March 10. 1824. *Respondent's Authorities.*—(1.) Cunninghame, Feb. 27. 1705, (8284.); Meres, Jan. 2. 1728, (8384.); Coutts and Co. March 8. 1769, (8292.); May 25. June 1799, (8293.)—(2.) 2. Stair, 3. 4. 6.; 2. Ersk. 3. 36.

J. CHALMER—J. CAMPBELL,—Solicitors.

(Ap. Ca. No. 12.)

No. 11.

FRANCIS Earl of Wemyss and March, Appellant.—*Sugden—Jeffrey.*

Sir JAMES MONTGOMERY, and Others, Executors of WILLIAM Duke of Queensberry; and WILLIAM MURRAY, Tenant in Whiteside, Respondents.—*D. of F. Cranstoun—Moncreiff.*

Et e Contra.

Bona Fides—Entail—Reparation.—An heir possessing under an entail prohibiting the granting of leases with evident diminution of the rental, having let the lands for payment of the former rents and grassums; and the First Division of the Court of Session having, at the instance of a succeeding heir, set aside the leases, as being granted in fraud against the entail; but the Second Division having sustained similar leases; and it being the opinion of a great majority of the Judges, on a remit from the House of Lords, that they were valid; and this being also the prevailing opinion of lawyers and others; and the House of Lords having found that the heir had no power to grant such leases, and the leases having been reduced on that ground;—Held, 1. (reversing the judgment of the Court of Session), That no claim of damages lay against the representatives of the granter, by the succeeding heir, but reserving his claim for payment of the grassums; and, 2. (affirming the judgment), That the tenants were protected by bona fides from payment of violent profits prior to the judgment of the House of Lords.

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1ST DIVISION.
Lord Hermand.

By the entail of the Neidpath or March estate, executed in 1693, it is declared,—'That it shall noways be leisome to the 'said Lord William Douglas, and the heirs-male of his body, 'nor to the other heirs of taillie respectively above-mentioned, 'nor any of them, to sell, alienate, wadset, or dispone any of the 'said haill lands, lordships, baronies, offices, patronages, and 'others above rehearsed, as well these to be resigned in favours 'of the said Lord William in fee, as these reserved to be dis-'poned by the said Duke of Queensberry, in manner foresaid, 'or any part thereof, nor to grant infeftments of liferents nor 'annualrents furth of the same, nor to contract debts, nor do 'any other fact or deed whatsoever, whereby the said lands and 'estate, or any part thereof, may be adjudged, apprized, or 'otherways evicted from them, or any of them, nor by any other

'manner of way whatsoever to alter or infringe the order and 'course of succession above-mentioned.'

This prohibition was fortified by the following irritant and resolutive clauses:—'And in case the said Lord William Douglas, 'or any of the other heirs of taillie a-specified, shall contravene 'the same, all such facts and deeds shall in themselves be null 'and void ipso facto, without necessity of any declarator; and the 'person contravening, and his heirs, shall forfeit, tyne, and amit 'all right, title, interest, and benefit yt they can any ways acclaim 'by virtue of the present taillie, and infeftments to follow here-'upon, and the said lands and estate shall immediately thereafter 'descend, appertain, and belong to the next heir of taillie imme-'diately following the contravener, without the burden of all 'such facts and deeds, in the same way and manner as if the 'person contravener and his heirs had never existed, or had 'been no members of this present taillie; and it shall be lawful 'and competent to the next heir of taillie to serve himself heir 'to the person immediately preceding the contravener, without 'the burden of all such facts or deeds, and otherways to establish 'the right of the said lands and estate in his person, by decla-'rator or adjudication, or any other manner of way agreeable to 'the laws of this kingdom.'

Then followed a clause as to leases, in these terms:—'It is 'always hereby expressly provided and declared, That notwith-'standing of the irritant and resolutive clauses above-mentioned, 'it shall be lawful and competent to the heirs of taillie a-speci-'fied, and their foresaids, after the decease of the said William 'Duke of Queensberry, to set tacks of the said lands and estate 'during their own lifetimes, or the lifetimes of the receivers yrof, 'the same being always set without evident diminution of the 'rental.'

