essentially different. A lease was, by common law, a mere personal contract, and not a real right; and the Statute 1449, cap. 17, (protecting leases against singular successors,) clearly recognized the distinction. The Respondent, however, relied on certain passages from Craig, Balfour, and Stair. Craig and Balfour spoke of long leases as sometimes a *kind* or *species* of alienation. But Craig was treating of the feudal law generally; and there, it being necessary that the lord should always know who was his tenant, a long lease might be considered as a species of alienation; and, with reference to that system, a term of ten years might be regarded (as Craig said it was) as a long lease. The passage in Stair, chiefly relied on by the Respondent, was an interpolation after his death. In the edition revised by himself before his death, the distinction between location and alienation was clearly marked. (Stair, Ed. 1693, b. 2, t. 11, s. 13.—b. 1, t. 15, s. 4.—b. 2, t. 9, s. 2.—Mack. Obs. on Act of 1621, p. 8.—Dallas, p. 648.) No illustration ought to be drawn from the rules of interpretation in regard to the rights of the Crown;

as, both in Scotland and England, the rights of the Crown and the subject often stood, in this respect, on a different footing. The words "sell, annalzie, "and dispone," were technical expressions appropriated to the transmission of the feudal right; but, after the grant of a tack, the feudal right still remained in the grantor; and therefore these words could, on no principle of law or reason, be held to include a tack. This interpretation had been also established in more than one decided case, and in the language of the legislature, not many years ago. (*Leslie Grant v. Orme*, March 2, 1779.—*Ker v. Cairns*, Feb. 1774.—Act of 10 Geo. 3, cap. 51.) It was clear, from the tenour of the will, that the testator wished to encourage, instead of prohibiting, long leases. His words were, "*they (the heirs of "entail) shall not heighten their tenants' rents, "neither put them out of their lands.*" This could not be intended as a personal favour to the tenants in possession at the time, as the lands were not then purchased. The will ought to govern the entail, and the lease in question was contrary neither to the letter nor the spirit of the instructions of the testator.

Another point was, that the lease could not at any rate be void as against Keith Turner, who had stood for nearly forty years observing the improvements going on upon the estate, without challenging the lease; and Thomas Andrew Turner had no right as yet to insist in the action.

2d, Whether the lease was in diminution of the rental?

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The only rental which the will, or testamentary settlement, supposed and presumed was not to be diminished, was the rental of 50 chalders, of which the estate was to consist at the date of the purchase. The presumed prohibition, then, against letting leases at a diminished rental, must have reference to the original rental, as ascertained at the time of the purchase. The entail likewise declared that the heirs "*should nowise have power to heighten, raise,* "*or augment the rent of the said land, as the same* "*is presently paid.*" It lay, then, with the Respondents, as a preliminary step, to prove the amount of the rent at the date of the purchase; keeping in view that the testator evidently intended that a considerable portion of the victual should be converted into money, and that the amount of the conversion was 100 merks for each chalder.

It was also observed, that all that was provided by the settlement in the will was, that the heirs should enjoy an income of 50 chalders annually from the *whole* estate, without stipulating that the rent of no one farm should at any time suffer diminution. Therefore, supposing there should be a trifling loss on the rent of Tipperty and Newark, it was more than compensated by an increase on the Turner Hall estate.

But supposing the rent payable by the Appellant Turner was to be compared with the rent paid for the lands immediately before the commencement of the lease, the present rent, in point of fact, considerably exceeded the former.

It was no objection to say that the present tack was executed some time previous to the expiration

of the preceding lease, as the lessor lived to put the lessee in possession.

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Messrs. Leach and *Horner* (for Respondents.)

1st, It was clearly established that any substitute in the entail might insist in such an action as this. And the deed of entail could alone be looked to, because it remained unreduced.

It was admitted that entails were *strictissimi juris*, and that no prohibition was to be extended by implication. But neither the principle of law, nor the decided cases on which they relied, would support the conclusion of the Respondents. The case of *Leslie v. Orme* depended on special circumstances.

The grant in question was an alienation in substance on two grounds:—1st, It gave all that could be conveyed by a feu contract, which was unquestionably an alienation. 2d, Because there was no tangible difference between 1000 years and a perpetuity; and therefore the lease was void for want of a legal *ish*. The authorities that long location (leases exceeding the customary duration of leases at the time they were granted) was an alienation, were decisive in favour of the Respondents. (Craig, b. 3, dieg. 3, s. 24.—Dieg. 4, *de jure protimeseos*. —B. 2. dieg. 10, *de locationibus sive assedationibus;* where he must be allowed to have confined himself exclusively to the law of Scotland.) Lord Stair, also, in speaking of the cases inferring recognition by alienation, made use of these words:—" Subin-" feudation, in all cases, is accounted alienation; " and where alienation is prohibited, subinfeudation

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"is understood, *and also long location.*" It was said that these last words were not in the edition revised by Stair before his death; but the alterations, except they were from manuscripts, were placed between crotchets, and the words in question were not between crotchets, and therefore ought to be considered as taken from a manuscript.

