

The Lords Spiritual and Temporal in Parliament assembled: Find that the Duke of Queensberry had not power under the entail, founded upon between the parties in this cause, to let tacks, partly for rent reserved, and partly for sums and prices paid to himself; and that tacks granted upon the renunciation of former tacks, which were granted, partly for rent reserved, and partly for sums and prices paid to the Duke himself, are to be considered as tacks made, partly for rent reserved, and partly for sums and prices paid to the Duke himself; and that the tack in question having been granted, partly for rent reserved, and partly for a sum or price paid to the Duke for a former tack renounced, for which a sum or price had been paid, besides the rent reserved, the same is to be considered as a tack, partly for rent reserved, and partly for a sum and price paid to himself, and ought not to be considered in a question with the tenant claiming under the said tack, as let without evident diminution of the rental. And it is ordered that with this finding, the cause be remitted back to the Court of Session, to do therein as is just and consistent with this finding.

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 SYMINGTON
 v.
 THE EARL OF
 WEMYSS.

Journals of the
 House of
 Lords.

For the Appellant, *James Moncreiff, Fra. Horner.*

For the Respondent, *John Leach, F. Jeffrey, J. H. Mackenzie.*

[Crook.]

THE RIGHT HON. EARL OF WEMYSS AND
 MARCH, *Appellant;*
 MARGARET JOHNSTON, Tenant in Crook,
 and JOHN HUTCHISON, her Husband, *Respondents.*

1819.

 THE EARL OF
 WEMYSS
 v.
 JOHNSTON,
 &c.

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWERS OF LEASING—ISH—GRASSUMS.—In the Neidpath entail there was no express prohibitory clause, either against granting leases or against taking grassums, but there was a prohibition to *alienate*. There was a permissive clause to grant leases for the granter's lifetime, or the lifetime of the receiver thereof, always without evident diminution of the rental. A lease was first granted for twenty-six years, at £12 of yearly rent, with £115 grassum paid. This

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was renounced in 1791 for a fifty-seven years lease at same rent, with no grassum paid. This lease, before its expiry, was also renounced for a new lease, with an alternative period of duration for 31 years, or for 29, 27, 25, 23, 21, or 19 years, whichever the Duke might be found to have power to grant. It was contended, that the lease was just a continuation of the first, and affected by the grassum then taken, and also that it was granted with evident diminution of the rental, and beyond the duration allowed by the entail. Held, that as no grassum was paid, the lease was not void on that ground, and the Court sustained the lease for twenty-one years. In the House of Lords remitted for reconsideration, with doubts expressed.*

* It appears to me to be a most extraordinary thing that a lease of such a nature as this, with such an interminable lease, can be a good lease.—*Lord Eldon's speech.*

It has been seen in the previous appeals, that the Neidpath and March entail contained no prohibition against leasing; but only against selling and alienating.

There was a permissive clause authorising the heirs of entail, "to set tacks or rentals of the said lands and estate during their own lifetimes, or the lifetimes of the receivers thereof, the same being always set without diminution of the rental."

The present case originated like the cases of Whiteside and Edstoun.

In 1731, the Inn of Crook, together with a few acres of ground, was let at a rent of £8, 6s. 8d.

In 1780, the Duke granted a new lease to Thomas Johnston, the respondent's father, for twenty-five years, at the yearly rent of £12. The tenant, in addition, was taken bound to pay the public burdens for which the property was liable; and for this lease the Duke received a grassum of £115.

After possessing about ten years, the tenant finding the inn too small, expended a considerable sum in building additions to the house and offices. In consideration of which he asked and obtained from the Duke a new lease for fifty-seven years, from Whitsunday 1791, upon renouncing the former lease. Instead of taking the tenant bound to pay the public burdens, the payment was undertaken by the Duke, but the amount was added to the rent; and in this way the rent of Crook came to be £12, 15s. 5d. No grassum was paid for this lease.

