SCOTLAND.

ON APPEAL FROM THE COURT OF SESSION.

ARCHIBALD, DUKE OF HAMILTON, &c. (since deceased), and
ALEXANDER, MARQUIS OF DOUGLAS, &c.;
And by Revivor,
ALEXANDER, DUKE OF HAMILTON, &c. - - - - - } *Appellants*;

MRS. H. P. ESTEN, (now SCOTT WARING,) and
JOHN SCOTT WARING, her Husband, for his interest - - } *Respondents.*

UNDER a strict tailzie prohibiting alienation, but containing a power to grant leases, provided they do not exceed twenty-one years, and be not let with evident diminution of the rental; the heir of tailzie in possession, acting upon the opinion of counsel, made leases to his steward at rents a little above the former rents of the lands leased, but far below their market value; with intent that the steward should underlet the lands at their full value, and pay the surplus, beyond the rents reserved in the principal leases, to persons named by the grantor of the leases, the heir of tailzie in possession. The steward accordingly underlet the lands at rents exceeding the principal rents by 1,371 *l.* and, some time after the grants of the principal leases, executed a trust obligation in favour of the objects of the trust. Held, that the leases, from the time of the grants until the declaration made by the trust obligations, were held in trust for the grantor, and that they were invalid as a violation of the prohibitions, and not within the permission of the deed of tailzie.

Whether receipt of the rent reserved upon the principal leases, or knowledge of and acquiescence for a considerable time in the payment to the objects of the trusts of the surplus, arising from the rents reserved upon the underleases, constitute homologation, *Quære.*

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THE family estates of the Dukes of Hamilton, in Scotland, are held under the fetters of a strict entail, with all the requisite clauses to make such an entail effectual, containing an express prohibition against alienation, and a permission to let leases, provided they do not exceed twenty-one years, and be not let "*with evident diminution of the rental.*"

Douglas, Duke of Hamilton, having cohabited with the respondent, Mrs. Scott Waring, (then Mrs. Esten,) who during the cohabitation had borne a daughter, the reputed issue of that connexion, and being anxious to make a provision for the mother and child, entered into a correspondence * with his agents, and took the opinion of counsel as to the most secure and effectual mode of making such provision, by granting beneficial leases of the entailed estates, to be held in trust for their benefit. In consequence of advice upon the opinion thus taken, the Duke, by a lease executed the 30th of November 1798, let to his steward and agent, John Boyes, his heirs, assignees and subtenants, certain farms, part of the entailed estates, for twenty-one years from Martinmas 1798 and 1799, at a rent nominally higher than had been paid on former leases.

* The material parts of the correspondence and the opinion, are stated by the Lord Chancellor, in moving the judgment.—*Post.* p. 208, *et seq.*

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By another lease, executed on the 8th of February 1799, the Duke let to Mr. Boyes, his heirs, assignees and subtenants, for twenty-one years from Martinmas 1798, other farms, being also part of the entailed estates, at rents just exceeding the rents payable on leases lately expired.

By a third lease, of the 20th and 25th of June, a farm called Bonhard was let to the same person, and for a similar rent.

On the 2d of January 1799, about a month after the date of the first lease, Mr. Boyes executed an obligation, which, reciting that lease, and *certain causes and considerations*, proceeds to declare the trust, which is in the form of an agreement between Mr. Boyes and Mrs. Esten, and an obligation on his part to underlet the lands or assign the leases for the highest rents and prices which could be obtained, and after paying the rents reserved in the principal leases, to hold the surplus rents or prices which might be so obtained for the use of Mrs. Esten, during her life, and for Anne Douglas Hamilton, her daughter, *and any other after-born child or children* of Mrs. Esten and the Duke of Hamilton, in such manner as in the trust obligation specified.

On the 26th of April and 3d of October 1799, Mr. Boyes executed similar obligations by way of declaration of trust, with respect to the second and third leases respectively.

These trust obligations were not produced or known to the appellant until long after the death of Douglas, Duke of Hamilton. Whether they

were ever by the grantor delivered to or in behalf of the respondent, Mrs. Scott Waring, and if so at what time they were so delivered, did not appear.

Douglas, Duke of Hamilton, died on the 1st of August 1799, and immediately after his death Mr. Boyes granted subleases of the lands comprised in the principal leases at rents which created a surplus of 1,370*l.* beyond the rents reserved upon the principal leases.

Upon the death of Douglas, Duke of Hamilton, he was succeeded in the estates and honours of the family by Archibald, Duke of Hamilton, the original appellant.

After the death of Duke Douglas, Mr. Boyes became the steward and agent of Duke Archibald, and accounted with and paid to him the rents reserved upon the three principal leases granted by Duke Douglas to Boyes, as trustee for Mrs. Esten and her issue by Duke Douglas; and with the knowledge and acquiescence of Duke Archibald, accounted with or paid to the respondent, Mrs. Waring, the surplus rents arising out of the subleases made by him to his subtenants.

Mr. Boyes died in 1812, and upon his death the principal leases vested in John Boyes, his son, as his heir and representative.

The respondents (who had lately intermarried) finding that some question was about to be raised on the part of the appellants, as to the validity of the leases and trust, required Mr. Boyes, as the representative of his father, to execute a conveyance of the principal leases and under leases in favour of new trustees; with which requisition, he having

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delayed to comply, an action of adjudication in implement, and of count and reckoning, was brought against him by the respondents in the Court of Session.

