" south, or south-west of Niddry, to apportion the value of the benefit " arising therefrom, between the said appellants, according to the local " situation and other circumstances of such lands respectively."

For Appellant, Mr. Wauchope, *James Wallace, Ar. Macdonald.*

For Earl of Abercorn, Appellant in Cross Appeal, and Respondent in Original Appeal, *Al. Wedderburn, Thos. Erskine.*

For Respondent, Sir Archibald Hope, *Henry Dundas, J. Dunning.*

One point in this case, viz. " Servitude," is reported M. 14538.

(M. 15530.)

DAVID ORME, Writer in Edinburgh, - *Appellant.*

JOHN LESLIE of Balquhain, Esq. - *Respondent.*

House of Lords, 25*th February* 1780.

ENTAIL—LEASES—ALIENATION.—How far leases for four nineteen years' duration of an entailed estate were reducible as an " alienation" thereof. Leases sustained, in the special circumstances, for the granter's life, and the life of the heir who ratified them; but a lease of a mansion house, offices, and gardens, &c. reduced, and also of the lands beyond the lifetime of these parties.

This is the sequel of the case between Counts Leslie and Leslie Grant, which, after five appeals to the House of Lords, ended in favour of the latter, finding him entitled to succeed to the entailed estates in Scotland of Balquhain and Mains, and of Fetternear. The entail of the estates originally contained a prohibition against leases in diminution of the true worth and rental of the estates; but by a second entail this restriction was taken away; and the only prohibitions in this entail were directed against selling, alienating, or disponing, or doing any other deed in prejudice thereof; and the question here was, whether long leases were to be held as alienations of the estate?

In the whole litigations which took place in the former cause, the appellant acted as agent for Leslie Grant, and an account being incurred to him in conducting the cases before the Court of Session and House of Lords, amounting to £3240, Grant executed six several deeds, having the effect of

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granting him leases of the whole estates of Balquhain and Fetternear for four nineteen years, including house, gardens, &c. &c. The first lease of 1765 was superseded by one more simple in 1769. This was followed by an assignment of the surplus rents, after deducting £300 payable to himself, to which sum he restricted his right as tack duty by deed 1769. This latter assignment was ratified by the next succeeding heir of entail, Mr. Patrick Duguid, in September of the same year, which was called the fourth deed. The fifth deed was the lease of the houses, gardens, &c. of Fetternear in 1773, and thereafter on the 11th of September of that year, a prorogation of the term of the lease was granted by the sixth deed for 19 years.

After Mr. Leslie Grant's death, and notwithstanding the above ratification by the next succeeding heir Mr. Duguid, the latter raised a reduction of the whole leases, as well as assignment and restriction, and of his own ratification thereof, (which, after his death, was carried on by the respondent, as next heir of entail), on the ground, 1. That they were unfair transactions, wherein an undue advantage was taken of Mr. Leslie Grant's situation with reference to the appellant and other creditors; 2. That it was not in his power, as heir of entail, to grant the leases in question, which, when looking only to the second entail, was inferred from the prohibition to *sell, annalzie,* or *dispone,* or *to do any other deed.* 3. That, at any rate, the heir of entail could not legally dispose of in this manner the house, offices, and gardens of Fetternear. 4. That the deed of assignment of the rents to the appellant for himself, and in trust for Leslie Grant's other creditors, and restriction of the tack duty, should be set aside, it not being in his power to grant such beyond endurance of his own life.

Mar. 3, 1779. The Court, of this date, pronounced this interlocutor, "They adhere to that part of the Lord Ordinary's interlocutor which finds that the insisting in a reduction of the "tack, dated the 5th of April 1765, was inept and incompetent, and assoilzieing the defender from that conclusion "of the pursuer's summons; repel the reasons of reduction "of the tack granted by Peter Leslie Grant to the said "David Orme, dated the 29th of March 1769; repel the "reasons of reduction to the obligation and assignation, "dated the 29th of March 1769, in so far as respects the restriction of the tack duty and assignment of the surplus "over and above the £3600, during the lifetime of the said

" Peter Leslie Grant, and of the pursuer's father; but sus-
" tain the reasons of reduction thereof so far as regards the
" restriction and assignment of the tack duty, of all years
" from and after the death of the pursuer's father. Repel
" the reasons of reduction of the ratification of the pursuer's
" father, in so far as regards the tack itself and the restric-
" tion of the tack duty and assignment of the surplus there-
" of, for the purposes therein mentioned, during the lifetime
" of the pursuer's father, after his succession to the estate
" of Balquhain; but sustain the reasons of reduction *quoad*
" *ultra*: Sustain the reasons of reduction of the deed of
" restriction granted by the said Peter Leslie Grant to the
" said David Orme, dated the 5th day of August 1769 years,
" and of the said tack and deed of restriction granted by
" the said Peter Leslie Grant to the said David Orme, dat-
" ed the 11th of September 1773, and remit to the Lord
" Ordinary to proceed accordingly, and further to do as he
" shall see just."