In virtue of this entail, William Duke of Queensberry, as Earl of March, succeeded to the estates in 1731. In 1769 he let the farm of Whiteside, forming part of the estate, to the father of the respondent, Murray, for 19 years, at the rent of L.109, and on payment of a grassum of L.132. 18s. 10d.; and in 1775 he granted to him a lease of the farm of Fingland, for 25 years, at the rent of L.50. 10s., and for a grassum of L.480. Again, in 1782, the Duke granted to him a lease of the farm of Flemington, for 6 years, at the rent of L.90, but for which no grassum was paid. The lease of Fingland was renounced by the tenant in 1788, at which time 12 years were to run, and he obtained a new lease of it for 57 years, including also the farms of White-

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side and Flemington, at a cumulo rent of L.260. 16s. 4d., and for which he paid a grassum of L.400, but which was declared to be for Whiteside and Fingland only. The above rent of L.260. 16s. 4d. was the amount of the old rents payable under the former tacks, with the addition of L.11 for cess, rogue, and bridge money.

The Duke having granted several other similar leases, and particularly one of the lands of Wakefield, for 97 years, and doubts being raised whether he could competently grant leases for so long a duration, he brought an action of declarator against the Earl of Wemyss, and the other heirs-substitutes, in 1804, to have it found that he had power to do so; but the Court, on the 17th November 1807, found that he had no such power, and therefore assoilzied the heirs-substitutes.* In consequence of this decision, an alarm was excited among the tenants on the estate as to the validity of their leases, and they thereupon entered into transactions with the Duke, by which they renounced their leases, and obtained others for such alternative periods as might be sustained by the Court of Session or the House of Lords; and they also insisted that the Duke should place within Scotland a sufficient fund to answer their claims of damages, in the event of their leases being set aside. Accordingly, for this purpose the Duke lent L.50,000 to his agent, Mr Craufurd Tait, writer to the signet, which was secured heritably, and Mr Tait then granted his personal obligation to warrant the leases.

Among others, the father of Murray renounced his lease of the above three farms, and in place of it he received three separate leases,—one to himself of Flemington;—another of Fingland, to his son, James Murray;—and a third of Whiteside, to his other son, William, the respondent; each being granted to endure for the respective lifetimes of the tenants, and for payment of the same rents as under those which had been renounced. Those leases the Duke, and Mr Craufurd Tait as cautioner, granted an obligation to warrant to be valid and effectual.

In 1809, the Earl of Wemyss, who was the next heir-substitute, brought an action of declarator, to have it found, 'that it was 'not competent to, nor in the power of, the said William Duke 'of Queensberry, to set or grant any tacks or leases of any part 'of the entailed lands or estate before-written, to endure for a 'longer term or period than his own lifetime, or the lifetime of

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* See Buchanan's Reports, p. 406.

'the tenants receivers thereof, except in terms of, and under the 'provisions of the Act of the tenth of our reign, cap. 51. for 'encouraging the improvement of the lands in Scotland held 'under settlement of strict entail; nor to grant any tack of the 'said lands and estate in consideration of fines or grassums, and 'thereby diminish the rental; and that all such tacks or leases 'so granted, either for a longer period than prescribed by the 'said entail, (unless they are in terms of the said Act of Par-'liament), or upon payment of grassums by the tenants, are 'void and null, and shall be of no force or effect in prejudice 'of the pursuer, as heir of entail aforesaid;' and there was also a conclusion for damages, the sum of which was left blank. The Duke died in 1820, and the Earl of Wemyss thereafter brought reductions against the tenants, and, among others, against the present respondent, William Murray, concluding that the lease granted to him should be reduced, in respect 'that it 'was ultra vires of his Grace to grant the tack or lease in favour 'of the said William Murray, defender, the same having been 'granted in consideration of a fine or grassum paid by the said 'defender, not without, but with evident diminution of the rental.'

