deliberately, and with a full knowledge of all the circumstances, joined in this attempt; and as to the appellant, William Murray, in particular, considering the renunciation of the lease of Flemington by his father in 1788, and the grassum paid upon that occasion for the lease of the three farms jointly, the subsequent renunciation of the fifty-seven years lease in 1807, and acceptance of *pro forma* separate leases, with conditional extension for ninety-seven years by additional contract, it is an absurdity to talk of *bona fides*. It is palpable, that the appellant, William Murray (for his father, the true party) had not one atom of *bona fides* more than the Duke himself.

After hearing counsel,

The Lords, Find, that William, late Duke of Queensberry, had not power, by the entail founded upon by the parties in this cause, to grant tacks, partly for yearly rent, and partly for a price or sum paid to the Duke himself; and that tacks granted by him upon the renunciation of former tacks which had been granted, partly for yearly rent, and partly for prices or sums paid to the Duke himself, ought to be considered as partly granted for rent reserved, and partly for sums or prices paid to the Duke himself: and the Lords further find, that the tack in question ought to be considered in this question with the tenant, as granted, partly in consideration of rent reserved, and partly in consideration of a price or sum before paid to the Duke himself, and of such renunciation as aforesaid, and as a tack set with evident diminution of the rental. And it is ordered, that with these findings, the cause be remitted back to the Court of Session, to do therein as is just and consistent herewith.

For the Appellant, *James Moncreiff, Fra. Horner.*

For the Respondent, *John Leach, F. Jeffrey, J. H. Mackenzie.*

1819.

[Declarator as to Whiteside, &c.]

SIR JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS, Esq.; WILLIAM MURRAY, Esq. of Henderland, and EDWARD BULLOCK DOUGLAS, Esq., Barrister-at-Law, Trustees and Executors of the late William, Duke of Queensberry,[1] } *Appellants;*

EARL OF WEMYSS, . . . *Respondent.*

1819.

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

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWER TO GRANT LEASES—GRASSUM.—In the Neidpath entail, there was no express prohibition against granting leases, or taking grassums, but there was a prohibition "to *alienate*." There was a permissive clause to grant leases for the lifetime of the heir, granter thereof, or the lifetime of the receiver, but without diminution of the rental. A lease was granted in 1788, for fifty-seven years, with a grassum paid. This lease was, in 1807, renounced for a new lease, for the tenant's life, at the same rent as the former, plus the cess and rogue money. Held, that this latter tack must be held as a mere substitute for the former, and subject to every objection, on the ground of grassum, and that though the new tack did not exceed the endurance permitted by the entail, yet, as it was affected by the grassum, and by being granted at the same rent as formerly, plus the cess and bridge money, it was to be held as granted in diminution of the rental. Affirmed in the House of Lords.

This is the appeal brought by the executors and trustees of the Duke, under the same circumstances, and in regard to the same lease as mentioned in the previous appeal, the interlocutors pronounced therein having reference to the three farms of Whiteside, Flemington Mill, and Fingland.

In 1731, the farm of Whiteside was under lease to a predecessor of the present tenant, at the rent of £68, 8s. 4d.

In 1744, it was let from Whitsunday of that year at the same rent, and a grassum of £16, 13s. 4d. It was again let by the Duke on a nineteen year's lease, from Whitsunday 1769, to James Murray, grandfather of the present tenant. The rent stipulated being £109, and a grassum was then paid of £132, 18s. 1d.

The same James Murray afterwards obtained a lease of the farm of Fingland for twenty-five years, from Whitsunday 1775, at the rent of £50, 10s., with a grassum of £480.

In 1782, James Murray, the present tenant's father, got a lease of Flemington Mill for six years, from Whitsunday of that year. That farm had previously been let at £75. Now it was let at a yearly rent of £90, but no grassum was paid.

At Whitsunday 1788, the leases of Whiteside and Flemington were about to expire, while the lease of Fingland had still twelve years to run. In that situation James Murray proposed to the Duke to renounce the subsisting lease of Fingland, on getting a new lease of all the three farms. The

proposal was accepted, and he obtained a lease for fifty-seven years, from Whitsunday, at an annual rent of £260, 16s. 4d., which was the former rent of these farms, with the addition of the cess, bridge, and rogue money of each, and a grassum of £400 paid, as applicable to Whiteside and Fingland.

About twenty years after this lease, James Murray proposed to renounce it. And in place of it he obtained a lease of Flemington for himself, and a liferent lease of Fingland for his son James Murray, and a liferent lease of Whiteside for his son William Murray, each of those leases bearing to run from Whitsunday 1807.

The rent of Whiteside was £113, 12s.

It was alleged, therefore, on the part of the appellants, that there was here no diminution of the former rent, on the contrary, there was an augmentation to the amount of these public burdens, being somewhat more than £11. For this lease a grassum of £400 was paid, and which was declared to be solely in consideration of the farms of Whiteside and Fingland.

