The Court of Session, instead of having done too much for the respondents, had awarded them little more than a fifth of what was their due. As a punishment on the appellant for the part he had acted, he would move that the appeal be dismissed with £200 costs."

It was therefore ordered and adjudged that the interlocutor complained of be affirmed, with £200 costs.

For Appellant, *W. Grant, W. Tait.*
For Respondents, *Sir J. Scott, J. Anstruther.*

SIR ALEX. RAMSAY IRVINE, & ROBERT KINNEAR, *Appellants;*
ALEX. VALENTINE, - - - *Respondent.*

House of Lords, 4th March 1793.

LEASE—ASSIGNEES—SUSPENSION—COMPETENCY.—A Lease was taken to the tenant, his heirs and assignees, such assignees to be approved of by the landlord. On assigning the lease:—Held that the landlord was not entitled to impose new and more ample conditions in his own favour in giving such consent or approval. A decree of reduction having been extracted, and suspension brought of that decree; Held that suspension of a decree *in foro* of the Court of Session was incompetent.

The respondent obtained leases of the farms of Easter and Wester Pitgarvie, the latter of which originally belonged to him. The leases were for a term of 19 years, and thereafter for the life of the person then in possession. They were both taken to Alexander Valentine, his heirs and assignees (such assignees being always agreeable to, and approved of by the said Alexander Ramsay Irvine, his heirs and successors, by a writing under his or their hands to that effect). And certain conditions as to cropping and enclosing and fencing were laid on the tenant, and also binding him "to take the advice and direction of the said Alexander "Ramsay Irvine and his foresaids, as to the fences to be "put upon said possession. And for the said Alexander "Valentine and his foresaids, their encouragement in carry-"ing on the said ditches, Sir Alexander Ramsay obliges

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"himself and his foresaids to advance money from time to "time."

Having obtained these leases at a small rent of £100, the tenant laid out considerable money in building new offices, and enclosing and fencing.

In consequence of these outlays he was under the necessity of obtaining a loan of £300 on the security of the leases. When this transaction came to be completed by deed, the landlord having inserted a clause of absolute renunciation of the leases, he refused to sign it. Thereafter, and of his own accord, the landlord caused an advertisement to be inserted in the newspapers, calling upon the tenant's creditors to lodge their claims with him, stating to his agent by letter: "I shall soon send you the substance of an agree-"ment betwixt Mr. Valentine and me, to be executed in "form; whereby I am to pay off his debts and take his "farm for certain under my management, for my reim-"bursement; and if all his debts are not extinguished "(which will then be in my person) within a limited time "then the farm is to devolve to me, and the lease will be at "an end. But my name is not to be mentioned in the ad-"vertisement." The advertisement appeared; but, in consequence of its damaging the tenant's credit, he was obliged to become bankrupt. He executed a trust deed empowering trustees to dispose of the leases. At a meeting of his creditors, the leases were agreed to be disposed of by public auction, the appellant appearing as a creditor at the meeting, acting as preses, and signing the minutes.

This minute, so signed by him, was in the eye of law, an unconditional consent to the sale of the leases. Afterwards, however, the appellant was pleased not so to consider it; and a few days before the sale he transmitted a series of conditions, which he insisted to be imposed on the purchasing tenant before he would consent to the same. These were, 1. That the tenant shall reside on the farm, and have no other residence, and no other farm. 2. That the tenant shall find security for five years' rent, and for the stocking of the farm. 3. Half of the arable land upon the farm laid down with grass seed with the first crop, and to continue in grass for four years. 4. That the tenant shall support the hedges, and leave them in a suitable condition on removal.

These conditions were new, and not such as were contained in the lease to be sold. They were, besides, such as prevented competition at the sale, as was proved by those

who attended. The result was, that after adjournments, the price was reduced to £200, and the appellant having offered that sum, became the purchaser. The conditions, of course, could not affect him; but the tendency of them was to deter competition, in order that the lease might be thrown on his hands. Soon thereafter he let the said farms to Kinnear, at a rent of £180 per annum for 38 years. Upon which the present action of count and reckoning, and reduction and removing was brought against both Ramsay Irvine and his tenant Kinnear. The reduction being applicable to Kinnear's lease.

The Court unanimously "Sustain the reasons of reduc- June 30, 1791.
"tion in so far as regards the defender Sir Alexander Ram-
"say Irvine, and reduce, decern, and declare accordingly;
"Find him accountable to the petitioner for the profits of
"the farms of Easter and Wester Pitgarvie since the date
"of his purchase, after allowance of the £200; and remit
"to the Lord Ordinary to hear parties' procurators on the
"amount of these profits, and to do as he shall see cause;
"And further find that the defenders, Sir Alexander Ram-
"say Irvine and Robert Kinnear, must remove from the
"said farms at the term of Martinmas next, and decern."
On reclaiming petition the Court adhered. July 9, 1791.

