

Dec. 18, 1813.

WILL.

He was authorised to state that this opinion was fortified by the authority of his noble and learned friend, (*Redesdale*), who had attended at the hearing, and who had felt less difficulty in coming to this conclusion than he had.

Judgment.

Interlocutor altered conformable to the above opinion.

Agent for Appellants, BERRY.

Agent for Respondents, MUNDELL.

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SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MONTGOMERY and others, Trustees of }  
 the late DUKE of QUEENSBERRY, } *Appellants.*

CHARTERIS, EARL of WEMYSS—*Respondent.*

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ENTAIL, with prohibition against *alienation*, properly fortified with irritant and resolute clauses, followed by a permissive clause to let life-rent tacks without diminution of the rental. No specific prohibition against letting of leases, except as above. A lease granted by heir of entail, for 97 years, taking a grassum, or fine. Held that this lease fell under the prohibition against *alienation*.

1693. Entail  
 of Nidpath.

IN 1693, William, Duke of Queensberry, on occasion of the marriage of his second son, Lord William Douglas, executed a deed of entail of the

Lordship of Nidpath, comprehending the particular lands therein described, in favour of the said Lord Douglas, and his heirs male and of tailzie, as therein mentioned. This entail contained the following proviso:—

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“ It is hereby expressly provided and declared,  
 “ and to be provided and contained in the said re-  
 “ signation, charter, and seisin, and in all the sub-  
 “ sequent rights to follow hereupon, of the said  
 “ lands and estate in time coming, *that it shall no*  
 “ *ways be leisome and lawful to the said Lord Wil-*  
 “ *liam Douglas, and the heirs male of his body, nor*  
 “ *to the other heirs of tailzie respective above men-*  
 “ *tioned, nor any of them, to sell, alienate, wadset,*  
 “ *or dispone any of the said haill lands, lordships,*  
 “ baronies, offices, patronages, and others above re-  
 “ hearsed, as well those to be resigned in favour of  
 “ the said Lord William in fee, as those reserved  
 “ to be disponed by the said Duke of Queensberry  
 “ in manner foresaid, or any part thereof; nor to  
 “ grant infestments of life-rent, nor annual rents,  
 “ forth of the same; nor to contract debts, or do  
 “ any other fact or deed whatever, whereby the  
 “ said lands and estate, or any part thereof, may be  
 “ adjudged, apprized, or otherwise evicted from  
 “ them, or any of them; nor by any other manner  
 “ of way whatsoever to alter or infringe the order  
 “ and course of succession above mentioned: and in  
 “ case the said Lord William Douglas; or any of  
 “ the other heirs of tailzie above specified, shall con-  
 “ travene the same, all such facts and deeds shall  
 “ in themselves be null and void *ipso facto*, without  
 “ necessity of any declarator; and the person con-

Prohibitory  
clause.

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clause.

“travening, and his heirs, shall forfeit tyne, and  
 “amit all right, title, interest, and benefit that they  
 “can anywise acclaim by virtue of this present  
 “tailzie, and infestments to follow hereupon; and  
 “the said lands and estate shall immediately there-  
 “after descend, appertain, and belong to the next  
 “heir of tailzie immediately following the contra-  
 “vener, without the burden of all such facts and  
 “deeds, in the same way and manner as if the per-  
 “son, contravener, and his heirs, had never ex-  
 “isted, or had been no member of the present  
 “tailzie; and it shall be lawful and competent to  
 “the next heir of tailzie to serve himself heir to the  
 “person immediately preceding the contravener,  
 “without the burden of all such facts and deeds, or  
 “otherwise to establish the right of the said lands  
 “or estate in his person, by declarator or adjudica-  
 “tion, or any other manner of way agreeable to the  
 “laws of this kingdom: *it is always hereby ex-*  
 “*pressly provided and declared, that notwithstanding*  
 “*of the irritant and resolute clauses above*  
 “*mentioned, it shall be lawful and competent to*  
 “*the heirs of tailzie above specified, and their fore-*  
 “*said, after the decease of the said William Duke*  
 “*of Queensberry, to set tacks of the said lands and*  
 “*estate during their own life-time, or the life-time*  
 “*of the receiver thereof, the same being always set*  
 “*without evident diminution of the rental; and*  
 “likewise that it shall be lawful and competent to  
 “the said heirs of tailzie to grant suitable and com-  
 “petent life-rent provisions in favour of their wives,  
 “not exceeding the sum of 5000 merks of yearly  
 “free rent of the said estate; and to grant provisions

“ in favour of their children, not exceeding two  
 “ years’ free rent of the same; and with this provi-  
 “ sion always, that it shall not be lawful to any of  
 “ the said heirs of tailzie to grant new provisions in  
 “ favour of their children until first the former pro-  
 “ visions granted by their predecessors be purged  
 “ and satisfied, and the said estate freed and disbur-  
 “ dened thereof, under the hazard of the like irri-  
 “ tancies and certifications above mentioned.”

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The late Duke of Queensberry having succeeded to the estate under this entail, granted a lease of one of the farms (Wakefield) belonging to the entailed estate to Alexander Welsh, for a term of 57 years from Whitsunday, 1800, at a yearly rent of 86*l.* 15*s.* 2*d.* taking a sum of 30*l.* of grassum, or entry money. Welsh afterwards renounced that lease, and received a new one for 97 years, from Whitsunday, 1802, at the same rent of 86*l.* 15*s.* 2*d.*; besides which, he bound himself to the performance of certain conditions and obligations, and also became bound to pay 318*l.* 1*s.* 2*d.* by way of grassum.

Lease or tack  
 for 97 years by  
 the late Duke  
 of Queensber-  
 ry, who takes  
 318*l.* 1*s.* 2*d.*  
 grassum.

To try the validity of this latter tack, the Duke brought an action of declarator in the Court of Session. The summons in this action concluded against the late Earl of Wemyss, the late Lord Elcho his eldest son, and the present Earl of Wemyss, (Respondent,) “ *that being heirs substi-*  
 “ *tuted to the Duke of Queensberry by the deed of*  
 “ *entail already mentioned, they ought to be called*  
 “ *as parties; and being so called, that it should be*  
 “ *found and declared that the Pursuer, the Duke,*  
 “ *was nowise limited by the said deed of entail, nor*  
 “ *by the clauses, prohibitory, irritant, and resolu-*

Action of de-  
 clarator to try  
 the validity of  
 the tack.

Summons.