The Lord Ordinary and the Court pronounced the interlocutors which are set forth in the preceding appeal, setting aside the leases of Whiteside and Fingland.

Against these interlocutors, the appellants brought a separate appeal from that of the tenant.

Pleaded for the Appellants.—1st, The lease granted in consideration of a fine or grassum, does not fall under a prohibition to alienate contained in a strict entail. 2d, The rental of the farms of Whiteside and Fingland were not diminished by the grassums taken by the late Duke of Queensberry; therefore, the lease under reduction does not contravene the condition in the entail, that liferent leases shall always be set without evident diminution of the rental. 3d, Neither the Duke who granted, nor the tenant who accepted, the lease under reduction, were guilty of fraud against the succeeding heirs of entail by entering into that contract.

4th, It has been decided by a series of decisions, that a prohibition to alienate and to let in diminution of the rental, does not import a prohibition to let in consideration of a grassum.

5th, Grassums have been recognised by long practice, and by the law of the country, as perfectly legitimate in the circumstances of this case; and no Court ought to disregard that practice. If, therefore, grassums be not prohibited by the entail itself, or by the common law of the country; it is

1819.

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

only by an implication that they can be brought under the prohibition to *alienate*, an implication that does violence to the strict rules of construction hitherto applicable to entails.

Pleaded for the Respondent.—1st, The question is, Whether the tack of Whiteside is or is not prohibited by the entail of Neidpath? As to this, two questions arise, and which the respondent begs leave to maintain, 1. That the lease is comprehended under the general prohibition of the entail; and, 2. That it is not comprehended under the exceptive or permissive clause of that entail.

1. He maintains that this lease is comprehended under the general prohibitions of the entail, because it was granted for a grassum. On this point of grassum, it would be superfluous to add to what the respondent has pleaded in the case of Harestanes, in which it is sufficiently shown that a lease with a grassum is prohibited by the general prohibition of the entail of Neidpath, both as an alienation of the future rents or profits of that estate, and as an alienation of the estate, *i.e.* a part of the right of property, or feudal right, constituting that estate.

Vide Harestanes' Appeal.

It may, however, be more particularly noticed, that there are just three forms of entail used in Scotland: 1st, Entails with clauses prohibiting alienation, &c., without any special mention of leases. 2d, Entails prohibiting alienations, and also specially prohibiting leases, unless of certain qualities. 3d, Entails prohibiting alienations, and excepting or permitting leases of certain qualities. In regard to the second sort, there is commonly no room for dispute respecting the meaning of the general clause, since it is explained by a special one. It may only be said that the special prohibition of leases is, in its own nature, clearly susceptible of being construed to be *exegetic*, and, in general, it is demonstrated to be exegetic by other undoubtedly exegetical clauses accompanying it. But it is very material to observe how the general prohibition must be, and has been, interpreted in the two other classes of entails.

In the first place, in respect to entails prohibiting alienations, but containing no special mention of leases, these are entails *in terminis* of the statute 1685. It may be contended that no others are authorised by that statute; but at any rate it is quite clear that the statute did not require any other, but authorised and designated these as good and effectual entails. And it has been shown that, if the prohibition of alienations in these entails includes leases, there is still a good,

equitable ground, for sustaining necessary administrative leases, so that this interpretation is subject to no difficulty whatever; but, on the other hand, if the prohibition of alienation does not include leases, it must follow that, under every entail of this class, leases may be let for *any annual rent, and any grassum.*

2. Is the lease, then, comprehended under the permissive clause? Here there is no room for argument upon the strict construction of entails, as has been advanced on the prohibitory clause. Construing the permissive clause by common, fair interpretation, it is clear that what the late Duke did was not permitted by this clause. It did not authorise him to take grassums. It did not authorise him to diminish the rental. On the contrary, there was an express condition that the leases so permitted should not be with diminution of the rental. Here there was a diminution of rental in respect of the grassums taken; and there was a diminution, also, in the actual amount, and therefore the lease of Whiteside was not granted under the power of the entail.

After hearing counsel upon this appeal, as also upon the answer of Francis Charteris, Earl of Wemyss, and due consideration being had of what was offered on either side in this cause, the Lords Spiritual and Temporal in Parliament assembled, find, That the said William, late Duke of Queensberry, had not power by the entail founded upon by the parties in this cause to grant tacks, partly for yearly rent, and partly for prices or sums of money paid to himself, and that tacks granted by him upon the surrender of former tacks, which had been granted partly for yearly rent, and partly for prices or sums of money paid to himself, as between the persons claiming under the entail, ought to be considered as set with evident diminution of the rental; and it is ordered, That with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as may be just and consistent herewith.

For the Appellants, *Sir Saml. Romilly, Geo. Cranstoun, H. Brougham.*

For the Respondents, *John Leach, F. Jeffrey, J. H. Mackenzie.*