Sir JAMES MONTGOMERIE and Others, Executors of WILLIAM DUKE of QUEENSBERRY, Appellants.—*Irvine—Cranstoun.* DUKE of BUCCLEUCH and QUEENSBERRY and his Tutors, Respondents.—*Gifford—Mackenzie.*

No. 18.

Lease—Purgation—Entail.—Held (affirming the judgment of the Court of Session,) that purgation was inadmissible where, after the death of an heir of entail, it had been found and declared, that certain leases granted by him were beyond his powers, fell under the irritancy of the deed of entail, and so null and void.

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2D DIVISION. Lords Craigie and Cringletie.

IN 1705, James Duke of Queensberry executed an entail of the estate of Queensberry, whereby, inter alia, he prohibited the heirs substitute 'to sell, wadset, or dispone any of the foresaid earl-'dom, lands, baronies, offices, jurisdictions, patronage, and others 'foresaid, nor any part of the same, nor to grant infeftments of 'liferent or annual rent out of the same, nor to contract debts, 'nor do any other fact or deed whereby the same or any part 'thereof may be adjudged, apprised, or any ways evicted from 'them, or any of them, except so far as they are empowered in 'manner after mentioned.' There was also a special prohibition against granting leases in these terms: 'And that the said Charles 'Douglas, nor the other heirs of tailzie above specified, shall not 'set tacks nor rentals of the said lands for any longer space than 'the setter's lifetime, or nineteen years, and that without dimi-'nution of the rental, at the least at the just avail for the time.' These prohibitions were fortified by irritant and resolutive clauses. By the irritant clause it was declared, that 'all such 'facts, deeds, and debts committed, done, or contracted contrary 'hereto, with all that may follow thereon, shall be in themselves 'void, null, and of no force, strength, and effect, such like 'as if the same had never been done, contracted, nor committed, 'in so far as concerns the said earldom, lands, baronies, and 'others above rehearsed, which, nor no part thereof, shall be any 'ways affected or burdened therewith, in prejudice of the said 'heirs of tailzie and provision above specified, appointed to suc-'ceed by virtue of these presents, which are made and granted 'sub modo, and with and under the provisions above specified, 'and no otherwise.'

In virtue of this entail, William Duke of Queensberry succeeded to the estate in 1778. He had adopted the practice of letting the lands for payment of a rent, with a grassum; and, prior to 1794, he had usually allowed the leases to expire, and then renewed them at the former rents, and for such additional grassum as could be obtained. In 1796, he formed a plan, by

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which he resolved to grant leases upon a different system. With this view he entered into arrangements with the tenantry, by which, for large ready money payments, and for the former rents, he bound himself to grant leases for 19 years. These leases were divided into four classes,—first, leases which he granted to the tenants in the tacks which were current, or to strangers, under the burden of the current tacks, and with obligations, in both cases, to grant a new lease for 19 years annually during the Duke's life;—second, leases which he granted under a similar obligation to renew when those current expired;—third, leases without an obligation to renew, but where the current leases were not near their natural expiration;—and, fourth, leases without an obligation to renew, and not granted till the previous leases had expired. On the death of the Duke, his executors brought an action of declarator, to have it found that the leases so granted were effectual, and within his powers as heir of entail. In defence against this action, the Duke of Buccleuch (who had succeeded to the estate) pleaded that the leases were ineffectual; first, Because they were not proper leases, but complex contracts, conveying away the lands for a term of years, partly for yearly rent, but in great part for a grassum or price payable to the Duke himself;—second, Because they were granted for a space longer than the setter's lifetime, or 19 years, the obligation of renewal being part of the contract, and elongating the term of possession for which the lands were let;—third, Because the leases were not let for the just avail, but for a rent known or intended to be inadequate, and for less than that avail;—fourth, Because they were let with diminution of the rental actually existing previous to letting them, the Duke having previously, by grassums, received an additional rent for the lands beyond that stipulated in these leases. The Court of Session, on the 7th of March 1816, decerned in terms of the summons of declarator.* The Duke of Buccleuch having appealed, the House of Lords, on the 10th of July 1817, 'Ordered that the said cause be remitted back to the 'Lords of Session in Scotland, to review generally the interlocu-'tor complained of in said appeal; and, in reviewing the same, 'the said Court is to have especial regard to the fact, that this 'action of declarator is brought by the executors and trust-dis-'ponees of the late Duke of Queensberry as such against the 'heir of tailzie, seeking thereby to establish unconditionally all 'and each of the numerous tacks mentioned in the summons, and

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* See Fac. Coll. Vol. 1815-1819, No. 44.