The summons in this action concluded that it should be declared that the principal and sub-leases were held by John Boyes, deceased, in trust for the respondent, Mrs. Scott Waring, under the trust-obligations, and that they were binding on "John "Boyes, as representing his father, and that he "should be decerned to render to the pursuer, "Mrs. Scott Waring, or to Captain Donald Mac-"leod and Alexander Forsyth, as trustees nominated "by her, a just and true account of his intro-"missions with the rents of the farms therein speci-"fied, (parts of the entailed estate of Hamilton,) and "should be decerned and ordained to denude and con-"vey two leases, which the said deceased John Boyes "held of these farms, and several subleases therein "specified, in favour of the said Donald Macleod "and Alexander Forsyth, or otherwise, on his "failing so to do, that the said leases and sub-"leases should be adjudged from the said John "Boyes, and decerned and declared to pertain and "belong to the said trustees, in trust for the use of "the pursuer during her lifetime."

Action of exhibition, &c.

Upon this action being raised, the appellant, the Marquis of Douglas, raised an action of exhibition, count, reckoning, and payment, against Mr. Boyes and the sub-tenants, demanding that they should produce the principal lease and the subleases; and that it should be found that they had no right to possess the lands demised, and that they should be

bound to account to him for the whole rents actually payable by the sub-tenants.

Action of multiple-poinding.

The appellant, at the same time, gave in defences in the action at Mrs. Scott Waring's instance, mentioning the action which he had brought, and praying that proceedings should be sisted, until they were conjoined. In the mean time an action of multiple-poinding was brought in the name of Mr. Boyes, with the view of trying the validity of the claims of the parties.

Interlocutor of the Lord Ordinary, 10 Mar. 1812.

By an interlocutor of the Lord Ordinary on the 10th of March 1812, the three actions were conjoined; and on the 11th March 1812, the Lord Ordinary pronounced the following interlocutor:—

"Having considered the three processes now con-
"joined, the representation for the Marquis of
"Douglas, separate representation for John Boyes,
"esquire, and having heard parties procurators
"upon the whole of the action of multiple-poinding;
"prefers Mrs. Scott Waring and her husband, so
"far as he may have an interest, to the sums that
"may be in the hands of the raiser of the multiple-
"poinding, and decerns in the preference accord-
"ingly, under deduction always of the necessary
"expences incurred by the raiser of the multiple-
"poinding, &c.; prefers Mrs. Scott Waring and
"her husband, so far as he may have an interest,
"for such of the rents as may be received for the
"year 1813, as well as for the preceding years, and
"decerns in the preference accordingly."

Against this interlocutor the appellants gave in a representation which the Court appointed to be answered.

On the 12th of May 1814, the appellants brought

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Action of reduction. Declaration.

an action of reduction and declarator against John Boyes, and the respondents, Mrs. Scott Waring and her husband, for his interest, (but taking no notice of Miss Hamilton, the respondent's daughter,) wherein they called for the production of the two leases granted by Douglas, Duke of Hamilton and Brandon, in favour of John Boyes deceased, and also the obligations of trust granted by the said John Boyes, in favour of Mrs. Scott Waring, and concluding that these writings should be reduced, set aside, and decerned, and declared to have been from the beginning, and in all time coming, to be null and void, and that the appellants should be reponed and restored against the same for the following reasons:—1st. Because they were vitiated and erased *in substantialibus*, and defective in the solemnities required by law.—2dly. Because the said leases were granted fraudulently and confidentially by the said Duke to the said John Boyes, his factor at the time, without any value, and with a view to defraud the heirs of entail in the dukedom and estate of Hamilton.—3dly. Because the foresaid tacks and relative obligations of trust were granted, *ob turpem causam et propter causam adulterii*, that they were not actionable and could bear no faith in judgment or out with the same, and that the said leases and trust obligations being so reduced and set aside, it should be found and declared that the appellant, the Duke of Hamilton and his successors in the entailed estate of Hamilton, had the only right and title to possess the lands contained in the said leases, and that the said John Boyes and his sub-tenants, should be decerned and ordained to flit and remove themselves from the said lands, in order that the pursuers might enter thereto.

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Interlocutor of L. O. 9th July 1814.

By an interlocutor dated the 9th of July 1814, the Lord Ordinary found, "that the leases being "granted in trust for Mrs. Scott Waring and Miss "Hamilton, so far as they were for the benefit of "Miss Hamilton, they must be held to be altogether "legal and unexceptionable; and so far as any benefit "was by the leases conferred on Mrs. Scott Waring, "it did not appear to have been with the view of "her entering into or continuing in an improper "course of life, but to secure a permanent income "to a person, who had been induced by the granter "to withdraw from a lawful and lucrative em-"ployment, and who was the mother of his only "daughter; *and having been so long acquiesced in* "*and unchallenged**, it ought not to have been made "the subject of judicial discussion; therefore, in the "action of exhibition, count and reckoning, and "adjudication by Mrs. Scott Waring and her hus-"band, so far as he has any interest, decerns, "declares, and adjudges in terms of the conclusions "of the libel; the pursuers, before extract, finding "security to relieve the defender of the engagements "his father came under, as a trustee for the pur-"suer; in the process of multiple-poinding brought "by Mr. Boyes, prefers Mrs. Scott Waring and her "husband, so far as he may have any interest, to "the rents and funds *in medio*; and decerns in the "preference, and against the raiser of the multiple

* This is to be taken (*semble*) as an opinion and decision against the appellants, upon the ground of acquiescence, (by receipt of rents, &c. p. 199.) and laches, as distinguished from homologation. See pp. 206 and 225. To what antecedent the relative pronoun *it* in this passage refers, does not very clearly appear. Whether to "*leases*" (by inadvertence,) or to "*benefit*," or generally to the whole subject matter of the litigation.

