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SIR WILFRED LAWSON *v.* MAXWELL, &c.

SIR WILFRED LAWSON, Bart., Cumberland, Executor under the Will of Mrs. Aglianby or Lowthian, ... *Appellant;*

JOHN MAXWELL, Esq., and Others, Representatives of Richard Lowthian deceased, *Respondents.*

House of Lords, 7th April 1803.

INTEREST—HOW CHARGEABLE—BONA FIDES—TERCE—BURGAGE.—1st. A widow, in accounting for the estate of her husband, the funds of which were administered to, and uplifted by her, was held liable in five per cent. interest from the date when the sums were uplifted, although she had intromitted in *bona fide*, and under an absolute conveyance of the husband's whole real and personal estate, which was reduced. 2d. Also held her liable, at the same rate of interest, for all rents recovered, or which ought to have been recovered. 3d. Held that her terce could not extend over that portion of her husband's heritable estate which was held burgage.

The late Mr. Lowthian had estates both in England and Scotland. Before his death he executed deeds, leaving both the English and Scotch estates to Mrs. Aglianby or Lowthian, his wife, cutting off his heir at law, George Ross, his nephew, with an annuity of £50. After her husband's death, she entered into possession of both estates, and enjoyed the rents thereof for several years, paying the annuity of £50 to George Ross, the heir at law, without any exception or even hint against the validity of the deeds. Thereafter, however, the trustees of George Ross, (who was in bankrupt circumstances,) sued out a reduction of these deeds, the result of which is reported, ante vol. iii. p. 365, where it is shown that they were successful in setting them aside.

They then raised the present action of count and reckoning, concluding "that Mrs. Aglianby or Lowthian should be "decerned to make payment to them, as trustees foresaid, "of the sum of £20,000 Sterling, as the amount of bygone "rents of the said lands and others, *and the interest thereof* "*since the same was intromitted with by her*; and also de- "cerned to make payment of £40,000, as the amount of the "other heritable and personal estate pertaining and belong- "ing to the said Richard Lowthian, and intromitted with "by her, *and the interest thereof since the same was intro-* "*mitted with by her.*"

By order of the Lord Ordinary, she lodged a state of her management and intromissions, in which she specified the whole rents drawn from the English and Scotch estates, and all debts due to Mr. Lowthian in either kingdom. She did not make any deductions from the amount on account of her own claims of terce, as, until it was previously determined whether certain subjects in Dumfries, &c., were held burgage or not, these could not be properly ascertained.

The whole of Mr. Lowthian's settlements of the Scotch estates in her favour being set aside, she claimed both her terce and *jus relictæ*. Separate questions arose as to each of these, viz. as to the first, assuming Mr. Lowthian's English settlements unchallengeable, Whether her acceptance of these English estates operated as a discharge of her terce over the Scotch estates, in virtue of the act 1681, c. 10. As to the second, Whether the obligation granted by Mr. Lowthian, for payment of George Mackenzie's debts *per aversionem*, constituted a moveable debt, which affected the *jus relictæ*, and must be deducted before that *jus relictæ* could be claimed.

Vide ante Vol. iii. p. 621.

The estate of Netherwood, in Scotland, belonged originally to George Mackenzie, who was insolvent, and Mr. Lowthian was his principal creditor. The manner in which he acquired Netherwood was by a transaction with the trustees of George Mackenzie, by which, in consequence of their conveying to him the estate, he became bound to pay all his creditors their debts as the price of the estate.

In regard to terce, the Court found her not entitled to it and also the English estates. The Court also found that the obligations granted to Mr. Lowthian to the trustees of George Mackenzie for the price of the estate of Netherwood, and debts owing by George Mackenzie, being of a revocable nature, must affect the *jus relictæ*. But, on appeal, the House of Lords reversed as to the terce, holding her entitled to her terce over the Scotch estates as well as her provision out of the English estates; but affirmed as to the second *jus relictæ*. By a previous interlocutor in the same question, she had been found liable to account with interest; and the only question which remained was as to this accounting. Two questions were agitated; 1. From what time, and at what rate, should Mrs. Lowthian be charged with interest, and whether at the rate of five per cent. upon each sum she uplifted at the time she received it? 2d. Whether her terce over Netherwood estate (although the whole

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was possessed *pro indiviso*, yet part ran through the burgh of Dumfries), was limited to parts held fee or blench, and did not extend to the other portion of the estate, which, it was alleged, was held burgage?