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“ *tive, therein contained, from granting leases for*  
“ *the endurance of ninety-seven years, nor from*  
“ *taking grassums for the same, the said leases*  
“ *being set without diminution of the rental: in*  
“ *particular, that the said lease, dated 23d Novem-*  
“ *ber, 1802, granted to Welsh, upon his renun-*  
“ *ciation of the former lease, should be valid and*  
“ *effectual, under the conditions and obligations*  
“ *therein mentioned, to the said Welsh, and to his*  
“ *heirs, assignees, and subtenants, for the full space*  
“ *of ninety-seven years from the commencement*  
“ *thereof.*”

Defences.

The Defenders having appeared to the said action, stated a defence, in general terms, that the said lease is contrary to, and in violation of, the provisions and prohibitions contained in the entail referred to in the summons.

*Lord Glenlee* (Ordinary) took the cause to report; and the Court, after hearing counsel, pronounced the following interlocutor:—

May 14, 1806.  
Interlocutors  
sustaining the  
defences.

“ The Lords having resumed consideration of  
“ this cause, and advised the same, with the mutual  
“ informations for the parties, and having also  
“ formerly heard the counsel for the parties in their  
“ own presence, they sustain the defences, assoilzie  
“ the Defenders from the conclusions of the declara-  
“ tor, and decern.”

The Appellant gave in a reclaiming petition against the above interlocutor; and, upon advising the same with answers, the following interlocutor was pronounced:—

Dated 17,  
signed 18,  
Nov. 1807.

“ The Lords having resumed consideration of the  
“ petition for the Duke of Queensberry, and advised

“ the same, with the additional petition and answers, they refuse the prayer of the said petition and additional petition, and adhere to their interlocutor reclaimed against.”

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Appeal.

The Duke of Queensberry appealed against these interlocutors, and after his death the appeal was revived by the Appellants, his trustees and executors.

There were two questions made :—1st, Whether the lease in question was prohibited by the prohibition against *alienation*? and, 2d, Whether it was prohibited by the subsequent permissive clause? The former was considered as the principal question.

*Romilly and Brougham* (for Appellants.) From the effect of the irritant and resolute clauses by which, in case of contravention, the prohibited act is not only rendered void, but the contravener also forfeits his estate, and likewise from the unfavourable light in which restraints on property were regarded, entails had received the strictest construction. This was stated by the most distinguished writers on Scottish law, and especially by Erskine, who thus summed up the doctrine of the law on that point :—“ *An heir of entail has full power over the estate, except in so far as he is expressly fettered, (New Col. 2, 13;) and as entails are an unfavourable restraint upon property, and a frequent snare to trading people, they are strictissimi juris, so that no prohibition or irritancies are to be inferred by implication. . Hence, though all debts to be contracted by the heir should, by the entail, be declared null, but without irritating the right of the heir contracting, (22d July,*

Argument for  
Appellants.  
That entails  
are “ *strictis-*  
“ *simi juris.*”

B. 3. t. 8. s. 9.

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“ 1812, *Creditors of Riccarton*;) or, vice versâ,  
“ *though there should be a clause irritating the*  
“ *right of the heir who contracts, but without de-*  
“ *claring the debts contracted null, (11th July,*  
“ *1734, Baily;)* the Court will not interpose to  
“ *supply the defect from presumed intention. For*  
“ *the same reason, a prohibition to alter the suc-*  
“ *cession, though under an irritancy, does not dis-*  
“ *able the heir from contracting debt, (Falc. 1,*  
“ *116;)* nor does a prohibition to contract hinder  
“ *him from selling, (Falc. 2, 92.)”*

That this  
strict con-  
struction had  
been applied  
in the Dun-  
treath and  
other cases.

This rigidly strict construction was applied  
in the *Duntreath* case, Nov. 24, 1769, appeal  
April 15, 1771; in the case of *Stewart v. Home*,  
1789, (Dict. vol. 4, p. 339;) in the *Tillicoultry*  
case, Jan. 1799, affirmed June, 1801, (Fac. Coll.  
No. 99;) and in the case of *Leslie v. Orme*, (6 Fac.  
Coll. 1779.)

That the word  
*alienate* in en-  
tails was to be  
confined to its  
technical  
sense, as ap-  
plying to the  
feudal right of  
lands, and not  
to tacks.

The word *alienate*, in the prohibitory clause of an  
entail, was used, not in a vague, indefinite, and po-  
pular, but in a strictly technical sense, applicable  
only to the feudal right or property of the lands.  
In this latter sense it was always used in convey-  
ances where the feudal right was meant to be car-  
ried, and in this sense it appeared to have been  
used in the act of entails, 1685, cap. 22. If the  
word were to be understood in its more extensive  
sense, it would include all the prohibitions usually  
inserted in entails, which would hardly be con-  
tended.

Dallas, 650.

The word *alienate* could not therefore apply to  
leases short or long, as the longest leases did not  
carry the feudal property of the lands. Leases

might possibly in some instances be set aside as being *in fraudem* of the entail, which was not here pretended. If long leases were alienations, and short leases were not, where was the line to be drawn?

The authorities relied upon by the Respondents did not bear out their conclusions. Craig stated the opinion of foreign feudists, rather than his own; and the law of Scotland, as it stood in his time, was of no great importance with respect to the present question, considering the changes it had undergone in regard to leases. The words most favourable to their views in Stair had been interpolated (*vide ante*, case of Turnerhall, vol. i. pp. 430—434) after his death, and were not to be found in the edition (1693) revised by himself, in which he stated, (b. 2. t. 11. s. 13.) that *alienation* was not extended to *location* by the common feudal customs. (*Vide* also b. 1. t. 15. s. 1.—b. 2. t. 9. s. 2.)

The illustrations drawn from the law in regard to the annexed property of the crown, and in regard to church property, as well as those from the style of inhibitions, law of death-bed, &c. were totally inapplicable, as these branches of law rested on their own peculiar principles, which were entirely different from those by which entails were governed.

This case differed from that of Turnerhall by the permission to grant life-rent leases, by the permissive clause following the prohibitory, and also as to the length of time for which the lease was granted, which was material. Though a lease for 1000 years (a period as long as empires had lasted)

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That the au-  
thorities cited  
by the Re-  
spondent did  
not apply.  
Craig, lib. 3.  
dieg. 4. s. 5.—  
Lib. 2. dieg. 10.  
s. 5.

Stair, b. 2.  
t. 11. s. 13.

Vol. i. p 423.



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6 Fac. Coll.  
1779. (*Vide*  
*post*, Lord  
Redesdale's  
observations.)

might perhaps, in some sense, be considered as an alienation, it did not follow that a lease for 100 years could be so considered; and the decision in the case of *Leslie v. Orme* had been considered as completely fixing the point, that heirs of entail, where there was no express prohibition against leases, might grant leases at the former rent, for any period not exceeding 100 years; and lawyers of the first eminence had had no hesitation in recommending such transactions as perfectly safe, and in referring to the case of *Leslie v. Orme*, as a judgment which had set that question at rest.