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" poinding, accordingly; Mrs. Scott Waring and " her husband for his interest, before extract, " finding security as before mentioned; refuses the " representations for the Marquis of Douglas and " for Mr. Boyes; and, in fine, in the process of " reduction at the instance of the Duke of Hamilton " and the Marquis of Douglas, his commissioner, " sustains the defences, assoilzies the defenders from " the whole conclusions of the libel, and decerns."

To this interlocutor the Lord Ordinary subjoined the following note:—" The former decisions " upon the point of *turpe pactum* do not appear to " be uniform. In the case of Sir William Hamil- " ton, the Lords had set aside a bond in favour of " a woman who was living in adultery with the " granter, while they sustained an obligation to the " child, which had been born of the same con- " nection. And from the case referred to, (20th " July 1622. Weir,) it appears, that a bond granted " to a mother in similar circumstances for behoof of " her child, was set aside. But in the case of *Ross* " v. *Robertson*, in 1642, a bond which had been " granted to a woman in the very same situation, " and after her death, to her children begot in " adultery, was sustained; and although, from " the statement of the case, it would appear, that " some argument had been raised upon the rule of " the civil law, that *turpiter facit quod sit meretrix*, " *non turpiter accipit cum sit meretrix*, the more " probable ground of decision seems to have been " that stated by Lord Kaimes*, viz. that it was a duty " and not a wrong to provide for a natural child, " and for a woman, that the man had robbed of her

* Principles of Equity, B. 2, cap. 1. near the end.

"chastity. It appears, too, (which, in a question "depending on general principles of jurisprudence, "must be of great weight) that in England, in a "similar case*, a decree in the courts of law (Chan-"cery) had been affirmed in the House of Lords "(in 1728), though the precedent appears to have "been overlooked in the case of Sir William Hamil-"ton; and there is this difference between the for-"merly decided cases and the present, that there, the "obligation granted to the woman and to the chil-"dren of an illicit connection could not be enforced "without the aid of a court of law, whereas in this "case, the right of Mrs. Scott Waring and her "daughter has been carried into effect, and must "continue in full force, unless challenged and set "aside in a court of law."

The case having been brought before the second division of the Court, at the instance of the appellants, the Court, by two successive interlocutors, affirmed the judgment of the Lord Ordinary.

The appeal was brought against the several interlocutors before stated.

For the appellants, The *Attorney General*, and *Mr. Abercrombie*.

For the respondents, *Mr. Warren*, and *Mr. Wetherell*.

The question as to the illegality of the consideration, though strenuously argued in the Court below,

* *The Marchioness of Annandale* v. *Harris*, 2 P. W. 432, and 3 B. P. C. 445.

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and discussed with much ability and learning, and supported by many authorities in the printed papers, was waived in the argument before the House of Lords.

The question of homologation was argued at great length before the House of Lords. But the House being of opinion that there was nothing in the judgments of the Court below upon that point amounting to a decision, gave no opinion upon that question. The arguments therefore, and the authorities upon these two points are omitted.

The validity or invalidity of the leases, under the power, or as affected by the prohibitions of the tailzie, was the only remaining question, and that was argued by the appellants upon the authority of the judgments in the *Westshiell*'s Case, and the *Queensberry Leases*, (ante, vol. 1.) and for the respondents the same arguments as in that case were repeated.

21 July 1820, Judicial observations.

The *Lord Chancellor*, in moving judgement, observed, that Miss Hamilton had not been a party in any of the suits, and upon a statement made by the agents in the cause, that she had no interest, because the leases had expired; the *Lord Chancellor* asked, whether they had expired at the time when this suit was instituted? to which question an answer was returned in the negative.

The *Lord Chancellor* then further observed, that upon the question of homologation, the House could give no opinion whatever, there being no passage in any of the interlocutors, which expressed any opinion * of the Court of Session as to

* See the interlocutor of the L. O. p. 203, and the observations, *post*. 225.

that question, and having put a question to the agents, whether he was right in that apprehension, in which they concurred, the *Lord Chancellor* then proceeded thus :—It is desirable that we should know, whether we are right in that, because the question on the validity of the leases, is certainly a very important question ; but if there had been any opinion given by the Court of Session, in the terms of their interlocutors, that there was homologation sufficient to sustain the leases, then if we had concurred in opinion with them, that there was homologation sufficient to sustain the leases, it would have been unnecessary to consider how the question ought to be determined about the validity of the leases, supposing there had been no such homologation ; but as far as I can find, looking anxiously at the terms of the interlocutors, the court has given no opinion whatever as to the homologation.

