1819.

THE DUKE OF BUCCLEUCH *v.* MONTGOMERY, &c.

[Queensberry Entail.]

HIS GRACE CHARLES WILLIAM, DUKE OF BUCCLEUCH AND QUEENSBERRY, . . *Appellant;*

SIR JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS, Esq., Banker, London; WILLIAM MURRAY, Esq. of Henderland; and EDWARD BULLOCK DOUGLAS, Esq., of the Society of the Inner Temple, Executors and Trust Disponees of the deceased William, Duke of Queensberry, ... } *Respondents.*

House of Lords, 12th July 1819.*

ENTAIL—PROHIBITORY CLAUSE—LEASING CLAUSE.—The Queensberry entail contained the prohibitory clause "to sell, wadset, or dispone." It also contained a permissive clause to grant leases, but not "for any longer space than for the setter's lifetime, or for "nineteen years, and that without diminution of the rental at "the least, for the just avail for the time." The Duke granted leases at the old rent, taking grassums instead of an increase of rent. Before these were expired he granted new leases, upon renunciations of the old, to endure for his life, *and* for nineteen years thereafter, granting at same time, an obligation to renew these annually, so that the tenant might have a lease for nineteen years, to run from the period of his death. Held, in the Court of Session, that the Duke had full powers to grant tacks in this manner. In the House of Lords this judgment was reversed.

In the year 1705, James, Duke of Queensberry executed an entail of the estate of Queensberry, in which there was the following prohibitive clause, "That it shall not be lawful "to the said Lord Charles Douglas, and the heirs male of his "body, nor to the other heirs of tailzie above mentioned, nor "any of them, to *sell*, *wadset*, or *dispone*, any of the foresaid "earldom, lands, baronies, offices, jurisdictions, patronages, "and others foresaid, nor any part of the same."

In the powers of this entail there was this clause in regard to making leases: "And that the said Lord Charles Douglas,

* The previous appeals under the Neidpath entail were decided by the First Division of the Court; this, and the appeal following were decided before the Second Division.

" nor the other heirs of tailzie above specified, shall not set " tacks nor rentals of the said lands for any longer space than " for the setter's lifetime, or for nineteen years, and that with- " out diminution of the rental, at the least for the just avail " for the time."

These prohibitions were fenced by irritant and resolutive clauses.

The late Duke William succeeded in 1778, and having no issue, nor the prospect of having any, he commenced thereafter a system of management of the entailed estate, in regard to granting leases of the same, which raised the present question.

He cut down the whole timber upon the estate, and allowed the noble Mansion House, erected by his predecessor, to go to ruin. In granting leases, instead of taking a fair tack-duty upon the expiration of a lease, as the consideration for granting a new one, his Grace thought fit to stipulate only for the old rent, taking in one sum the difference between that and the actual rent, which the land was worth, which, by the improvement of the land, and the progress of the country, in every case greatly exceeded the old rent. This, by whatever name it might be called, the appellant alleged, was a conversion of a part of the annual tack-duty, into a payment *ante manum*. The Duke, however, thought fit to term these payments *grassums*, with the view, it is supposed, of confounding them with the small payments of entry money, for which, at one period, his immediate predecessor, in letting the lands, had thought fit to stipulate.

In the year 1796, a system still more prejudicial was devised by his Grace, when seventy years of age, at a time of life when his possession of the Queensberry estates was about its close. At this time, a great number of farms upon the estate of Queensberry were let upon leases, the termination of which had not arrived, and in most of them a great many years of the leases were yet to run; others of the leases were expiring. In those cases, where the leases were current, and the termination was distant, the Duke's hopes of exercising the power of granting a new lease, and, of course, stipulating for a new payment *ante manum*, which he termed a grassum, were necessarily faint. To remove this obstacle to his wishes his Grace caused it to be intimated, that he would renew these for the period of nineteen years, upon payment of a sum of ready money. This was a transaction by which the rents of those years which were thus added to the original lease,

1819.

THE DUKE OF BUCCLEUCH *v.* MONTGOMERY, &c.

were anticipated by the Duke. But as the leases which the Duke thus proposed to grant, were only to endure for nineteen years, his Grace could not expect to obtain so much of anticipated rents as if the leases should be granted for a longer period; and the entail prohibiting for longer than the "setter's lifetime, or for nineteen years," the plan was resorted to of interpreting this clause as if it gave power to grant leases for the "setter's lifetime, *and* for nineteen years," and making the Duke grant leases for nineteen years at the old rent, upon large sums being immediately paid to himself, the Duke granting an obligation to *renew these leases* annually, during his life, without any increase of rent. The appellant alleged that in this way the late Duke would, by this system of taking grassums, enrich his personal representatives, if the respondents succeeded in this action, to the amount of, at least, nearly half a million sterling.

Seeing that the appellant was adopting measures to reduce and set aside those leases, the respondents anticipated his measures by bringing an action of declarator to have it found and declared that the late Duke of Queensberry had full power to grant the said tacks, and was nowise limited from granting the same by any entail or entails of the said estate. All the existing leases were recited in this summons. The appellant brought also a reduction for reducing the whole leases. It was afterwards agreed that the question should be decided in the declarator.