In the meanwhile, one of the tenants, Alexander Welsh, (who had acquired a lease for 57 years, on payment of a grassum), had brought a declarator of its validity, which was remitted to, and conjoined with the general declarator of the illegality of the leases, at the instance of the Earl of Wemyss. On the 25th May 1813, the Court assoilzied the Earl of Wemyss, and the other heirs-substitutes, from the conclusions of the process of declarator by Welsh, and remitted to the Lord Ordinary to hear the respective parties in the general declarator brought by the Earl of Wemyss. The reductions against the tenants having been conjoined with the general declarator, the lease which had been granted to Murray of the farm of Whiteside was one of those which was selected for discussion, and the decision in which was to regulate the fate of the others which were in a similar situation. The Lord Ordinary then pronounced a long and special interlocutor reducing the lease; against which Murray, and the executors of the Duke, having reclaimed, the Court appointed the case to be heard in presence; and thereafter, in reference to the pleas of the parties, pronounced this interlocutor: —'Find, that the entail in question contains a strict prohibition 'against alienation, but a permission to grant tacks of the said 'lands and estate during their own lifetimes, or the lifetimes of 'the receivers thereof, the same being always set without evident

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'diminution of the rental: Find, that in the year 1769, the petitioner's father obtained a tack of the lands of Whiteside for 19 years, at a rent of L.109, for which he paid a fine or grassum of L.132. 18s. 10d.: Find, that in the year 1775, the petitioner's father obtained from William Duke of Queensberry a tack of the farm of Fingland for 25 years, at the rent of L.50. 10s., for which he paid a grassum of L.480: Find, that in the year 1788 he renounced this lease, of which 12 years were to run, and obtained a new lease for 57 of the said farm of Fingland, and also of the farms of Whiteside and Flemington, at the rent of L.260. 10s. 4d., being the amount of the old rents payable under the former tacks, with the addition of the cess, and rogue and bridge money, amounting to L.11 odds, for which he paid a grassum of L.400, which was declared to be for Whiteside and Fingland only: Find, that in the year 1807 the petitioner's father renounced the said tacks, and took new tacks to himself and sons for their lifetimes, at the rents payable under the tacks renounced: Find, that this current tack must be held merely as a substitute for the former ones, and subject to any objections on the ground of grassum, diminution of rental, or otherways, which were competent against the tacks renounced: Find, that in estimating the rents of Whiteside and Fingland, the value of the fines or grassums paid at the commencement of the former tacks ought to have been added to the annualrent: Find, that this was not done, and that the new rent was made the same as the old rent, plus the cess and bridge money: Find, that this was not equal to the value of the grassums taken, and, therefore, that the said last tacks of Whiteside and Fingland were set with evident diminution of the rental, and in violation of the said clause in the entail: Further find, that the conversion of part of the new rent into a fine or grassum of L.400 was to the manifest prejudice of the succeeding heirs of entail, and operated as an alienation pro tanto of the uses and profits of the estate: Therefore, although the said tacks, in point of endurance, do fall within the provision of the entail above referred to, find, that they are struck at by the clause prohibiting alienation, as well as by the condition in the said permissive clause against evident diminution of the rent; and therefore, in the process of declarator, repel the defences; and in the process of reduction, repel the defences, sustain the reasons of reduction, and reduce, decern, and declare accordingly, so far as concerns the said tacks of Whiteside and Fingland.'

To this judgment their Lordships adhered on the 17th November 1815, in so far as regarded the farms of Fingland and Whiteside, but recalled it in regard to Flemington, 'in respect 'the question concerning the tack of the lands and mill of Fle- 'mington was not regularly before the Court at the date of the 'former interlocutor.'* March 10. 1824.