I can collect from the notes of the Judges opinions, what each of them probably thought about this matter of homologation ; but we cannot take that to be a matter decided in the cause, unless it is decided in the terms of the interlocutors, and that therefore will reduce the question to this way of being considered, namely, whether if it should turn out (and I am not stating any thing now with reference to that question), that we should think the leases not good leases, we must not necessarily send it back again on the point of homologation. If we thought the leases bad, it would become absolutely necessary to consider, whether they have been homologated or not ; if we thought them good, it

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would be unnecessary to consider the effect of homologation.

I know what the parties contend, and I have an opinion as to the merits of the case on the point of homologation; but we, upon that question, cannot, according to our forms, give any opinion, if it should become necessary to give an opinion, because that point appears not to have been decided in the Court below.

If the agents are agreed as to that question, we shall know how to decide the case.

Upon the question of the validity of the leases, I have made up my opinion; but as it may be necessary to go to some length in the statement of the reasons upon which our opinions must be founded, we propose to move the judgment upon the validity of the leases to-morrow. If that opinion should be that the leases are good, then it is not necessary to consider homologation at all; if on the other hand, it should be the opinion of the House that the leases were originally bad, we cannot determine whether homologation has or has not made them good. In that case the cause must be remitted. I will go so far now in the case, as to state the circumstances.

All that relates to the turpitude of the transaction, has been given up at the bar. I do not mean to say given up because it could or could not be sustained, but because it has been thought right to give it up; that is therefore a point not to be the subject of decision: but I would observe, that whatever might have been in England the law with respect to a provision for Mrs. Scott Waring

(Mrs. Esten as she then was), and the child which was her child, and supposed to be a child by the Duke of Hamilton; if the provisions for these two persons could have been supported, I apprehend, that according to the decisions of English courts, a trust for illegitimate children to be begotten between *A.* and *B.* could not be supported. I will say no more, however, upon that point; and with respect to homologation, if the leases are held to be invalid, there being no opinion of the Court of Session given upon that point, the cause must be remitted.

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By the law of England, a trust for illegitimate children, *to be begotten*, cannot be supported.

By the case as it is stated by the respondents, in whose printed case the whole history of this transaction is minutely traced, it appears, that Douglas Duke of Hamilton having communicated his intention to Mr. Cochrane, one of the commissioners of the excise in Scotland, who was also a commissioner for the management of the Duke's affairs, and much in his Grace's confidence, and also to Mr. Hugh Warrender, writer to the signet, his confidential agent, a correspondence ensued between the former of these gentlemen and the respondent Mrs. Waring, respecting the most eligible method of accomplishing his Grace's intentions. In a letter from Mr. Commissioner Cochrane, in answer to one from the respondent, Mrs. Waring, relative to the expediency of taking the proposed leases in her own and her daughter's name, or in the name of Mr. Boyes, the Duke's chamberlain, he says, "When I first thought of this subject, it
" occurred to me, that provided it could be done, the
" simplest and most natural method was what I see has
" also occurred to you, that the leases should be in

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"your own name; I accordingly some time ago men-
"tioned this to Mr. Warrender, (the Duke's agent
"in Edinburgh) who was of opinion, that in case of
"the Duke's death, such leases might be liable to be
"reduced by his successor in the entail, and that
"therefore using (the name of) some other person
"might perhaps be safer; I made it my business to
"meet with Mr. Warrender this morning, and again
"fully stated the matter to him, showing him at the
"same time your letter; the result of our conversation
"was, that the safest and most satisfactory thing
"which could be done, was to follow your suggestion,
"and to lay the matter at once before counsel;
"I mentioned Mr. Blair, Solicitor General, (after-
"wards Lord President of the Court of Session) as
"undoubtedly the best in every respect which this
"country can afford; such matters are understood
"to be entirely confidential, and the most perfect
"reliance may be put, as well upon his honour as
"upon the soundness of his opinion; Mr. Warrender
"agreed with me, and the opinion of Mr. Blair is
"accordingly to be got as soon as possible." In an after part of the same letter, Mr. Cochrane says, "with regard to your questions, how you and your "child would be situated in case of Mr. Boyes's "death, and how your claim would be ascertained "while he is living, I have only to repeat what "I mentioned in my letter to Mr. Boyes, that it was "understood that he was to execute a proper deed, "obliging himself and his heirs to account for the "surplus rents for behoof of you and your daughter." In this sentence the plan is developed, which was finally adopted in regard to these leases. There is

a series of letters from Commissioner Cochrane, which give a clear view of the progress and the various steps which preceded its completion.

In another letter to the respondent, Commissioner Cochrane says, "Immediately upon receiving your "letter this morning, I went to Mr. Warrender, "who put into my hands the list of farms which he "had just received from Mr. Henderson, (the "Duke's sub-factor). I have accordingly requested "Mr. Warrender to draw up the form of a lease to "Mr. Boyes, containing these farms which expire at "Martinmas 1798 and 1799, to be submitted to "Mr. Solicitor Blair for his consideration and "opinion, and this you may depend upon being "done as soon as possible. The surplus arising from "these farms, according to Mr. Henderson's esti-"mate, is I see 1,313 *l.*," that is, the surplus arising upon sub-leases, beyond the rents payable on the principal leases. In a postscript to a letter of this date, Mr. Cochrane says, "Since writing the above, "I have this moment received from the Solicitor his "opinion, of which I now send a copy, and wait "your further instructions."