No inference against this lease could be drawn from the permissive clause:—1st, Because, in cases of entail, no prohibition could be *implied*; and, 2d, Though it had contained an *express* prohibition, it could have no effect, as it was not fortified by ir-ritant and resolute clauses.

Argument for  
Respondent.  
That leases for  
longer terms  
than were  
usually grant-  
ed in the ordi-  
nary adminis-  
tration of the  
estate were  
alienations.

Distinction  
between long  
and short  
leases strongly

*Leach* and *Thomson* (for Respondent.) Leases for longer terms than were usually granted in the ordinary administration and management of the estate at the time were considered as alienations, and struck at by the prohibition. A lease, or tack, it was admitted, was not in its own nature an alienation, but it became so when extended beyond the term commonly granted as an act of ordinary administration.—a term necessarily varying according to the fluctuations in the notions as to the proper system of management. The distinction between leases of ordinary, and those of extraordinary duration, was strongly marked in the law of Scotland; the

latter being regarded as alienation, as was evident from the language of the law as it appeared in the Statute Book, in judicial proceedings, and in the writings of the Scottish lawyers.

In illustration and support of these observations, the Respondents referred to the following cases, in which prohibitions against alienation were held to extend to long tacks:—

1st, The limitations imposed on the crown in the management of the royal demesnes, act of 1455, cap. 41, with Sir G. Mackenzie's observations on that act. In the Annexation Act, 25 Geo. 2, cap. 41, after the rebellion of 1745, alienation was prohibited, and this was held to extend to long tacks, which were therefore let only in virtue of a special power given to that effect.

2d, In the management of church property, life-rent assedation was considered as a species of alienation. Balfour's Practicks, p. 203.—*Bishop of Aberdeen v. Forbes*, Dec. 14, 1501.—*Abbot of Crossraguel v. Hamilton*, March 2, 1504.

3d, Long location of their fees by the vassals was held to be alienation by the feudal law generally, and as adopted in the law of Scotland particularly. Craig, lib. 2. dieg. 10. s. 5. *de locationibus*.—Lib. 3. dieg. 3. s. 22—24. *de recognitione*.—Lib. 3. dieg. 4. s. 5. *de jure protimeseos*.—Stair, b. 2. t. 11. s. 13.

4th, Long leases on death-bed were struck at by the law of death-bed on the ground of their being alienations. *Chrystisons v. Ker*, December, 1733, Kames, 1 Dict. 215.—*Bogle v. Bogle*, June 19, 1759, Fac. Coll.

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marked in the  
law of Scot-  
land.

Illustrations  
of the doctrine  
that *alienation*  
extended to  
long leases.

From the an-  
nexed pro-  
perty of the  
crown. Act of  
1455, cap. 41.  
25 Geo. 2,  
cap. 41.

From the case  
of church pro-  
perty.

From the feu-  
dal restraints  
on the vassal.

From the law  
of death-bed.

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From the  
bankrupt-law.  
From the writ  
of inhibition.

5th, Under the *alienations* in fraud of creditors prohibited by the bankrupt laws, long leases were included. Act of 1621, cap. 18, with Sir G. Mackenzie's observations on that act.—Act of 1696, cap. 5.

6th, Leases of extraordinary endurance were also struck at by the writ of *inhibition*, under the clause against alienation of the lands.

7th, A lease granted of burgh property, in virtue of a delegated commission, was set aside on account of extraordinary endurance, as being a species of alienation. Aberdeen case, 1491.

8th, In cases of joint interests, and in all cases of restraint on property, alienation was held to extend to long tacks.

That the word *alienate* must have extended to tacks, as it was the only word in the act of 1685 that could give effect even to *express prohibitions* against letting tacks.

The construction put upon the Act of Tailzies, 1685, cap. 22, afforded another proof of the comprehensive meaning of the word *alienate*, or *annailzie*. The most direct express prohibitions against letting tacks derived their efficacy as against third parties from that act, and yet there was no word in the act to give this effect to such prohibitions, unless the word *annailzie* had been considered as extending to *leases*.

That the practice of lawyers contemporary with the act of 1685 confirmed this view of the subject.

This conclusion as to the meaning of the Entail Act, and the extensive import of the word *alienation*, was confirmed by the practice of contemporary lawyers and conveyancers, as appeared from the most considerable entails put on record prior to the year 1700; such as the entails of Lee, of Bargeny, of Newbyth, of Blackcastle, of the Dukedom of Hamilton, of Prestonhall, of Malleny, of Nidpath,

of Rosehaugh, of Galashiels, of Dirleton, of Kintore, of Niddrie, of Libberton, of Craigievar, of Invercauld, and of Balnagown.

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It was also contended, that independent of the ground of extraordinary endurance, a lease at a large grassum and an elusory rent would be regarded as alienation, if it deprived the succeeding heir of the due enjoyment of the estate.

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That a lease, if it deprived the successor of fair enjoyment of the estate, was an alienation. Permissive clause.

The permissive clause in this entail was also irresistible evidence that the previous prohibition against alienation was understood to have extended to long leases.

The same conclusion was supported by the decided cases. In the case of *Lord Kinnaird v. Hunter*, Nov. 26, 1761, a lease for 25 years was challenged on the ground of its being an alienation, and supported only because the entail had not been properly recorded. The leases in the cases of *Ker (or Carre) v. Cairns*, and *Leslie v. Orme*, were supported only on the specialties in these cases, and rather tended to confirm than impugn the general doctrine. (*Vide ante*, case of *Turnerhall*, vol. i. pp. 423—429.)

Decided cases.

*Clerk* (in reply.) There could be no question here about the right to take a grassum. The question rested almost entirely on the length of time. From 1685 down to the present time there had not been a single case of a lease reduced merely on the ground of its being an alienation, unless there was an express prohibition. A lease for 76 years (*Leslie v. Orme*) had been supported, and an additional

Reply.

*Leslie v. Orme*, 6 Fac. Coll. 1779.

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That since the decision in the case of Leslie v. Orme, the opinion of lawyers had always been, that leases for any period not exceeding 100 years were good.

Some entails without this word *alienate*.

That the Court below was shaken on the general principle.

19 years' lease would in that case have been supported, had it not been that there was no possession under it; so that it could not be supported against an heir of entail who had the privilege of a singular successor. Since that decision it had always been the opinion of lawyers, and that opinion had been acted upon by heirs of entail, that, unless in cases where there was an express prohibition, these leases were good for any period not exceeding 100 years. Though the reason for fixing upon this particular period of duration rather than any other was not very clear, yet, as the opinion had prevailed, it had been thought advisable not to recommend it to heirs of entail to grant longer leases.

