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GRIEVE
v.
CUNNINGHAME,
&c.

ADAM GRIEVE, Eldest Son and Heir-at-Law of the deceased William Grieve, Original Lessee of the lands of Barlaugh. } *Appellant;*

Lieut.-Colonel FRANCIS CUNNINGHAME of Dunduff; and (by Revivor) WILLIAM GRIEVE, Ensign in the Ayrshire Militia, Eldest Son and Heir of the deceased William Grieve, second Son of the said Original Lessee. } *Respondents.*

House of Lords, 13th June 1814.

LEASE—"HEIRS," MEANING OF TERM—WHAT IT INCLUDES—ASSIGNEES AND SUBTENANTS.—1st, A lease bore to be to the tenant and his heirs, secluding assignees and subtenants, without the consent of the landlord. The tenant made a will, assigning the lease at his death to his *second* son, who, on his death, claimed the possession of the farm in virtue of it. He was opposed successfully by the landlord; on the eldest son claiming his right, the landlord then came forward and gave his consent to the assignation of the father to the second son. Held this consent to validate the assignation of the lease by the father.

2d. Question, whether "heirs" in a lease can be held to include heirs nominate of the father, or was to be confined to heirs at law?

This case is reported at p. 571 of Volume IV., which see for the particular circumstances of the case.

The question regarded a lease, which bore to be to the tenant and his heirs, excluding assignees and subtenants without the landlord's consent. The tenant had, in contemplation of death, and seeing his *eldest* son to be unfit to succeed him in the farm, assigned the lease, by will, to his second son, William Grieve.

This assignation of the lease having been questioned by the landlord, the second son contended that the term "heirs" in the lease, meant not only heirs-at-law, but heirs in general—heirs nominate, in short any heir whom his father might appoint; while, on the other hand, the landlord contended that it could only apply to the heir-at-law. The Court of Session held that the term heirs could refer only to the eldest son. This judgment was appealed to the House of Lords, and the Lord Chancellor remitted the cause for reconsideration.

Under this remit from the House of Lords, the following interlocutor was pronounced by the Court of Session, of this date:—"The Lords having resumed consideration of this "petition, and of the order and remit from the House of "Lords therewith produced; and having advised the same "with the mutual memorials for the parties, and having con- "sidered the interlocutors referred to, in the said order and "remit, they adhere to the interlocutors appealed from by "the petitioners." In the action of reduction at the appellant's instance, the Court, of same date, pronounced this Nov. 21, 1805. interlocutor:—"The Lords conjoin the process of reduction "raised by Adam Grieve against William Grieve, with the "process of declarator at the instance of the said Adam "Grieve against Lieut.-Colonel Francis Cunynghame, and "reduce, decern, and declare, in terms of the rescissory and "declaratory conclusions of the libel, against both the "defenders, and decern against William Grieve in the re- "moving."*

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* Opinions of the Judges.

LORD PRESIDENT CAMPBELL said,—"I think the interlocutor wrong. 'Heirs' simply means *heirs whatsoever*, in any destination of succession, *i.e.*, all heirs entitled to succeed *secundum subjectam materiam*. It is the reverse of a tailzie, where certain heirs alone are called and others cut off.

"Sometimes heirs designative are meant, who take not as actual representatives of their predecessors, but as conditional institutes or as standing in his place by the more legal *jus representationis*, *e.g.*, the case of a legacy to heirs, and where the original legatee has predeceased, the legacy lapses as to him, but is good to his heirs designative; or, suppose I call to my succession, 1st., the heirs of my body, whom failing, the heirs of A. B. or A. B. and his heirs; but A. B. dies before the succession opens to him, and, consequently, before he has any vested right in him, which he can settle or dispose of. But here the right was actually vested in the father when he settled his succession, and the heir named by him had actually succeeded before the special term was elapsed. The construction of tacks, and even feus, originally was very strict, but by degrees this was relaxed. A tack did not at first go to heirs; afterwards, however, they became heritable, and when they did so, tacks were just as much heritable as feus. The tacksman has the same right to regulate his succession that vassals have, although there may be clauses *de non alienando*.

"In tacks it was understood that, although heritable, there was an implied or virtual exclusion of assignees, *i.e.*, of alienation, though not of adjudging. Even this is now confined to tacks of

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An arrangement seems then to have been gone into with William Grieve, by which the landlord consented to allow him to retain the farm, and it was thought at the time, that Adam

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ordinary duration, *e.g.*, nineteen years, but longer tacks require express clauses of seclusion in order to bar assignees voluntary or legal. It may be highly expedient often to exclude adjudgers; but all this had nothing to do with succession. Why should the landlord interfere in the tenant's succession, more than the tenant in the landlord's?"