The case as laid before Mr. Solicitor Blair, (a very great authority undoubtedly,) is stated thus:

A. B. holds an estate under entail, with prohibitory, irritant and resolutive clauses against selling, contracting debt, wadsetting or granting infeftments in security. Having no lawful issue, the estate, failing him, devolves on a relation who is heir of entail. By a female friend living with him he has a daughter, and in the event of his predeceasing them, he wishes to have some provision secured to

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them. In consequence of the entail, and their particular situation, it is not in his power to grant them any provision on the estate; and though he has some real and personal estate, yet, as there are debts which may go far to exhaust the value of them, he would not wish to rest their dependence solely upon what surplus might remain. Several of the farms on the estate are out of lease at Martinmas next, or Martinmas thereafter; and owing to the progressive state of improvement, as well as the general rise of rent through the country, a considerable increase of rent will certainly arise from them. In his particular situation, it has occurred, that by granting leases to his female friend, or some trustee for her and her child, of the farms so now falling out of lease, at the present or some small additional rent, with the power of subsetting, a considerable surplus could be had by them upon subsets, and in that mode he may attain his wish of securing some provision for them. It never has been his practice to take any grassums, but always to let farms, as they became open, at the best rent that could be had, on leases for nineteen years, so that every justice in that respect has been always done to the future heirs of entail; and he does not feel that he could be accused of impropriety to them, if, in his situation, for the purpose of subsistence for his child, he should endeavour to appropriate to her the *additional* rent only, that might hereafter be got on a small part of his estate, during the currency of one lease. By the entail, "notwithstanding the prohibitive and irritant clauses," it is declared, that it shall be lawful to the first institute "and the other heirs of tailzie above spe-

" cified, to set tacks of the said estate, or any part " thereof, for the space of twenty-one years, or the " setter's lifetime, the same not being set with " evident diminution of the rental." Was there but one farm or two, on which a surplus rent might arise to the extent of what was wished, the matter might, it seems, be easily carried into execution; but the farms in general, in that part of the country, are small, and therefore, though the increase on each might be considerable, in proportion to the rent presently payable, yet, in order to raise on the whole a surplus equal to the provision he would wish, it would require a very considerable number of farms to be so let. His female friend is also in a particular situation. She had been formerly married in England, where her husband yet is. Articles of separation were long ago entered into betwixt them, and they have ever since lived separate. A divorce has taken place in the Doctor's Commons, but has not been carried through the House of Peers.

On the whole, under all the circumstances, the opinion of counsel is requested;—and more particularly,

1. If it is not in the power of the memorialist, to let leases at present, of such of his farms as expire at Mantinmas next, or Martinmas 1799, for any period of years not exceeding twenty-one, and at the present rent?

2. If the granting such a lease to his female friend, or a trustee for her, would be effectual, although not actual resident tenants?

3. If so, could he, instead of one farm only, include perhaps twenty or thirty in one lease?—On

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would a separate lease for each be necessary, and would all of these be effectual?

4. If one lease, to comprehend the whole, should be deemed sufficient, would it be necessary in it to specify the rent presently payable for each, and make a specific rent payable for each? Or would a general set and *cumulo* rent for the whole be sufficient, resting on the knowledge that the rent was not less than the present?

5. Under the particular circumstances of her situation, would it be advisable to have any lease in the name of the lady herself?

6. If in the name of a trustee, would it not be sufficient that he granted a declaration of the lease being only in trust, with an obligation on him and his heirs to pay the surplus rent arising from the subsets?

The Solicitor General gave the following opinion.

"As to the first query, I have no doubt that "*A. B.* may at present grant leases for twenty-"one years, for such of the farms as will be out "of lease at Martinmas next or Martinmas 1799, "such leases being granted without diminution of "the rental. I even think, that *A. B.* is under no "limitation with respect to the endurance of the "leases, which he may choose, to grant upon the en-"tailed estate, for although there is a clause in the "entail giving power to the heir in possession to set "leases for the space of twenty-one years, or the "setter's lifetime, which would seem to imply, that "the heir was understood to be restrained from "granting leases for a longer endurance, yet I ob-"serve no such limitation in the clauses of the entail

" itself, and it is a received rule in the construction " of entails, that restraints of this sort are not to be " fixed upon an heir by implication alone, or from " the presumed will of the entailer, however clear. " An heir of entail in the eye of law, is proprietor of " the entailed estate, and is entitled to exercise every " power inherent in the right of property, except so " far as he is limited and restrained by the express " words of the entail. Query second. I do not " think it will affect the validity of the lease, whether " granted to the lady herself or to a trustee for be- " hoof of her and her child, that the lessee does not " reside upon the farms, and cultivate the same per- " sonally, as the lease may contain an express power " to assign or subset."

Much argument has been made at the bar, upon the question, whether supposing this had been *bonâ fide* a transaction between the lessor and lessee, the lessee at the time when the lease was constituted, and for some time after, was not a trustee for the lessor. If the appellant herself had been made the lessee, it might have been otherwise; but is is insisted, that during an interval of time (how short they say does not signify) the lessee is trustee for the lessor, and that he did not become at the time when the lease was executed immediately a trustee for the lessee, whereas, if the lady herself had been made the lessee, I think, (under the circumstances, which I shall have occasion to speak to presently,) that argument could not have been urged.