To this action the following defences were given in by the appellant, "that the pretended leases are invalid, having "been granted by the late Duke, in contravention of the "provisions of the deed of entail; that, after entering on the "possession of the estate, he did not, as the leases gradually "expired, let the lands at the just avail for the time, but "granted leases for nineteen years, below the true value, "and in consideration of large grassums received, and after "having continued this system for a period of eighteen or "nineteen years, he thought fit, about the year 1796, when "the whole estate was under current leases, which had been "granted by himself, to form a new device, without waiting "for the expiry of these leases, of letting of new the whole "estate, both for his own lifetime and for nineteen years "after his decease, and also in diminution of the rental. In "pursuance of that device, his Grace had entered into trans-"actions with the tenants of the farms of the estate, by "which it was agreed that the latter, upon renouncing the

" leases which they then held, and for which they had already " paid large sums of money, should, upon payment of ad- " ditional large sums to the Duke, obtain new leases for " nineteen years, at the same rent as that which was payable " at the period of the said Duke's succession to the estate " in the year 1778, or which was stipulated in their said " original leases, and without a regard being had to the " large sums of money which had been then paid his Grace, " he becoming bound at the same time to renew the said " leases annually, during the Duke's life, for the space of " nineteen years, from the time of said renewal, without any " increase in the amount of the rent being stipulated. In " conformity with this plan and obligation so granted, leases " were annually renewed during the whole period of the " Duke's life."

The Court (Second Division) finally pronounced this interlocutor in that action :—" Having advised the mutual March 6, 1816. " informations for the parties, with the writs produced, and " heard the counsel for the parties *viva voce*, repel the " defences, and find and decern and declare, in terms of the " original libel : Allow the executors of the late Duke of " Queensberry, to give in a minute of the facts stated by " their counsel at the bar, and the defender to answer it; " supersede extract till the first box-day."

Against this interlocutor the present appeal was brought by the appellant to the House of Lords.

Judgment of House of Lords in the first Appeal.

" After hearing counsel, on Friday the 21st, and Monday the 24th days of February last, upon the petition and appeal of Charles William, Duke of Buccleuch and Queensberry, complaining of an interlocutor of the Lords of Session in Scotland, of the Second Division, of the 7th, and signeted the 8th March 1816; and praying that the same might be reversed, varied, or amended, or that the appellant might have such other relief in the premises as to this House, in their Lordships' great wisdom, should seem meet. As also upon the answer of Sir James Montgomery, &c., trustees and executors. And consideration being had yesterday, and this day, of what was offered on either side, in this cause, it is ordered by the Lords Spiritual and Temporal in Parliament assembled, that the said cause be remitted back to the Court of Session in Scotland, to review generally the interlocutor complained of in the said appeal; and in reviewing the same, the said Court is to have especial regard to the fact, that this action of declarator is brought by the executors

1819.

THE DUKE OF BUCCLEUCH v. MONTGOMERY, &c.

and trust disponees of the late Duke of Queensberry, as such, against the heir of tailzie, seeking thereby to establish unconditionally, all and each of the numerous tacks mentioned in the summons, and granted by the said Duke, in the manner, and under the circumstances mentioned in the pleadings, and is not instituted by any persons to whom such tacks are granted, nor any such persons parties thereto. And it is further ordered, that the said Court do reconsider the defences of the said appellant, and especially, Whether in a question between such parties, the leases so granted, ought or ought not to be considered as granted in execution of such device as is alleged in the said defences; and if so granted, Whether the same ought to be considered as granted in fraud of the entail, and are, or are not such as ought on that account, or on any other account appearing in the pleadings to be held invalid, or not to be sustained at the instance of the pursuers as representing the Duke. And in reviewing the interlocutor complained of, the said Court do particularly also reconsider what is the legal effect of the word 'dispone,' contained in the deed of tailzie of the 26th December 1705, with reference to tacks of lands comprised in the said deed; and, further, do reconsider what is the effect, with reference to such tacks, of all other parts of the said deed which relate to tacks, having regard to the endurance of such tacks, and to the fact of grassums being or not being paid upon the granting thereof, or paid upon the granting of former leases, and to all other the terms and conditions upon which such tacks were made, and to the effect of such grassums, terms, and conditions, in reducing the amount of the clear rent receivable by the heir of tailzie, and to all the circumstances under which the appellant has alleged, and it shall appear, that the late Duke of Queensberry granted all such tacks. And it is further ordered, that the Court to which this remit is made, do require the opinions of the Judges of the other Division, in the matters and questions of law in this case in writing; which Judges of the other Division are so to give and communicate the same. And after so reviewing the said interlocutor complained of, the said Court do and decern in this case as may be just."

The cause having been remitted to the Second Division of the Court of Session, for reconsideration, their Lordships, upon a petition for the appellant, pronounced the following interlocutor:—"The Lords having considered this petition, "with the remit from the House of Lords, and whole pro-

" ceedings in this cause, in order to enable them to review " the interlocutor complained of, in terms of the said remit, " appoint the parties to put in mutual memorials, to be seen " and interchanged; and to furnish the Judges of both " Divisions of this Court, and also the Judges in the Outer " House, with printed copies thereof, and of the said remit; " and request of these Judges to consider the same, and to " give and communicate their opinion in writing on the " matters and questions of law arising out of this case, if " possible on or before the last day of the second week in the " ensuing Christmas recess, so as to enable this Division to " review the interlocutor complained of, and give judgment " as soon as may be after the meeting of the Court."

