1819.

MONTGOMERY, &c. *v.* THE EARL OF WEMYSS.

[Alternative Leases—Edstoun.]

SIR JAMES MONTGOMERY of Stanhope, Bart.; THOMAS COUTTS and Others, Trustees and Executors of the late William, Duke of Queensberry, . . } *Appellants;*

The Right Hon. FRANCIS CHARTERIS, Earl of Wemyss and March, . . . *Respondent.*

House of Lords, 12th, July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWERS OF LEASING—GRASSUMS—INDEFINITE TERM.—In the Neidpath entail, there was no express prohibition against granting leases or taking grassums, but there was a prohibition to "alienate" the estate or any portion of the lands. A lease was granted for fifty-seven years, at a rent of £155, with a grassum paid of £300. Some time thereafter this lease was renounced for another lease for thirty-one years, or for 29, 27, 25, 23, 21, or 19, for whichever of these periods, the Duke might be found to have power to grant it. The Court would have sustained the lease for twenty-one years, but held that as a grassum had been paid for the lease renounced, the new lease must be viewed as a substitute for the former lease, and subject to the objections pleadable against it, and that the conversion of any part of the rent into a sum instantly paid, was an alienation *pro tanto*, and struck at by the prohibition against alienation. In the House of Lords held that tacks granted partly for rent reserved, and partly for rent paid down, were not to be considered as leases let without evident diminution of the rental.

Under the circumstances set forth in the previous appeal, the late Duke of Queensberry let leases of lands for alternative periods of duration.

In 1807, Robert Symington renounced his lease of the farm of Edstoun, and obtained a new one "for the space of "thirty-one years, from and after the term of Whitsunday "1807, which is hereby declared to have been the term of the "said Robert Symington's entry, notwithstanding the date "hereof; declaring always, as it is hereby expressly declared, "that in case it shall be found that the said William, Duke "of Queensberry, is prevented by the entail of his Grace's "estate of March, from granting a lease of the foresaid "subjects for the above-mentioned period of thirty-one years, "then, and in that case, this lease is granted for, and shall "subsist and be understood to have been granted for the

" term of twenty-nine years, twenty-seven years, twenty-
" five years, twenty-one years, or nineteen years from the said
" term of 1807, whichever of the said several terms of Whit-
" sunday 1807 (short of the aforesaid period of thirty-one
" years), the Court of Session or House of Lords shall find
" to be the longest period of those above specified, for which
" the said Duke has power to grant a valid lease of the fore-
" said subjects.

When he obtained this lease, he had a lease of the same farm for fifty-seven years from Whitsunday 1792. The rent stipulated on that occasion, was £155, 7s., and the grassum paid was £300. This lease had, therefore, a great many years to run, when it was renounced for the new lease, and the rent under the new lease was the same as under the previous; but no grassum was paid. There was also a separate contract, by which the Duke agreed, if the Wakefield case was reversed, to continue the tenant on the original footing.

The respondent brought an action of reduction to reduce those leases, and, in particular, the lease of Edstoun, which is the subject of the present appeal. This action came before the Lord Ordinary, Hermand, and his Lordship pronounced this interlocutor:—" Having advised the condescendence and June 14, 1814.
" answers in the process of declarator, and also the conde-
" scendence and answers in the process of reduction at the
" instance of the Earl of Wemyss and March, against Robert
" Symington, and whole processes, conjoins this process with
" the declaratory action between the parties, depending before
" the Lord Ordinary, in so far as the declarator is applicable
" to the present case: Finds it stated in the condescendence,
" and not denied in the answers, that the whole farms, whereof
" the leases are now under reduction, were formerly let by
" the late Duke of Queensberry for fifty-seven years, and with
" an exception stated by the defenders, of the lands of
" Flemington and Crook, under burden of grassums, the
" interests of which bore a considerable proportion to the
" yearly rent: Finds it admitted in the answers, 'That in
" ' or about the year 1807, many of the tenants holding
" ' leases for fifty-seven years, renounced their leases and
" ' took new ones for periods equal to the terms unexpired
" ' of the old ones, but without paying any grassums for
" ' their new leases; and that soon afterwards, the tenants
" ' of all the farms as to which the present discussion relates,
" ' whether they had got new leases of the nature above

1819.