LORD JUSTICE-CLERK HOPE.—"I am for altering. Heir or heirs in possession, are words which imply a power to name an heir. Assignee is quite a distinct character from heir. The latter takes in his father's lifetime. The words "shall have succeeded to," etc., exclude the supposition of legal succession. On the whole, I am for altering."

LORD WOODHOUSELEE.—"I was formerly for the interlocutor, but now have a doubt, and incline to alter. I am influenced much by the opinion intimated in the remit of the House of Lords. The special words of the tack here do not seem properly to relate to the heir-at-law. The word would have been heirs only if that had been meant."

LORD BANNATYNE.—"I am for adhering."

LORD CRAIG.—"I am for adhering to the strict legal construction of the words in deeds. The words are clear here. The heir means the eldest son. I cannot distinguish between a second son and a stranger, put into possession."

LORD ARMADALE.—"To get at the just grounds of decision, we must throw aside the alleged doctrines here advanced by William Grieve. It is not sufficient with us to *name* an *heir*. The granter must by deeds *dispone*. If Grieve had simply named an heir to his tack, it would have been ineffectual. I also throw aside *sui et necessarii hæredes*. There is no such distinction with us. To come, then, to the case, I think the word 'heirs' here means heir-at-law. The words as to the possession, are expletive only. There must have been many cases to that purpose before Minto's case. There, there is no hint of any such doctrine. If the tenant may give the tack to the second son, it may be given to any one of the children—to a brother, to an uncle, to a stranger. That is a necessary consequence of the doctrine. The same form of deed precisely will suit all these cases. The general principle is, as to all deeds of provision, and more especially mutual contracts. The destination to heirs means heirs of line. In a tailzie to a person and his heirs, it would be a singular doctrine that he could name a stranger heir. More especially is this true in tacks. If not, why does a tack which is conquest, not go to the heir of

Grieve, the eldest son, had acquiesced in this arrangement. Afterwards, however, he thought proper to repudiate this transaction, in so far as he was concerned, and insisted on his

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conquest, which is clear. But here, over and above that, is an exclusion of assignees, thus strengthening that destination. In short, it is a favour to heirs of line in all such destinations. A bond secluding executors, brings forward the heir of line, though not named."

LORD MEADOWBANK.—"I was against the judgment in Minto's case. It was always common in practice for the tenant to name his heir. If the word heirs had not been in this tack at all, still it would have gone to heirs. There could not be a *delectus personæ* of the individual heir at the distance of thirty-eight years. He had an interest in an heir who should have a good stock, but none in any particular child. The object of the landlord was merely to give such a grant as would induce the tenants to expend on the land liberally. Exclusion of assignees meant merely to hinder from carrying the tack to the market. The heir to whom a thing is left at death, is neither a legal nor a conventional assignee. It is the interest, both of tenant and landlord, to hold the word heir as meaning heir of provision—that person who shall be a good tenant, and induce a liberal treatment of the land. But it is said, *filius hæres esto* is not a part of our law. But I observe tacks at first excluded charter and sasine. They might have been resigned by procuratory, and a new charter to a new heir goes without the form of assignation. I return to this, that it is not the landlord's interest (to limit the succession thus), so we cannot imply such a purpose. Further, I agree with the Lord Justice-Clerk's construction of the special words, here it implies that the granter had a *choice* of heirs, and even a plurality. I cannot hold these words *pro non scripto*, if I can find a reasonable meaning for them."

LORD HERMAND.—I am for adhering. In Minto's case I thought the judgment right. Words "succeeded to," &c., imply heir-at-law. "Heir or heirs," mean heirs portioners. As to consequences in that case I *care* not for them. There is no hardship in such construction. He may go to the landlord if a deviation from the first purpose is meant. A good landlord will not refuse for his own interest. The tenant's deed here shows that he knew he was doing what he had no right to, and that without an assignation or disposition, his heir-at-law would take. It is a fraudulent and clumsy device. As to Adam, I think it rigorous and not well-founded. He was kept out of possession by the wrong of the father and the neglect of the landlord. I observe further, that there was a liferent tacked to the thirty-eight years. It is

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rights, contending that his brother could not, even *with the consent* of the landlord, retain possession of the farm, nor could Colonel Cunynghame give sucha consent as would prejudice his rights, because the original lease was for thirty-eight years, and if alive at the expiry of that term, for the lifetime of his father, and in case of his death "for the lifetime of the heir or heirs."

It appears, too, that the landlord had procured a renunciation of the lease from William Grieve, the second son, on condition of granting him a new lease. The respondents contended that this was all that was necessary without any interference or consent on the part of the appellant, the eldest son.