Memorials were, accordingly, given in; and the Judges of the First Division of the Court and of the Outer House gave and communicated their opinions in writing as directed by the said interlocutor.

On considering these memorials of the opinions of the Judges, the Lords of the Second Division pronounced this interlocutor:—" The Lords having resumed consideration " of this petition with the remit from the House of Lords " referred to, and advised the same, with the mutual " memorials for the parties, and opinions of the Judges " required by the interlocutor of the 12th day of November " last, with the alteration on the opinion of Lord Cringletie " given in by his Lordship, and heard the counsel for the " parties *viva voce*, repel the defences, and find, decern, and " declare, in terms of the original libel; allow the pursuers " to give in a minute of the facts stated by their counsel at " the bar, respecting the amount of grassums, and the " defender to answer it."* Feb. 5 and 10, 1818.

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, There are some of the leases included in the summons of declarator, which are of endurance greater than nineteen years, which are stated to have been let under the Statute 10th Geo. III., of his present Majesty; but which are questioned by the appellant on special grounds, as being of endurance beyond nineteen years, and yet not let in due conformity to that statute, and which special objections have never been considered in this process of de-

* This was an adherence to their original interlocutor, although the First Division was against it.

1819.

THE DUKE OF BUCCLEUCH *v.* MONTGOMERY, &c.

clarator; but in respect to which, on the contrary, the appellant prayed the Court to reserve consideration of these special objections; and the respondents declared, that "it was "open to the appellant to bring these leases under reduction "on that ground." Yet, the judgment of declarator pronounced by the Court, contains no reservation of these objections; and so does, in form, appear to apply even to these leases, and to establish their validity in all respects. In form, these leases ought to have been struck out of the libel, or a reservation ought to have been inserted by the Court. Before entering upon the discussion of questions applicable to the leases generally, this matter ought to be rectified.

2d, The question then is, in point of form, Can such a declarator of right in favour of the respondents be sustained? In this question, it is obvious, that all arguments or considerations drawn or attempted to be drawn from the right of, or favour to, the tenants, as pretended onerous third parties, are completely out of place. These will be considered in their own place. But, at present, the executors might completely fail in their action, although it might appear that, from the existence of pleas competent to *bona fide* onerous acquirers (not that any such are admitted to exist, but speaking hypothetically) it would not be in the power of the appellant to reduce one lease in a question with the tenants, or to remove a single tenant. In this question, there is no occasion at all to inquire how far the consequences of the operations of the late Duke may or may not have been to put it in the power of the tenants, or any of them, to maintain their possession against the appellant. However that may be, yet, if in these operations, the late Duke committed any wrong against the appellant, it is impossible that the interlocutor of the Court can stand in favour of the respondents.

The above is the only consideration which the appellant insists upon respecting the form of the action. He never said, that such an action of declarator was not competent, or that the respondents had not a sufficient title to pursue such a declarator in their own favour. He only contended and contends, that, being competent, it must be viewed in its true nature, and not treated as if it were a different action by other parties.

3d, The entail of the Queensberry estate, is a valid entail, and in legal form containing the usual prohibitions of a strict entail against disposition, or alienation in particular.

It is not denied by the respondents, that this entail con-

tains clauses prohibitory, irritant, and resolutive, and that it has been duly registered, and is in general in good form, and a valid and effectual entail. But they say, that it is narrower than entails prohibiting alienation; because though it prohibits to "*dispone*," yet it does not prohibit to "*alienate*." The appellant conceives that this criticism is wholly unfounded; and that a prohibition to *dispone* is equal to a prohibition to *alienate* in the language of Scotland, and of Scotch law. On this point, the appellant has already produced ample evidence in his former appeal case, which, as it remains entirely undisturbed by the respondents, it appears unnecessary to repeat. The respondents, unable to contradict this evidence, attempt to evade its force by an argument, that "The term *dispone* has two significations, the one strictly "forensic, the other also occasionally used in law writings, "and in general discourse by Scotchmen of the seventeenth "century. In its forensic sense, it signifies the transmission "of a right to any heritable subject, by that form of convey-"ance, termed a disposition. In its general or popular sense, "it is synonymous with the word dispose, and consequently "it is applied not only to all dispositions, strictly so called, "not only to all alienations, but to every act to which a sub-"ject is affected, either as a transmission, incumbrance, use, "or arrangement." And then the respondents proceed to argue, that the first of these meanings is to be taken, because entails are to be strictly interpreted, and because the other meaning is *too wide*, and would interfere with *the use* or management of the entailed estate.

But in reply to this, it is submitted that the evidence produced by the appellant does by no means go to any *extra forensic*, or merely popular meaning of the word dispone; but to its meaning in legal language, in the language of the legislature, and most particularly in the legal sense of prohibitions *to dispone;* nor does that evidence go to show that dispone has a legal meaning in such prohibitions of the vague kind stated by the respondents, but that it is equivalent to alienate, meaning any transmission of right, in whole or in part, out of the person prohibited. This, and nothing else but this, is the meaning of the term dispone, in such prohibitions as is established by the abundant evidence exhibited by the appellant: And if that be the case, it matters nothing, that in one or two instances it may have been used in a vague and popular sense, to designate, even use or arrangement. Alienate, is also used sometimes in a popular way, to signify things different.