There was no attempt to show that this lease was prevented by any thing except the word *alienate*. Strike out that word, and nothing remained. But then it so happened that some entails had not this magical word, and heirs of entail having, upon searching among their old parchments, discovered this circumstance, came for opinions whether they might not grant leases as they were not bound by the magical term. Being told that they might, leases were granted accordingly; and one of these cases was now before the Court of Session. To the astonishment of every body, it was then found that there was infinitely more magic in the word *disposition* than in the word *alienation*; and he would venture to say that the Court was now very considerably shaken on the general principle.

By the law of Scotland, all deeds of importance must be registered, a system which was generally

admired. Unless an entail was properly recorded, it was not worth a pinch of snuff against creditors and purchasers. By a reference to the proper register, creditors and purchasers must know how to deal with heirs of entail. If there was nothing in the entail to strike against the particular transaction, the creditor or purchaser was safe. But unless the creditor or purchaser was safe, the heir could not be safe. If the transaction was void, the heir lost his estate. If the tenant was not safe here, the Duke had lost his right to the estate. The question whether the transaction was valid, and whether the heir had lost his right to the estate, was in these cases always the same. It was not surprising therefore that entails had received the strictest construction. Then, by the law of Scotland, there could be no unknown burdens on land, and entails were *strictissimi juris*; the prohibitions must be clear as the sun, otherwise they could not be effectual.

To apply these principles to this case, What was this prohibition? It was a prohibition to alienate, and a long tack was an alienation. Then what was a long tack? The prohibition must be precise and clear. What was a long tack? *Craig* said that one of 10 years was a long tack; then any thing beyond was an alienation. Others said 19 years. One Judge (*Islay Campbell*) fairly acknowledged he did not know what it was. *Blair*, in arguing these cases, had said that a tack for a longer period than one usually granted tacks in the ordinary administration of his affairs was a long tack. If the Judges had been asked separately, without any

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By the law of Scotland, there could be no unknown burdens on land. Prohibitions in entails must be clear as the sun.

Uncertainty as to what was a long tack. A thing so dubious not the proper subject of prohibition in an entail.

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Words *sell*,  
*annailzie*, *dis-*  
*pone*, in act of  
1685, referred  
exclusively to  
feudal right,  
or property of  
lands.

Meaning of  
the words *dis-*  
*position* and  
*alienation*.

Many aliena-  
tions (in loose  
sense of the

communication with each other, what was a long tack, every one of the 15 would probably have fixed on a different number of years. And yet it was said that the Duke had contravened, and of course lost his right to the estate, on a clause so dubious that no two persons ever agreed about its meaning. That was contrary to the construction which had always been given to these deeds.

The words *sell*, *annailzie*, *dispone*, in the act of 1685, cap. 22, referred exclusively to the property. Nothing was here meant or said as to the possession either by tacks or otherwise. In this entail, too, they related purely to the property; and it was necessary to attend to the distinction, as the property and possession were totally different things. In the act there was not a word about tacks, and it might be concluded that those who passed it applied it exclusively to the property.

What was *disposition*? and what was *alienation*? Disposition was the conveyance of some real right, and in that sense it was opposed to *assignation*, which was a conveyance of some moveable right. A lease was transmitted, not by disposition, but by assignation. (*Lord Eldon*. Don't you call that assignation *alienation*?) Certainly. Alienation, in its popular sense, was more comprehensive. It applied not only to real, but to moveable property. In this sense it comprehended every right that could possibly be transmitted. Giving sixpence to a common beggar was an alienation. It extended to deteriorations. Cutting a tree was alienation. But an heir of entail might cut trees, and do all manner of

waste, though they were alienations. In the bankrupt laws, alienation comprehended every thing by which the party might diminish his estate, real or personal. The prohibitions under alienation were so comprehensive that they could not all be specified. This was their argument. How far it was a sound one would be seen. If a life-renter cut trees, or pulled down a wall, this was alienation, and the property must be restored to the fiar as it was before. There was an attempt to prevent an heir of entail from committing waste, but without effect. He was absolute fiar, except in so far as he was restricted; and what might be alienation in others would not be so considered in him. This was the distinction. Who ever heard of an heir of entail being an administrator? He had not his powers on the one hand, and was not limited like him on the other. The reasonable acts of an administrator were effectual against him for whom he acted: they would bind a second administrator. An heir of entail contracted for a lease at rack rent. Was it sustained against the next heir? No,—unless clothed with possession. The acts of an administrator were not treated in this way. An heir of entail might contract with a purchaser for the sale of trees; he might put the price in his pocket and die: suppose the trees were not then cut, the next heir would say, “The trees are my property, and shall not be cut.” But if this had been a contract by an administrator, it would clearly have been good, &c.

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term) acknowledged to be competent to an heir of entail.

Difference between powers of heir of entail and an administrator.

But an heir of entail might do what an administrator could not do. He had greater powers than a



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That the resolu-  
tive clause  
in entails was  
useless, if the  
heir was con-  
fined to acts of  
ordinary ad-  
ministration.

No specific  
prohibition  
here against  
leases.

life-renter. He might grant leases for 19 years for his own advantage, and very much to the prejudice of the successor: he might cut down woods; he might exhaust mines; he might lay waste the whole estate. There was no analogy between his powers and those of an ordinary administrator. If there had been the slightest analogy, it would follow that the acts of the heir of entail might be challenged without a resolute clause. What was the use of a declarator of irritancy, if his acts might be set aside as contrary to a prudent administration of the estate? What was the use of the act of 1685, if this was at all analogous to a case of ordinary administration? But the fundamental point in cases of entail was, that, on contravention, the contravener lost his right to the estate.

In this entail there was no specific prohibition against leases. The only word relied on was the word *alienate*. (*Lord Eldon*. If the Duke had a younger son, could he give him a lease of this estate for 1000 years at a pepper-corn rent?) The permissive clause was not prohibitive, and a lease might be granted *at any rent*, except a lease for life. (*Lord Eldon*. It was a curious distinction that a lease might be granted of the estate for 1000 years, and that the mansion house could not be let in the same way.) The act was obscure, and it had been extended by the Courts. They had thought it hard to deprive the heirs of the mansion house, and had raked up the "*Regiam Majestatem*," a book written 500 years before the act of 1685, for reasons to enable them

to cut down leases of mansion houses and pieces of ground about them; and with respect to these pieces of ground, they had stepped from two acres and a half in the Greenock case, to five great estates in the Roxburgh cause.