With respect to queries three and four, the learned counsel says, " I see no objection to including any " number of farms in the same lease; it may, how- " ever, be proper to specify a separate rent to be

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" paid for each farm, so as to make it appear with
" certainty, that there is a rise of rent, however in-
" considerable, upon each farm, or at least, that they
" are all set without diminution of the former
" rental. Queries five and six. Under the whole cir-
" cumstances of this case, I consider it to be the
" most eligible plan, that the proposed lease should
" be granted to a trustee, who must execute a back
" bond, declaring that he holds the same in trust,
" and binding himself to account for the surplus
" rents to the lady for behoof of herself and child, in
" such proportions and in such manner as shall be
" agreeable to the parties, and in the event of either
" dying during the currency of the lease, to be
" accountable to the survivor for her sole benefit."

It will be recollected, that other great lawyers have in former cases given opinions more qualified, by stating, that this would be all right, unless it could be said to be in fraud of the entail, and it was that expression which led to a discussion in former cases * in this House, as to what was fraud upon the entail, and that qualification of the opinion to which I have alluded, was certainly of some importance; I mean, if there can be such a thing as fraud upon an entail.

Acting upon the advice of that eminent lawyer, the parties finally resolved that the leases should be granted to Mr. Boyes, and that he should declare, by a separate deed, that they were held in trust by him for the respondent and her daughter, and oblige himself to account on their behalf for the excrescent rents.

Accordingly, in a letter to the respondent Mrs.

* The Queensberry Leases, *ante*, vol. i.

Waring, Mr. Cochrane says, "Agreeably to your de-
"sire, the scroll of the lease was sent to Mr. Eiston,
"who, after revising it, returned it to Mr. War-
"render. Two copies being necessary, one to be
"kept by the Duke, the other by Mr. Boyes, I ac-
"cordingly send them both by this night's post,
"under covers addressed to the Duke. Mr. Boyes
"will explain the form, as to signing and witnesses.
"Upon the Duke's executing this lease, it will
"become necessary that Mr. Boyes should on his
"part execute the trust obligation in regard to the
"surplus."

The respondents then state, in their case, that "instructions were accordingly given to Mr. Eiston "to frame the trust obligations." Mr. Eiston is represented, however, as labouring under indisposition, and for that reason, as it is alleged, the execution of the deeds was delayed, and this, they say, is "a circumstance which will explain the in-"terval of time between the dates of the principal "leases and the dates of the trust obligations."

In another letter to the respondent, Mrs. Waring, dated the 27th of December 1798, Mr. Cochrane says, "Mr. Eiston will, I suppose, have mentioned "to you the cause of the delay in drawing up the "back bond, (that is, the declaration of trust,) oc-"casioned by his health not permitting him to attend "to it. I have, however, been this moment informed "by Mr. Warrender, that Mr. Eiston will send it to "you in a day or two." On the 9th of January 1799, Mr. Cochrane writes to the respondent, Mrs. Waring —"Immediately upon receiving your letter this "morning, I went to Mr. Warrender who informed

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"me, that the obligation which he had sent off to "Mr. Boyes, had not been as yet returned to him. "As soon, however, as it is returned to him, I shall "not fail to acquaint you."

On the 30th of November 1798, the Duke let to Mr. Boyes, his heirs, assignees and subtenants, certain farms, parts of the entailed estates of the family (the names of which it is unnecessary to detail), some for twenty-one years after Martinmas 1798, and the rest for the same period after Martinmas 1799. These farms (as the case of the respondent states) were all out of lease at the time, and a separate rent is stipulated for each, somewhat higher than had been paid by the former tacks. At the same time, the regulations, which were in use to be observed on the estate for the cultivation of the farms, were carefully preserved, and other clauses were superadded, which they say "are "greatly for the benefit of the heirs of entail." The case of the appellant states that the farms so let were thirty-nine different farms.

By a second lease, dated on the 8th of February 1799, the former having been executed on the 30th of November preceding, (and therefore about two months and eight days afterwards), his grace also let to Mr. Boyes, his heirs, assignees and subtenants, for twenty-one years after Martinmas 1798, certain other farms, being also part of the entailed estates of the family, specifying a separate rent for each, exceeding the rents payable by the tack which had just expired, and the lease contains the same conditions and provisions as the former, for securing the interest of the grantor and the heirs of entail.

A third lease was made on the 20th and 25th of June 1799, by which there was let to Mr. Boyes, also for twenty-one years, the farm of Bonhard, in Linlithgowshire, for a rent exceeding the former tack duty, and upon the same conditions and provisions as were contained in the former leases. The declarations of trust bear date on the 2d of January, the 26th of April, and the 3d of October 1799, the leases being dated on the 30th of November 1798, the 8th of February 1799, and the 20th and 25th of June 1799, so that there is an interval of time between each lease, and each declaration of trust, executed at those respective periods.