In regard to the first point, it was contended that Mrs. Lowthian had possessed under an absolute conveyance, vesting the subjects in her for her own behoof. As things then stood, no other party was interested. She could not consider herself responsible to any one, and supposed herself at liberty, not only to receive the funds in what manner, and at what time she pleased, but also to dispose of them as she pleased. Not having had a whisper as to their invalidity, she, in the worst view, must be looked on as a *bona fide* possessor. If so, she was not liable for the fruits, far less the interest of the rents. She did not obtain these deeds by fraud, and though reduced, yet they were not reduced on that ground. If liable then for interest at all, it can only be for bank interest, or interest at three per cent.

As to the second point of terce, the respondent having argued that if terce was due out of the estate of Netherwood, it must be restricted to the portion held feu or blench of the crown, and could not extend to the other portion *within* the *territory* of the *burgh* of Dumfries, and *held by burgage tenure.* The appellant answered, that, in point of law, the rule that the terce is not due out of burgage tenements, is founded, not upon the situation or nature of the subject, but upon the tenure or holding.

Lord Glenlee, Ordinary, reported the case to the Court,

June 12, 1801. who, of this date, found "the defenders liable to account to "the pursuers for interest on principal sums, from the time "the same were uplifted by Mrs. Lowthian, at the rate of "five per cent.: Find them also liable in interest at the same "rate, for the interests and rents uplifted by her, or which "ought to have been recovered by her; and that from and "after one year after the said rents and interests became due, "or might have been recovered; repel the objections stated "to Mr. Lowthian's infeftment, and find Mrs. Lowthian was "entitled to her terce out of the lands in which she stood in-"feft, in so far as the same did not hold burgage; but find "that the terce does not extend to lands holding burgage; "and remit to the Lord Ordinary to ascertain the extent of "the lands so holding burgage, and the amount of the rents "thereof. And also find the defenders are not bound to "account to the pursuers for the rents uplifted under Mr. "Lowthian's English will, out of the estate of Staffold, and

" applied in extinction of the debt due by George Ross " to Mr. Lowthian, and remit to the Lord Ordinary to pro- " ceed accordingly, and to do further as he shall see cause." On reclaiming petition the Court adhered.

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

July 2, 1801.

Pleaded for the Appellant.—(1.) On the point of interest. The order that she shall be charged with interest at the highest legal rate, on all principal sums from the time she received them, and at the same rate upon rents and interests from the lapse of a year after she received or might have received these, is, under all the circumstances, most rigorous, and, it is apprehended, not founded either in law or equity. For the space of four years after her husband's death, she considered, and was entitled to consider, the residue of his property, after payment of debts and legacies, as her own absolutely; and, consequently, there was no call upon her either to sue the debtors to the estate, or to lay out what she received at interest, or to the best advantage. Neither could she conceive herself under any obligation to keep regular accounts; and this is an ample excuse for her not being able to show precisely when she received or how she disposed of the money during that period; and yet she is by the decree to be charged with five per cent. from the amount she received principal sums, and from a year after the time it is supposed she might have received, or recovered rents and interest. It is obvious that even if she had been inclined to make the most of money, it was impossible for her to obtain securities bearing five per cent. interest with such promptitude. Had she been able to show what interest she actually drew, it is humbly apprehended that she could not, in equity, have been liable for more; and as no gross negligence or fraud is imputable, the appellant conceives that some medium ought to be struck, and that three per cent., or the rate which it would have yielded, if lodged in bank, ought only to be allowed. (2.) On the point of terce and burgage tenure. By our ancient law, burgage subjects were not exempted from the terce. But, since Craig's time, they have been so. But this has only reference to separate tenements, and to tenements in burgh, and not to rural subjects in lands, far less to part of a large estate, which, for the greater part, is confessedly held feu or blench of the crown. The lands in question are not held by burgage tenure. Though a charter is granted by the magistrates of a burgh as superiors, and