1819.

THE DUKE OF BUCCLEUCH *v.* MONTGOMERY, &C.

from what can be contemplated in prohibitions to alienate. But that is not enough to bring into doubt its legal meaning in such prohibitions. As to the alleged *forensic* meaning of dispone, the appellant is very much at a loss to know what the respondents say is that meaning. Erskine, in a loose way, says, that a disposition is a deed containing procuratory and precept. But Erskine, it is perfectly plain, is talking of the ordinary dispositions of land only, never dreaming of defining all the deeds that are contained under the term disposition. For it would be ridiculous to say, that all lands cannot be disponed without procuratory and precept. It is really absurd to say, that because, in point of fact, dispositions containing the fullest possible conveyance of the feudal property of lands, are the most common dispositions; and that dispositions of that sort, are very generally in view when the word disposition is used, *without any reference to its extent;* therefore, the meaning of the word is to be limited to this sort of dispositions, when it is used without a clear intention of its having its full extent, and applying to all dispositions as in a prohibition to dispone. In order to afford any argument to the respondents, they should show, that in forensic or rather legal language, a *prohibition to dispone* was understood to mean only a prohibition to grant any particular form of deed, or in any sense narrower than a prohibition to alienate. But that has not been, and cannot be done. It is vain, therefore, to say that the prohibition to dispone in an entail, ought to be taken in its narrowest sense. Such a prohibition has no sense but one, which is that of prohibiting *all dispositions, i.e.,* deeds of an alienative nature. The respondents have referred to the Duntreath case, as an instance in which a narrow technical meaning was taken, though a popular meaning existed, which was only the meaning of the entailer. But in that case there was no sufficient evidence of any such popular meaning, far less of a *legal* meaning in which the entailer had used the word. If there had, in that case, been produced dozens of passages in the chief books of law, in decisions, and most of all, in statutes, in which the word *heirs* expressed the institute, there never would have been an idea of such a determination of that case as did take place. It is hardly necessary to notice again the argument, that a prohibition to dispone, prohibits nothing but deeds by the party prohibited, in which he *uses the word dispone.* The argument was formerly used in reference to the word alienate; and was, it is believed, thought frivolous.

It is not anywise better in relation to *dispone*. It is plain, that a prohibition to dispone is a prohibition to do *the thing disponing*, not merely to use the word dispone, just as every other prohibition of the kind is a prohibition to do the thing signified by the word. On this point, therefore, there can be little difficulty; nor is it necessary to go further into argument. There can, it is thought, be no doubt, that the entail of Queensberry is nowise incomplete, but contains as broad, and as effectual a prohibition, as if the word alienate had been used.

The above considerations derive additional force from the particular expressions in the entail of Queensberry, wherein, at the end of the clause prohibiting to dispone to contract debt, or to alter the succession, there is added the words, "*any manner of way whatsoever.*" And, in the irritant clause, the irritancy is provided in case the heirs of entail shall contravene the conditions or provisions in "any manner of way;" the expression, in both cases, shewing that the entailer was anxious to use the words in the broadest sense, and by no means in a sense limited to any particular form or style of conveyance.

There is no dispute, that this entail contains complete prohibitions against contracting debt and altering the succession, particularly the former.

4th, There is added in this entail a special prohibition of tacks let for "any longer space than the setter's lifetime, or "nineteen years, and that without diminution of the rental, "at the least, at the just avail for the time."

5th, There is further added, in this entail, a special prohibition of all deeds "in any sort," whereby the tailzied lands and estate, or any part thereof, "may be affected," directly or indirectly. Which prohibition is, by the use of the words "in any sort," and "directly or indirectly," expressly provided to be of as wide and comprehensive signification as the words can admit.

6th, Such being the nature of the entail, the leases libelled were granted by the Duke of Queensberry, in direct contravention of the general prohibitions of the entail, in respect they were granted, not for annual-rent payable to the heir of entail having right to the land, at the time the use and fruits of it were to be taken by the tenant, but in great part, for a price or anticipated rent, under the name of *grassum*, paid to the granter, who was not to have right to the land at the time the use and profits of the land were taken by the tenant.

1819.

THE DUKE OF BUCCLEUCH *v.* MONTGOMERY, &C.

Being so granted, the leases libelled are prohibited in one of two ways, either as contracts or as dispositions or alienations.

The first has been suggested, and, indeed, forced upon the appellant by the respondents themselves, who have strongly contended that *leases are not real rights.*

Now, if this be well founded, it follows, that leases, not being real rights, but merely personal rights, or *jura crediti*, binding singular successors indeed *vi statuti*, but binding the heir of the granter by representation, just as if the statute had never existed, *i.e.* by way of personal obligation *ex contractu*, then undoubtedly, all leases are *in terminis* prohibited by the prohibition to contract debt in the entail. For, it never has been disputed, this prohibition in entails absolutely excludes all personal obligations whatever, contracted by any heir of entail from affecting his successors (except in so far as it is qualified by express exceptions). And, in particular, it is contended by the respondents themselves, that an obligation to grant a tack is not effectual against an heir of entail; and he cites the case of Ker of Chatto to prove the point. This demonstrates, that the words of the prohibition to contract debt, are broad enough to exclude obligations of lease, as well as any others, provided they be truly personal obligations. The heir of entail being prohibited to contract any debts or obligations, can never bind his successors by any such; and, if leases be reducible into that class, there can be no doubt, that by the express words of the prohibition, the heir of a strict entail is prohibited to grant any.