Mr. Boyes declares in the following manner: "that "he held them in trust for the benefit of the respon- "dent and her daughter," namely, "that for certain "causes and considerations," (not stating what,) "it "had been agreed upon between Mrs. Harriet Pye "Esten and him, that whatever advantages or rise of "money-rents could be obtained," (so that you observe here, Mr. Boyes is agreeing with Mrs. Esten, and Mrs. Esten is agreeing with Mr. Boyes, as to the advantages or rise of money-rents which could be obtained, that is, according to the ordinary sense of the language, could be obtained by Mr. Boyes from these leases), "by subsetting the lands and "farms before mentioned, or by assigning the said "leases, or any part thereof, should be held by him "in trust for the use and behoof of the said Mrs. "Esten during her lifetime, and of Anne Douglas "Hamilton, her daughter, and *any other child or* "*children that may be procreated* between the said "duke and her, in manner underwritten, and that

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"she had further reposed in him the trust and "charge of collecting the surplus money-rents to "be obtained by subsetting, or the prices or con- "siderations to be got by assignments."

On this narrative, Mr. Boyes bound and obliged himself and his heirs to use all manner of diligence in getting the said farms subset, and to report his progress thereon, by delivering to the respondent "a "faithful and true account from time to time, of the "rises of rent that might be obtained by subsetting, "and to pay over to her during her natural life all "and whatever sum or sums of money, as (which) "may so be got, raised and recovered by him from "subtenants or assignees, upon subsetting the said "lands and farms, or any part or parts thereof, and "after her death to pay over the same, along with "what remains unaccounted for to herself, to the "said Miss Anne Douglas Hamilton, or any other "child or children she may have as aforesaid, equally "amongst them or in such proportions as the said "Mrs. Harriet Pye Esten may direct and appoint by "any writing under her hand; and that yearly and "termly during the currency of the lease, and as "soon as the same can be got in and uplifted and "recovered by the ordinary and usual modes of "process and diligence, deducting always all charges "of management, and a reasonable allowance for "his own trouble."

Within a very few weeks after granting the third lease, the Duke of Hamilton died, (I believe within the sixty days).

Mr. Boyes proceeded to grant subleases of the farms, whereby a surplus beyond the rents payable

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to the proprietor was obtained upon the whole of about 1,370 *l.*

The questions which arise in this case between the parties, (putting out of the case now all that has been stated about the vicious consideration of this transaction,) are, whether leases made under these circumstances are to be considered as leases made within the power which the possessor, as heir of entail, had, or whether they are to be considered as leases at all; whether they are to be considered as leases in trust for Mrs. Esten, or whether they were originally to be considered as leases granted according to the power, and from the moment when they were granted, leases in trust for her, and good against the succeeding heirs of entail.

These questions came to be discussed in different actions, which have produced different interlocutors. The last interlocutor, which is a material one, is to this effect, "having considered, &c. finds, that the "leases in question are proved to have been granted "in trust for the pursuer, Mrs. Scott Waring, and "her daughter Miss Hamilton, and not as in the "case of Westshiel, to create in or reserve to the "grantor a right to part of the rents of the lands, "after his interest in them as proprietor under a "strict entail had ceased."

The case of Westshiel was a case where a person in possession of a tailzied estate, let leases without a diminution of the rental, that is, not below the last rent that was paid; but at the same time, instead of taking a grassum, that is, instead of taking what the Scotch call a slump sum, at the time when the leases

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were made, he took bonds from the tenants to pay him yearly certain sums of money.

If I recollect that case rightly, the yearly sums were not reserved payable at the same period as the rents, but they were reserved payable by bonds yearly from the respective tenants.

It was contended on the one hand, that this was to be considered as a grassum. It was held that it was not a grassum, because it was not a slump sum, according to the then notions of grassum.

On the other hand, it was said, inasmuch as the heir of tailzie in possession might have taken grassum, there was no reason why he who could have taken 1,500*l.* at once, might not reserve 1,000*l.* to be paid to him at certain times during the currency of the lease; and if he might reserve 1,500*l.* to be paid to him prior to his making the demise, it was nothing to the subsequent heirs of tailzie what he got from the tenants for the forbearance. Instead of taking it in one sum he took it in portions of yearly payment, having just as much for his forbearance in that respect, as the value of the money during that period.

The Court of Session was at last of opinion, that although he might have taken 1,000*l.* *in presenti*, (for such was the position in that case) although he might have enjoyed that 1,000*l.* together with the interest of it, by laying it out in loans to a third person, yet that he could not lend the money to the tenants themselves, but that what was secured by these bonds was to be considered as rent, and that although the bonds had been assigned, or might have been as-

signed, for a valuable consideration, they were in truth to be taken as so much yearly rent, and being to be taken as so much yearly rent, the succeeding heirs of entail were entitled to these yearly payments, although they would not have been entitled, as the law then stood, to any part of the 1,000 *l.* if it had been paid before, or at the time of executing the lease.

We then, as it appears to me, get into a considerable difficulty in this case, because if the Duke of Hamilton could not have reserved these surplus rents for his own benefit, in the form of bonds for money, and if the surplus rents, reserved for his own benefit in the form of bonds for money would have been bad in the hands of persons holding for a valuable consideration, you will have to consider whether it is argued unanswerably at the bar, that nothing was reserved for himself. Surely, as between the tenant in tail in possession, and the person to take after him, it is a very nice distinction, that for the actual use and enjoyment of the tenant in possession, he cannot reserve, by a separate security, such a payment; but if he has to provide for a person with whom he cohabits, and her natural daughter, he may then relieve himself of the necessity of making that provision out of another part of his fortune, and make it at the expense of the entailed estate.