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It was absurd to say that there must be in proper entails specific prohibitions against several acts of alienation, and yet to say that the general word was sufficient to prohibit the granting of long leases. It destroyed the principle of construction in regard to entails, and introduced a new and absurd construction under which it was hardly possible to avoid contravention. But then they said that the prohibitions of entails would be thus evaded; but who ever heard of *bona fides* in a case of entail? The heirs were evading them from generation to generation, and a single hole was sufficient to put an end to them. A great Judge (*Mansfield*) in the Court of King's Bench in this country had said, in a case where the maxim of "*strictissimi juris*" applied, that it was necessary "to hit the bird in the eye." So it was in the case of Scottish entails. (*Lord Eldon*. There were cases where the Court of King's Bench held that the bird was hit in the eye, but in which the Court of Chancery thought it was hit in both eyes very hard.) There was no equity in cases of entail.

The authorities in which long tacks were stated to have been considered as alienations had no application to the condition of an heir of entail. Besides other considerations, the passages in *Craig* might apply only to tacks that were established by

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infestment. A peculiar construction might be properly applied as to the property of the crown. With respect to church property, the incumbent there was merely an administrator. The principle of the law of death-bed was entirely different. Then they spoke of delegated trusts. It was new to him to hear that an heir of entail held his estate in trust.

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Judicial ob-  
servations.

The case  
stated.

*Lord Redesdale.* This case arose upon a marriage settlement entered into in 1693, on occasion of the marriage of Lord William Douglas and Lady Jane Hay, by which the lordship of Nidpath, and other parts of the estate of March, was resigned by the then Duke of Queensberry in favour of his son, (Lord W. Douglas,) and his heirs male by the said Lady Jane Hay. The settlement, or marriage contract, contained a proviso by which it was provided that “*it should in nowise be leisome and lawful to the said Lord William Douglas, and the heirs male of his body, nor to the other heirs of tailzie, nor any of them, to sell, alienate, wadset, or dis-  
pone any of the said haill lands,*” &c.; and after the irritant and resolute clauses, the instrument contained the following permissive clause:—“*It is always hereby expressly provided and declared, that, notwithstanding of the irritant and resolute clauses above mentioned, it shall be lawful and competent to the heirs of tailzie above specified, and their foresaids, after the decease of the said William Duke of Queensberry, to set tacks of the said lands and estate during their own life-*

Entail of Nid-  
path.  
Prohibitory  
clause.

Permissive  
clause.

*“ time, or the life-time of the receiver thereof; the same being always set without evident diminution of the rental.”*

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The late Duke of Queensberry had become possessed of the estate under this entail, which, under the same entail, had devolved upon the present Respondent, the Earl of Wemyss. The Duke had thought fit to execute the leases in question in the cause, and the action had been brought by the Duke of Queensberry, in his life-time, in order to have the legality of these leases declared.

Lease for 97 years, and action of declarator by the late Duke of Queensberry.

The lease was granted in 1802, upon the renunciation of another lease for 57 years, granted to a person of the name of Welsh, from Whitsunday, 1800; for which lease Welsh was to pay 86*l.* 15*s.* 2*d.* yearly rent, besides paying a grassum of 30*l.* as entry-money. The lease in question was granted on the 23d November, 1802, for 97 years, at the same rent, and a grassum of 318*l.* 1*s.* 2*d.*

The question for their Lordships to determine was, Whether it was within the power of the heir of entail to grant this lease. This turned upon the general power of persons holding estates as heirs of entail, subject to the prohibition contained in the words, *“ it shall in nowise be leisome and lawful, &c. to sell, alienate, wadset, or dispoine,”* &c. It did not depend on the power given to the heirs of entail *“ to set tacks of the said lands and estate during their own life-time, or the life-time of the receiver thereof,”* this not being a lease of that description. The whole depended on the general question, Whether the prohibitory words, *“ not to*

The question to be determined was, Whether this lease was within the powers of the heir of entail? and the whole depended on the effect of the prohibitory clause.

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Entails to be  
strictly con-  
strued.

Whether the  
prohibitory  
words extend-  
ed to leases, or  
were confined  
to the fee of  
the property?

Consequences  
of the con-  
struction that  
the prohibi-  
tion against  
alienation was  
confined to  
the fee of the  
property.

“*sell, alienate, wadset, or dispone,*” extended to such leases as the present.

In construing entails under the act of 1685, cap. 22, it had been determined as in the *Duntreath* case, that they were to be construed strictly; that the meaning was not to be extended by implication, but understood according to the strict words of the entail. That had now been so firmly settled that it would be very unwise to infringe upon the decisions establishing the doctrine; and therefore the question now was, Whether the words, “*it shall not be leisome, &c. to sell, alienate, wadset, or dispone,*” &c. had the effect contended for by the Respondent, or whether they merely prevented the entire alienation of the fee of the property?

If the construction contended for by the Appellant, viz., that the prohibition against alienation was confined merely to the alienation of the fee of the property, was the right one, then leases of every description must be excepted; and therefore a lease of the whole estate, even of the mansion house, might be granted at a pepper-corn rent, notwithstanding the prohibition in question; and this would have the effect of allowing the destruction of every entail where there were no words expressly prohibiting the granting of tacks or leases. If such had been the general idea at the time of passing the act of 1685, cap. 22, or subsequent to that period, in every case of entail without an express prohibition against leasing, (and there were but few such prohibitions in the ancient entails,) the entailed estates would have been covered with leases.

It had been said that these entails were injurious to Scotland, and ought not to be favoured. It might be so. But nothing could be so injurious as that estates might be so entailed and then let in leases. A great portion of a large estate, worth 3000*l.* 4000*l.* or 5000*l.* a-year, might thus be let under lease, and then sub-let again and again; and a great part of the landed property of Scotland in this manner might be put in the same condition as that of Ireland, under leases for lives, renewable for ever; a practice which, to his knowledge, was most injurious to the agriculture and quiet of that country. These considerations, however, ought to have no weight in opposition to the law, because the law, whatever it was, must be enforced; but he mentioned this merely to intimate his opinion that entails themselves were not so bad as allowing this mode of evading them.

The question then came to be, What sense the Courts had put upon the words “sell, *alienate*, “dispone.” In all other cases except entails, it appeared to be admitted that the word *alienation* extended to leases which deprived the heir or successor of the enjoyment of the property; as in the case of the annexed property of the crown, leases to the injury of the successor were considered as alienation; and so with respect to ecclesiastical tenures, and in other instances, some of them not perhaps so exactly analogous to the present case.