On reclaiming petition, therefore, against the above interlocutor, the appellant pleaded that though the stipulation in the arrangement alluded to, had been that Colonel Cunynghame should consent to the assignment of the lease, it could not at all improve the situation of the respondents. For what is the express condition on which the consent is given? It is, that the original lease shall be annihilated, and a new lease granted for such a rent, and of such a duration, as shall be afterwards fixed. Now, a consent to assignment qualified with such a condition is, in truth, no consent at all;

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material to him whether that life is long or short. Such a judgment would affect the construction of the word heirs in a marriage contract. It would enable the father to give his estate, so provided, to a younger son or daughter."

LORD METHVEN.—"I am for adhering. William's right is by assignation merely."

LORD CULLEN.—"I adhere."

LORD BANNATYNE.—"The remit from the House of Lords rather acknowledges the general principle of our judgment, and sends back the case on the special words of the tack. I throw out of view the expediency or inexpediency of such exclusions. That is the business of the parties. I think that where a lease is to heirs, and excludes assignees, he cannot assign at his death, under colour of naming an heir. If that be allowed, it will defeat the exclusion of assignees entirely. I am not moved by the special words. "Heir or heirs," is either a careless expression, or means heirs portioners." The Court adhered.

Vide President Campbell's and Hume's Coll. of Session Papers.

At another advising on 18th February 1806, the Court adhered on the merits, but in respect of the landlord withdrawing his objection. The following opinions were delivered on this occasion:—

LORD PRESIDENT.—"By allowing the landlord to interfere with

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for it is downright mockery to call that a consent to a deed, of which the condition is, that the deed itself, and all that is connected with it, shall be *eo epso* destroyed.

The Court were pleased, of this date, to pronounce this interlocutor in the removing at Colonel Cunynghame's instance against William Grieve :—" The Lords having resumed consideration of this petition, along with the conjoined actions of " reduction and declarator, at the instance of Adam Grieve " against Lieutenant-Colonel Francis Cunynghame, the pursuer in this process of removing; in respect that the said " Lieutenant-Colonel Francis Cunynghame has now by petition, dated 10th December 1805, given in by him in the " said conjoined process, judicially declared that he consents " to the petitioner, William Grieve, being continued in possession of the farm, and to his being assoilzied from the " action brought against him; they do assoilzie him accordingly and decern; reserving all other questions which may " arise upon the terms or effect of the agreement referred to " in the said petition and relative minute."

And in the conjoined action at the appellant's instance against Colonel Cunynghame and William Grieve, the judg-

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the tenant's succession, an unfair transaction seems now to have taken place."

Lord Meadowbank.—" See the case for Alexander Ramsay Vallentine, where the landlord's consent was held as not a patrimonial right, which he could convey or sell."

Lord Polkemmet.—" The proceedings seem to be at an end by this arrangement."

Lord Justice-Clerk.—" We must determine between the two brothers."

Lord Hermand.—" The landlord's consent comes too late, besides it is qualified."

Lord Balmuto.—" This is not a continuation of the old lease, but a new lease."

There were six judges to five in finding that the landlord was still entitled to prefer the second son.

Advising, 14*th November* 1806.

Their Lordships alter and find the lease belongs to A. Grieve.

Lord President said,—" The interlocutor I think wrong, as it necessarily follows from that final interlocutor against William Grieve, that Adam must have the right. The landlord's consent comes too late."

Advising, 10*th March* 1807.

Judges alter the previous interlocutor.

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ment was as follows:—"The Lords having resumed con-
" sideration of this petition for William Grieve, and of the
" petition for Lieutenant-Colonel Francis Cunynghame with
" answers for Adam Grieve, and minute for the petitioners,
" find that Adam Grieve, as the eldest son and heir-at-law
" of the deceased William Grieve, was entitled, by the terms
" of the lease in question, to succeed as tacksman on the death
" of his father; and that he could not be deprived of his said
" right by any deed executed by his father, without consent
" of the landlord, and so far adhere to the interlocutor under re-
" view; but in respect that the said Lieutenant-Colonel Francis
" Cunynghame, the landlord, has now, by a petition dated 4th
" December 1805, judicially declared that he consents to
" William, the second son, being continued in the possession
" of the farm, and to his being assoilzied from the actions
" brought against him, they do assoilzie him accordingly;
" reserving all other questions which may arise upon the
" terms or effect of the agreement referred to in the said peti-
" tion, and in the relative minute; find that the said Adam
" Grieve having been led to insist in his preferable right as
" eldest son, in consequence of the proceedings which had
" taken place at Colonel Cunynghame's instance, which have
" now been put an end to by the said petition and minute, he is
" entitled to be indemnified of the expense thereby occasioned,
" and therefore find Lieutenant-Colonel Cunynghame liable
" to him in expenses."

Nov. 14, 1806.

