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The YORK BUILDINGS COMPANY, and their }
 Creditors, - - - - - } *Appellants;*
 JAMES FERGUSON of Pitfour, Esq. - - - - - } *Respondent.*

THE YORK
 BUILDINGS CO.
 &c.
 v.
 FERGUSON.

House of Lords, 21st March 1780.

SALE OF LANDS—WADSET—DECREE OF SALE.—The York Buildings Company purchased the forfeited estate of the late Earl Marischall, together with the right of redemption of the wadsets and superiorities thereof. There were two wadsets on the lands of Clerkhill and Downieshill, being part of the Marischall estate. The Marischall estate, along with others, was afterwards let on lease to Sir Archibald Grant and Mr. Garden; and were thereafter ordered to be sold by Act of Parliament, as so let on lease. Neither the articles as to the lease, nor the Act of Parliament, mentioned any thing about the wadset lands of Clerkhill and Downieshill, although the prepared state and scheme of the rental included them in the computation of the rental and price at which they were to be exposed. The purchaser insisted that they were included, and ought to go into his charter, as the decree of sale conveyed to him “all and hail the late Earl Marischall’s lands in the county of Aberdeen, except certain parts therein mentioned.” Held, that the right of reversion was not included in the sale, and still belonged to the York Buildings Company.

The question here was, Whether the right of reversion of the lands of Clerkhill and Downieshill, which were granted in wadset, belonged to the respondent, the purchaser of part of the estate of Marischall, or to the appellants the York Buildings Company, who sold that estate after they had purchased from the Government the whole forfeited estates, and, among the rest, the estate of the Earl Marischall.

In September 1639, the Earl Marischall had disposed in wadset to Robert Martin, the lands of Clerkhill, redeemable on payment of 6000 merks, (£333. 6s. 8d.) with a lease for the space of seven years, after the redemption at the rent of 11s. 1 $\frac{4}{8}$ d. yearly. There was an obligation to infest.

By another contract of wadset, of this date, the Earl’s predecessor wadsetted and disposed to Thomas Robertson, the lands of Downieshill, redeemable on payment of 6000 merks, with a back tack for eleven years, on payment of a small elusory rent. There was an obligation to infest in said lands by feu charter, containing precept of sasine, to be holden of the said Earl, his heirs and assignees. April 22, 1600.

In the sale to the York Buildings Company, the right of

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redemption and superiority of these wadset lands was conveyed. The minute of sale set forth, “Whereas certain parts of the said parcels are in possession of creditors, by virtue of mortgage or proper wadset, which wadsets are redeemable upon payment of the several sums,” &c. and then the minute proceeds to convey these. The York Buildings Company estates were sold under Act of Parliament. The estate of Marischall, along with others, was at the time leased by the Company to Sir Archibald Grant and Alexander Garden.

The whole of the Marischall estate was purchased by the late Earl Marischall, who, at sametime, disposed the 13, 14, and 15 lots to the late Lord Pitfour, the respondent’s father, and the decree of sale went out in his name, for the part he purchased. Lord Pitfour thereafter obtained a charter upon the decree of sale 1767. And the present question arose, upon his proposing to include in this charter, the lands of Clerkhill and Downieshill, as a part of the purchased lands. The Barons of Exchequer ordained these lands to be inserted in the charter.

The appellants, therefore, brought the present declarator and reduction before the Court of Session against the possessors of the wadset lands of Clerkhill and Downieshill, to which the respondent sisted himself as a party, and claimed the reversion of these wadsets, as being comprehended in the decree of sale; the appellants also brought a reduction of this decree of sale and declarator of their right to these reversions. The lands in question lay in Aberdeen. The decree of sale was in these words:—“All and hail the lands which belonged to the late Earl Marischall, lying in the parishes of Langside and Old Deer, and salmon fishing of Ugie; and also all and hail the said Earl’s lands, lying in the parish of St. Fergus, and county of Banff, and a house in Newburgh, and sicklike; *all and hail the said late Earl’s lands in the counties of Aberdeen and Banff, being the hail subjects contained in the three first lots or parcels of the said estate of Marischall, except the lands of Adiel, in the parish of Strichen, and house in Aberdeen; all lying, bounded and described in manner mentioned, in the act of roup, and original and subsequent rights and infestments of the same, to pertain and belong to the said James Ferguson, his heirs and assignees, heritably and irredeemably; and in like manner the said Lords adjudged and decerned and declared, and hereby ad-*