That is one way in which the House will have to consider this case.

The interlocutor proceeds in these words: "finds, "that in so far as the leases were granted for the "benefit of Miss Hamilton, they must be held to be

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" altogether legal and unexceptionable; finds that " so far as any benefit was by the leases conferred on " Mrs. Scott Warring, it does not appear to have " been with a view of her entering into or continu- " ing in an improper course of life, but to secure " a permanent income to a person who had been in- " duced by the grantor to withdraw from a lawful and " lucrative employment, and who was the mother of " his only daughter, and having been so long *acqui-* " *esced in and unchallenged*, it ought not to have " been made the subject of judicial discussion." This was afterwards adhered to by subsequent interlocutors.

In this interlocutor of the 9th of July 1814, there are many findings, which it has become unnecessary by what has been stated at the bar to attend to, and the question in which alone the House can deliver any judgment now, is, whether under all the circumstances appearing in this case, under which these instruments were made, (call them leases, or by whatever denomination you think proper to give to them), this is to be considered as a transaction which lies within the true intent and meaning of the power which the Duke of Hamilton had, or whether on the other hand, this transaction is of such a nature, that it cannot be sustained against the subsequent heirs of entail.

I will at this time only add again, that with respect to the other question, which has been very largely argued at the bar, (the question of homologation,) I am afraid we cannot deal with it. If we could, provided there has been sufficient homologation, it would not be necessary to consider whether these leases

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are in themselves good or bad; but as we are not in a situation to authorize us to consider whether there has been homologation, we must enquire whether the leases themselves are valid according to the law of Scotland. I move that the discussion which belongs to that important question, be reserved till the House shall meet to-morrow.

The *Lord Chancellor*:—I have stated from the papers, the case of the Duke of Hamilton and Brandon against Mrs. Scott Waring. 24 July 1820.

The two questions which have been submitted to your consideration are, first, whether the leases which were made by the late Duke of Hamilton are to be considered as valid and effective leases? and secondly, if they are not, whether you are to consider the circumstances which have been stated to you in argument, as circumstances proving that these invalid leases have received validity from what is called homologation; or whether on the other hand there is only acquiescence, not in its effect equivalent to homologation? With respect to the latter question, I stated the other day, that it appeared to me that we should not rightly proceed according to our usage, if we now gave an opinion upon it.

If you hold the leases to be valid, it is not necessary to consider the other question: if you hold the leases to be invalid, it appears to me it will be absolutely necessary to remit the cause to the Court of Session, in order that the court may consider whether the circumstances stated to amount to homologation, do or do not give validity to these leases.

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The first question, whether the leases are valid or not, is certainly an important question in a great many views. It appears to me, that your decision may bear on a great many cases which have not yet come into controversy. I have endeavoured to look at the case in all the points of view in which it may possibly affect such cases, but into the discussion of those points it does not appear to me prudent, or at all events necessary at present to enter. The opinion which I have formed with respect to these leases, (an opinion which I entertain with great confidence) is, that these leases are not valid. The ground upon which I satisfy my mind as to that question, is, that when these leases were executed, they appear to me to have been leases for the benefit of the Duke of Hamilton himself. Without entering into the question whether the making a provision for another person is a benefit to himself, it appears to me, that at the time when these leases were actually made and in existence, the Duke of Hamilton might have disposed of the leases as he pleased. He was under no more obligation to give them to Mrs. Esten than to any other person, and if a lease under such circumstances, executed by the person in possession of an estate tail, would not be a good lease, it appears to me that it will make no difference in principle, whether he makes a present of that lease soon after it is executed, or at a distant period from the date of its execution, and upon that ground alone, my opinion is, that these leases were not good. There are other grounds also on which, as it appears to me, the validity of the leases

might be affected; but it is not necessary for me, at least in my view of the case, to proceed to examine those other grounds.

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The judgment, therefore, which I think the House ought to pronounce is, a judgment asserting the invalidity of these leases, and sending the case back again, with that finding, to the Court of Session, in order to have the question determined how far the plea of homologation can or cannot be supported. I therefore move the House to find, that the leases in question were leases not warranted by the power contained in the deed of entail, and were therefore subject to reduction, unless the same were homologated by the late Appellant Archibald Duke of Hamilton, deceased, and by the present Duke of Hamilton and Brandon; and so far as the same were not so homologated, to reverse the interlocutor complained of, and to remit the cause to the Court of Session to review, subject to this finding, and to do therein as is consistent with right.

24th July 1820.

Order.

The Lords find, that the leases in question were not warranted by the power contained in the deed of entail, and therefore subject to reduction, unless the same were homologated by the late Appellant Archibald Duke of Hamilton, deceased, and by the Appellant Alexander now Duke of Hamilton, and so far as the same were not so homologated respectively; and therefore, it is ordered and adjudged, that the interlocutors complained of be reversed; and it is further ordered, that the cause be remitted back to the Court of Session, to review the same, subject to the above finding.