But there was one instance in which no leases could be given to bind the heir, which threw considerable light on the question; he alluded to leases of the mansion house. It appeared to have been

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If entails were injurious, it would be still more injurious to allow the entails to be made, and then to be evaded by long leases.

Admitted, that in other cases leases which deprived the successor of the enjoyment of the property were alienations. Crown and church property, &c.

Principle upon which leases of mansion houses are prohibited.

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constantly held as undoubted law in Scotland,  
 “that in the case of a tailzied estate, the heir in  
 “possession could not let the mansion house and do-  
 “main attached to it to the prejudice of the next  
 “heir, even though the tailzie contained no express  
 “prohibition against granting tacks.” Upon what  
 principle could that be? It could only be because  
 such a demise, being inconsistent with the full and  
 convenient enjoyment of the estate by the heir of  
 entail, was therefore an alienation.

Framers of en-  
 tails must have  
 conceived that  
 alienation ex-  
 tended to long  
 leases.

On looking at deeds of entail, with prohibitions  
 against alienation, and subsequent permissions to  
 lease, it would appear evident that those who  
 framed them clearly understood that leases were  
 included under the previous prohibitory words, as  
 the subsequent permissions gave a power which  
 must have been supposed not to have existed before.  
 It appeared to him clear, therefore, that a general  
 impression had prevailed among the framers of  
 these deeds of tailzie, that the prohibition against  
 alienation extended in some degree to leases. This  
 was naturally to be expected in a law derived in a  
 great measure from the feudal system, where long  
 leases granted by the vassal were held to be a species  
 of alienation.

Decided cases.

Then see how the question stood upon the decided  
 cases. He had been able to find no decision that a  
 lease of this description could be supported in the  
 face of such a restriction against alienation, without  
 something special in its circumstances. It was  
 stated, that after the decision in the case of *Leslie*  
*v. Orme*, it had been conceived in Scotland that the  
 effect of that case had been to determine *that heirs*

*Leslie v.*  
*Orme*, 6 Fac.  
 Coll. 1779.  
 This case it-

of entail, where there was no express prohibition against leasing, might grant leases for any period not exceeding 100 years, at the former rent. That form of words, however, implied that a prohibition against alienation restrained the granting of leases, otherwise the qualification, or limitation to 100 years, would not have existed. The power of letting leases, unless restrained by the prohibition against alienation, must, in such a case, be without limit; so that the case of *Leslie v. Orme*, instead of supporting the construction contended for by the Appellants, went directly the other way; for it appeared, that, at the time when that case was decided, it was conceived that the prohibition against alienation did in some degree restrain leases.

In the case of *Leslie v. Orme*, it appeared that Patrick Count Leslie, by his original tailzie of the 8th November, 1692, “*prohibited, conditioned, and declared, that it should in nowise be leisome and lawful, nor in the power of his heirs of tailzie, to sell, annailzie, or dispone the lands and others above-written, or any part thereof, hereby provided to them in manner foresaid, heritably and irredeemably, or under reversion, one or more; nor to grant infestments of annual rent, or yearly duties forth thereof; nor to set tacks of the same, in diminution of the true worth and rental they paid before the said tacks; nor to contract debts, nor do any other deeds whereby the samen may be evicted, appraised, or adjudged from them.*”

By a subsequent deed, taking notice of the original tailzie, especially of the declaration that it should not be lawful for his heirs of entail to set

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self, and opinions founded on it, proved that alienation was understood to have extended to leases.

Case of *Leslie v. Orme* particularly examined.

Entail of Balquhain.



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tacks in diminution of the true worth and rental paid before the said tacks, and that George Leslie, his son and heir of tailzie, who stood infeft in the entailed lands by virtue of the said original tailzie, and he, the said Patrick Count Leslie, taking into their serious consideration the difficulties and hazards that might arise by and through the aforesaid clause; “*therefore he, Patrick Count Leslie, by*  
“*virtue of the powers and faculties reserved to*  
“*himself, to alter, change, innovate, and annul*  
“*any irritance thereof he might think fit or con-*  
“*venient, with consent and advice of his said son,*  
“*George Leslie, by these presents dispensed with*  
“*and annulled the clause above specified, sicklike*  
“*and as freely in all respects as if the same had*  
“*never been conceived or insert in the bond of tail-*  
“*zie above deduced, and declared the same to be*  
“*void and null in all time coming; so that, in all*  
“*time thereafter, it should be leisome and lawful*  
“*to any of his said heirs of tailzie* TO GRANT TACKS  
“ AND ASSEDATIONS ON ANY PART OF THE LANDS  
“ CONTAINED IN THE SAID TAILZIE, AND THAT UN-  
“ DER THE PRESENT RENTAL, *if they should think*  
“*fit and expedient, without incurring any hazard*  
“*or danger in and through the aforesaid irritant*  
“*clause, which was thereby abrogate and taken*  
“*away.*”

Express per-  
mission to  
grant tacks  
without limit-  
ation as to  
time or rent.

The effect of this was to leave the case as if the prohibition against letting tacks in diminution of the rental had been wholly out of it. Taking both deeds together, there was first a prohibition against alienation, and then a power to grant leases of any description.

Under this entail, a person of the name of *Grant* came into possession, after a suit to recover the estate, in the progress of which he became very considerably indebted to Orme, his agent, who had assisted him with money to carry on the suit, and also advanced sums for his maintenance and education. To secure the repayment of these sums, he executed to Orme a lease for 19 years of the whole of the estate, (Balquhain,) for which Orme was to pay a yearly rent of 300*l.* and to apply what might be received over and above from the sub-tenants towards the extinction of the debt. This was afterwards discharged by the parties. A subsequent deed was executed, by which the whole estate was in effect demised to Orme, for four times 19 years, for a considerable rent and fine. Afterwards, by a farther transaction between these parties, in order to provide for the engagements with Orme, Leslie Grant likewise executed in favour of Orme a trust disposition of the whole tack duty, during the lease, except 300*l.* payable annually to himself; and in case any of the heirs should refuse to ratify the deed, the tack duty was restricted to the same sum till such time as the whole debts should be paid. Leslie afterwards executed new deeds in Orme's favour. By one of these (August, 1769) a privilege reserved in the former lease to him, his heirs, and *assignees*, of assuming possession of the mansion house and mains, was limited to him and his heirs. By another deed, (September 7, 1773,) Leslie further restricted this privilege to the heirs male of his body. Afterwards, on payment by Orme of a small sum by way of grassum, the whole estate was let to him

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Leslie Grant  
supplied with  
funds by  
Orme, his  
agent, to re-  
cover the es-  
tate.

Lease, April 5,  
1765.

Afterwards  
discharged by  
the parties,  
March 29,  
1769.