This decree being extracted, a suspension was brought, which the tenant contended was just a renewal of the same cause of discussion, and his counsel (the late Lord President Hope) pleaded:* "If such proceedings were tolerated, for the future your Lordships must sit like Sybils writing your oracles upon leaves, and scattering them to the winds,

> ——————Foliis tantum tu carmina mandas
> Et turbata volant rapidis ludibria ventis.

Your decrees, instead of being the grave of disputes and of animosities, will give birth and fresh vigour to every species of contention; and the rights of the people will be unhinged by those very means which, in this and every other country, have been intended to foreclose and secure them for ever." The Court held that a suspension of a decree *in foro* was incompetent.† Feb. 28, 1792.

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* Written pleading in Session Papers.

† Opinions of Judges.

LORD PRESIDENT CAMPBELL.—"The instrumentum novitur repertum makes no difference. The missive, which is not in Valentine's handwriting, must have been drawn by Sir Alexander's direc-

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Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The respondent's estate having been sequestrated under the bankrupt statute, he disposition, is shortly expressed, with a reference to the lease of the other farm; and it is not pointed in the same manner as in the Information. But supposing the intention at that time to have been, that assignees should be simply excluded, the inference is rather against Sir Alexander, such intention having been departed from when the lease was extended.

"Even if assignees had been simply excluded, the lease contains no irritant clause in case of assigning. Sir Alexander could only, therefore, have insisted that the assignees should not possess, but that the possession should be held by the tenant or his heirs; and it is doubtful whether subtenants would have been excluded, as the missive shows that the farm was actually then possessed by Valentine and his subtenants, and in leases of such long endurance, exclusions should not be implied. It is doubted whether the decision, Alison *v.* Proudfoot, 22d Jan. 1788, (Mor. p. 15,290), goes to such a case.

"But the present lease does not simply exclude assignees; on the contrary, it admits them, with a proviso of their being such as the landlord should approve of; and there is a subsequent clause, which evidently shows that an arbitrary power of rejecting could not be meant,—the lease, after 19 years, having been taken for the lifetime of the person then in possession, without distinguishing whether such person was the original tacksman, or his heir or assignee. He might happen to have no heirs who could succeed to him by law without special destination, or, in other words, assigning the lease, so as to give effect to this clause, of adding a life to the 19 years.

"The lease was entered into of the same date with the sale; they were *partes ejusdem negotii*, and every stipulation in favour of the tenant is to be considered as a part of the purchase money. If one may judge from the high rent which Sir Alexander got from the new tenant, after keeping the farm one single year in his possession, and laying out, as he says, £60, besides that year's rent, in summer fallowing and draining, it seems plain that he made a very easy purchase of lands, and it is not to be presumed that Valentine would have sold them upon any other terms than securing the possession at a moderate rent for 19 years, and a life thereafter. A simple and unqualified exclusion of assignees is easily understood. But when other words or clauses are thrown in, we must have recourse to the probable intention of parties, and to evidence arising upon the face of the transaction, to discover what was meant. Every such case must depend on its circumstances, and therefore the decisions referred to by Sir Alexander do not apply.

vested himself of the leases in question, by a regular deed of conveyance to the trustees for his creditors, giving them a complete power to sell. The trustees sold the leases by auction, in a manner exactly conformable to the respondent's deed, with concurrence of the creditors, after regular advertisements and repeated adjournments. The leases are therefore gone from him for ever; and what remains with him is only an interest, entitling him to call the trustees to account. By the conception of the lease to the respondent, the landlord reserved to himself a negative against assignments; and the necessary consequence of this was, that if he gave his consent, he was entitled to qualify it with new conditions different from those in the lease sold.

Pleaded for the Respondent.—It did not follow because the landlord had reserved to himself a power to approve or disapprove of assignees, that in giving his consent he was entitled to couple that consent with new and unfavourable conditions, for such would, in substance, entitle him to make a new lease altogether, entirely beneficial to himself, and different from the original right. In the present case, the conditions imposed materially altered the lease, and affect-

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" Besides, Sir Alexander, at the meeting 30th May, having acted as preses, did expressly concur in the measure of a sale of the leases, and it is frivolous to say, that he concurred only as a creditor, and did not mean to consent as a landlord; or to attempt, by parole evidence, to prove that he annexed conditions which were not specified in the minutes. Had he not consented to the sale, and had it been understood that there was any doubt of the tenant's power to assign, it was in the power of the creditors, and their trustees, to have enabled him to continue the possession whether Sir Alexander would or not.