Thomas Johnston, the tenant, having died, his daughter, the respondent, succeeded to the lease under which she continued to possess till 1807, when, as the Duke's powers had been struck at by the decision in the Court of Session in the

Wakefield case, she, like the other tenants, renounced her fifty-seven years' lease, and obtained in place of it a lease for thirty-one years, or for such other alternative period of 29, 27, 25, 21, or 19 years, as the Court of Session, or your Lordships, should find to be the longest of these periods for which the Duke had power to grant a valid lease of the said subjects. The Duke, at same time, granted an obligation, in case the judgment in the Wakefield case should be reversed in the House of Lords, to grant new leases for fifty-seven years as formerly.

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In 1809, the appellant had brought an action of declarator against the Duke and the tenants on the March estate, to have it found and declared that it was not in the power of the Duke to let leases of any part of the said estate, for a longer period than his own lifetime, or the lifetime of the receivers thereof, except agreeably to the Act 10 Geo. III. c. 51; and that all tacks granted upon payment of grassums, were prejudicial to the next heir of entail.

This action was remitted to, and afterwards conjoined with the process of declarator at the instance of Alexander Welsh, one of the Duke's tenants, brought for the purpose of trying the validity of his lease of the farm of Harestanes. The Duke died, and these actions were transferred against the Duke's executors. The conjoined actions were subsequently reported to the Court, on informations regarding the fifty-seven years' lease, when an interlocutor was pronounced, assoilzeing the appellant, the Earl of Wemyss, from the conclusions of Welsh's declarator, and the general declarator was remitted to Lord Hermand as Ordinary.

After an interlocutor, ordering the defenders (respondents) to produce the contracts, the Lord Ordinary pronounced an interlocutor, finding nothing stated "relevant to take the
" case out of the predicament of the other leases on the Neid-
" path estate, which have been set aside by the Court; sus-
" tains the reasons of reduction; reduces, decerns and
" declares accordingly."

May 16, 1815.

On representation, his Lordship adhered. And, on reclaim-
ing petition to the Court, the Court pronounced this in-
terlocutor:—"Alter the Lord Ordinary's interlocutor re-
" claimed against; and, in respect it appears that no grassum
" was paid for the tack, under reduction, sustain the same
" as a valid and effectual tack for the restricted endurance of
" twenty-one years from the date hereof; and to that extent
" sustain the defences in the conjoined processes of reduction

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Nov. 17, 1815.

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“ and of declarator, and assoilzie to the extent, from the conclusions of the libels in the said process, and decern.” On reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought. *Pleaded for the Appellant.*—The lease of Crook (1807) was substantially let for a grassum. This appears from the circumstance that it was neither more nor less than a continuation of the lease granted in 1780, and which was then granted on payment of a very large grassum. The fifty-seven years' lease, let in 1791, was substituted in place of the lease of 1780; the yearly rent under all these various leases remaining the same. All these leases must, therefore, equally be regarded as let for grassum; the grassum taken originally affecting them all.

2d, Supposing the fact to have been, that the leases in 1791 and 1807, were granted without other considerations than the rent, then it would follow that the Duke had made a present to the tenant of value to a certain amount, at the expense of his heirs of entail. But his Grace was not at liberty to make a present of that kind, at the expense of his heirs of entail.

3d, In fact, it is not said that the Duke granted the leases of Crook in 1791 and 1807, without consideration. But the consideration taken by the Duke, is said to have been a discharge, for certain repairs which had been made by the tenant on the inn, and which the Duke found himself bound to pay. Of this there is no evidence. It is not said that the lease bears that this was the consideration for which it was entered into on the part of the Duke. But let it be supposed that it really was the case, that for the prolongation of his lease at the same rent, the tenant discharged the debt due to him by the Duke, this is just the same as if the Duke had taken a grassum, inasmuch as he, in lieu of grassum, got a debt due by him discharged. The repairs, it will be observed, are not said to have been repairs stipulated *in futuro*, but past repairs, for which the Duke considered himself liable. These repairs, therefore, plainly were not at all of the nature of rent or future return for the farm, and, supposing the statement of the respondents to be true, they appear just to have been a debt of the Duke himself to the tenant. The discharge of such a debt, therefore, was, in fact, a new grassum.