Against this interlocutor the appellant brought an appeal to the House of Lords, in so far as it reduced the third deed of assignment and restriction; and in so far as it sustains the reasons of reduction of the deed restricting the tack duty and assignment of the surplus rents above the £3600, *after the death of the respondent's father;* and in so far as it sustains the reasons of reduction of the deed dated the 5th August 1769; and the tack and deed of restriction dated the 7th September 1773; and of the tack dated the 11th September 1773 appealed therefrom to your Lordships. The respondent brought a cross appeal against the part of the interlocutor adverse to him.

Pleaded for the Appellant.—An heir of entail, it is settled law, may exercise every act of ownership, not expressly prohibited by the entail. Leases were not expressly prohibited, and consequently the heir of entail had full power to grant leases of the estate. No restriction can be inferred in this respect from a prohibition against selling or doing any other deed to affect the other heirs of entail. No objection lies to the leases as to the power of granting them; and the question is, what other ground exists for reducing? There is no fraud or circumvention, and there is an object and an onerous cause as the groundwork of the whole. The fairness of the transaction is unimpeachable, the object wished to be attained by the deeds was openly avowed, namely, the clearing off the debts contracted to the appellant and others.

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And as these costs were expended *in rem versam* of the whole heirs of entail of the estate of Balquhain, the leases ought to be good not only for the lifetime of Mr. Leslie Grant, and Mr. Duguid, who ratified them, but also during the lifetime of the succeeding heirs, until the leases are expired, or the debt paid. Nor is this power of granting leases confined to the lands alone. It is equally competent in regard to the mansion-house or seat of the family, because there is no law prohibiting an heir of entail, unfettered as to leases, from granting a lease of the mansion houses, offices, and gardens. The Court has found these leases reducible, as well as the mains or farm adjoining the house, but this is not supported by any ground in the law whatever.

Pleaded for the Respondent.—The original object of the lease to the appellant was to secure him in payment of his account, yet this was rather an unusual security to take, and there was one more regular, and equally secure and open to him, in so far as his payment was concerned; but this did not exactly suit his views. He got a lease, and entire possession of the estate; and by degrees he extended his views, and carried them into execution by a series of deeds. Besides, at the time the transaction was entered into, Mr. Orme understated, concealed, and misrepresented the real grassums payable by the several tenants, so as to affect the terms of the bargain in his favour. These deeds were to the great injury and lesion of Mr. Grant, and to the injury of the succeeding heirs, as they gave to the appellant this very considerable estate, for nearly one hundred years, on payment of a very trifling amount to the true owner.—The multiplicity of the deeds themselves—the grasping at the whole rents and even casualties of the estate, as well as the mansion house, stamp the true character upon them, and shewed a determination on the part of the lessee, to enjoy the property of the whole estate. Separately, There is reasonable ground for maintaining that the original entail, expressly prohibiting leases, remained in full force. At all events, if otherwise, the second entail, prohibiting to *sell*, *alienate*, or *dispone*, or *do any other act or deed*, was sufficient to prohibit leases such as the present, by which the entire estate was transferred from the proprietors for a 100 years, because such a lease was equivalent to an alienation. It was, besides, express against contracting debt, " by which the same might be evicted, apprized, or adjudged," and therefore Mr. Leslie Grant had no right or power by the entail to charge a six-

pence of debt either upon the lands, or upon the rents, for longer than his own lifetime, and though this debt was contracted in conducting the law suits in question, yet there is no legal obligation upon the respondent to pay the same.

After hearing counsel, it was

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

For Appellant, *Al. Wedderburn, Dav. Rae.*

For Respondent, *Henry Dundas, Ar. Macdonald.*

NOTE.—The grounds of the judgment in this case, are explained by Lord Chancellor Eldon, in the Queensberry Leases, Dow, vol. ii. p. 112.

[M. 4277.]

ELIZABETH, MARGARET, and HARIET GRAHAM, Infant Children of William Graham of Gartmore, - - - - - } *Appellants;*

MARGARET GRAHAM, Mother of the said Children, and ALEXANDER GREIG, her Trustee, } *Respondents.*

House of Lords, 17*th March* 1780.

FIAR—FEE OR LIFERENT.—Circumstances in which the terms of a destination to a parent in liferent, and to "*the heirs of her* "*body in fee*," held to give the mother a fee and absolute right to the personal estate conveyed.

Dr. Porterfield, the respondent's father, assigned and transferred "to and in favour of the said Margaret Porter-" field, my daughter, *in liferent*, and to the heirs of her body "*in fee;* whom failing, my own nearest heirs and assignees "whatsoever, the several bonds and sums of money herein "after mentioned." Here followed the enumeration of the "bonds. There was a declaration that "these presents are "granted by me, and to be accepted by the said Margaret "Porterfield, with the burdens of all my just and lawful debts, "legacies, funeral charges and expenses. With full power "to my said daughter, and *her foresaids*, for their respective "interests above mentioned, after my decease, to uplift and "receive the foresaid sums of money, and, if need be, to sue "therefor, and to grant discharges of the same, which