Illustrations of the doctrine that long leases amounted to alienation were also to be found in the limitations anciently imposed on the Crown in the management of the royal demesnes; (Act of 1455, cap. 41;) and also those which affected ecclesiastical beneficiaries in the management of church property. (*Bishop of Aberdeen v. Forbes,* Dec. 14, 1501.—*Abbot of Crossraguel v. Hamilton,* March 12, 1504.—Balfour's Practicks, p. 203.) Another illustration was to be found in the principles of the law of death-bed, by which tacks of extraordinary duration were reduced as being a species of alienation. (*Chrystisons v. Kerr,* Dec. 1733. Dict. I. 215.—*Bogle v. Bogle,* June 19, 1759. Fac. Coll. 335.)

It had been determined that a tack wanting a legal *ish,* or one which was equivalent to a grant in perpetuity, (as this was,) could not be sustained against singular successors. The principle was recognized in several cases. (*Alison v. Ritchie,* Feb. 3, 1730.—*King's Advocate v. Fraser,* Dec. 6, 1758. —*Irvine v. Knox,* 1760.—*Wight v. Hopetoun,* Nov. 17, 1763.)

If a lease of this kind were not prohibited under the word "annalzie" in the Act of Entails, 1685, cap. 22, it followed that the legislature meant that an

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heir of entail might grant a lease of 1000 years of the entailed property at a pepper-corn rent, which it was impossible the legislature could mean. Dallas, though an eminent conveyancer, was no great authority on this point; and Craig, in the passages on which the Appellants relied, was treating of the general feudal customs. There was nothing in the objection that Keith Turner suffered the improvements to go on without challenging the lease, as it did not appear that he was then aware of his right.

2d, Tacks were not to be let "in diminution of "the true worth and rental that MAY BE PAID for "the said tacks;" the obvious import of which words were, that a rent equal to the true worth and value of the lands at the time when a lease was granted ought to be stipulated for. Whether the lease to George Turner was below the true worth and rental in 1763 was a matter of fact and calculation; and it was a matter of history, as well as in proof even upon the principles of conversion contended for by the Appellants, (though below the real rate of conversion of victual into money,) that the rent reserved by the contravening heir of entail was not equal to the true worth and rental of the lands at the time of the granting of the lease.

July 12, 1813. Observations and Judgment.

Lord Eldon (Chancellor.) The question in this case had been argued on two grounds:—1st, Whether a lease for a thousand years was supportable under the deed of entail, as containing a prohibition against alienation? and with reference to this point, it had been largely argued on the same ground as that which occurred in the Queensberry

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case. (*Vide post.*) 2d, Whether the lease, or tack, was "*in diminution of the true worth and value of* "*the rental?*" On giving the best attention in his power to the subject, it appeared to him that this was a tack which could not be supported on this latter ground. The prohibition was against letting tacks "*in diminution of the true worth and rental* "*may be paid for said tacks*, without being obliged, "nevertheless, to raise the rental in manner after "provided;" that was, to raise it (as he understood the expression) with reference to present contracts. He was clearly of opinion that, taking the grassum into account, and independent of it, this was not a lease without a real diminution of the rental. He confined himself here, however, to this particular case, without reference to the other. (Queensbury case, *vide post*,) where there was a material distinction. There was no occasion here to say any thing as to the question of alienation, He proposed, therefore, that the decision of the Court of Session be affirmed, with the findings stated in the judgment which was as follows:—

The lease was in diminution of the true worth and rental, and judgment of Court of Session affirmed on this ground, without reference to that of alienation.

"The Lords find, that the tack under reduction "was a tack in diminution of the true worth and "rental which might be paid for the same, and was "in contravention of the express prohibition con-"tained in the deed of entail; and therefore find, "that it is not necessary to determine whether the "said tack was liable to reduction on any other "grounds. And it is ordered and adjudged, that "the interlocutors of the 14th, signed 15th, May, "1806, and 17th November, 1807, be affirmed,

"And it is further ordered, that the cause be remitted back to the Court of Session, to do thereupon as shall be just."

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Agent for Appellant, MUNDELL.
Agent for Respondent, BERRY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MUNRO and others—*Appellants.*
COUTTS and others—*Respondents.*

July 3, 1813.

PAPER WRITTEN AND SIGNED BY TESTATOR, AND CONCEIVED IN TESTAMENTARY LANGUAGE, HELD, UNDER THE CIRCUMSTANCES, NOT TO BE TESTAMENTARY IN ITSELF.

TESTATOR executes a trust-deed of the whole of his property, and also a will in the English form, giving the whole of his property not situated in Scotland to the trustees, for the uses of the trust. The will proved in the English Ecclesiastical Court. Testator afterwards wishing to alter his settlement in regard to the personal or moveable property, writes and signs two papers, conceived in testamentary language, which he called his *codicil;* one of which he sends to his agent, with whom he was corresponding on the subject of the intended alteration, and lays up the other in his repositories. Testator dies before a more formal instrument is prepared, but no pretence that he was prevented by sudden death from executing it. The Court of Session decides that the paper sent to the agent was in itself testamentary; but this decision reversed on appeal.

Oct. 30, 1798. Settlement of Sir H. Munro, and will in English form, proved in the Ecclesiastical Court.

SIR Hector Munro, of Novar, on the 30th October, 1798, executed a deed of entail, and likewise a trust-deed of the same date, whereby he conveyed and made over the whole of his property, real and personal to the Respondents, (trustees,) in trust, to