Vide ante, vol. iii., p. 309.

The second view is, that the leases are not personal rights, but real, which the appellant understood to be the view taken by the Court of Session and House of Lords, in the cases of long leases upon entailed estates, and which the appellant, therefore, was willing to take in this case. In this view, it is unquestionable, that the lease is constituted by imparting to the tenant a share of the right of property, for no real right can possibly be constituted any other way. It is a real right to keep possession of the land, and to use and take the fruits of it for a certain time. Now, in this view, leases must fall under the prohibition of *alienation* or *disposition*, because all grants of any part of the right of property must fall under such a prohibition. In such a prohibition, the word has always been used to express any conveyance of any part of the corporeal subject, or of the right thereto.

In a prohibition of alienation or disposition, the obvious

meaning is to designate every thing, more or less, which is at all of the nature of the alienation, whether it relates to the whole or a part of the corporeal subject, or of the right. The obvious intention is to preserve the subject and right entire, not merely to prevent it from being conveyed entirely. It is plain, that if the sense of alienate or dispone in any prohibition were otherwise, it would be absurd. For it would leave it perfectly open to the person prohibited, to defeat the prohibition at pleasure, by alienating any part of the subject or right, however great, and leaving only any part, however small.

According to the civil law, it appears, that a prohibition of alienation applied to all transmissions of any part of the real right, *vide* the title of the code *De Rebus alienis non alienandis*, where a rescript of Justinian shows this.

In the law of Scotland, there can be no doubt, that prohibitions of disposition or alienation have in Scotland always and universally been regarded as sufficient to prohibit any transmission of the right of property in whole or in part, by granting real rights out of it. Thus, to pass over entails and leases at present, alienation of land is prohibited in Scotland by persons on deathbed; where the land is annexed to the Crown; where it belongs to persons who are *oberati*, or to persons inhibited or interdicted. In none of these cases was it ever held competent to grant real rights out of the property, materially diminishing it.

It is said, in answer to this, that these persons are not merely prohibited to alienate; but also to "affect or burden their heritage." This is a dangerous argument for the respondents in the present case, where the heirs of entail are prohibited to do "any deed in any sort," whereby the land may be affected directly or indirectly. But to pass over that, the answer of the respondents appears to be erroneous.

In judging whether any conveyance is an alienation, the transference of the right *to the thing* in whole or in part is looked to, not the transference of right or obligation, in relation to the superior, or any other person. Indeed, it has been proved that, in Scotch law, the grant of any real right was distinctly called disposition. Lord Stair, it was shewn throughout, bestowed that appellation on transmission of any real right, by transmission of part of the right of property. And the Scotch statutes use the same phraseology.

Such being the case in general, why should not such prohibitions apply to leases as to other real rights? Leases are

1819.

THE DUKE OF BUCCLEUCH *v.* MONTGOMERY, &c.

real, and they convey out of the granter for a time, which may be very long, almost the whole right of property. They transfer to the tenant the right of property in the fruits, before they are separated from the solum, and while still part of the landed right; and, in some cases, as in leases of mines, quarries, coal-pits, &c., they give him a right to take away, as his own property, part of the *solum* itself. Of all grants of real right out of the property, leases seem to be most plainly alienations.

7th, A great many of the leases in question, were granted for a term of endurance prohibited by the provisions of the tailzie. The special clause respecting tack, prohibited the heirs from setting tacks or rentals "of the said lands for "any longer space than the setter's lifetime, *or* for nineteen "years." This prohibition obviously extended to tacks, in whatever form constituted, by which a right of lease for a longer term than that specified, might be constituted. In short, it did not apply to one form of instrument more than another; but it obviously meant, a specific term of endurance, not exceeding nineteen years.

In like manner, an obligation followed by possession to grant a tack which should endure for the life of the granter, and for nineteen years after the term immediately preceding his death, equally fell under the prohibition, because it is *triti juris*, that an obligation to grant a lease, followed by possession, constitutes a right of lease; on this point, it is sufficient to refer to the opinion of Lord Stair, B. ii., tit. 9, § 6. The Duke, in order to make these leases extend to both these periods, that is, to his *own liferent*, and for nineteen years, granted the obligation to renew these leases for nineteen years annually. The grassums were paid as applicable to leases to endure for his own life, and nineteen years after his death, and, therefore, they were granted for a longer period than nineteen years, or the Duke's lifetime.