March 29,  
1769.

August, 1769.

Sept. 7, 1773.

Reversionary

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lease, Sept. 11,  
1773.

at the same rent for a farther term of 19 years after the expiration of the previous four 19 years. These instruments were confirmed by the next heir of entail, (the Pursuer's father.)

On the death of this Leslie Grant, however, without issue, the next heir of entail raised a process of reduction of the deeds, but which appeared to have been abandoned by him. But after his death, his son endeavoured to set aside the deeds:—1st, On the ground of fraud. 2d, On the ground of their being *ultra vires* of Leslie, who held the estate under a strict entail. As to the ground of fraud, that was out of the question, as the deeds had been acquiesced in and confirmed by the subsequent heir of entail. As to the first term, (1765,) that was out of the question, having been given up by the parties.

The Lord Ordinary (*Covington*) pronounced an interlocutor in this case, finding,—

*“ That as, by the two deeds of entail above mentioned, the heirs of entail were put under no restriction as to the number of years for which leases might be granted, they were at liberty to grant leases for any term of years they thought proper; and therefore sustains the defences, and assoilzies the Defender from the reduction of this tack, in so far as challenged on account of its being granted for such an unusual term of years,” &c.*

Tack of four  
times 19 years.

The cause afterwards came before the whole Court, and the Court pronounced the following interlocutor:—

Interlocutor in

*“ Find that insisting in the tack of 5th April,*

“ 1765, was inept and incompetent, and assoilzie  
 “ the Defender from that conclusion in the Pur-  
 “ suer’s summons. Repel the reasons of reduction  
 “ of the tack granted by Peter Leslie Grant to the  
 “ said David Orme, dated 29th March, 1769.  
 “ Repel the reasons of reduction to the obligation  
 “ and assignation granted, dated 29th March,  
 “ 1779, in so far as respects the restriction of the  
 “ tack duty and assignment of the surplus over and  
 “ above the 300l. during the life-time of the said  
 “ P. L. Grant, and the Pursuer’s father; but  
 “ sustain the reasons of reduction as to all subse-  
 “ quent years. Repel the reasons of reduction of  
 “ the ratification by the Pursuer’s father, in so far  
 “ as regards the tack itself, and the restriction of  
 “ the tack duty, and assignment of the surplus  
 “ thereof for the purposes therein mentioned during  
 “ the life-time of the Pursuer’s father, after his  
 “ succession to the estate of Balquhain; but sus-  
 “ tain the reasons of reduction quoad ultra. Sustain  
 “ the reasons of reduction of the deed of restriction  
 “ granted by the said P. L. Grant to the said  
 “ D. Orme, dated 5th August, 1769; and of the  
 “ tack and deed of restriction granted by said  
 “ P. L. Grant to the said D. Orme, dated 7th  
 “ September, 1773; and also of the tack granted  
 “ by the said P. L. Grant to the said D. Orme,  
 “ dated 11th September, 1773.”

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the case of Les-  
 lie v. Orme.

Their Lordships would observe, that the effect of  
 this interlocutor was to agree with the Lordordi-  
 nary as to the power of granting leases, but to hold,  
 that, notwithstanding this, the mansion house was

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Case of Leslie  
v. Orme does  
not support  
the construc-  
tion contend-  
ed for by the  
Appellants.

The case of  
the mansion  
house in Les-  
lie v. Orme  
considered as  
a fraudulent  
execution of  
the power.

not within the power, as it was the residence of the family. They also considered the subsequent lease, by which an additional term of 19 years was given after the expiration of the previous four times 19 years as void, the entail not giving the power of granting leases in reversion.

If this, then, was an authority, it by no means supported the proposition contended for by the Appellants, that, without a power expressly given, leases not exceeding 100 years might be supported under such an entail as this. There a power was expressly given to set tacks without any restriction as to the rents to be reserved, or the duration of the term; and, notwithstanding this, the Court held that the tack was not good as to the mansion house, that being considered as a fraud, in as far as it was contrary to the intention of the creator of the entail: for the ground of decision must have been, that this was contrary to the intention of the entailer, as it was considered by the Court below, and by this House, as a fraudulent execution of the power, as the creator of the entail must have intended that each heir of entail in succession should have the mansion house to live in, if he chose, during the period of his enjoyment. The case of *Leslie v. Orme* was therefore no authority, except in a case of entail with a similar power to that contained in that deed of entail; viz.—“ *It shall be leisome and lawful to*  
“ *any of my said heirs of tailzie to grant tacks and*  
“ *assedations in any part of the lands contained*  
“ *in the said tailzie, and that under the present*  
“ *rental, if they shall think fit and expedient, with-*

“ *out incurring any hazard or danger in and through the foresaid irritant clause, which is hereby abrogate and taken away.*”

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The effect of all this was, that the deed of entail in the case of *Leslie v. Orme* was one with words prohibiting the heirs of entail “ to sell, annailzie, and dispone,” but with the express power of leasing without bounds. It was clear then that it was no authority for this proposition, that a prohibition against alienation did not restrain leasing for any number of years. This case had been very much misunderstood in Scotland. It was impossible it could have any such effect. It was a case by itself, and could only apply to leases within a power so given.

Case of *Leslie v. Orme* very much misunderstood in Scotland, if considered as an authority to the extent stated by the Appellants.

This being the construction of the case of *Leslie v. Orme*, it formed no authority for contending that such a lease as this, for 97 years, with a *grasum*, or fine, was not restrained by the general words. This would be to give these general words of restriction a sense which they did not bear in other cases; such as those of the annexed lands of the crown, ecclesiastical lands, and lands which had been held by a vassal, where it appeared to have been clearly understood, that leases which went to deprive the successor or superior of the benefit of the property could not be sustained against such superior or successor.

Then it had been said, that it must be doubtful upon this construction, where there was a prohibition against alienation and no power to grant leases, as to what was to be the extent of the leases that

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As to the extent of the leases, the use or abuse of the power was the criterion.

10 Geo. 3, cap. 51, enabled heirs of entail to grant leases for 31 years, but without grassum.

might be granted. It might be difficult to set any direct specific bound to any such power of leasing, supposing it to be incident to the nature of the thing; but the limit of the exercise of a general power given, or incident to the nature of a thing though not expressly given, must be the use of it, and not the abuse. The act of 10 Geo. 3, cap. 51, had, in effect, provided for such cases; for it enabled persons who were otherwise restrained from granting leases by their deed of entail, to grant leases under certain restrictions. The utmost limit allowed was 31 years, (which supposed that leases to that extent were not before allowed.) It was clear, then, that notwithstanding the restriction under the general words, leases might be granted for 31 years, but no grassum must be taken, as that was prohibited; leases for 31 years being considered merely as improving leases, and for that reason only allowed.

