[Fac. Coll. Vol. xiv. p. 414.]

1807.

The Earl of Galloway, - - - *Appellant;*
Alexander M'Hutchon, Charles Selkrig, and Others, - - - - - *Respondents.*

THE EARL OF GALLOWAY *v.* M'HUTCHON, &c.

House of Lords, 21st April 1807.

Landlord and Tenant—Lease—Secluding Assignees and Subtenants—Irritancy and Removing.—A lease was granted to the tenant and his heirs, secluding assignees and subtenants, for 21 years. The tenant died two years thereafter, in considerable debt; and the question was, Whether certain transactions gone into with the heir, by which the latter entered into possession *cum beneficio inventarii*, giving the creditors the benefit thereof, was not a covered assignation, and the tenant had thereby incurred an irritancy of the lease? The heir, pending the action, entered into an agreement with the creditors, whereby the latter discharged their claims, and transferred the stock for a certain sum; Held that there was no ground for removal, and the defenders assoilzied. Affirmed in the House of Lords.

The respondent's brother, the deceased Hugh M'Hutchon of Chanque, held a lease from the appellant of the four farms of Bargrennan, Falbains, Glengrubbock, and Drumlawhanty. In 1796, when this lease was granted, two of these farms were held under previous leases, which did not expire until 1803 and 1807 respectively; but, on condition of his renouncing these leases, and granting an immediate increase of rent, the lease in question was granted, in the following terms: "In assedation let to the said Hugh M'Hutchon, Dec. 24, 1796. "*his heirs and successors*, secluding assignees and subten- "ants, legal and conventional, in whole or in part, all and "whole the said lands of Bargrennan, Falbains, and Glen- "grubbock; and all and whole the said lands of Drumla- "whanty, with the houses and haill pertinents thereto be- "longing, or presently occupied by himself, lying in the "parish of Menigaff, and stewartry of Kirkcudbright, and "that for the space of twenty-one years from and after the "term of Whitsunday last; and, after the expiry of the "said twenty-one years, during all the days and years of "the said Hugh M'Hutchon's natural life." The rent fixed was £210 per annum. They were improving leases, and it appeared necessary, in order to make the lands yield anything like an adequate return, in order to pay this rent, to undertake laborious and expensive improvements. With

1807.

THE EARL OF GALLOWAY v. M'HUTCHON, &c. Oct. 26, 1798.

this view, therefore, the tenant proceeded forthwith to lay out heavy expense, both in liming the lands and in building fences, and in making roads. But, while these operations were going on, the tenant died. On this event, it was found that the deceased had left a great number of creditors, and a considerable amount of debt, for payment of which there were no means but his small heritable estate of Chanque, and the stocking upon these various farms, which were quite insufficient to pay his creditors. There were obstacles in the way of the creditors proceeding against the deceased's estate, to avoid which, and all unnecessary expense, the creditors applied to the respondent, the deceased's brother, and heir at law and executor, that he might serve as heir, and confirm also as executor, for the purpose, 1st, Of selling the estate of Chanque; and, 2d, For disposing of the crop and stocking upon his farms. The respondent at the time being in delicate health, was unwilling, and declined interfering, although he was himself a creditor to a large amount. At the first meeting of the creditors, however, it was pressed on him as a measure which might ultimately prove beneficial to himself. At last he agreed, as the minutes bore, chiefly induced by the solicitations of the creditors, and expressly upon condition that, in allowing his name to be used, he was not to incur any passive title. Liberty was also expressly given for him to retract from this compact in case it turned out that his health would suffer. At this meeting of the creditors, three of the creditors farmers were appointed as a committee to co-operate with and give their advice and counsel to the respondent Alexander M'Hutchon, in the management of the deceased's affairs. But Alexander M'Hutchon's health having at this time grown worse, he wrote the agent of the creditors that he found himself unable to undertake the management of his brother's affairs, and therefore resiled from the engagement.

A second meeting of the creditors took place, whereupon it was resolved by the creditors to apply to Mr. M'Hutchon to allow his name to be used, on their guaranteeing to keep him free of all responsibility. This was consented to, upon his receiving a bond of indemnity freeing him of all trouble except the signing of the necessary papers.

Under this arrangement, the property of Chanque, and the moveables, were easily disposed of; but there seemed to be more difficulty about the farms, owing to the leases se-

cluding assignees and subtenants; and it became desirable for the creditors to derive benefit from them, as, in the meantime, they had materially increased in value. The respondent Alexander M'Hutchon, as heir of his deceased brother, was entitled to take the lease, but he could not assign it without the consent of the landlord. Having it in view either to negotiate some arrangement with the landlord, so as to be able to assign or subset the leases, he, in the meantime, saw it was necessary, until that was effected, to crop the farms; and having made his intentions known to the creditors, with the view of obtaining their concurrence, this was granted, and certain persons were named at a meeting of these creditors, and appointed as managers, with Alexander M'Hutchon's concurrence, in "regard to the "management and disposal of the current tacks." Alexander M'Hutchon entering *cum beneficio inventarii*, and giving over the profits of the farm to the creditors.