Against these judgments, Murray and the executors of the Duke entered separate appeals, which were superseded till the opinion of the Court of Session in the Buccleuch cases should be obtained; and thereafter the House of Lords, on the 12th of July 1819, pronounced this judgment in the declarator by the Earl of Wemyss:—'Find, that the said 'William, late Duke of Queensberry, had not power, by 'the entail founded upon by the parties in this cause, to 'grant tacks, partly for yearly rent, and partly for prices or 'sums of money paid to himself; and that tacks granted by 'him, upon the surrender of former tacks, which had been 'granted partly for yearly rent, and partly for prices or sums of 'money paid to himself, as between the persons claiming under 'the entail, ought to be considered as set with evident diminu- 'tion of the rental: And it is ordered, that, with this find- 'ing, the cause be remitted back to the Court of Session in Scot- 'land, to do therein as may be just and consistent herewith.'

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

At the same time their Lordships affirmed the interlocutors in the declarator at the instance of Welsh.

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* See Fac. Coll.

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When the reduction and general declarator returned to the Court of Session, a motion was made by the executors, as in the Buccleuch cases, to be allowed to purge the irritancy; but this was refused, and decree of reduction having been pronounced, and Murray having been ordained to remove, the Earl of Wemyss then insisted in his claim of damages against the executors, and violent profits against Murray and the other tenants. As the action of declarator had been instituted during the Duke's life, and it being considered objectionable in point of form, so far as it concluded for damages, the Earl brought a supplementary action against the executors and Murray, in which he concluded for payment 'of the sum of L.100,000 Sterling, or such other 'sum as our said Lords shall modify as the loss and damage 'sustained by the pursuer, by and through the leases granted by 'the said Duke, and the pursuer's being deprived of the posses-'sion of the fair rents and profits of the said entailed estate, in 'manner foresaid.' This action having been conjoined with the processes of declarator and reduction, the Court, on the 19th December 1822,* found 'the defender liable in damages or violent 'profits from the term of Martinmas succeeding the judgment 'of the House of Lords, dated 12th July 1819.' In pronouncing this judgment,

The Lord President observed:—This is a mere question of law, or of legal construction,—and the question is, Whether it was not a point which the executors and tenants were entitled to maintain to the last? I think it was. My own opinion always was, that tacks of extraordinary endurance, or let at grassums, are alienations, and therefore struck at by tailzies prohibiting alienations; and although I don't think that the Court had ever properly buckled with that question till these Queensberry cases, yet had my opinion been asked as a lawyer, I should certainly have said that the contrary seemed to be the general opinion of the Bench, at the Bar, and of the country; and, consequently, though I should have hesitated to advise a party to grant such tack, I should most certainly have advised them to defend them, if granted, to the utmost.

Therefore, how can I blame the Duke, his executors and tenants, for having done so?

I may observe in general, that a doubtful point of law is the most favourable of all cases; because the parties cannot fix that

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* See 2. Shaw and Dunlop, No. 106.

law, and their own private opinions, one way or another, are of no moment. Take the case of a reduction on the head of deathbed. If the question turn on the mere fact, Whether the disponer was ill of the disease of which he died within sixty days?—that is a fact which the party, though he chooses to dispute it, may well be supposed to know, and therefore to have been in mala fide to hold possession under such a deed, contrary to his own knowledge. But suppose the question to turn on a point of law, such as, Whether the day of signing the deed, or the day of the death, are to be counted within the sixty days?—or whether a man under a challenge to fight a duel is to be held on deathbed?—or whether going to a seceding meeting-house is to be held a going to kirk?—or going to the market-place on a particular day, (as the case of the fish-market at Aberdeen), is to be held as a going to market?—all these points, if not fixed by previous decisions, are fair debateable points, where there is hardly room for a question of bona fides before a final decision.

So, on the construction of a deed, whether a particular subject is carried by it, *e. g.* the lime and stone-quarries in Duchess of Roxburgh's locality, where the Court found, that though these did not fall under her disposition in locality, yet her locality was so colourable a title, and it was so natural in her to suppose that they did fall under it, that the Court refused to order her to account for the rents and profits she had drawn during the time she had possessed them.

