June 13. 1821. justice could not be excluded by a limited finding, which was evidently introduced per incuriam. The House of Lords 'Ordered and adjudged, that the interlocutors complained of, so far 'as they allow to the respondent interest on the enlarged salary 'of £226 : 18 : 5, before the same was constituted by the interlocutor of the 13th December 1799, and so far as the same relate 'to the costs of suit, and the allowance to the respondent of '£200 sterling, in addition to the taxed amount of costs reported by the auditor, be reversed: And it is declared, that, under 'the circumstances of this case, neither party is entitled to costs 'of suit hitherto: And it is further ordered and adjudged, that 'the rest of the interlocutors be affirmed: And it is further ordered, that the cause be remitted back to the Court of Session, 'to do thereupon as shall be just.'

A. MUNDELL,—J. CHALMER,—Solicitors.

(Ap. Ca. No. 27.)

No. 15.

EARL of ELGIN, Appellant.—*Romilly—Erskine—Bell.*
ROBERT WELLWOOD, Respondent.—*Clerk—Moncreiff.*

Entail.—Held (affirming the judgment of the Court of Session,) that a lease of 999 years, with a grassum, did not fall under the prohibitions in an entail against alienating, there being a permissive clause to let leases on certain terms, without limitation in point of endurance, and the lease being so granted.

June 13. 1821.
1ST DIVISION.
Lord Armadale.

BY the entail of the estate of Garvoch, executed by the father of the respondent in 1790, there is a prohibition, fortified by irritant and resolutive clauses, against selling, alienating, or disponing the lands; and it is declared, that the heirs shall not 'set 'tacks or rentals of any part of the said lands and estate, except-'ing in the terms after mentioned, for longer space than nineteen 'years certain, or for the life of the setters, or in the terms of the 'powers given to the proprietors of entailed estates in Scotland 'anent granting of tacks or leases, by an act of Parliament passed 'in the tenth year of his present Majesty's reign.' The exception alluded to is thus expressed: 'And with this power and faculty, 'as it is hereby expressly provided and declared, notwithstanding 'of the restrictions before written with regard to the setting tacks, 'that the said Robert Wellwood, my son, and each of the heirs 'succeeding to the said lands and estate, shall have full power to 'set tacks of the same, excepting the house, office-houses and gar-

'dens of Pitliver, and 100 acres of ground most adjacent and 'contiguous to the said manor-place, for such space of time as 'they shall think fit, provided that the same shall never be set at 'a smaller yearly rent than three bolls of oatmeal, at eight stone 'weight per boll, for each acre so to be set, and proportionally 'for any smaller quantity; and which rent or tack-duty shall al- 'ways be payable in kind, and never be converted into money: 'Declaring, that in case the said Robert Wellwood, my son, or 'any of the said heirs of tailzie, shall set tacks of the said estate, 'or any part thereof, for any longer space than nineteen years, or 'in terms of the act of Parliament before mentioned, except in 'the terms of the clause immediately before written, then shall 'not only such tacks be in themselves void and null, but also the 'persons granting the same shall, for himself or herself alone, 'forfeit their right to the said tailzied lands and estate, and the 'same shall ipso facto fall and devolve to the next heir called to 'the succession as aforesaid, free of such tacks, and in the same 'way and manner as is provided in the other cases of contraven- 'tion.' June 13. 1821.

On the 9th of October 1807 Lord Elgin, through the medium of his agent, addressed a letter to the respondent Mr. Wellwood, the heir in possession, by which he offered to enter into a missive of lease of part of the estate for 999 years, declaring, that 'the 'rent is to be three bolls of oatmeal per acre, besides a grassum 'of £12,000 sterling, bearing interest from Martinmas next, but 'the grassum not to be payable during your lifetime. It is un- 'derstood that Lord Elgin is in the mean time to find security for 'that sum to the satisfaction of Mr. Thomas Adair, writer to the 'signet; and also, that if the lands before mentioned, to be con- 'tained in the lease, do not amount to 200 acres Scots measure, 'you are to include in it as much more land from the west side 'of the farm of Munschilloch as will make up that extent. It is 'further understood that, by your acceptance of this offer, you 'agree to enter into a lease with Lord Elgin, for the same period 'of years, at the same rent, and for a grassum in proportion to 'the extent, to be fixed according to the grassum now offered, of 'all the land lying to the west of Pitliver house, and belonging 'to you, which you are at liberty to let for that period of years, 'in terms of the entail of your estate; but this only in case his 'Lordship should incline to enter into such a lease. And it is 'further agreed that, at all events, the grassum shall not be pay- 'able for five years from next Martinmas.' This offer was accepted by Mr. Wellwood, and he alleged that afterwards a transaction took place, by which the quantity of land lying to the west

June 13. 1821. of Pitliver house, and referred to in the above missive, was marked off and ascertained.