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they grant entries to vassals, this does not prove the subject is held burgage. The reddendo alone rules and decides this, indicated by the usual badge of watching and warding. The burgh in general holds of the king; and every burgage tenant is the king's immediate vassal; for though the magistrates give the entry, it is not as superiors but as bailies of the king. On the other hand, the distinguishing badge of feu holding is the reddendo in money; and it is a settled point, that property held feu, though of a burgh, is subject to the widow's terce. Houses in the very centre of a burgh may, and are very often held feu, and not burgage. It is not the situation, therefore, but the tenure, which exempts them. Now the lands of Netherwood are not comprehended within the royalty of the burgh of Dumfries, and therefore cannot be held burgage. They are not named nor described in the town's charter. The magistrates have never pretended to exercise jurisdiction over the inhabitants of that part of the estate which is held of them; and the whole estate is valued and rated in the county books, and pays all taxes as situated there, and not in the royal burgh. And, lastly, the title deeds prove this a feu and not a burgage holding.

Pleaded for the Respondents.—In regard to the interest. It has already been determined, in the former litigation, and by the interlocutor of 6th February 1796, and the point is now at rest, that Mrs. Lowthian's representatives are responsible for interest on the different sums belonging to the respondent, and intromitted by Mrs. Lowthian, after the death of her husband. It does not seem seriously disputed that the terms or periods from which interest is decreed to be paid, are justly and fairly fixed. Nay this seems admitted in the Court below; and really, in fixing those periods, and in making a distinction between principal sums and the interest chargeable on rents and interests from twelve months after they became due, every indulgence has been shown her, obviously with the view of giving her the utmost latitude to recover these. The only point here, therefore, is the rate or amount of interest chargeable—the appellant contending that the legal rate of interest is exorbitant and unjust in the circumstances. The principle adopted by the Court below was, that Mrs. Lowthian was to be viewed as an executor or administrator acting in the affairs of another, and subject to all the strict rules applicable to such cases. She was liable as a *negotiorum gestio* is, or as a tutor is, and this being the case, and not seriously denied, the rates of interest charged are agreeable to the general principles,

and therefore unexceptionable. 2. With regard to the terce, before deciding this, it is necessary to see by the titles whether the subjects alleged to be burgage be really and truly held of that tenure. It is clear, both by the titles and by the authorities, that the part of Netherwood within the burgh of Dumfries, can be considered as no other than holden burgage. They appeared in some writs to be held of the king, sometimes of the magistrates, as the king's bailies, but both for the services of the burgh used and wont. At another time, a small sum of money, or feu-duty was exacted as payable to the town treasurer "for the use of the burgh," and performing other burgal services "used and wont." And, looking to the tenure of the subject, and not to the *nature* of the property, it is clear that the subject in question is burgage, and therefore not liable to terce.

After hearing counsel,

The LORD CHANCELLOR ELDON said—

"This is an appeal from the Court of Session, (states the question as being one of accounting between the parties. Interlocutor, June 10, 1801, read; and reclaiming petition and prayer read, by which the party sought to be reponed against that interlocutor).

"The appellant mistakes as to the effect of this interlocutor. It only finds, in general terms, that the terce does not extend to lands holden burgage; and it is quite obvious that the interlocutor 10th June 1801, does not find that the lands referred to hold burgage, but simply remits to the Lord Ordinary thereon. Therefore, it is unnecessary to say more on this point, further than to observe, that your Lordships did not seem to think, even as to Netherwood, that the finding had gone on this footing when the case was last before you, otherwise your Lordships would not have reversed in the former appeal. The point of terce, however, is not before us.

"The other point relates to a charge against Sir Wilfred Lawson, the executor of Mrs. Lowthian, of interest on monies which came into her hands. The Court has not charged interest on money which ought to have been recovered by him. It is not my purpose to propose any reversal as to the interest, and therefore it is more according to proceeding, simply to affirm.

"But it is not improper to say a word, for the better understanding the principle of the Court, to prevent it being misunderstood. (Interlocutor read.)

"The charge of five per cent. for interest is made, but a distinction is taken between principal sums and rents. These are the same in this country; and there is no difference between them if paid, as interest is chargeable on monies received, whether that be principal or interest, as soon as they are recovered.

