The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutor complained of affirmed, with 'L. 50 costs.' March 9. 1824.

J. DUTHIE—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 10.)

CHARLES FRASER, Esq. Appellant.—*Moncreiff—Skene.* No. 7.
FRANCIS MAITLAND, Respondent.—*Gordon—Buchanan.*

Landlord and Tenant—Singular Successor—Judicial Remit.—Held, (affirming the judgment of the Court of Session), 1. That a singular successor is bound by a stipulation in a lease to pay for the value of houses which were erected prior to his purchase of the property. 2. That a tenant is not liable in damages for retaining the keys of the houses, after tendering them on condition that the landlord should concur in getting the value of the houses ascertained. 3. That a landlord is not entitled, at the termination of a lease, to claim damages from the tenant for mislabouring, where during the currency of the lease he has made no objection, and where there have been no rules laid down in the lease as to cultivation. And, 4. That a party who has consented to a remit to a professional person to report on disputed facts, is not thereafter entitled to insist on a proof.

March 9. 1824.

1ST DIVISION.
Lord Alloway.

IN the year 1777, Alexander Leith, proprietor of the estate of Williamston, in Aberdeenshire, by a missive of lease let to Francis Thomson two adjoining farms, the one called North Williamston, consisting of 25 acres, and the other called Polquhite or Gateside, of 105 acres, for the period of two nineteen years. By the missive of lease it was stipulated, that the said 'Alexander 'Leith is to build at his own expense a sufficient fire-house and 'barn of stone and mortar, pinned with lime, which Francis Thom-'son is to get at an appreciation; and he is also to hold all the 'inventory on North Williamston, which belongs to the heritor, 'and what other sufficient houses he builds shall be held from 'him at an appreciation at the expiry of his lease.' In virtue of this missive, Thomson entered to possession, and Leith thereafter erected on the farm of Gateside a small house and barn, the former having only one chimney and fire-place, and both being only one storey in height, and covered with thatched roofs.

In 1791, Thomson was succeeded as tenant by his son-in-law, Francis Maitland, with consent of Leith; and Maitland thereafter erected additional buildings, consisting of wings attached to the dwelling-house and offices, for the use of the farm.

In 1797, and subsequent to these erections, the appellant,

March 9. 1824. Mr Fraser, purchased the property from Leith, and was infeft. In making this purchase, he alleged that no notice was given to him of the existence of any claim on the part of Maitland for the value of the houses built by him, or for any meliorations whatever.

In the missive of lease, there was no stipulation as to the mode of cultivation; and until 1812, no objection whatever was made by Fraser to the mode which had been followed by Maitland. A correspondence, however, took place in the course of that and the two subsequent years, as to the plan of management prior to the termination of the lease; and an arrangement was entered into, the import of which will be found in the interlocutor of the Lord Ordinary, to be hereafter quoted.

When the lease came to an end at Whitsunday 1815, several disputes arose between the parties; and, in particular, Maitland insisted for payment of the value of the houses which he had erected, and Fraser claimed damages for improper cultivation. Maitland then removed from the whole of the lands and houses, except a few acres in grass, to the possession of which he alleged he had right till Lammas, according to a custom in that part of the country. In order, however, to enforce a settlement of his claim for the value of the houses, Maitland, on removing, locked the doors, and carried away the keys with him, after tendering them to Fraser on condition that he would consent to a valuation being made. This having been declined, Maitland immediately presented a petition to the Sheriff of Aberdeenshire, praying him to appoint valuators to examine the buildings and report, and to decern for their value.

After a remit had been made to valuators to ascertain the value of the houses, Fraser raised an action before the Court of Session against Maitland, setting forth, that he had mislaboured the lands, and was illegally retaining possession of the houses and grass lands; and, therefore, concluding for decree of removing, for damages on account of mismanagement, and for violent profits. At the same time, he brought an advocation ob contingentiam of the process before the Sheriff, which was thereupon conjoined with the action at his instance; and Maitland having deposited the keys in the hands of the clerk, Lord Alloway ordained Fraser to give in a condescendence of his averments, and at the same time ‘ authorized the clerk to ‘ deliver to the pursuer, or his agent, the keys which have been ‘ lodged with him by the defender, and remitted to the Sheriff ‘ to nominate proper persons to value and appreciate the houses

'and dungs,' &c. Under this order, the Sheriff, of consent of parties, named and appointed George Knox, builder in Aberdeen, for valuing the houses; and accordingly a valuation was reported by him, from which it appeared, that the whole tenement was worth L.261. 1s. 7d., and that, after deducting the value of the part which had been erected by the landlord, the sum due to the tenant was L.204. 5s. 1d. This report was approved of by the Sheriff without objection by Fraser. March 9. 1824.

