1819.

THE EARL OF WEMYSS *v.* MONTGOMERY, &C.

Journals of the House of Lords.

After hearing counsel upon the original appeal, and appeal of the Right Honourable Francis Charteris Douglas, Earl of Wemyss: and likewise upon the cross appeal of Margaret Johnston, tenant in Crook, and John Hutchison, her husband, as also upon the answer of Margaret Johnston *alias* Hutchison, and her husband foresaid; and the answer of Sir James Montgomery, Bart., and others, trustees appointed by the late Duke of Queensberry, put to the said appeal: and consideration being had of what was offered on both sides in these causes, it is ordered by the Lords Spiritual and Temporal in Parliament assembled, that the said causes be remitted back to the Court of Session in Scotland, generally, to review the interlocutors complained of.

For Respondents, *Alex. Irving, Geo. Cranstoun.*

[Farm of Flemington Mill.]

1819.

THE EARL OF WEMYSS *v.* MONTGOMERY, &C.

The RIGHT HON. FRANCIS, EARL OF WEMYSS, ... *Appellant;*

Sir JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS of the Strand, in the County of Middlesex; WM. MURRAY, Esq. of Henderland, and EDWARD B. DOUGLAS, Esq., Trustees and Executors of the late Duke of Queensberry, ... } *Respondents.*

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWER TO GRANT LEASES—ISH—GRASSUM.—In the Neidpath entail, there was a lease granted in 1788, for fifty-seven years, at a rent of £90, no grassum being then paid for it. This lease was, in 1807, renounced for a new lease for thirty-one years, or such other term of 29, 27, 25, 23, 21, and 19, as it might be found the Duke had power to grant it for. The rent stipulated was £93. Held, in respect no grassum was paid for this lease, that the same was good for twenty-one years. In the House of Lords, the case remitted for reconsideration.

The late William, Duke of Queensberry, possessed the estate of Neidpath, under an entail executed in 1693, by his

great grandfather, William, first Duke of Queensberry. By this deed, it is provided, "That it shall be nowise lawful to "the said Lord William Douglas, and the heirs male of his "body, nor to the other heirs of tailzie respectively above-"mentioned, nor any of them, to sell, alienate, wadset, or "dispone any of the said haill lands, lordships, baronies," &c. These prohibitions were secured by appropriate irritant, and resolutive clauses.

There was no prohibition, as is seen from the above clause, against the granting of leases; but there was the following permissive clause:—"It is hereby expressly provided and "declared, that notwithstanding of the irritant and resolutive "clauses above-mentioned, it shall be lawful and competent "to the heirs of tailzie, above specified, and their foresaids, "after the decease of the said William, Duke of Queensberry, "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 evident diminution of "the rental."

The late Duke of Queensberry succeeded to the March estate in 1731, at which time the farm of Flemington Mill was let for the yearly rent of £69, 14s. 8d., the cess or land tax, being paid by the landlord. It continued to be possessed, at the same rent, down to the year 1769, with this difference only, that latterly the cess was paid by the tenant, in addition to the rent. Grassums to a greater or less amount were received, at granting the different leases.

In 1769, the farm was let for 19 years, at the rent of £107, and the tenant agreed, besides, to pay £157, 2s. 2d., of grassum. But this rent turned out to be higher than the tenant could afford; and the Duke was under the necessity of lowering it long before the end of the lease.

The lease was, in March 1781, advertised, and the Duke, after several failures, was obliged to let it to Mr Murray for £90 (Mr Murray was his tenant in two neighbouring farms, Whiteside and Fingland), who possessed it at this rent, up to 1788, being the period at which the lease expired.

At this time the Duke entered into a new lease with James Murray, for the whole three farms of Whiteside, Fingland, and Flemington Mill, for fifty-seven years, paying of yearly rent, for Whiteside, £109, for Fingland, £50, 10s., and for Flemington Mill, £90; and also paying on two of these farms a grassum of £400 (none for Flemington).

But, in 1807, after the decision in the Court of Session in

1819.

