1766. *February* 27. THOMAS CARLYLE *against* GEORGE LOWTHER.

No 75.
A ranking and sale, without sequestration, bars not ordinary acts of management, but bars extraordinary acts, such as a new lease during the currency of the former.

SIR JOHN DOUGLAS granted a fifteen years lease of the farm of Todholes to George Lowther for a rent of L. 33 Sterling, commencing at Candlemas 1749. In the year 1756, a ranking and sale was commenced of Sir John's estate. In the year 1758, Sir John granted a new fifteen years lease of the said farm to the same George Lowther for a rent of L. 40 Sterling, to commence after expiry of the former lease, viz. Candlemas 1764. The estate was sequestrated a few months after, and Thomas Carlyle appointed factor. The factor judging it to be for the interest of the creditors to oppose this new lease, as containing a rent much under the real rent of the land, did, in spring 1763, bring an action of removing, which was followed with a reduction. And the Lords reduced the tack, as being granted during the dependence of the ranking and sale.

A ranking and sale without sequestration bars not ordinary acts of management, but ought to bar extraordinary acts, such as a new lease during the currency of a former. The rule is, *nihil innovandum pendente lite;* and if bankrupts were permitted, after a ranking and sale, to exercise without limitation every act of property, creditors would be in a ticklish situation. In this case there was good evidence that a higher rent might be obtained. But it appears to me, that to challenge an extraordinary act of management done in the present circumstances, it is not necessary to prove lesion. It is sufficient that it is an extraordinary act, leaving to the defender to prove that there is no lesion.

Fol. Dic. v. 3. *p.* 392. *Sel. Dec. No* 242. *p.* 316.

1778. *July* 7.

CREDITORS of the YORK-BUILDING COMPANY *against* JAMES FORDYCE and Others.

No 76.
A process of sale, and petition to sequestrate interrupt the debtor's powers of administration over the subject. See No 75. *supra*, in conformity with which this case was decided.

THE York-buildings Company, in 1719, purchased from the Crown several forfeited estates in Scotland. In 1721, their commissioners granted a lease of the lands of Belhelvie, a part of these estates, to George Fordyce, his heirs, &c. at the rent of L. 500, for fifteen years, which lease was prorogated for other fourteen years from its expiry.

Soon after the purchase of the forfeited estates, the affairs of the Company went into disorder. In 1720, an act passed, enabling them to raise money, by a lottery of annuities out of these estates; and, for the security of the annuitants, the Company granted a trust-deed, empowering the trustees, in case of the non-payment of the annuities, to enter into possession of the lands. They borrowed, afterwards, another large sum upon an heritable security over these estates, which were likewise adjudged by the Duke of Norfolk, and

partners, creditors of the Company to a great amount, and by other creditors. No 76.
Upon some of the adjudications charter and sasine followed.

In 1732, the Company having failed in payment of the annuities, the annuitants raised an action of mails and duties against the tenants of their lands, upon which the tenants having brought a multiplepoinding, it was ultimately found, that rhe annuitants were preferable, *primo loco*, on the rents, and, after them, the Duke of Norfolk, and partners.

In 1735, the annuitants raised a process of ranking and sale of these estate s This action was depending in 1744, when the Duke of Norfolk, and partners, applied, by petition, to the Court, for a sequestration; setting forth, that the Company, as proprietors, were giving leases of the lands, and some of them at an under rent. The petition, after being duly intimated, was remitted by the Court to an Ordinary, to inquire into the facts. Upon his report, it was again remitted to inquire into the arrears due the annuitants; and, in the mean time, the Court prohibited the Company to set any tacks of their estates without the authority of the Court.

During the interval betwixt presenting the petition in December 1744, and the prohibition of the 14th June 1745, the Company granted leases of their lands for long terms of years; and, among others, prorogated the lease of Belhelvie, in favour of David Fordyce, for 37 years after expiry of the current lease; the rent to be augmented to L. 525 after the year 1750. Fordyce, and his assignees, continued in possession from 1745 to the present time, paying the rent to the annuitants.

In 1753, some preferable debts were cleared off by a partial sale of the estates. In 1776, the greater part of the annuities being extinguished, an act of Parliament was obtained by the postponed creditors for a total sale of the estates. They were afterwards sequestrated, and a factor named, with power to bring reductions of the leases granted by the Company since 1732. An action of reduction was accordingly brought; among others, for setting aside the lease of Belhelvie to Fordyce in 1745, against James Fordyce and others, assignees of David. In this action, the creditors insisted for removal of the principal tacksmen, but not for any higher rent, as to bygone years, than that contained in the tack; and agreed, that the sub-leases should remain for their term of endurance.