Lord Elgin having delayed to enter into the lease, Mr. Wellwood brought an action against him, concluding for implement of the missive. A counter action of declarator and reduction was brought by Lord Elgin against Mr. Wellwood and the other heirs, in which, after founding on the terms of the entail, he concluded that it ought to be found and declared, 'That, under these 'general prohibitions, the said Robert Wellwood was effectually 'prohibited and debarred from granting a lease for 999 years of 'so considerable a part of the said entailed lands and estate as '248 acres and 658 parts of an acre; such lease being in truth 'and substance an alienation of the said land, and a deed whereby 'the same will be evicted from the heirs called to the succes-'sion after the said Robert Wellwood, and not being any or-'dinary tack or lease, such as even an unlimited proprietor, 'having no intention to alienate, would grant in the administra-'tion of his estate, nor a deed in exercise or within a fair and 'true meaning of the powers granted to heirs with respect to the 'setting of tacks or leases,' the above missive ought to be reduced and set aside. Lord Armadale decerned in terms of the conclusions of the action of implement at the instance of Mr. Wellwood; and this judgment having been brought under the review of the Inner-House, he reported the action of declarator and reduction which had been subsequently raised. By Lord Elgin it was maintained, 1. That although he was ready to fulfil the bargain, provided he were in safety so to do, yet, as doubts had recently begun to prevail as to the validity of such a transaction,—that as it had been settled by the cases of the Duke of Queensberry against the Earl of Wemyss, Turner against Turner, and Malcolm against Henderson, that leases beyond the ordinary endurance were alienations,—it was clear (abstracting from the permissive clause) that the lease in question was an alienation, and as such prohibited by the entail; that the permissive clause could not be extended so as to entitle an heir to make an alienation of the dominium utile for 999 years, because it had reference exclusively to contracts of leases limited for those periods of years which in law did not extend to an alienation; and, 2. That, supposing the missive to be binding, no arrangement had been completed with regard to the lands to the west of Pitliver house.—To this it was answered, 1. That the power contained in the permissive clause to set tacks for such space of time as the heirs of entail should think fit, was sufficient to authorize the contract, whatever might be the interpretation of the prohibitory clause;

and, 2. That there was satisfactory evidence that the arrangement as to the quantity of additional land had been completed. The Court, on the 11th of March 1810, after conjoining the two actions, found and declared in the process of declarator, 'That the 'missive of lease granted by Mr. Robert Wellwood to the pur- 'suer is a valid and effectual right to the pursuer, both against 'the granter and the other defenders and substitute heirs of en- 'tail;' and in the action of implement adhered to the Lord Ordinary's interlocutor.* June 13. 1821.

In terms of these judgments, Lord Elgin subscribed a contract of lease, granted an heritable bond for the grassum, and paid the rents and interest for some years. Conceiving, however, from the decision in the House of Lords in the case of the Queensberry leases, and of Henderson against Malcolm, that a lease of so long endurance, accompanied with so large a grassum, was not valid, he entered an appeal on the grounds above stated. The respondent, in addition to his answers formerly made, contended, 1. That Lord Elgin was barred personali exceptione from entering the appeal, because he had confirmed and homologated the transaction, and the decree of the Court by which it was found to be binding; and, 2. That the grassum was not with diminution of the rental, because the precise rent required by the entail had been stipulated; and so far from being prejudicial to the heirs-substitute, it was beneficial, seeing that it was impossible to get a higher rent than that which Lord Elgin was bound to pay. The House of Lords 'Ordered and adjudged that the appeal be dismissed, and 'the interlocutors complained of affirmed.'

J. CHALMER,—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 28.)

---

* This decision is not reported; but it is mentioned in the respondent's case, that the judgment was 'pronounced by the Court without the slightest difference of opinion. 'In particular, Lord President Blair, by whom all the judgments were pronounced, 'concurred in every one of them; and in pronouncing the last decision, though his Lord- 'ship stated that at one time he had doubted whether the respondent was not bound 'and required to give the whole ground up to the line of the circle on the west side, he 'added, that he had never entertained the slightest doubt about the power of the re- 'spondent to give the lease on the terms stipulated.'