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“ judged all and hail the said late Earl Marischall’s lands
 “ of Dunnotter, Lungair, Uras, and others, in the county of
 “ Kincardine, with the foresaid lands of Adiel, in the parish
 “ of Strichen, and the foresaid house in Aberdeen, as the
 “ said whole lands and others foresaid, were formerly pos-
 “ sessed by Sir Archibald Grant and Alexander Garden of
 “ Troup, in virtue of a lease thereof from the Governor and
 “ Company of Undertakers for raising the Thames water in
 “ York Buildings, and all lying, bounded and described in
 “ manner mentioned in the act of roup and original and sub-
 “ sequent rights and infestments of the same, to pertain to
 “ the said George Keith, late Earl Marischall, his heirs and
 “ assignees, heritably and irredeemably.”

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The lands of Clerkhill or Downieshill were not expressly mentioned in the lease to Sir Archibald Grant and Alexander Garden, nor in the act of Parliament authorizing these lands to be sold. They were not also expressly mentioned in the proceedings in the decree of sale. The only evidence adduced of this was, from a state of the rental of these wadsets, and an abstract in which these entered into the calculation of the rental of the late Earl Marischall’s lands in the shires of Aberdeen and Banff. From the accountant’s scheme and state there appeared the following:—“ The ap-
 “ portion falling on the lands which formerly belonged to
 “ the said late Earl Marischall, lying in the counties of Aber-
 “ deen and Banff, *formerly wadset, now redeemed by the*
 “ *Company, £384. 17s. 9d.*”

The agreement, to give a lease to Sir Archibald Grant and Alexander Garden, bound the company to grant them, their
 “ heirs, executors, and assignees, of the estate of Pitcairn,
 “ and also of the estates of Panmure, Southesk, and Ma-
 “ rischall, excepting from the three last mentioned estates
 “ the following lands, which are already overleased, viz. the
 “ lands of Bellhelvie, part of the estate of Panmure, leased
 “ to Provost Fordyce; the lands of Arnhall, part of the es-
 “ tate of Southesk, and such parts of the lands of Fetteresso
 “ and Dunnotter, being part of the estate of Marischall,
 “ as are leased to Provost Gordon and Provost Stewart;
 “ the lands of Leuchars and Leuchars Forbes, leased to
 “ Professor Gregory; and the lands of Gavel, part of Maris-
 “ chall, leased to George Hay.”

The act of Parliament 3 Geo. III. only authorized the sale of such parts of the Company’s estates as were leased to Sir Archibald Grant and Mr. Garden.

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The appellants contended that neither the act of Parliament nor the agreement in regard to the lease, nor the proceedings in, and decree of sale, comprehended the wadsets in question, while the respondent maintained that they did.

The Court unanimously pronounced this interlocutor:—
“ On report of Lord Covington, Ordinary, the Lords find,
“ that the right of reversion of the two wadsets of Clerkhill
“ and Downieshill, does not fall under the sale of those parts
“ of the estate of Marischall, sold in virtue of the act of
“ Parliament of the third of his present Majesty ; and that
“ the defender, Mr. Ferguson, has no right to the reversion
“ of that wadset ; and reduce the decree of sale in favour
“ of Lord Pitfour, father to the defender, in so far as it may
“ extend to the said wadset rights, or to the reversions of
“ these wadsets ; find the right of reversion remains in the
“ York Buildings Company, and remit this cause to the
“ Lord Ordinary to proceed accordingly.”

On reclaiming note presented by the respondent, the
Mar. 3, 1779. Lords pronounced this interlocutor:—“ Find that the pe-
“ titioner has right to the reversion of the two wadsets of
“ Clerkhill and Downieshill ; repel the reasons of reduc-
“ tion ; assoilzie the petitioner, and decern.”

Against this last interlocutor the present appeal was brought.