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'granted by the said Duke in the manner and in the circumstances mentioned in the pleadings, and is not instituted by any of the persons to whom such tacks are granted, nor are any of such persons parties thereto: And it is further ordered, that the said Court do reconsider the defences of the said appellants, and especially whether, in a question between such parties, the leases so granted ought or ought not to be considered as granted in execution of such device as is alleged in the said defences; and if so granted, whether the same ought to be considered as granted in fraud of the entail, and are or are not such as ought, on that account, or any other account, appearing in the pleadings, to be held invalid, or not to be sustained at the instance of the pursuers, as representing the said Duke; and in reviewing the interlocutor complained of, the said Court do particularly also reconsider what is the legal effect of the word 'dispone,' contained in the deed of tailzie of the 26th of December 1705, with reference to tacks of the lands expressed in the said deed: And further, do reconsider what is the effect, with reference to such tacks, of all other parts of the said deed which relate to tacks, having regard to the endurance of such tacks, and to the fact of grassums being or not being paid upon the granting thereof, or paid upon the granting of former leases, and to all other terms and conditions upon which such tacks were made, and to the effect of such grassums, terms, and conditions in reducing the amount of the clear rent receivable by the heir, and to all the circumstances under which the appellants have alleged, and it shall appear that the late Duke of Queensberry granted such tacks: And it is further ordered, that the Court to which this remit is made do require the opinion of the Judges of the other Division in the matters and questions of law in this case in writing; which Judges of the other Division are so to give and communicate the same; and after so reviewing the said interlocutor complained of, the said Court do and decern in this cause as may be just.'

After having complied with this order, the Court, on the 5th of February 1818, adhered to their former interlocutor, and decerned and declared in terms of the original libel.* Against this interlocutor the Duke of Buccleuch entered an appeal, but having died during its dependence, it was followed forth by the tutors of his son; and the House of Lords, on the 12th of July 1819, 'Ordered and adjudged that the said interlocutor complained of

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* See Fac. Coll. Vol. 1815-1819, No. 151.

July 2. 1821. 'in the said appeal be, and the same is hereby reversed. And 'the Lords find, That William, late Duke of Queensberry, 'had not power, by the entail founded on by the parties in this 'cause, to grant tacks for terms of years, partly for yearly rent, 'and partly for a price or sum paid to the Duke himself; and 'that tacks granted by him upon surrender 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 prices or sums paid to the Duke; and that 'such tacks ought not to be considered as let without diminution 'of the rental, or at the just avail, and are therefore to be consi-'dered as between the persons claiming under the entail, as tacks 'which he had not power to grant by such entail: And it is fur-'ther ordered, that with this finding the cause be remitted back 'to the Court of Session in Scotland, to do therein as shall be 'just and consistent with this finding.'

When this judgment came to be applied, the executors contended, first, That although it was thereby fixed that the late Duke had not power to let tacks partly for a sum or price payable to himself, yet it was not found that he had by the tacks in question contravened a prohibition, and incurred a forfeiture; and, secondly, Supposing the judgment to mean that a contravention had been incurred, it was competent to them and to the tenants to purge the irritancy, by converting the grassum in each lease into an annuity for the period of the lease, or for the period to which it was prorogated, and to pay this as an additional rent from the time of the late Duke of Queensberry's death, with interest from the respective terms at which it became due, and in future till the expiration of the lease. The Court having, on the 29th of February, and 6th July 1820, assoilzied the Duke of Buccleuch from the declarator,* the Executors entered an appeal, on the ground chiefly, that supposing an irritancy had been incurred, yet it was still competent to them to purge it in the mode above proposed; and that this could not be barred by the death of the contravener. In support of this they contended, that no third party can lose his right in any case by virtue of an entail, except by the direct operation of a resolutive clause forfeiting the right of the heir of entail, granter of the right; that, therefore, in cases where the heir of entail contravener is dead, and where, con-

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* See Fac. Coll. No. 49. from which it appears that the Court unanimously held, 1. That the leases fell under the irritancy of the entail; and, 2. That purgation was both inadmissible and impracticable.

sequently, there can be no declarator of forfeiture, nor actual forfeiture; nevertheless the granter of such deed must be held to have forfeited his estate in the act of granting the right which is voided; that there cannot be a process of reduction of such deed, without its involving in principle a declarator of irritancy; and that it is competent in such process to purge the irritancy by a modification of the deed granted, and which is only objectionable on the ground of excess of power. To this it was answered, 1. That this being simply a process of declarator relative to the validity of the leases, and these having been found to have been deeds of contravention, and therefore invalid in terms of the irritant clause, nothing farther could be done than to pronounce decree of absolvitor; 2. That as the Duke, who was guilty of the contravention, was dead, no forfeiture could be declared against him; and, 3. That although it was competent where a party, having a power to do a certain act, exceeded that power, to restrain the act to that which was lawful, yet this was not purgation, but a restriction to the extent that the power was lawfully exercised; that the leases in question had been declared to have been altogether ultra vires of the late Duke; that they were therefore utterly null; and that being so, it was not competent, under the name of purgation, so to arrange matters, as, in truth, to make new bargains between the parties. The House of Lords 'Ordered and 'adjudged that the appeal be dismissed, and the interlocutors 'complained of affirmed.'

Appellants' Authorities.—1503, c. 91; Queen's College, May 25. 1542, (7934); 1. Craig, 13. 18; Mack. Ob. 1567, c. 10; 2. Stair, 8. 19; Price, July 6. 1660, (not rep.); 3. Ersk. 8. 29.

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

(*Ap. Ca. No.* 37.)