1734.

DUKE OF ROXBURGH *v.* WAUCHOPE.

JOHN, DUKE of ROXBURGH, *Appellant;*
JAMES DON, *alias* WAUCHOPE, of Edmonstone, Esq. } *Respondent.*

Et è Contra.

5th March, 1734.

TAILZIE—Circumstances under which a feu-charter by an heir of entail was reduced as granted *a non habente potestatem*, although power to feu, without diminution of the rental, was given by the entail.

PRESCRIPTION.—Lands being possessed under a lease, and a feu of the same subsequently granted, it was found that the possession continued to be in virtue of the lease, and that prescription against the right of challenging the feu, commenced only at the expiry of the lease, and not from the date of the feu-charter.

JUS TERTII.—It being objected to the title of an heir pursuing a reduction of his ancestor's deed, as a contravention of the entail, that the contravention implied the forfeiture of his own right,—the objection was repelled as being *jus tertii* to one who did not claim under the entail.

No. 27. THE entail of the earldom and estate of Roxburgh contains the following clause; "Reserving always to the said heirs of entail, liberty and "privilege of granting feus and rentals of such "parts and portions of the said estate as shall "seem expedient to them, provided the same shall "no ways be granted in lesion or diminution of "the rental of the lands and others aforesaid, as

"the same shall happen to pay at the time of the "succession of the said heir to the same."

Earl Robert, the maker of this entail, granted to Alexander Don, in consideration of his services, a lease of certain lands for the term of his life-time, and nineteen years after his death, at the yearly rent of L.6 Scots. The lease recited that "the Earl had formerly granted to Mr. Don a "bond for 500 merks yearly pension for life; and "that the lands were charged with certain annui-"ties which Mr. Don became bound to clear." It provided that Mr. Don "did accept of the "said lease in satisfaction of the said pen-"sion; and that the lands should be redeem-"able by the Earl, his heirs or assignees, upon "payment of 10,000 merks." It was likewise provided that at the expiry of the lease he should be allowed the expenses, not exceeding the sum of 2000 merks Scots, of repairs upon buildings, &c.

Dec. 31, 1649.

Earl Robert was succeeded by Earl William, who shortly afterwards granted to Mr. Don a feu charter of the same lands, for the yearly feu-duty of L.7, 10s. Scots; upon which infeftment followed.

May 14, 1650.

After the death of Earl William, an action was raised in 1685 by his son, for the purpose of setting aside this conveyance, but it was not proceeded in.

In 1727 the Duke of Roxburgh brought an action for having it declared that the lease was expired,—Alexander Don the lessee having died in 1687; and that the conveyance and feu-charter were

1734.

DUKE OF ROXBURGH *v.* WAUCHOPE.

void and null, having been granted by one who, by the entail, was disabled from making any alienation of the estate.

In defence it was objected to the title of the Duke, that if the grant of the feu-right in question should be construed a contravention, it would, by the express words of the entail, create a forfeiture of the right of the Duke, who was the male heir of the granter, and possessed the estate as such. Besides this, by the entail, express powers are given to grant feus of the lands, if the yearly profit is not thereby diminished from what it was at the time of the succession opening to the granter, and by the feu in question the rent had been increased. It was farther pleaded that the action was barred by prescription, the defender and his ancestors having possessed for above 40 years.

To the objection to the title, the Duke answered, that it was *jus tertii* to the defender, who could have no right to profit by the contravention. He farther maintained, that the feu-duty stipulated to be paid was not adequate to the profits of the lands, and was an elusory and not a real rent. As to the defence of prescription, he answered that the action which was brought in 1685 was a sufficient interruption of the course of the prescription, and even although that action had not been raised, still Mr. Don, having entered to possession by virtue of a lease, which is no foundation for the plea of prescription, could not, although he afterwards obtained a feu-charter, alter or change the title of his possession, until the lease expired; and therefore prescription necessarily requiring posses-

sion upon charter and seisin, it could not commence until the termination of the lease. 1734. DUKE OF ROXBURGH v. WAUCHOPE.