MONTGOMERY, &C. *v.* THE EARL OF WEMYSS.

" ' mentioned, or had continued to possess on their fifty-seven
" ' years' leases, executed renunciations, and accepted of
" ' existing leases, for which they paid no grassums ;' as also,
" ' That when the tenants renounced their former leases, and
" ' took the present ones, contracts were entered into betwixt
" ' them and the Duke's commissioner, Mr Tait, as stated in
" ' the condescendence :' Finds, that although it be stated
" by the respondent, that, depending on a contingency not
" explained, but said not to have existed, these contracts
" never were acted upon, yet they afforded evidence to show
" that the new leases were, with the exception of the term
" of endurance, a *surrogatum* or substitute for those which
" had been renounced : Finds that the rents payable under
" the renounced leases, must of necessity have been, from
" the inconvenience and loss arising to the tenants from the
" advance of money, a consideration of the doubts of the
" powers of the lessor, held out in the contracts, and other
" circumstances, have suffered a greater reduction than the
" amount of the interest of the sums paid in name of gras-
" sums : Finds, that besides the prohibition of alienation,
" which in this Court and in the House of Lords, has been
" found, in questions upon the entail now under consideration,
" to strike at leases exceeding the usual term of endurance,
" that entail contains a clause, which, though placed in con-
" nection with a permission to the heirs of entail to grant
" leases for their own lifetimes, or the lifetimes of the re-
" ceivers, is to be held as a limitation on their power, ' the
" ' same being always set without evident diminution of
" ' rental :' Finds that the rent payable under the renounced
" leases, diminished, as it was, by the payment of grassums,
" cannot be considered as constituting a fair rental, such as
" is implied in the above clause : Finds, that upon these prin-
" ciples, there is no material difference between the lease of
" ninety-seven years, and lease of any shorter period : Finds it
" unnecessary to give any determination upon the effect of
" the clause reducing the endurance of the lease from thirty-
" one years progressively to nineteen years, or to the longest
" period which the Court of Session or House of Lords may
" find to be within the powers of the granter : Finds that the
" lease under reduction was granted with evident diminution
" of the rental ; repels the defences in the declarator, sus-
" tains the reasons of reduction, repels the defences therein,
" and reduces, decerns, and declares accordingly."

Against this interlocutor a petition was given in for the

appellant, Robert Symington, the tenant, and also for the executors of the Duke of Queensberry, who had hitherto taken the sole charge of the defence. The Court ordered a hearing in presence; and thereafter their Lordships, with great difference of opinion, pronounced the following interlocutor: "The Lords having advised the said reclaiming Feb. 3, 1815.
" petition, and having heard the counsel for the parties
" at great length, in their own presence, on the whole pleas
" and points in the cause, they find, that a tack of the
" lands and farms of Edstoun was granted to the petitioner,
" to commence at Whitsunday 1792 for the period of fifty-
" seven years at the rent of £155, 7s., for a fine or gras-
" sum of £300: Find it admitted in the petition, that
" doubts having been entertained of the validity of the above
" lease, the petitioner, along with most of the other tenants
" on the estate, renounced the said tack, from and after
" Whitsunday 1807, and obtained a new tack at the same
" rent, for thirty-one years, or for several alternative periods
" down to nineteen years, according as the Duke should be
" found to have powers to grant tacks under the entail:
" Find, that this current tack must be held to be merely a
" substitute for the former tack, and subject to any objec-
" tions on the ground of grassum or otherwise, which were
" competent against the tack renounced: Find, that the con-
" version of any part of the rent, which at the time might
" have been obtained for the farm, into a price instantly
" paid, was to the manifest prejudice of the succeeding heir
" of entail, and operated as an alienation *pro tanto* of the
" uses and profits of the estate; and, therefore, find that the
" said tack is struck at by the clause in the entail, prohibit-
" ing alienations: Find, that in estimating what was the rent
" paid under the former lease, the value of the grassum paid at
" the commencement of the former lease ought to have been
" added, and that this not having been done, the rent pay-
" able under the new lease was in evident diminution of the
" rental: Find, that the whole circumstances under which
" the tack was granted, taken in connection with the rela-
" tive contract entered into between the Duke of Queens-
" berry and the petitioner and other tenants, again to pro-
" long the tack to fifty-seven years, or even ninty-seven
" years, if found competent, together with the fact, that all
" the tenants renounced their tacks under similar circum-
" stances and conditions nearly at the same time, do indicate
" a fixed plan on the part of the Duke to defeat and defraud

1819.