Having gone thus far, the appellant raised his action of removing, under the act of sederunt, before the sheriff. The sheriff assoilzied the defenders (respondents), whereupon an advocation was brought, to which was added a declarator; and both actions having been conjoined, the appellant pleading, 1st, That the transactions gone into amounted to an assignation of the lease on the part of the respondent Alexander M'Hutchon. 2d, That the respondent had no control over the committee appointed as managers, whom he suffered to remain in the natural possession of the land. 3d, That they had subset and assigned the farms from year to year, and were neglecting the interests of the farm, and contravening the stipulations of the tack. 4th, If it was competent for a person entered heir *cum beneficio inventarii* to appoint managers with instructions to account to the creditors of a deceased tenant, the clause secluding assignees and subtenants would be defeated. In answer, the respondent contended that the managers were no more than stewards or servants answerable to him. The last appointed managers were appointed by himself, the managers appointed by the creditors having ceased to act. These managers were therefore no way connected with the creditors, nor accountable to them, but accountable to the respondent, whom the creditors had discharged. A proof was allowed to both parties, in which it was clearly proved that the farm was managed by certain creditors, but that no assignation had been granted.

Durham v. Henderson & Livingston, Jan. 23, 1773. Mor. 15283, Vide Note at the end of the case of Dalhousie v. Wilson, Dec. 1, 1802, F. C.

1807.

THE EARL OF GALLOWAY *v.* M'HUTCHON, &c.

Pending the action, an agreement was entered into by the respondent Alexander M'Hutchon, on the one part, and Charles Selkrig and others, acting for the creditors, whereby, for a certain sum, they discharged all claims against him as representiug his brother, and sold to him the stocking.

The cause was reported to the Court; and, on advising
Jan. 19, 1803. memorials, the following interlocutor was pronounced:—
"The Lords having the mutual memorials for the parties,
"with the proof adduced, and further proceedings, they, in
"the advocation, advocate the cause, and conjoin the same
"with the process of declarator, sustain the defences, and
"assoilzie the defenders from the conclusions of both ac-
"tions, find the pursuer liable in the full expense of extract,
June 7, 1803. "but find no other expenses due."* On reclaiming peti-

* Opinions of the Judges:—

LORD PRESIDENT CAMPBELL said:—"Both parties seem here to have been in a mistake, in supposing that the defender could not succeed to this farm, as heir to his brother in the lease, without incurring a passive title, unless he entered *cum beneficio inventarii*, which, it is supposed, made him a trustee for the creditors; 1st. The heir in a lease, which excludes assignees and subtenants, takes a right which no other person can enjoy. It is a sort of tailzied fee, which creditors cannot touch; and the heir taking it after the death of the original tacksman, does not represent him, but takes it *suo jure*, as conditional institute by the joint will of the original tacksman and the landlord. It is one of the conditions of the transaction, that it shall not be a subject of representation, but that the person who is heir designative, shall take, as eventual tacksman, or at least as an heir under a strict entail, and of course be liable to the landlord in all the prestations of the tack, and run the sole risk of profit or loss, as he is not accountable to any other person. So it
Unreported. was considered by the Court in the case of Ogilvy *v.* Arnot, 18th May 1796, and 1st March 1799. The defender, therefore, might, with perfect safety, have taken up this tack upon his brother's death, without any service *cum beneficio*, or any transaction with creditors; and it was imprudent in him to introduce their trustees into the possession, which has given a colour to the action now raised against him. In all events, he was an heir of provision in the strictest sense, and not liable *ultra valorem*.

"2d. It appears, however, that as he did this, either from ignorance, or from a laudable desire to see his brother's debts paid, the only consequence which could follow in law was, that the landlord had a right to insist that these trustees, as virtual assignees, should

tion, which sought, at all events, for a decree of removing against Selkrig, trustee for the creditors, the Court found, "In respect Charles Selkrig, the trustee for the creditors of "M'Hutchon, does not claim possession of the farms in "question, it is unnecessary to pronounce any decree of re- "moving against him, and *quoad ultra* adheres to their "former interlocutor, and refuse the desire of the petition."

Against these interlocutors the present appeal was brought by the landlord to the House of Lords.

Pleaded for the Appellant.—In the present case, the lease to the deceased Hugh M'Hutchon and his heirs, expressly excluding assignees and subtenants, legal or conventional, in whole or in part, meant nothing more nor less than an exclusion of either creditors of the lessee adjudging or attaching his right by legal process, or persons acquiring by purchase or voluntary transmissions; and, accordingly, the be removed, and that the defender himself should take the possession and management, as the only person entitled to do so. The lease contains no clause of forfeiture, nor can any take place.

"3d. The defender is now in full possession, in consequence of the transaction by which the creditors have given up any claim, which, although unnecessary, was perfectly legal and fair. The entry *cum beneficio inventarii* was a superfluous step, and can make no difference upon the question. Could the creditors have forced him not to remove?"