In the present case, a grassum was taken—a sum to be put in the pocket of the heir of entail in possession, by anticipation of part of the rent; for it was neither more nor less than rent. A long lease by that means for a grassum was in effect the very thing which, in the case of *Leslie v. Orme*, could not be done. So, as to the mansion house, the power of taking possession of the mansion house was by the subsequent lease curtailed; and that was considered as a fraudulent execution of the power, as taking a benefit which was inconsistent with the proper enjoyment of the property by the future heirs of entail.

If a power of

If the power of leasing was incident to estates

tail, yet it must be exercised in a manner consistent with the proper enjoyment of the estate by the successor, otherwise it was, to a certain extent, a sale of the estate. Suppose the original lease had been granted at double the rent, and the Duke had then sold so much of the rent, would not that be within the words prohibiting the sale? It must be; otherwise he would have had power to dispoise the estate. There had been 80% odd of rent reserved on this lease. This was said not to be an alienation, as it only disposed of the enjoyment for a term of years. But suppose he succeeded in establishing this lease, and sold 80% a-year out of 86% rent, that would be a sale. Yet the same effect might be produced by letting long leases, taking a grassum.

Upon the whole, this lease could not be supported. It was not a lease necessary for the enjoyment of the property; and the power to make such leases was not legally incident to entailed estates, without express words authorising them. It was a sale *pro tanto*. The general word must extend to this kind of leasing. The prohibition against *alienation*, in other cases, restrained such leasing, and so it must do here. The impression on his mind, therefore, was, that they ought to affirm the almost unanimous decision of the Court of Session. Lawyers in Scotland, from 1685 down to the time of the decision in *Leslie v. Orme*, and even from that time till 1802, when the present lease was granted, a space of more than 100 years, must have been of opinion that such leases were not allowed, other-

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leasing was  
incident to en-  
tailed estates,  
that power  
must still be  
exercised in a  
manner con-  
sistent with  
the proper en-  
joyment by  
the several  
heirs.

The power of  
making long  
leases not le-  
gally incident  
to entailed es-  
tates, without  
words express-  
ly authorising  
them.

Lawyers in  
Scotland must  
have been of  
opinion that  
the prohibi-  
tion against  
alienation ex-  
tended to long  
leases, other-



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wise there  
could now  
have been no  
doubt on the  
subject.

wise there would have been no doubt on the subject. But it appeared the Duke of Queensberry himself had doubts. The impression, for a vast number of years, had certainly been as the Court had now decided. If any doubt had been created by the case of *Leslie v. Orme*, it was because the real nature and effect of that case had been misunderstood.

*Lord Eldon* (Chancellor.) He did not understand it to be the intention of his noble friend to propose that the House should immediately proceed to judgment. If the duty which he had to discharge had been confined merely to the giving the result of his opinion, he could without delay discharge it. But their Lordships would remember that the question had been frequently discussed in the Court of Session, and that they had the benefit of the opinions of the bench on this subject, (*vide* Roxburghe cause, *post*.) of such infinite importance to the landed property of Scotland. It would be recollected that this question had come indirectly to be agitated in the Roxburghe feu cause, where much had been said about perpetual leases, and one lease of an entire estate. In the course of the argument on that question, much had also been said as to the effect of prohibitory clauses in entails.

Roxburghe  
feu case, *post*.

The manner in which the noble Lord stated the case of *Leslie v. Orme* accounted well for that case, but it did not account for the arguments; for it had been argued, that when a power was given to grant leases, it was in the sense of a prudent administra-

tion of the estate, and that the heir of entail was bound to do in this respect what would be done by an husband-like administrator; and that if it was to be understood in a larger sense, the heir of entail would be an absolute proprietor: that it must be wisely exercised for the benefit of the estate, even if given with liberty to diminish the rental; otherwise, that in the case of a holding, for example, of 1000*l.* a year, such a power of diminishing the rental might be so exercised, as that a lease of the estate for 1000 years might be granted at a pepper-corn rent. He had heard an anecdote respecting this case of *Leslie v. Orme*, which, if correct, showed, that under the particular circumstances of that case, a lease for four times nineteen years was not considered as an abuse of a power confined even to a fair administration of the estate.


He threw out these observations now merely to show that there were several particulars to which they must have regard. As far as respected this lease, he was ready to discuss the question so as to go to judgment now; but it must occur, that in observing on the feu case, the discussion must go to leases as well as to feus, and that the feu question must be considered on all the grounds that occurred in this Queensberry case; and he should be sorry to obtrude on their Lordships' attention twice. Having, then, to go at large into the question of leases on the feu case, and the time not being distant when he proposed to do so, he thought it might be proper to defer the farther consideration

Déc. 10, 1813.

NIDPATH  
ENTAIL.  
(QUEENS-  
BERRY.)

The 4 times 19 years' lease, in the case of *Leslie v. Orme*, considered as, under the special circumstances, consistent with a power of fair administration, and that was a ground of the judgment in that case.

Dec. 10, 1813. of this case till the same day. (*Vide Roxburghe case, post.*)

  
 MIDPATH  
 ENTAIL.  
 (QUEENS-  
 BERRY.)  
 Judgment.

Judgment of the Court below *affirmed.*

Agent for the Appellant, CHALMER.

Agent for the Respondents, SPOTTISWOODE.

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ENGLAND.

IN ERROR FROM THE COURT OF KING'S BENCH.

HAWKINS—*Plaintiff in error.*

REX—*Defendant in error.*

Dec. 15, 1813.

  
 CORPORA-  
 TION OFFICE.  
 —ELECTION.

AT a meeting duly held for the election of an alderman for the borough of Saltash, Hawkins and Spicer were candidates. Two votes were given for each, when they were interrogated whether they had qualified by taking the sacrament within a year before the election, as required by 13 Car. 2, stat. 2, cap. 1, sect. 12. Hawkins admitted he had not. Spicer answered that he had. Public notice then given of Hawkins's disqualification, but poll proceeds; and, after the notice, 20 vote for Hawkins, 16 for Spicer. Mayor swears in Hawkins; two of the aldermen (as they might do by the constitution of the borough) swear in Spicer. Hawkins takes the sacrament within the time limited by the Annual Indemnity Act. Held by the Court below:—  
 1st, That though notice of the disqualification of Hawkins was not given till after the commencement of the election, all the votes for him, after that notice, were thrown away.  
 2d, That Spicer having the greatest number of legal votes was duly elected, and, he having been sworn in, the office was *legally filled up* by him, so as to exclude the operation