8th, Laying aside, at present, the effect of the obligation to renew, as itself constituting in each case a right of lease, and looking only to the special grants of leases for nineteen years, as the only rights of lease affecting the lands at the death of the Duke, the tacks so let, were not let without diminution of the rental, 'at the least, at the just avail for the time.' In the first place, it must be admitted, that those tacks which do not even pretend to reserve any more than the old rent, a rent confessedly quite inadequate, were certainly not let "at the least, at the just avail for the time." But it

is said, that they were let without diminution of the rental, and that this is sufficient, though they be not let at the just avail for the time. These words, "without diminution of "the rental," have been argued to admit of two meanings,— 1st, Without taking less than the rent, by the lease to expire. 2d, Without making the rental or value of the estate less by the tack, than it would have been without it. The latter is certainly the most literal, as well as the most reasonable meaning; and whatever may be said as to the possibility of adopting the former, it certainly is impossible to deny that the latter may be the meaning. Now, if that meaning be in itself probable, it appears clear that it must be adopted, when the words "at the least, for the just avail for the time," are added. For these words explain the meaning of the words, "without diminution of the rental." Shewing that, if a fair rent for the time is taken, then the rental will not be held diminished. This appears the most consistent and rational explanation of the clause. The antecedency of an uncertain quantity, has no necessary effect in taking away the proper meaning of the words, "at the least," as expressive of something, than which nothing should be less. This appears in the definition cited by the respondents themselves, from Dr Johnson, "At the lowest degree." It is provided at the lowest degree, the just avail for the time shall be taken. Under such a provision then, can it be said, that something is to be taken lower than the lowest? In poetry, there may be found, in the lowest deep, a lower deep; but this cannot well be done in reality.

9th, The Duke, while he took these grassums, neglected to relieve the rent, which he reserved to the heirs of entail from the legal burdens payable on account of these grassums, thereby directly imposing these burdens upon this reserved rent, and so diminishing the rental.

Pleaded for the Respondents.—1st, The present action of declarator is a competent form of process for trying the validity of the leases granted by the late Duke of Queensberry, on the Queensberry estate. The respondents have a sufficient interest to entitle them to use this process; and, it is not necessary that the tenants should be parties to it. And from the nature of the conclusions, and the interest which entitles the respondents to insist in this action, they must have right to use every argument in support of the leases which may be competent to the tenants as third parties, onerously contracting.

1819.

THE DUKE OF BUCCLEUCH *v.* MONTGOMERY, &C.

2d, There can be no fraud against an entail, independent of, or as distinguished from, the infringement of any express prohibition; and, therefore, unless it can be shown that the leases granted by the late Duke of Queensberry, are expressly prohibited by the entail, he must have possessed the legal power to grant them. It has been an established maxim ever since deeds of entail were known in Scotland, that they are *strictissimi juris*, an expression which imports that all the conditions and restrictions which they impose on the heir in possession, are to be interpreted, so as to impose no greater restraint than the words used clearly and necessarily express; and that where these are in any respect ambiguous, that meaning must be adopted which is most favourable to liberty. The intention to impose restrictions and limitations, is not to be gathered, by inference or implication, from other parts of the deed, and, however apparent, it is of no avail, unless it is expressed in clear, proper, precise, and unambiguous terms. Lord Braxfield laid it down in the Duntreath case, in regard to the terms of prohibitory clauses in entails, thus: —"He who means to limit his heirs, must do it in such "explicit, apt, and proper terms, that no man who reads can "doubt. In questions of this kind, parties are not left at "liberty to argue from intention. If that intention is not "expressed in clear and unambiguous terms, it can have no "effect. *All acts, however inconsistent with the general pur-* "*pose of the settlement, or contrary to the clear intention of the* "*entailer*, not expressly and in legal technical language pro- "hibited, are within the power of an heir of entail, as well "as effectual against the estate. No aid whatever can be "drawn from other points of the deed, from its general scope "and purpose, or from the intention of the maker, however "clearly to be gathered from the deed."

To these authorities, the respondents might add, if it were necessary, the opinions of every eminent lawyer or judge, down to the present time; and they might cite decisions without number, all proceeding on, and governed by, this rule.

But, if it is the rule of law, that entails are to be strictly interpreted, and that fetters are not to be reared up by inference and implication, it appears to the respondents to be a necessary consequence, that there can be no fraud, unless where an express prohibition is infringed. In this case there is no express prohibition against granting leases, nor is there any express prohibition against taking grassums; yet, if the

appellant's argument is to prevail, these prohibitions are to be implied, that is, they are to be inferred from the prohibition to dispone, and thus, prohibitions in violation of the strict rule of interpretation, are to be reared up by implication.

The appellant has referred to instances of implied prohibition. But, it is not in consequence of an implied prohibition, that the heir of entail cannot sell wood to be cut after his death, because the reason of this is founded on a totally different principle. Until the wood is cut, the contract remains a mere personal obligation on the seller. The trees, while they remain growing, are *pars soli*, and as such, become the property of the succeeding heir, the moment his predecessor dies; and as he is in no way liable for the personal obligations of his predecessor, he is not obliged to suffer his property to be touched. The true criterion by which to judge of the principle on which such cases rest, is to suppose that an unlimited proprietor had, after making such a contract, transferred the estate by sale, without taking the purchaser bound to fulfil the contract. The moment the purchaser took infeftment in the lands, the whole growing wood became his property; and having nothing to do with the contract, he could not have been called on to fulfil it.

3d, But the late Duke did not, by the leases which he granted, contravene the prohibitions contained in the leasing clause of the entail. The heir of entail is allowed to let leases for his own lifetime for any period not exceeding nineteen years; of course, every lease for the exact space of nineteen years, is, where not objectionable on other grounds, within the powers of the heir, and cannot import a contravention. But, with the exception of a few building leases for ninety-nine years, the whole leases on the estate, and the whole of those to which the declarator has a reference, are for a period of nineteen years, and nothing more. And, though there was an obligation to renew these annually, yet these obligations regard only a lease for nineteen years and nothing more, so that these leases are not in fraud of the entail, in so far as their endurance is concerned.