Thereafter, in reference to the pleas of the parties, Lord Alloway pronounced this interlocutor:—'1*st*, Finds, that by the lease of 'the subjects in question, the landlord bound himself to build a 'fire-house and a barn; and whatever other houses the tenant 'erected, it is declared, should be taken from him at an appreciation at the end of the lease; and he also agreed to take the houses 'upon Williamston according to their appreciations in the landlord's inventory: But finds, that the fire-house and barn were built 'upon Polquhite or Gateside, where there were no houses before, 'and where the parties seem to have agreed to erect a new steading, 'the houses of Williamston having been allowed to fall to ruin. '2*d*, Finds, that the remit was made by the Sheriff to Mr Knox, 'builder and architect, with the consent of both parties, to inspect 'and value the houses in question; and that Mr Knox has accordingly given a very distinct valuation and report of the 'whole subjects separately, together with a plan; and that there 'does not appear to be any reason for suspecting the fairness or 'accuracy of that report. *3d*, Finds, that by Mr Knox's report, 'the value of the whole subjects is L.261. 1s. 7d. Sterling; but 'that, deducting the valuation of the middle house and kiln 'barn, as erected by the former proprietor, being L.56. 16s. 6d. 'Sterling, there remained due a balance of L.204. 5s. 1d. Sterling, on account of these houses: And finds the expense of 'causewaying in front of the court of offices, being L.3. 18s. 11d., 'being essentially necessary for the offices, has been properly included in the above valuation. *4th*, Finds, that the above house 'and offices are not more than the accommodation necessary for 'a farm of 130 acres, where turnips are raised; and that it is not 'denied that the whole of these houses are at present occupied, 'or that the landlord has received the full benefit from them; 'and although it is stated for the landlord in the last proceedings, that the wings to the dwelling-house were built at the 'same time that the middle house was built, yet as the former 'proprietor was only bound to build one fire-house, and in all 'the former proceedings the landlord's plea was, that the tenant

March 9. 1824. 'had built a larger house for his own accommodation as an inn, 'than was necessary for the accommodation of the farm, finds it 'unnecessary to lead any proof upon that subject. *5th*, Finds, 'that no deduction can be granted on account of the houses of 'Williamston, in respect that the houses were removed to their 'present site, by the landlord having built the fire-house and 'barn at that place, which rendered the others totally unneces- 'sary; and besides, the tenant was only liable for that part of 'the landlord's inventory of the former appreciation, which has 'not been produced. *6th*, Finds, that although the pursuer is a 'singular successor, yet as he bought the subjects under the con- 'dition in that lease, and in respect of the decisions referred to, 'and particularly of the very recent case, Bells *v.* Lamont, 14th 'June 1814, the pursuer must be liable in that valuation. *7th*, 'Finds, that the pursuer has no claim for any alleged miscrop- 'ping of the farm, in respect he stated no objections at the time, 'and did not put the tenant on his guard; and in respect to the 'allegation of the tenant having ploughed up land that was only 'two years in grass the last year, finds, that there was no restric- 'tion in the lease upon that subject, and that he would even 'have been entitled to do so, had there been no stipulation or 'agreement between the parties: But finds, that there had been 'an agreement betwixt Mr Jopp, the pursuer's agent, and the 'respondent, or his son acting for him, by which, in order to 'avoid any question with regard to ploughing up grass lands, 'the respondent had agreed to surrender a field which had been 'already ploughed or ribbed, in order that the landlord, or the 'incoming tenant, might make turnips of it; and he also agreed 'to give the landlord or the incoming tenant his dung, at a valua- 'tion for that purpose, upon being repaid at the rate of 18s. per 'acre for ploughing and harrowing, and the price of the dung.' After some other findings of a special nature, his Lordship repelled the claim by Fraser, 'founded on the tenant's having 'kept possession of the key, and lodged it in process until the 'houses were inspected;' and also a claim for the grass lands, 'in respect it is admitted, that by the custom of the country the 'tenant is entitled to keep possession of the sown grass until 'Lammas, and in respect that the pursuer has not particularly 'condescended upon such parts of the grass retained by the de- 'fender, beyond the period allowed by the custom of the country.'

Against this judgment Fraser reclaimed; and having alleged that the wings of the house had been erected by Leith, and that the offices were not suitable to the farm, the Court remitted to

the Jury Clerk to prepare issues on these points. He accordingly did so, and suggested the following:—'1. Whether the wings of 'the farm-house of Gateside were erected at the expense of the 'then landlord, Mr Leith of Freefield?—2. Whether the offices 'on said farm were suitable to the said farm in point of size or 'extent?—3. Whether all, or part of the said offices, were in 'repair, and were sufficient houses at ? and 'what sum would have been required to put them in repair?' March 9. 1824.