LORD BANNATYNE.—"I think the possession by managers was in defrad of the lease."

LORD MEADOWBANK.—"The lease is descendible to heirs, and M'Hutchon cannot be removed. He may apply the profits as he pleases. The heir is liable *in valorem*."

LORD HERMAND.—"He is not like an heir of entail, who does not represent his predecessor, but only the tailzier. The entry *cum beneficio inventarii* was proper, in order to save him from the risk of passive title. I am clear that he could not take this tack without being liable to creditors. This he very soon declared, and that he would not possess, and that the creditors must keep him free of all claims."

LORD CRAIG.—"There is here no assignation, and the possession is for the tenant, *i. e.* the deceased tenant, for whose debts we must suppose the present tenant liable, to the extent of the profits of the farm, *ergo*, the management must be under him."

LORD BALMUTO.—"M'Hutchon is the tenant to all intents and purposes. He cannot give it up without Lord Galloway's consent. He is liable to all the prestations of the lease."

Lord President Campbell's Session Papers, vol. 110.

1807.

THE EARL OF GALLOWAY *v.* M'HUTCHON, &c.

creditors of Hugh M'Hutchon never thought of adjudging this lease, nor did they think of taking, or the respondent Alexander, the heir, of granting an assignment. All concerned were sensible it would be vain to follow such courses; but the trustees for Hugh M'Hutchon's creditors were let into the possession, under the colour of its being the possession of the heir, or, more properly, they assumed the possession without even that colour, as they had no special authority from the heir, and can hardly be said to have had his connivance. The only question then, while matters were in that state, was, Whether the bargain which the appellant made with the lessee could be defeated in that way by such a device, a question which surely needs little discussion. It was agreed that the farm should be possessed by Hugh M'Hutchon and his heirs, *but not by their assignees or subtenants*, that is, none but he or his heirs should possess; and yet here were stranger tenants, and of the worst species, introduced, being a set of creditors, or trustees for creditors, and their subtenants, who had no individual interest to manage the farm properly, but whose whole object was to draw as much money from it as possible, though every word of the lease shows that it was granted with a view, and on the expectation of the farm being improved. Nor is it any answer to say, that by the lease the tenant was under no obligation to reside upon the farm—in the nature of things he could not reside on all the four farms,—and that the exclusion of assignees and subtenants was therefore not repugnant to the lessee occupying the farm by servants, or persons managing for him; but this doctrine the appellant has no occasion to dispute, when the facts of this case are attended to. The fact is, that Alexander M'Hutchon is not in possession. The managers, who are said to be in possession for him, are not so,—they are in possession for the creditors, for whose behoof they act, and to whom the profits or rents of the farm are paid. 2d. The question then is, Whether the agreement entered into, pending this cause, and at the last stage of it, ought to make any difference? It can make none, because it is obviously just another device fallen upon, when it was seen the former devices would not do. The agreement states what is false, that Alexander did enter into possession of the farm as heir; while, on the other hand, in other parts, it acknowledges that this possession was for behoof of his brother's creditors. It purports to give him actual possession, and draws that back to

Martinmas 1802, though it is undeniable that he was not, and could not be in possession, at least, until after the last date of his contract, 8th of January 1803. That contract also shows that nothing on the farm was his, not so much as the instruments of husbandry, far less the stocking, until the date of that contract. Supposing, therefore, that the actual possession of the stocking of the farm was delivered over to Alexander M'Hutchon after the date of the contract, which was the 8th of January 1803, and before the Court gave judgment, which was upon the 18th of the same month; in what character did he then possess? It was not surely as heir of Hugh M'Hutchon, but under the sufferance of Hugh's creditors. And the whole transaction is the same as if he had assigned to Hugh's creditors, and Hugh's creditors had assigned back to him.

Pleaded for the Respondents.—1st. Neither the assignment, nor any such transaction as that alluded to, ever existed. 2d. If there had been an assignment of the lease, or any transaction equivalent thereto, although it might have furnished ground for an action of damages, it would not have been relevant to infer the appellant's conclusion of irritancy and removing against the respondent. 3d. Even if the transaction libelled had been proved, and had been relevant to infer an irritancy against the respondent, it must have been competent for the respondent to purge it at any time before final judgment; and he must be held to have purged it, by obtaining a discharge from the creditors, which is dated 27th and 29th December 1802, and 5th and 8th January 1803.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellant, *Wm. Adam, Charles Hay.*

For the Respondents, *John Clerk, Wm. Alexander, David Cathcart.*

NOTE.—One of the cases founded on by the appellant, Durham *v.* Henderson and Livingstone, 23d January 1773, Mor. Dict. 15,283, it was observed on the bench, had been prematurely and erroneously collected, as that judgment had been altered by a subsequent interlocutor of the 18th January 1775; and the final judgment of the 8th March same year, refused a reclaiming petition, complaining against that alteration.