THE EARL OF WEMYSS *v.* MONTGOMERY, &c.

the Wakefield case, doubts arose as to the Duke's powers to grant leases for so long a period as fifty-seven years, he, along with most of the tenants on the Duke's estate, thought proper to renounce what remained of this lease, for new leases. These new leases were granted separately of the three farms; and the present lease of Flemington Mill, was granted to himself, for thirty-one years, from Whitsunday 1807; but, as it was uncertain whether a lease of this duration would be sustained, there was a clause superadded, that if it should be found that the Duke was prevented by the entail from granting a lease for thirty-one years, then the lease should be for 29, or 27, or 25, or 21 or 19 years, whichever of these periods the Court of Session or House of Lords, should find to be the longest term for which the Duke had power to grant it.

For the last of these leases no grassum was paid.

Separate actions of declarator and action of reduction to reduce the lease, having been brought and conjoined, the Lord Ordinary thought that there was nothing stated to take this case out of the predicament of the other leases in the Neidpath estate, which had been set aside by the Court, and

May 16, 1815. sustained the reasons of reduction. On reclaiming petition to the First Division of the Court, their Lordships pronounced this interlocutor:—"Alter the Lord Ordinary's interlocutor "reclaimed against; and, in respect it appears that no grassum

Nov. 29, 1815. "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 thereof; and, to that extent "sustain the defences in the conjoined processes of reduction "and declarator, and assoilzie to that extent from the con-"clusions of the libels in the said process, and decern."

On further reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought.

Feb. 6, 1816. *Pleaded for the Appellant.*—1st, The lease of Flemington was let for a grassum. The general point, that under the entail of Neidpath, leases of any part of that estate, let for a grassum, are void, has been decided by the Court of Session in favour of the appellant, and the argument respecting it is stated in the case for the appellant, in the appeals respecting the leases of Easter Harestanes and of Whiteside. It does not appear to be necessary to state that argument in detail in the present case. The point here may be assumed. Under this head of the appeal, it is, therefore, only necessary to advert to the plea of the respondents, that there are special

circumstances in this case which prevent the rule regarding leases let for grassum, from applying to it. In considering this plea, it must be admitted, in the first place, that the original lease of Whiteside, Fingland, and Flemington Mill, in 1788, was bad, being for a grassum. In the next place, it is equally clear, that the lease for thirty-one years, substituted in lieu of this long lease, if it had been contained in one instrument of lease, must have been void, as a mere substitute for the original lease, to which the quality of grassum equally attached; but, if this be once admitted, it appears clearly to follow that the device or accident, no matter which, of putting this substitute grant of lease into three instruments instead of one, can make no difference; that these three instruments, granted *unico contextu*, must still be regarded as one grant, and the set must have precisely the same fate, as one instrument expressing the same transaction, would have had. On this point, it is sufficient to refer to the well-known case of the Roxburgh feus, where a great many feus being granted *unico contextu*, were held to be but one feu; and the present is a much stronger case, since, here, the right actually was *one*, before the separation into different instruments.

Accordingly, the Court of Session had no doubt as to the two other parts of the original lease in question, viz., the *pro forma* new leases of Whiteside and Fingland. The Court held each of these to be parts of a lease substituted for the original long lease, let for a grassum, and reduced them accordingly. It is conceived, however, that *the third* part of this substitute, *i.e.* the *pro forma* separate lease of Flemington, never can be in any different situation from the two others, but must be reduced, as it was by the interlocutor of the Lord Ordinary. The respondents are sensible of the force of this, and attempt to escape from it by bringing forward into the case other circumstances of a date anterior to the grant of lease for grassum, in 1788—circumstances which, the appellant conceives, are neither proved, nor at all relevant in this case. The object of the respondents in this statement is to show, first, that although, in 1788, the lands of Flemington formed part of a farm, let without any division as one farm, to one tenant, for one rent and for one grassum, yet no part of the grassum was paid for the lease, in so far as related to these lands; and consequently, that the part of the renewed lease in 1807, which is applicable to them, was not affected by the objection of grassum. For this purpose,

1819.