Then, again, in regard to that part of the leasing clause which has reference to the rent or rental, the entail directs that the leases should be granted "*without diminution of the* "*rental*, at the least, at the just avail for the time," the meaning which the respondents have affixed to these words, and which a great majority of the Judges of the Court of Session

1819.

THE DUKE OF BUCCLEUCH *v.* MONTGOMERY, &C.

have concurred in, thinking the only rational and just meaning is, that the farm shall be let, not under the last rent, but if that rent cannot be obtained, then they shall be let at the just avail for the time, that is, the rent shall be lowered as little as possible below the last rent.

It has been alleged by the appellant, that in all the leases in question, there has been an actual diminution of the rental, because, under the previous leases, the late Duke drew not only the annual rent, but a grassum besides, and in fixing the present rent, no allowance or increase was made on account of the grassum. In support of this view of the matter, reference is also made to the practice in valuations of teinds, where grassums are taken into account as well as rents.

In answer to this argument, the respondents may, in the first place, observe, that it proceeds on the assumption that grassum is rent, and of course that it is an anticipation of a part of the rent, made at the commencement of the lease. But, were this proposition even made out, it would not follow that the leases could be set aside. There is no prohibition or irritancy in the entail, directed against an anticipation of rent; such an anticipation, therefore, imports no contravention. It is not, indeed, effectual against the succeeding heir; but this arises, as has been shown, not from its being forbidden, but because the tenant has no right to the benefit of the statute 1449, without paying his full rent. The only consequence, therefore, of such an anticipation would be, that the tenant would be obliged to pay over again to the appellant such part of the anticipated rent as corresponds to the period since the late Duke's death, or, in other words, that the respondents would be obliged to pay the appellant such a proportion of each grassum, as corresponds to the period of the lease which remained to run at the time of his succession.

But, in the second place, there is no ground for saying that a grassum is anticipated rent. The two things are plainly and essentially different. Rent is an annual payment to be made by the tenant during his possession; grassum is the price or consideration given for a beneficial lease.

4th, The general prohibition to *dispone*, can have no reference to leases, and, therefore, it follows, that it is quite immaterial to inquire whether the word "*dispone*" be equivalent to the word "*alienate*," because, supposing the special clause here in dispute had not existed, the respondents conceive that it is easy to prove that a lease of ordinary duration,

whether let for a grassum or not, would not have been struck at by the general prohibition. Such an inquiry, it is humbly conceived, would not have been necessary, had not the appellant, among other arguments, maintained this extraordinary proposition, that a lease of any endurance, whether with a grassum or not, is an alienation, and, consequently, that every entailed proprietor in Scotland, is in the constant practice of contravening. But, the respondents maintain, 1st, That leases of ordinary duration are not alienations; 2d, That the taking a grassum does not convert a lease into an *alienation;* and 3d, that even supposing that to grant a lease is to *alienate,* it is not to *dispone,* these terms not being synonymous, according to the construction applicable to entails.

1st, That leases of ordinary endurance were ever accounted alienations, is an assumption made in direct contradiction to every authority in the law.

The whole series of texts brought forward in the Wakefield case, to prove that a long lease is an alienation or *quasi* alienation, prove by necessary implication that a lease of ordinary endurance is not so. When Balfour says, "a grant "of lands for certain years, and until a loan be paid, is no- "wise to be understood a tack and assedation, but rather a "kind and sort of alienation;" it follows, that he considered a tack or lease in the general case to be something different from an alienation. Sir Thomas Craig repeats the same observation:—"Non autem est assedatio, se ad certos annos "locatio fit, quibus finitis, duratura semper donec pecunia, "quam fortasse dominus, a colono mutuam acceperat repen- "datur; sed species quædam alienationis." He afterwards adds:—"Qui alienare in jure prohibentur, neque ad novem "decim annos neque pro vita assedare queant." It is impossible to make a more marked distinction betwixt an alienation and a lease of ordinary endurance.

P. 201.

P. 279.

Mackenzie observes, that "possession is the same thing "to tacks, that seisins are to alienations," an absolute solecism if all tacks are alienations. Lord Stair expressly says, that "tacks in the ordinary extent thereof, are not alienations." The same thing is repeated by all later authors. In the Wakefield case, President Campbell observed:—"My opinion "is just that of all your Lordships. All of us know, 1st, "That a *lease may be granted by an heir,* which is no alien- "ation; and, 2d, That a lease may be granted, which is "really, substantially, and truly an alienation. Now, it is

Obs. on Stat. 1449, l. 15. (1st Ed. 1693.)

1819.

THE DUKE OF BUCCLEUCH *v.* MONTGOMERY, &c.

" unnecessary for me to bring under your Lordships' view, " examples of the two extremes, because they must be " obvious; for leases of one year or two years, or in Craig's " time, for ten years, or in the present day for nineteen years, " are not alienations."

The appellant's doctrine, therefore, is not only contradicted by every authority, but absurd in itself. If every lease were an alienation, then no heir of entail could derive any rent from letting the farms on the estate, and he would be left to farm the whole estate himself, or to let it from year to year, at little better than an elusory rent.