The Lord Ordinary "repelled the objection to the Duke's title, and sustained the same;" and having reported the other points to the Court, their Lordships found, "that the prescription propon- July 21, 1732. Dec. 19.
"ed for John Wauchope the defender, commenc-
"ed from the date of the charter in the year 1650,
"and not from the ish of the tack, but found the
"said prescription interrupted by the process rais-
"ed in the year 1685; and found that William,
"Earl of Roxburgh, had sufficient powers to
"grant the said feu-charter and disposition; and
"therefore repelled the reason of reduction of
"the said charter and disposition, as granted *a non*
"*habente potestatem*."

An appeal was brought by the Duke, from that part of this interlocutor, which finds that the prescription commenced from the date of the feu-charter in 1650, and not from the expiry of the lease; likewise from that part which finds that Earl William had sufficient powers to grant the said feu-charter and disposition. Entered Jan. 26, 1733.

A cross appeal was brought by Mr. Wauchope, from the interlocutor of the 21st July, repelling the objection to the Duke's title to pursue; and also from that part of the other interlocutor which finds that the prescription is interrupted by the process raised in 1685. April 9, 1733.

ON THE ORIGINAL APPEAL.

Pleaded for the Appellant:—1. As Earl Wil-

1734.

DUKE OF ROXBURGH *v.* WAUCHOPE.

liam had no powers to alienate any part of the estate, the power reserved to grant feus or leases without diminution of the rental, could never be applied to the present case, where the lands were given away on account of services, but not let for what could properly be called a rent, but only an elusory acknowledgment. It is evident that the ten shillings (L.6 Scots) payable by Alexander Don, was not the rule at which the heirs of entail were at liberty to feu the land; for as the 10,000 merks payable for redeeming the lease, and the 2000 merks allowed for repairs and buildings, were to bear no interest during the term of the lease,—as Alexander Don was bound to clear off the annuities payable out of the lands, and to release the pension of 500 merks due to himself for life,—a discharge of these incumbrances must be construed as an equivalent and consideration in place of so much rent, over and above the nominal rent of ten shillings.

2. Supposing that the heir of entail had power to grant a feu for a feu-duty of no greater extent than the rent contained in the lease from Earl Robert, yet he could not release the casualties which attend the right of superiority, and which would be more beneficial to the succeeding heir of entail, than this rent stipulated; for such release would be directly contrary to the nature of a feudal right, by which the superior is entitled to all the usual casualties. The power to grant feus cannot be otherwise understood than of *proper* feus, attended with the usual casualties and profits arising from the nature of a feu.

3. The prescription cannot be counted but from the expiry of the lease; because,—Alexander Don having only a temporary right by lease, in virtue of which he held the lands as tenant to Earl Robert,—when he obtained the feu from Earl William, he could not by the law of Scotland invert that possession during the currency of the lease, and acquire a right of property in prejudice of his right under the lease, and in prejudice of the heirs of entail. During the continuance of the lease every heir of entail was under a disability of proceeding against him with any effect; for during that time he could not possibly remove the lessee from possession; and as no prescription can take place against an action, but from the time at which such action could have been effectually instituted, there is no room for it in the present case.

There was no homologation. The receipts were granted by the heir's steward, and although the sum was in them erroneously called a feu-duty, it was not the exact sum specified in the charter. Such receipts can never be construed into an approbation of the title, as has often been adjudged in similar cases.

Pleaded for the Respondent:—1. Restrictions cannot by construction be extended beyond the words of the deed, and there is here no restraint upon the power of feuing, except in the proviso that the rent or feu-duty should not be diminished "prout tempore successionis dict. hæredum iis-"dem persolvere contigerit." No greater rent had ever been paid out of these lands than L.6 Scots, and therefore the feu-duty of L.7, 10s. was

1734.

DUKE OF ROXBURGH v. WAUCHOPE.

a higher rent than what was payable to the heir upon the opening of the succession; neither can the yearly pension and liferents be accounted any part of the rent, because the liferents determined with the life of the liferenters, and the pension with that of Alexander Don, and the lease was to subsist for nineteen years after his death, yet no more was to be paid in these events than the above rent. That rent had been fixed by the maker of the entail, and therefore could not by any heir claiming under his deed, be objected to as elusory, especially as Earl Robert could not be ignorant that the lands were of greater value, the lease reciting the other considerations for which it was granted.