THE EARL OF WEMYSS *v.* MONTGOMERY, &c.

letters alleged to have been written to the late Duke of Queensberry, by his man of business, Mr Tait, have been produced. Now, it is conceived to be impossible, to listen at all to such averments. An instrument, granting a farm in lease for rent and a grassum, is conclusive evidence that every part of that farm was let for grassum, as well as for rent. It appears altogether inadmissible in the tenant to attempt, in the face of the lease, to pick out particular fields or portions of land, and say, that as to these, the grassum did not apply, and as to others it did apply. The lease itself makes no such distinction or application as to the grassum. It is proved by that instrument, that the whole farm together, all and every part of it, was let for a grassum.

2d, Besides, the lease of Flemington was not let "without "diminution of the rental." In 1769, it was let for £107, with a grassum of £157, 2s. 2d. In 1807, it is let at the rent of £90.

3d, This lease was also let for a term of years not authorised by the power of letting leases, contained in the entail of Neidpath, and was also greater than was necessary in the fair administration of the estate. The Court of Session admitted this by cutting down the lease from thirty-one to twenty-one years. But, there is no ground for sustaining it to any extent. Being prohibited by the primary clauses of the entail against alienation, and not being permitted by the power of letting leases, it must fall under the clause irritant, and so be wholly void.

Pleaded for the Respondents.—In 1807, when the present lease was entered into, the Duke had no power of varying the rent which had been stipulated in the previous lease of 1788, for fifty-seven years, then renounced; for the sole object of the transaction then was, to remove the objection which, it was feared, would be raised against the latter lease, on the ground of its length. But, though the rent was not raised then, it was not diminished; for that payable by the lease, was exactly retained. There is nothing in the entail which made it incumbent on the Duke to raise the rent above what it had been under the immediate preceding lease, if this was a valid and effectual contract; though it may have happened that a higher rent had been promised by some earlier lease.

The lease, which is the subject of reduction, restricted as it has been by the interlocutors appealed from, to the length of twenty-one years, is one which the Duke could legally grant,

in virtue of the powers he enjoyed under the entail, and which was granted without payment of any grassum.

Vide Judgment at the end of next case.

1819.

THE EARL OF WEMYSS v. MONTGOMERY, &C.

[Case of the Tenant; Flemington Mill.]

THE EARL OF WEMYSS, ... *Appellant;*

JAMES MURRAY, ... *Respondent.*

1819.

THE EARL OF WEMYSS v. MURRAY.

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWER TO GRANT LEASES—ISH—GRASSUM—BONA FIDES.—Under the Neidpath entail a lease was granted in 1788, for fifty-seven years, at a rent of £90, no grassum being then paid. It was renounced in 1807, for a new lease for thirty-one years, or for 29, 27, 25, 23, 21, or 19, whichever it might be found the Duke had power to grant it for. The rent stipulated was £93. Held, in respect no grassum was paid, the lease was good for twenty-one years. In the House of Lords, remitted for re-consideration.

James Murray, the tenant under the lease of the three farms of Whiteside, Flemington Mill, and Fingland, granted by the Duke for fifty-seven years, it has been seen, was one of the tenants in whose favour the Flemington Mill farm was granted, in 1807, for thirty-one years, or alternatively, for whichever of the terms of 29, 27, 25, 21, or 19 years, the Court of Session, or your Lordships, should ultimately find the Duke had the power to grant. The rent stipulated being £93, 9s. 1d., the previous rent having been £90, and as that previous rent was acknowledged by the Duke's commissioner to be its full value, there was no grassum paid for it (the grassum of £400 then paid being for Whiteside and Fingland). And the argument he pleaded was as follows:—

Pleaded for James Murray, the tenant.—The lease in question was competently granted by the 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 in the deed of entail; and it is farther secured to the respondent by the Act 1449, c. 17. It is, at all events, good for the period to which it has been restricted by the interlocutors appealed from.

Even if, contrary to the heretofore invariable practice, and to the established doctrine of the law of Scotland, the inter-