This was nothing but an error juris, which, although it will not protect against the restitution of the subject, is sufficient to protect against restitution of the fruits reaped under that error. Now, under the judgment of the House of Lords, putting their decision solely on the want of power, this is nothing but an error juris, arising out of the misconstruction of a deed, and affording, therefore, a colourable title of possession till finally reduced.

And so the Court has found, in the case of Sir William Elliot *v.* Potts, 22d May 1822, where we refused a petition without answers, against an Outer-House interlocutor, finding a tenant, in a similar case, liable for full rent only from the date of the judgment of the House of Lords. It is true that, in that case, our judgment had been in favour of the tenant, which may be said to have confirmed his bona fides, till he was taught better by the House of Lords; while, in this case, our judgment was against the tenant, which therefore should have put him in mala fide.

March 10. 1824. But, really, in so new a case, and where a judgment of the Second Division stood the other way, I cannot lay any weight on this distinction. Therefore, without going into the distinction between damages as against the executors, and violent profits as against the tenants, or between bona fides and mala fides, I think this was a doubtful point of law, which both were warranted to contend to the last.

Lord Hermand.—The tenants were in bona fide for a certain period, and your Lordships will determine the time when they began to be in mala fide. It is impossible to say that the Duke was in mala fide to grant, or the tenants to receive the leases upon grassums. Although it was held by lawyers generally, that an heir of entail was entitled to take grassums, it is said that they must be liable for the violent profits from the date of citation. I do not think so; neither do I think that they can be liable from the date of the judgment of this Court, because an opposite judgment had been pronounced in the Second Division; and when the opinions of the whole Judges were taken, ten were in favour of the leases, and therefore the tenants were in bona fide to believe that they were effectual. If not so, on what principles are men to act? Are Judges alone entitled to indemnity for mistaking the laws? I apprehend not; and therefore, that the damages, or violent profits, can be due only from the date of the judgment of the House of Lords.

Lords Succoth, *Balgray*, and *Gillies*, concurred.

Both parties then appealed,—the Earl of Wemyss contending that he was entitled to damages, or violent profits, from the period of his succession to the estate;—and the executors and Murray, that an action of damages was not competent against them, and that at all events they were protected by bona fides from any claim whatsoever. In support of these pleas the same argument was maintained as that which was urged on the part of the Duke of Buccleuch in the question relative to the Queensberry estate, with this difference, that the Earl of Wemyss endeavoured to make out a specialty from the circumstance of the tenants having stipulated for and obtained security in the event of their leases being set aside, which, he alleged, indicated such a degree of doubt in their minds as was exclusive of the plea of bona fides; and besides, that the leases had been found, both by the Lord Ordinary and by the Court, to be ineffectual. To this it was answered, that the leases had been set aside by the House of Lords simply on the ground that Duke William had no power to grant them upon grassums, as to which there had been a gene-

ral and prevailing mistake in Scotland, and under the influence of which the parties had acted bona fide. March 10. 1824.

The Lord Chancellor, in the course of the pleading at the Bar, observed,—Fraud may be stated in the summons, but originally neither the Court of Session nor this House proceeded on grounds of fraud, but on the nullity from want of power. Still it is open to you to plead fraud now; but it has not been proceeded upon in the Court below at all. I, however, now say, that I shall never admit that it is not competent for this House to take into consideration any points stated in the summons. At the same time, with reference to Vans Agnew's case, I must say that not a word was stated at the Bar on this point. The judgments given here may not negative fraud, but yet nothing was done upon it in the Court below. Again his Lordship asked, Am I to understand from the judgments of the two Divisions of the Court, that what are called violent profits, and what again are called damages, mean the same thing?

Jeffrey.—There is some looseness in the expressions used, but certainly they mean the same thing.