2. The prestations to the superior may be, and commonly are regulated *pactis et provisionibus hominum*, and therefore the power of feuing being limited only to the effect that the rental should not be diminished, the releasing certain casualties payable by some feuars to their superiors, was not inconsistent with that power. Besides, these casualties were only released during the lifetime of Alexander Don.

3. Nothing is more certain than that every landlord or tenant may, by agreement between themselves, change the nature of the tenant's possession, and that the landlord may grant, and the tenant accept, in lieu thereof, any new deed which the landlord has the power to execute.

The heir of entail had a power to redeem the lease, and therefore cannot be said to have been *non valens agere*. Moreover, during the subsistence

of the lease, he might have brought an action of reduction of the feu-charter, of which he could not be ignorant, because the infeftment was upon record, and the acquittances granted yearly referred to it, the rent being paid from the year 1650 according to it, and not according to the terms of the lease.

ON THE CROSS APPEAL.

Pleaded for the Appellant, (Mr. Wauchope):—1. If this feu-charter was a contravention of the entail, the necessary consequence of it, by the very words of the entail, was a forfeiture of the right of the granter and all his issue; and therefore the Duke, who claims as heir of the body of the granter so forfeiting, had no title whatever to carry on any suit concerning the lands entailed, or any part of them.

2. It appears, that in the action of improbation, in the year 1685, to which Sir Alexander Don with many other persons were made parties, no particular writing is specially mentioned in the summons; and it is a settled point that no action can interrupt prescription, unless not only the title is particularly called for in the summons, but also the objection libelled, of which the pursuer could avail himself. Here no reason of reduction was libelled, except that of falsehood, which is perpetual in its own nature, and on which the Duke does not now insist.

Pleaded for the Respondent, (the Duke):—1. The objection to the title is *jus tertii* to Mr. Wauchope, being competent only to an heir of

1734.

DUKE OF ROXBURGH *v.* WAUCHOPE.

entail, but not to a third party; and even supposing it had been made by an heir of entail, it would now be barred by prescription, no heir having pretended to take advantage of it for upwards of forty years, during which the descendants of Earl William have enjoyed the estate without challenge in virtue of their retours as heirs of entail to each other.

2. The prescription was interrupted by the action brought against Mr. Wauchope's ancestor in 1685, the object of which was to void and set aside his title to the lands, and in which several proceedings were had. Since that time the minority of the Duke excludes the plea.

Judgment March 5, 1734.

After hearing counsel, "it is ordered and adjudged, &c. that such parts of said interlocutor "of 19th December, 1732, whereby the Lords of "Session found that the prescription proposed for "the defenders commenced from the date of the "charter, anno 1650, and not from the ish of the "tack; and that William, Earl of Roxburgh, by "the tailzie had sufficient powers to grant the feu-"charter and disposition in the appeal mentioned, "and therefore repelled the reason of reduction, "proponed for the pursuer, of the said charter as "granted *a non habente potestatem*, and of the "said disposition, be, and is hereby reversed; and "it is hereby further ordered, that the cross ap-"peal of the said James Wauchope, be, and is "hereby dismissed, without prejudice to the ques-"tion relating to the interruption of the prescrip-"tion when a proper case shall come before this "House; and it is further ordered and adjudged,

" that the said interlocutor of the Lord Ordinary " of the 21st July, 1732, be, and is hereby affirm- " ed ; and it is hereby declared that the prescrip- " tion pleaded for John Wauchope, the defender, " commenced from the termination of the lease, " and not from the date of the charter, and that " William, Earl of Roxburgh, by the entail, had " not sufficient powers to grant the feu-charter and " conveyance."

For Appellant, *P. Yorke, Ro. Dundas, Wm. Murray.*

For Respondent, *Dun. Forbes, C. Talbot, Ch. Areskine.*