On reclaiming petition and answers, the Court pronounced this interlocutor:—"The Lords having resumed considera-
" tion of this petition and answers thereto, alter the inter-
" locutor reclaimed against, and adhere to the interlocutor
" of 21st November 1805, reduce, decern, and declare in
" terms of the rescissory and declaratory conclusions of the
" conjoined libels at the petitioner's instance against both the
" defenders; find the defenders conjunctly and severally liable
" in the expense incurred since the date of the said inter-
" locutor, 21st November 1805, without prejudice to their re-
" lief against one another as accords: appoint an account
" thereof to be given in," &c.

Mar. 10, 1807.

Against this judgment the respondent, William Grieve, reclaimed, and the Court, after ordering answers, finally pronounced this interlocutor:—"Alter their interlocutor of the
" 14th November last, and return to their interlocutor of the
" 18th day of February 1806 years, in so far as they assoilzie
" the petitioner (William Grieve) from the process of remov-

" ing brought against him by Colonel Cunynghame, and from " the action of reduction, removing and damages brought " against him by Adam Grieve, and of new assoilzie him from " both these actions, and dismiss the process of declarator at " Adam Grieve's instance, but refuse this petition *quoad ultra*, " and adhere to these last mentioned interlocutors, in so far " as they find that Adam Grieve is entitled to expenses," &c.

The appellant brought his appeal to the House of Lords against this last judgment, and likewise against the preceding interlocutor of the 18th February 1806, so far as they gave effect to the transaction between Colonel Cunynghame and William Grieve, and assoilzie William Grieve, and dismiss the action of declarator at the appellant's instance.

Pleaded for the Appellant.—The lease was for thirty-eight years certain, and in case of the death of William Grieve, senior, during that period, for the lifetime " *of the heir or heirs of the* " *said* William Grieve, who shall, at the end of the said thirty- " eight years, have succeeded to, and shall then be in pos- " session of, the said lands." Now as far as regarded this life-rent lease, William Grieve, senior, could not, even with the consent of the proprietor, execute a valid assignation, for by such deed he could give nothing; because its necessary effect being to exclude the heir-at-law, there could not be an heir who had succeeded to the possession of the lands. The deed must therefore have been inept; it could not carry anything to the assignee, and, consequently, the right of the heir must have remained the same as if it had not been granted. No consent of the proprietor, therefore, even though granted at the instant of executing the deed, could give it efficacy, or affect the right of the appellant as the heir-at-law, who alone had right to succeed to the lease.

Pleaded for the Respondents.—1. The claim at the instance of the appellant is utterly groundless, as it is advanced by a person who does not hold the slightest interest in the lease, which it is the object of the action to enforce. The lease was granted to William Grieve, senior, for the term of thirty-eight years, and the lifetime of himself, " or his heir who should " have succeeded to, and should be in possession of, the farm." When that period had elapsed, William Grieve, junior, succeeded to his father in virtue of the deed by which he was nominated and appointed, " heir entitled to succeed in the " lands of Barlaugh and Halkerston," and by which the tacks are disponed to him, with the express exclusion of Adam Grieve, the appellant. The life interest, therefore, commenc-

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ing at the termination of the thirty-eight years of specific endurance, was completely vested in William Grieve, junior, as heir of his father in possession of the farm; and that life interest having suffered a double extinction by his renunciation and by his death, the lease is now completely at an end, and the farm restored to the actual possession of the respondent. 2d. Even supposing that the term "heir," as used in the lease, did not apply to William Grieve, junior, the heir nominated by the deed; and that this nomination amounted, therefore, to a departure from the stipulation of the lease; that deviation from the order of succession established by the lease, could only be called in question by the landlord, and could afford no objection against William's possession available to the heir-at-law. It is in favour of the landlord alone, that such a restriction of the succession to the heir-at-law can be understood to operate. And the ground upon which he is entitled to challenge the assignation is, that the farm is transferred to a person to whom he is not obliged. The right to urge this objection is, from its very nature, confined to the landlord; and the heirs of the tenant have no *jus quæsitum* to insist otherwise; because this right to challenge the assignation, contrary to the terms of the lease, was personal to the landlord. It was so found in Marquis of Tweeddale *v.* Hay, 8th December 1801. The consent, therefore, of the landlord was alone sufficient to validate the right in William Grieve.

Fac. Coll. et M. p. 15, 297.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Sir Saml. Romilly*, *John Greenshields*.

For the Respondents, *John Fullerton*, *Francis Horner*.

THOMAS MITCHELL, Soap-Manufacturer, Dunbar, - - - - *Appellant.*

Messrs JOHN JAMIESON and SONS, Merchants in Leith, - - - *Respondents.*

House of Lords, 15th June 1814.

SALE—MARKET PRICE—MISREPRESENTATION—COMPENSATION.—Circumstances in which a purchaser of tallow was held not entitled to object to the sale on the ground of alleged misrepresen-