MONTGOMERY, &c. *v.* THE EARL OF WEMYSS.

" the entail, so far as possible, and that the petitioner, and " the other tenants did lend themselves to, and co-operate " with the Duke in the said fraudulent scheme: Find, that " the tack in question, and others now before the Court, " were not entered into in the fair, rational, and husband-like " administration of the estate, but for the purpose of fore- " stalling the rents and profits thereof, which would other- " wise have belonged to succeeding heirs of entail, and " thereby enriching the Duke at their expense, by enabling " him to draw from the estate more than the value of his " own liferent interest in the fruits of it: Find, that the per- " missive clause in the entail to grant tacks for the lifetime " of the granter or receiver, does not bar the heir in possession " from granting tacks for any definite period, which does not " amount to alienation, and that the tack in question might " therefore have been restricted to the period of nineteen " years, being the period then, and now, most usual in the " practice of the country, and analogous to the period fixed " by the statute of the 10th of Geo. III., where no improve- " ments are stipulated: but, in respect that the tack is other- " wise objectionable on the grounds above specified, and that " the tenants on that account, have no claim in equity in " support of their tacks, find, that the said tack cannot be " restricted to any shorter period than that for which it was " originally granted: Therefore, in the process of declarator, " repel the defences, sustains the reasons of reduction, and " reduce, decern, and declare accordingly."

Nov. 17 and 29, 1815.

On reclaiming petition, the Court further pronounced this interlocutor: " Find, that the tack in question, if it had not " been objectionable on the several grounds specified in their " former interlocutor reclaimed against, might have been " sustained as valid and effectual for the restricted endurance " of twenty-one years, as the period then and now most " usual in the practice of the country; and under this varia- " tion, adhered to their said former interlocutor, and refuse " the desire of the said several petitions; and having also " advised the counter petition of the Earl of Wemyss, they " refuse the prayer of the same."

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

Pleaded for the Appellants.—1st, The lease of Edstoun not being granted in contravention of the prohibitions contained in the Neidpath entail is not exposed to challenge on account of the grassum taken by the Duke of Queensberry.

2d, The lease was granted for a definite term, namely, for the longest of six specific periods, to which the Court of Session, or this Honourable House, should find the Duke of Queensberry's power to lease extended.

3d, The lease ought to be sustained for thirty-one years, being a period far within the power of his Grace the Duke.

Pleaded for the Respondent.—1st, The alleged lease of Edstoun is, in its own nature, an incomplete agreement, and ineffectual in law, from the want of any definite stipulation in respect to its endurance.

In this case, the contract entered into between the parties was for a lease of no definite period of endurance, but which, in a certain event, might be reduced as low as nineteen years, and in another raised as high as ninety-seven, and which might be found good for any number of the numerous years between these periods. For, in this branch of this discussion, the respondent is entitled to look to the contract at the time it was entered into; he is not bound to look merely to the present state of matters, abstracting from the contract accompanying the lease which is now nugatory, though even if that be done, the agreement of lease appears to be for thirty-one years, or a less number down to nineteen, or for such other number as it should appear by a decision of a Court of law, that it was within the power of the Duke to give.

Such being its nature, it does not appear that it was binding in law, even as a completed contract. It wanted one of the essentials even of an agreement to grant a lease. For even an agreement of that sort must be void in law, unless the term of endurance of the lease be fixed by the parties in some complete way. Here, it is said, that the termination of the lease is to be fixed by the Court of Session, subject to the review of the House of Lords. That that Court is to be arbiter between the parties, and to say how long they are bound to each other. There seems to be very great doubt whether the Court could accept of such a submission; whether it would be decent and becoming for it to become arbiter for completing transactions which the parties ought to have completed themselves. It is the duty of courts of law to enforce the fulfilment of contracts; but it is not their duty to make contracts, if the parties have not made them. Where parties have contracted, a court of law will explain what is ambiguous, and enforce fulfilment of what is clear, but it will not supply any essential, which is defective, from the parties themselves not coming under an engagement upon that par-

1819.