Pleaded for the pursuer, The Company had not power to grant the lease in question: They were insolvent at the time: The annuitants drawing the rents: The lands adjudged: A process of sale, and a petition to sequestrate, in Court. In that situation, though the judgment to sequestrate had not yet been pronounced, the unlimited administration of these estates no longer remained with the Company: The creditors had the only substantial interest in the lands. It was *ultra vires* of the Company to do any thing in the management to the prejudice of the creditors; or exercise any act of administra-

No 76. tion over the subject, but what was strictly necessary to preserve the subject for them. The lease in question was unnecessary, for there was a current lease on the lands of Belhelvie at the time. It was to the prejudice of the creditors; for the locking up of the lands by a lease of so long endurance, was obviously a bar to the sale of the subject, in which the creditors were insisting.

As the granting of this lease, therefore, was *ultra vires* of the Company, it would not avail the defenders though they could plead *bona fides*, and ignorance of the state of the Company, on the part of the lessee. This could go no further than to save from bygones; but the lessee was not in *bona fide*. The situation of the Company was publickly known; and the lessee, who was paying his rents to the annuitants, could not be ignorant of it.

The time at which the lease was obtained, while an application to have the Company prohibited from granting such lease was depending, is evidence of the *mala fides* of both parties, and of its being a collusive transaction.

The pursuers cannot be deprived of the right to challenge this lease on account of a taciturnity less than the years of prescription. They had no interest in bringing the challenge until the act of Parliament, and the sequestration in 1777, which paved the way for the payment of their debts out of these estates.

Answered for the defenders, The Company remained in the administration of these estates at the date of this lease; they had not been deprived of it by the trust-deeds, nor any diligence then done by their creditors. Their creditors might have been entitled to take the management from the Company at this time; but, until they were actually removed by a judgment of the Court, third parties, who saw them in possession, must be safe in transacting with the Company. The lease in question was only an act of ordinary administration.

As to the charge of collusion, whatever suspicions may arise against the Company from their situation at the time, the lessee was acting *bona fide*. There is no evidence of his being in the knowledge of their situation.

The long taciturnity is evidence that all parties concerned were satisfied with the lease.

Besides the grounds of reduction above mentioned, it was likewise urged by the pursuer, that the lands were let at an under rent; but the Court considered the rent as adequate for the lands when the lease was granted.

The Court were of opinion, that, in the circumstances of the Company at the time, they had no power to grant the lease in question, and that the long endurance of the lease is sufficient objection to it, though the rent might be adequate.

Observed on the Bench, That, after a process of sale is brought, the debtor, even before a petition for sequestration, cannot grant leases for any length of time, for such leases must have a bad effect on the sale. And it was said,

that the edictal citation is sufficient intimation to all and sundry of the debtor's situation. No 76.

The Court "sustained the reasons of reduction of the lease of the lands of Belhelvie;" and adhered to their interlocutor upon advising a petition and answers. *See* RANKING and SALE.

Act. *Lord Advocate, Ilay Campbell, Buchan Hepburn.* Alt. *Solicitor-General, Rae, Crosbie.*

Fol. Dic. v. 3. p. 392. Fac. Col. No 28. p. 46.

*** This case was appealed.

The HOUSE of LORDS, 16th April 1779, "ORDERED and ADJUDGED that the appeal be dismissed, and the interlocutors complained of, affirmed."

1778. *July 7.*

CREDITORS of the YORK-BUILDING COMPANY *against* Dr STEWART THREIPLAND.

No 77.

THIS case differed from the preceding only in the following particulars: 1*mo*, The lease to Dr Threipland was granted for the space of 99 years: 2*do*, The old lease upon the lands was expired at the time that the new lease to the defender was granted: 3*tio*, The parties had treated about the lease before the petition to sequestrate.

The Court pronounced a judgment similar to that in the former case. *See* PERSONAL and REAL.

Act. *Advocate, Ilay Campbell, Buchan-Hepburn.* Alt. *Solicitor General, Rae, Crosbie.*

Fol. Dic. v. 3. p. 392. Fac. Col. No 29. p. 49.

*** This case was appealed.

The HOUSE of LORDS, 15th April 1799, "ORDERED and ADJUDGED, that the interlocutors complained of be reversed, and the defender assoilzied."

SECT. III.

Mora.

1627. *July 21.* M'CULLOCH *against* HAMILTON.

No 78.

A debtor having disponed the lands, after leading the comprising, but before infeftment taken thereon, the LORDS refused to reduce the alienation at