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"If the principle be, that the party did not make due account of money received, of £500 of principal on bond, and of £500 of interest or arrears. If he be charged with interest on the principal of money received, why not on both? Yet the Court, more favourable to the appellant than he seems to think himself, allowed interest on principal sums from the day they were received; also on interests and rents received from twelve months after they fell due. There is thus a difference; but no cross appeal has been brought.

"Lowthian owned property in Scotland and England. He executed deeds in the close of his life in favour of his wife; and a process of reduction was brought by his nephew, to reduce, on various grounds, and, *inter alia*, that he was incapable of understanding the deeds so executed by him, looking to his blindness, and the manner they were executed by the aid of notaries. And also praying that Mrs. Lowthian do account for money and interest. This led to various proceedings below and here; and, finally, the deeds were reduced.

"I recollect I was counsel in the case, contending very strenuously against their being reduced.

"It may appear somewhat whimsical that deeds, both in Scotland and England, should have been laid before me as counsel for opinion, which I then prophesied would be difficult to shake—that they should at last be tried before me as judge.

"The decree was affirmed here, on grounds which have given rise to some debate at your Lordships' bar. The English property has been overlooked; and nothing carried before an English jury by ejectment. The case, after these points were determined, went back to the Court of Session to take accounts.

"The interlocutor of 6th February 1796, shows that there is some interest due. This is a very clear interlocutor. (Read). It proceeds on this principle, that the party is to be charged with interest according to their receipts; therefore, it slumps the matter.

"This course was not pursued. It could not then be well made. Then it was contended, that she could not be charged with interest at all, as the defender had possessed and intromitted in *bona fide*.

"One strong answer to this is, that the interlocutor gave interest. Though counsel must sometimes imbibe prejudice, it is impossible not to say that this point is concluded and settled; because it is beyond dispute that some of the deeds were reduced for want of moral integrity, and some of the deeds on no other grounds. *Bona fides*, therefore, is no excuse, and interest must be due from some period.

"Then, in regard to the question of rents, there is no cross appeal; and therefore your Lordships cannot alter in favour of the respondents. In this country, it is quite obvious that a trustee sometimes finds it proper to keep in his hands certain sums, in order to pay back other certain sums due by the estate. In this, the act is innocent. But, in other circumstances, where gross fraud is apparent, he is not only chargeable with five per cent. interest, but also with rests at stated periods.

"I do not recollect in this country a single instance where interest is charged on some sums the moment they are received, and others at twelve months thereafter. It is obvious, that trustees are not to lay out immediately; but still, in a question of interest, they are liable from the moment they are received.

"The Court here have adopted a different rule. It seems difficult to say that your Lordships should reverse the interlocutors on this head; for where five per cent. is given on sums when uplifted, it might be asked, why your Lordships do not charge on other sums according to the same rate and principle. There is no cross appeal on this point.

"The appellant said, that three per cent., which is got from bankers, was sufficient. It is dangerous to lay down a rule of this kind, so that executors and trustees may be at liberty to speculate, and, notwithstanding, shall only be held liable at three per cent. Nothing, I hope, which has fallen from me will be understood that this House is of opinion that a trustee is to be so charged. It is not proper to alter, but I have said so much as to show the special grounds on which your Lordships concur."

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *C. Hope, Wm. Alexander.*

For Respondents, *W. Adam, D. Monypenny.*

NOTE.—Vide App. to Mor. Dict., "Annual Rent," No. 2.

[Mor. p. 15473 et App. Mor. Dict. "Tailzie," No. 5.]

JOHN SYME, W.S., Trustee for the Creditors of Mrs. Ann Ranaldson Dickson of Blairhall, } *Appellant;*

Mrs. ANN RANALDSON DICKSON of Blairhall, and JAMES RANALDSON DICKSON, Esq., her Husband, for his interest, . . } *Respondents.*

House of Lords, 25th April 1803.

ENTAIL—CONTRACTION OF DEBT—RESOLUTIVE CLAUSE—DISPONEE.—The entail executed in this case, contained clauses prohibitory, irritant, and resolutive, against selling or contracting of debt; and the question was, whether these clauses respectively were directed against the institute, so as to include him as an heir of entail? The prohibitory and irritant clauses included him expressly by name, but the resolutive clause, which, in this instance, formed a part of the same clause or sentence with the irritant, only made reference to "the person or persons, heirs of tailzie *foresaid*." In