MONTGOMERY, &C. v THE EARL OF WEMYSS.

ticular point. If an agreement to sell an estate were entered into, but no price was fixed, would a court of law compel implement, and fix the price at which the seller must denude and give possession? Nay, if the minute of sale distinctly referred the price to the Court of Session, could the Court accept of this reference, enter into an examination of the lands, and so fix the price? Would it be right to occupy the time of the court of justice, instituted for the purpose of enforcing rights and redressing wrongs, in determining matters of that kind, which it was incumbent on the parties to settle for themselves? Surely not. They will not interfere either to make a contract for the parties or to fill up a blank left unsettled or undetermined by a contract made by them. For such a proposition as the appellant contends for, the respondent has looked in vain for any decision or authority.

2d, But supposing the lease of Edstoun to have been in itself otherwise complete as a real right, it was let for a grassum. *Vide* the argument on this point in Harestane's case.

3d, The lease of Edstoun was, in respect of endurance, not a lease under the power of letting leases on the entail of Neidpath. The power is limited to leases for the lifetime of the granter or receiver; and there is no provision in the lease of Edstoun, by which it could, in any event, or may, be reduced to a lease of that kind. It, therefore, is clearly not in terms of the power. But it has been shown in the Harestanes case, that the general prohibition of alienation in its own nature, and still more, when taken, as it must be, in connection with the permissive clause, must be interpreted to extend to all leases whatever, and to exclude all leases not excepted by the permissive clause.

Journals of the House of Lords.

After hearing counsel upon this appeal, complaining of two interlocutors of the Lord Ordinary, of 14th June and 19th July 1814, and two interlocutors of the Court, and signed the 21st February 1815, and 17th and 29th November 1815. As also upon the answer of Francis Charteris, Earl of Wemyss and March, put into the said appeal: And consideration being had of what was offered on either side in this cause. The Lords Spiritual and Temporal in Parliament assembled, Find, that the said Duke of Queensberry had not power under the entail founded upon between the parties in this cause, to let tacks partly for rents reserved, and partly for sums and prices paid to himself; and that tacks granted upon the renun-

ciation of former tacks which were made partly for rent reserved, and partly for sums and prices paid to the Duke himself, are to be considered as tacks made partly for rent reserved, and partly for sums and prices paid to himself, and that such tacks are not to be considered in questions between the parties claiming under the entail, as let without evident diminution of the rental: and it is ordered, that with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

For the Appellants, *John Leach, F. Jeffrey, J. H. Mackenzie.*

For the Respondent, *Sir Saml. Romilly, Geo. Cranstoun, H. Brougham.*

[Edstoun.]

ROBERT SYMINGTON, Tenant in Edstoun, . *Appellant;*

THE EARL OF WEMYSS AND MARCH, . *Respondent.*

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWER TO GRANT LEASES—GRASSUMS—ISH.—In the Neidpath entail there was no express prohibition against granting leases, or taking grassums, but there was a prohibition to alienate the lands, or any portion thereof. A lease was granted for fifty-seven years, at a rent of £155, 7s., and a grassum paid of £300. This lease, before its expiry, was renounced for a new lease, at the same rent, for the term of 31 years, or 29, 27, 25, 23, 21, or 19 years, whichever it might be held the Duke had power to grant. In a declarator, at the instance of the tenant, held that the last mentioned tack must be held as a substitute for the 57 years lease, and subject to the objections pleadable against it, and, therefore, that the conversion of any part of the rent into a sum instantly paid, was to the injury of the substitute heirs of entail, and an alienation *pro tanto*, and struck at by the prohibitory clause to alienate. In the House of Lords, held that a tack granted for rent partly reserved and partly paid to the Duke, fell under the prohibition to alienate, and was in diminution of the rental.

In 1731, when the late Duke succeeded to his entailed estates of Neidpath and March, as detailed in the preceding appeals, the farm of Edstoun was let for a rent of £83, 10s. In 1756, it was let for £85, 12s. In 1769, it was let for 19 years, at the rent of £149; and a grassum was then paid of £193, 7s. 4d.