To the latter issue it was objected, that it had been decided by the report of Knox; and accordingly, while the Court approved of the two first issues, they found 'respecting the third issue, it 'is unnecessary to send the same to the Jury Clerk, the question 'being already determined by the report of Mr Knox, upon 'mutual reference of the parties, which report was approved of 'by the Sheriff.' In the meanwhile Maitland had died, and his son having been sisted in his place, the issues were sent to a jury; and no appearance having been made by Fraser, and Maitland having led evidence, a verdict was found in his favour, and a motion for a new trial was subsequently dismissed. Thereafter the Court, on the 15th December 1818, adhered to the interlocutor of the Lord Ordinary in toto.*

After some other proceedings necessary to exhaust the cause, Fraser entered an appeal to the House of Lords, in which he contended that they ought to be reversed, for the following reasons:—

1. That they were erroneous, in so far as they subjected him in a personal obligation incurred by the former proprietor. In support of this plea he maintained, that he purchased the estate for a fair price, and paid full value to the seller for all the farm-steadings or buildings which were upon the property. Prior to the statute 1449, ch. 18. the contract of lease was not effectual against a singular successor; but that statute merely secured to a tenant the right of possessing the lands till the expiration of the lease on payment of the rent. It did not declare that all the private contracts and stipulations between the landlord and the tenant, of a personal nature, should be effectual against purchasers; and in this case the claim resolved into one merely of debt contracted by Leith, the original proprietor, and was entirely indefinite.

* Not reported.

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2. That supposing that the appellant were liable for the debt, he could not be bound by the report of Knox as to the value of the houses. When his agent consented to a remit being made to Knox, he did not give his consent on the footing that his report was to be conclusive, but merely that his opinion as a professional man should be taken, subject always to be objected to as erroneous; and accordingly the appellant had offered to prove that it was so. And,

3. That he was entitled to damages, on account of the ground having been mislaboured, and of Maitland having kept possession of the keys for more than six months after the term of removal.

On the other hand, it was contended by Maitland,

1. That although it is no doubt true, that stipulations which are contrary to law, or which, though legal, remain entirely latent, are not available against singular successors; yet the case is entirely different where the conditions are lawful in themselves, and form part of the contract of lease. In the latter case, the condition or stipulation is good against singular successors; and the rule of law is, that they are held to read the leases, and to know and be bound by their contents. It is true, that leases cannot be converted into securities available against singular successors for debts; but it has been settled, that in matters properly connected with the lands, and forming the natural objects of the contract of lease, every stipulation is effectual against them. In the present case, the houses were necessary for the cultivation of the farm, and therefore formed one of the natural objects of the lease; and as the obligation appeared ex facie of it, Fraser was bound by it.

2. That as Fraser had not only acquiesced in the remit to Knox, but had actually proposed him as valuator, and as he had not complained of the approval of his report by the Sheriff, he must be held to have adopted him as a referee, and abandoned any right to a proof.

3. That in point of fact there was no mislabouring of the lands; but, at all events, a landlord is not entitled, at the termination of a lease, to rear up claims for mismanagement for an indefinite period, where he has made no objection during the currency of the lease; and accordingly, that point had been settled in the case of Broughton's trustees against Gordon. That with regard to the keys, they had been tendered under form of instrument to Fraser, upon condition of his agreeing

to have the houses valued, which he illegally resisted; and therefore, as it was entirely owing to himself that he had not obtained delivery of the keys, he could have no claim on that account. March 9. 1824.

The House of Lords 'ordered and adjudged that the appeal 'be dismissed, and the interlocutors complained of affirmed, with 'L. 100 costs.'

Appellant's Authorities.—(1.) M'Dowall, December 17. 1760, (15,259.); Bell on Leases, p. 70. 188.

Respondent's Authorities.—(1.) Arbuthnot, February 5. 1772, (10,424.); Walpole, February 16. 1780, (15,249.); Bell, June 14. 1814, (F. C.)—(2.) Murray's Trustees, February 26. 1806; (No. 12. App. Tack.)

MEGGINSONS and POOLE—J. DUTHIE,—Solicitors.

(Ap. Ca. No. 11.)

No. 8.

WALTER FRANCIS, Duke of Buccleuch and Queensberry, and his Curators, Appellants.—*Sugden—Jeffrey.*

JOHN HYSLOP, Tenant in Halscar, and Sir JAMES MONTGOMERY, and Others, Executors of the late WILLIAM, Duke of Queensberry, Respondents.—*Moncreiff—Whigham.*

Bona Fides.—A tenant having acquired and possessed under a lease, granted in consideration of payment of a grassum and of the former rent, by an heir in possession under an entail prohibiting the granting of leases with evident diminution of the rental; and it having been the practice under that entail to grant such leases, and the opinion of lawyers and others that they were effectual; and one Division of the Court of Session having by repeated judgments found them lawful, and the majority of the whole Judges being of that opinion, but the House of Lords having found that the heir had no power to grant such leases;—Held, (affirming the judgment of the Court of Session), That the tenant was a bona fide possessor till the judgment of the House of Lords, and was not liable in violent profits prior to its date.

ON the 26th of December 1705, James Duke of Queensberry executed an entail of the lands and estates comprehended in the dukedom of Queensberry, together with various other lands and baronies, which was recorded in the Register of Tailzies, and sasine taken. By this deed it was declared, that it should not be lawful to the heirs of tailzie, nor 'to any of them, to March 10. 1824.

2D DIVISION.
Lord Cringletie.