" Sir Alexander's conduct at the after meetings, in beating down the upset price, and deterring offerers, by adding very severe conditions, and thereby new modelling the lease altogether, had evidently the effect of throwing the farms into his own hands at a great under value, to the prejudice both of the tenant and his creditors.

" The proof engrossed in the former papers shows clearly how this stands, and the lesion is clearly instructed by his own state annexed to the Information, where, after screwing up the supposed outlays, with interest, &c., he is obliged to make a considerable surplus rent.

" Tacks are more favourably constructed (construed?) now for tenants than formerly. Kaimes' Rem. Dec. 4 Dec. 1747, Elliot."

Vide President Campbell's Session Papers, No. 65.

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ed the sale thereof so much, as to deter any one from buying it except the landlord, in whose hands the conditions would fall to the ground. The lease was for 19 years, with an eventual liferent of the farms to the person in possession at the end of that period. The power therefore granted of assigning with the landlord's approval, could not entitle him, on granting such consent, to insert arbitrarily additional conditions, altering entirely, and depreciating the value of the lease to be assigned. Besides, the minute signed by the appellant, as preses of the meeting of his creditors, by which he gave an unqualified consent to the sale, ought not to have been receded from, by subsequently insisting or inserting in the articles of roup these oppressive conditions, which deterred purchasers from buying, and tended to force the leases into his own hands, by all which he was enabled to let the farms to Kinnear at an increased rent of £180 per annum. The whole transaction is therefore reducible, and he entitled to redress.

After hearing counsel, it was

Ordered and adjudged that the said interlocutor of the 30th June 1791, complained of in the said appeal be varied, by inscrting after the word (" cause,") the following words (" without prejudice, however, to any claims or demands which may be competent to the creditors of the respondent, or to the said Sir Alexander Ramsay Irvine merely as creditor, and to their trustees in respect thereof"); and in respect that the said Robert Kinnear appears not to have been yet heard for his interest before the Court of Session or the Lord Ordinary: It is therefore further ordered, That the said cause be remitted back to the Court of Session to hear parties upon the said interest of the said Robert Kinnear; and in respect that in case of judgment passing in favour of the said Robert Kinnear, the privity and relation which may thereupon be found to subsist between Sir Alexander Ramsay Irvine and the said Robert Kinnear, may appear to make some difference as to the mode and form of redress which may be competent to the pursuer, Alex. Valentine: It is further ordered and adjudged, That the said consideration of the case be, in like manner remitted back to the said Court of Session. And it is further ordered and adjudged, That in the meantime the said interlocutor be *reversed*, in so far as it finds that the defenders, Sir Alex. Ramay Ir-

vine and Robert Kinnear, his tenant, must remove from the said farm at the term of Martinmas then next, without prejudice, however, to any point which may arise thereupon; and that, with these variations, the said interlocutor be affirmed; and it is further ordered That the said appeal be dismissed as to the said interlocutor complained of, dated the 9th July 1791, but without prejudice to the several matters herein before remitted, or to any consequence which may arise from thence: And it is further ordered and adjudged, That the said interlocutor of 28th February 1792, complained of in the said appeal, be and the same is hereby affirmed, without prejudice to any other questions which may arise.

For Appellants, *W. Grant, Thomas Macdonald.*

For Respondent, *Allan Maconochie, Wm. Tait, Chas. Hope.*

The Right Hon. Basil Wm. Douglas, commonly called Lord Daer, Eldest son of the Earl of Selkirk, - - - } *Appellant;*

The Hon. Keith Stewart and Others, Freeholders of the Stewartry of Kirkcudbright, } *Respondents*

House of Lords, 26th March 1793.

Member of Parliament.—Held the eldest son of a Peer ineligible to be elected a Member to sit in the Commons House of Parliament.

The present question relates to, Whether the eldest son of a peer can represent a Scotch county in the British House of Commons?

The appellant, conceiving he had such a right, lodged his claim for being enrolled a freeholder of the Stewartry of Kirkcudbright, at Michaelmas head court in 1791, in respect of his standing infeft and seized in the lands of Over Mains of Twynham of 50s. old extent, by charter or grant from the crown, and other titles set forth in his claim, and exhibited at the meeting.

To his right to be put upon the roll, it was objected, That the claimant, being the eldest son of a peer of the