4th, Besides, there is in this case a diminution of the rental, because no rent was stipulated in the leases of 1791 and 1807, to answer for the grassum of £115, payable under

the former lease. It was the duty of the Duke in letting the lease in 1791, to have preserved to future heirs of entail, a rental equal, not only to the return of the land, but also to a proportion of the grassum payable under the preceding lease. Not having done that, this lease was, therefore, let with diminution of the rental; and the lease of 1807, which he substituted for that in 1791, must have the same quality.

5th, The lease was let for a term not authorised by the permissive clause in the entail, and not necessary in the fair administration of the estate.

Pleaded for the Executors and Trustees.—They pleaded as in separate case, *vide* next page.

Pleaded for the Respondent, the Tenant.—1st, The lease in question, restricted as it has been, by the interlocutors, to the length of twenty-one years, was competently granted by the late Duke of Queensberry, in virtue of the powers which he enjoyed as a proprietor of the estate, and is struck at by no prohibition or limitation in the deed of entail. It is, at all events, good for the period to which it has been restricted, by the interlocutors appealed from.

2d, There is no ground for maintaining that the lease was granted for a grassum. Holding it to be a substitute for the fifty-seven years' lease granted in 1791, no grassum was paid either then, or when the substitution was made in 1807.

It is not denied that there was a grassum paid in 1780; but the endurance of the lease, which was bought by that grassum, terminated in 1805.

The commencement of the present lease in 1807, was two years subsequent to the expiry of the lease of 1780, the only lease for which the Duke received a grassum. It is impossible, therefore, either to hold that the present lease was substituted for any part of the lease 1780, or that it has any connection with the grassum, for which that lease was granted. And the respondents submit, that the fair view of the case is to consider the first fourteen years of the renewed lease of 1791, as the remainder of the lease 1780, and the subsequent period of it, an additional term, granted in consideration of the expense laid out by Johnston, in improvements. These expenses, the Duke, was in no way individually bound to repay; but, as the extent and permanency of these improvements, rendered them valuable to the appellant and subsequent heirs of entail, as well as to the Duke, and, as the tenant was taken bound, not only to uphold and keep good the buildings during the currency of his lease, but to leave them so at its

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expiry, the prolongation of the lease seems to have been but a reasonable return for the advantage thus derived to the estate.

3d, There was in this case no diminution of rental. The appellant has maintained the reverse; because, as he contends, no sum has been added to the present rent, to answer for the grassum for £115, paid in 1780. This is assuming that grassum is rent taken by anticipation. The respondents maintain that it is a payment altogether different and distinct from rent. But it would be improper to enter more fully into the discussion of that point, as it is fully argued in the cases of Whiteside and Edstoun; before referred to.

Vide Judgment at the end of next case.

For the Appellant, *John Leach, F. Jeffrey, J. H. Mackenzie.*

For the Respondents, *James Moncreiff, John Cuninghame.*

1819.

[Case of the Executors; Farm of Crook.]

THE EARL OF
WEMYSS
v.
MONTGOMERY,
&c.

EARL OF WEMYSS AND MARCH,

Appellant;

MONTGOMERY,
&c.

SIR JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS of the Strand, in the County of Middlesex; WILLIAM MURRAY, Esq. of Henderland; and EDWARD BULLOCK DOUGLAS, Esq., Trustees and Executors of the late Duke of Queensberry,

Respondents.

House of Lords, 7th April 1819.

The respondents lodged a separate case in this appeal, in which, after stating the circumstances as detailed in the preceding appeal, they

Pleaded for the Respondents.—The lease in question, restricted as it has been by the interlocutors appealed from, to the length of twenty-one years, was competently granted by the late Duke of Queensberry, in virtue of the powers which he enjoyed as proprietor of the estate, and is struck at by no prohibition or limitation contained in the entail.

The First Division of the Court has, no doubt, found that the Duke had no right to take grassums, but this judgment