2d, But if a lease is not an alienation in itself, a grassum can never make it one. The tenant who pays a grassum does not obtain a right of a higher description, more real in its nature, or more ample in its effects, than the tenant who pays a rack rent. He gives, in return, no doubt, a different consideration; but the question, alienation or not? depends on the nature of the right transferred, not on the cause of transference.

3d, But, even if it were proved that to let a grassum lease is to alienate, it will not follow that it falls under the prohibition to *dispone*, because to *dispone* and to *alienate* are not synonymous.

It has been mentioned, that long leases, or leases of such endurance as to approach to emphyteutic contracts, have been termed alienations by all our writers. They have been considered as rights of ownership, and, therefore, a word expressive of a grant of ownership, has been applied to their constitution.

The term "*dispone*" has two significations; the one strictly technical, the other used occasionally in law writings and in general discourse by Scotchmen of the seventeenth century. In its strict technical sense, it signifies the transmission of a right to an heritable subject to that form of conveyance, termed a disposition, and in which the granter makes use of the word "dispone," in conveying the right. In its general and popular sense, it is synonymous with the English word *dispose;* and is consequently applied, not only to all dispositions, strictly so called—not only to all alienations—but to every act by which a subject is affected, either as to transmission, incumbrance, use, or arrangement. The appellant has, with great labour and research, collected together a mass of authority, to prove that *dispone* is the same with dispose of, and disposition the same as disposal. But it goes

no way to solve the question, as it still remains to be considered in which of these two acceptations, the popular or the technical, the word must be taken in construing a Scotch entail.

The interpretation which the Court of Session has put on the prohibitory clause of this entail, is proved to be correct, by the practice and understanding of the country for centuries back, in cases where lands have been possessed under a prohibition to alienate or to diminish the rental. It is proved to be correct by the practice in the present entail for fifty years after it was made, by the universal practice of other entails, containing similar prohibitions, and by various decisions of the Supreme Court.

Journals of the House of Lords.

After hearing counsel upon the appeal of Charles William, Duke of Buccleuch and Queensberry, which was brought into this House on the 17th February 1818, and which has since been revived in the name of Walter Francis, now Duke of Buccleuch and Queensberry, and in the name of Henry James, Lord Montagu, and the Honourable Charles Douglas, as his tutors, complaining of an interlocutor of the Lords of Session in Scotland, of the Second Division of the 5th, and signed the 10th of February 1818, and praying that the same might be reversed, varied, or amended. As also upon the answer of Sir James Montgomery and others. And consideration being had on what was offered on either side in this cause: It is ordered and adjudged by the Lords, that the said interlocutor complained of in the said appeal be, and the same is hereby reversed: And the Lords find, that William, late Duke of Queensberry, had not power, by the entail founded on by the parties in this cause, to grant tacks for terms of years, partly for yearly rent, and partly for a price or sum paid to the Duke himself; and that tacks granted by him upon surrender 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 prices or sums paid to the Duke, and that such tacks ought not to be considered as let without diminution of the rental, or at the just avail, and are, therefore, to be considered as between the persons claiming under the entail, as tacks which he had not power to grant by such entail. And it is further ordered, that with this

1819.

THE DUKE OF BUCCLEUCH *v.* MONTGOMERY, &C.

finding the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this finding.

For the Appellant, *Alex. Maconochie, R. Gifford, John Bell, J. H. Mackenzie.*

For the Respondents, *Sir Saml. Romilly, Geo. Cranstoun, Alex. Irving.*

1819.

THE DUKE OF BUCCLEUCH *v.* HYSLOP.

THE DUKE OF BUCCLEUCH AND QUEENSBERRY, ... *Appellant;*

JOHN HYSLOP, Tenant in Halscar, . . *Respondent.*

House of Lords, 12th July 1819.

[Halscar.]

ENTAIL—PROHIBITORY CLAUSE—PERMISSIVE CLAUSE TO GRANT LEASES—CONTRAVENTION—ACT 1449, C. 17.—A reduction was brought by the appellant, to set aside a lease granted by the late Duke of Queensberry, on the ground that it was granted in contravention of the prohibitions in the said entail; that it was granted for the whole period of the Duke's life, *and* for nineteen years after his death, and, consequently, for a longer period than was permitted by the entail; that the farm was not let at the just avail at the time; and that it was let with diminution of the rental. The tenant contended that he had entered into possession, and put out large sums on the faith of the lease, and that the same was entered into on his part in *bona fide*, and the action against him was, therefore, irrelevant, his lease being protected by the Act 1449, c. 17. The Court of Session sustained the defences, and assoilzied the tenant. In the House of Lords this judgment was reversed.

This was an action of reduction raised by the Duke of Buccleuch and Queensberry, against one of the tenants in the leases granted by the late Duke of Queensberry, as fully detailed in the previous appeal. He had been all his lifetime on the farm. In the year 1786, he had obtained a lease for nineteen years, of the farm of Halscar, for a rent of £30 per annum, and a grassum of £36. In the year 1797, this lease was renewed for nineteen years, at the same rent, but upon payment of a grassum of £28. In 1803 he procured a lease of the same farm for nineteen years, at the yearly rent of £30, the old lease then being unexpired; and, besides, there