Pleaded for the Appellants.—The respondent has not proved that the subjects he now claims were comprehended in the act of the 3d of King Geo. III. under which he must derive his title. On the contrary, this act, which directed a *partial* not a *total* sale of the Marischall estate, *expressly confines* the sale to *such parts* of *that* and other estates as were leased to Sir Archibald Grant and Mr. Garden. The right of reversion of the two wadsets of Downieshill and Clerkhill could not in its nature be the subject of a lease, and was not in fact leased to Sir Archibald Grant and Mr. Garden. The best evidence of this is the depositions of the lessees themselves, and who were men of business, and attentive to their interests, and who have sworn that they were in possession of the whole subjects comprehended in their leases, with certain exceptions which they particularize, but among the exceptions these wadsets do not occur. And they certainly never bargained for these wadset lands, or ever, during the 29 years of their lease, thought of setting up the present claim of the respondent. No power or authority having been given to the Court of Session by the

act of Parliament to sell these rights of reversion, they could not act ministerially in ordering them to be sold. 2. Besides, there is no evidence that the Court had under their consideration, or intended to sell the reversion of Clerkhill and Downieshill. The description in the *prepared state* of the lots supposed to contain them, viz. "The lands *formerly wadset, now redeemed by the Company*, is exclusive of and never can comprehend the wadsets in question, which were *then and are still unredeemed*. However broad, therefore, the words of the extract of the decree of sale may be, they cannot avail the respondent, as that decree of sale cannot go beyond the limits of its warrants. This decree, and the act of Parliament having not authorized the sale of the reversions in question, the interlocutor ought to be reversed, and a return made to the interlocutor of the whole Lords of 1st July 1778.

Pleaded for the Respondent.—It is an admitted fact that the York Buildings Co. purchased from the Government both the right of redemption and the superiority of these wadset lands, and that the Company uplifted the quit-rents or feu-duties payable from the same. Now there was nothing incompatible in making that the subject of a lease. It is a point established by the law of Scotland, that the profits of a wadset, holden of the reverser, are proper objects of lease. 2. The articles of agreement 11th November 1728, between the Company and Sir Archibald Grant and Mr. Garden for the lease to them of the estates of Pitcairn, Panmure, Southesk, and Marischall, under certain exceptions, it was specially provided that the lease to be granted of the lands, *with the teinds and other pertinents*, should be particularly enumerated under the exceptions of the lands of Dunnotter, Fetteresso, as in other leases of the like nature. No formal lease was executed, but the articles were binding on both parties, and possession followed. These articles let on lease the WHOLE estate of Marischall, under certain exceptions enumerated. Whatever was not excepted fell within the articles. No exception is made of the wadsets in question, and therefore it must be held to have been comprehended within these articles of lease; and if the lessees of the Company did not uplift the quit-rents and feu-duties derivable from these wadsets, they might have done so, as it was entirely in their power so to do. 3. It is further apparent that the act of Parliament intended the estate to be sold as a *universitas*, and not that any portion or parcel should be reserved to the Company. And the act

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expressly directs the same to be sold "as the same are, have, or *might* have been enjoyed or possessed under the said lease. 4. The same intention to include these wadsets in the sale is apparent in the proceedings of the Court of Session, in directing that sale, and the upset prices at which the wadsets were to be sold, to be increased by the sum of £945, among which wadsets were that of Clerkhill and Downieshill. But further, as the superiority of these wadsets is included in the respondent's purchase, the right of reversion must follow; a point established by the law of Scotland, and particularly by the late decision *Lady Frances Erskine v. Lord Fife*.

After hearing counsel, it was

Ordered and adjudged that the interlocutors of 3d of March 1779 be *reversed*; and that the interlocutor of 1 July 1778 be affirmed.

For Appellants, *Henry Dundas, Ar. Macdonald*.

For Respondent, *Al. Wedderburn, Alex. Wight*.

Not reported in Court of Session.

GEORGE HALDANE, Esq. of Gleneagles, *Appellant*;
The Hon. JOHN ELPHINSTON of Cumber-
nauld, Assignee of the now deceased } *Respondent*.
GEO. KEITH, late Earl Marischall,

House of Lords, 11th April 1780.

JURISDICTION—*RES JUDICATA*—INTEREST.—A claim was preferred to the Barons of Exchequer, acting under a particular act of Parliament, and the amount of the claim adjusted, but the Barons disallowed interest thereon: An appeal was taken to the House of Lords, and dismissed as incompetent: In a new action brought before the Court of Session, held that it was competent to the Court to entertain the question, and objection to the competency repelled; and decerned for the amount of the claims, but without interest. Affirmed on appeal.

For the facts of this case *vide ante* p. 443.

The appeal then taken to the House of Lords from the Court of Exchequer was held to be incompetent; the consequence was, that no judgment was given upon the merits,