The House of Lords ordered and adjudged, 'That the interlocutors complained of in the cross appeal, so far as such interlocutors maintain any demand against the appellants for damages, be reversed; reserving entire to the respondent any claim which he may be advised to make against the appellants with respect to the whole, or any part of the grassums taken and received by the late William Duke of Queensberry from his tenants; and reserving also to the appellants their defences, as accords. And with respect to the said original appeal respecting the tacks under which the respondent, William Murray, claimed, and which were reduced upon the grounds expressed in the judgment of their Lordships of the 12th July 1819, it is further ordered and adjudged, That the interlocutor complained of, so far as the same is complained of, be affirmed, with like reservation as to any demand of the appellant against the respondents, the executors of the Duke of Queensberry, in respect to the whole, or any part of the grassums taken and received by the late Duke of Queensberry from his tenants; and reserving also to the respondents, the executors of the Duke of Queensberry, their defences, as accords.'

Appellant's Authorities.—2. Ersk. 1. 25.; 2. Stair, 1. 22.; 1. Bank. 8. 12.; 1. Stair, 7. 12.; 2. Stair, 12. 7.; 2. Stair, 1. 24.; Cockburn, Feb. 12. 1679, (1732.); Agnew, July 15. 1746, (1732.); Agnew, July 31. 1822, (ante, Vol. I. p. 333.); Cunningham, Feb. 19. 1635, (1738.); Gray, Feb. 23. 1672, (1751.); Milne,

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July 19. 1715, (1759.); Oliphant, Nov. 30. 1798, (1721.); Wedgewood, June 13. 1820, (not rep.); Duke of Athol, June 20. 1822, (2. Shaw and Dunlop, No. 560.); See also authorities in Queensberry Cases.

Respondents' Authorities.—2. Ersk. 6. 54.; Stair, p. 338.; 2. Bank. p. 117.; 2. Craig, 9. 5.; Inst. de Rei Div.; 1. Ersk. 1. 28.; Stair, p. 76. 176.; 1. Bank. 213.; 2. Ersk. 1. 25. 29.; Leslie, Feb. 13. 1745, (1723).; Gordon, Dec. 1. 1757, (Elchies, voce Tailzie, Aff. March 24. 1760.); Grant, Feb. 9. 1765, (1760.); Laurie, June 21. 1769, (1764.); Duke of Roxburgh, Feb. 17. 1815, (F. C.); Turner, March 3. 1820, (F. C.); Bonny, July 30. 1760, (1728.)

SPOTTISWOODE and ROBERTSON—J. RICHARDSON—J. CHALMER,—Solicitors.

(Ap. Ca. No. 34.)

No. 12. EXECUTORS of WILLIAM Duke of Queensberry, Appellants.—*D. of F. Cranstoun—Moncreiff.* WILLIAM SYMINGTON, Respondent.—*Whigham.*

Warrandice—Reparation.—An heir in possession under an entail, who was uncertain as to the extent of his powers in granting leases, having, on payment of a grassum, granted one for 31 years, or such other period as it should be found he had power to do; and having warranted the possession for 31 years, and the leases having been set aside as ultra vires;—Held, (affirming the judgment of the Court of Session), That the representatives of the granter were bound, under the warrandice, to make reparation.

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1ST DIVISION. Lord Alloway.

In 1792, Robert Symington, the father of the respondent, obtained from William Duke of Queensberry a lease of the farm of Edstoun, forming part of the Neidpath estate, for 57 years, at a rent of L.155. 7s., and for payment of a grassum of L.300. In consequence of the terms of the entail,* and the decision in the Wakefield case, doubts having been entertained of the validity of this and the other leases, an arrangement was entered into, by which, among others, Symington renounced his lease, and obtained a new one for 31 years, or for several alternative periods, down to 19 years, according as the Duke should be found to have powers to grant tacks under the entail. By this new lease, the Duke as principal, and his agent, Mr Craufurd Tait, as cautioner, bound and obliged themselves, that 'in case it shall be found that the said 'Duke has not power to grant the present lease for a term of 31 'years, and that the same shall only subsist for one of the afore-

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* See ante, p. 70.