in virtue of the powers he enjoyed under the entail, and which was granted without payment of any grassum.

Vide Judgment at the end of next case.

1819.

THE EARL OF WEMYSS v. MONTGOMERY, &C.

[Case of the Tenant; Flemington Mill.]

THE EARL OF WEMYSS, ... *Appellant;*

JAMES MURRAY, ... *Respondent.*

1819.

THE EARL OF WEMYSS v. MURRAY.

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWER TO GRANT LEASES—ISH—GRASSUM—BONA FIDES.—Under the Neidpath entail a lease was granted in 1788, for fifty-seven years, at a rent of £90, no grassum being then paid. It was renounced in 1807, for a new lease for thirty-one years, or for 29, 27, 25, 23, 21, or 19, whichever it might be found the Duke had power to grant it for. The rent stipulated was £93. Held, in respect no grassum was paid, the lease was good for twenty-one years. In the House of Lords, remitted for re-consideration.

James Murray, the tenant under the lease of the three farms of Whiteside, Flemington Mill, and Fingland, granted by the Duke for fifty-seven years, it has been seen, was one of the tenants in whose favour the Flemington Mill farm was granted, in 1807, for thirty-one years, or alternatively, for whichever of the terms of 29, 27, 25, 21, or 19 years, the Court of Session, or your Lordships, should ultimately find the Duke had the power to grant. The rent stipulated being £93, 9s. 1d., the previous rent having been £90, and as that previous rent was acknowledged by the Duke's commissioner to be its full value, there was no grassum paid for it (the grassum of £400 then paid being for Whiteside and Fingland). And the argument he pleaded was as follows:—

Pleaded for James Murray, the tenant.—The lease in question was competently granted by the Duke of Queensberry, in virtue of the powers which he enjoyed as proprietor of the estate, and is struck at by no prohibition or limitation in the deed of entail; and it is farther secured to the respondent by the Act 1449, c. 17. It is, at all events, good for the period to which it has been restricted by the interlocutors appealed from.

Even if, contrary to the heretofore invariable practice, and to the established doctrine of the law of Scotland, the inter-

1819.

THE EARL OF WEMYSS *v.* MURRAY.

locutors of the First Division of the Court of Session, in the other causes before your Lordships, finding that the taking a grassum invalidates the leases, should be affirmed, it is, nevertheless, distinctly in evidence in this cause, that no grassum was given for the present lease of the farm of Flemington Mill. With the grassum given by Bryden in 1769, for the lease relinquished by his representative, Simpson, in 1780, neither James Murray, the respondent's father, nor the respondent, can by possibility, be connected. That the grassum paid when the lease of Whiteside, Fingland, and Flemington Mill, was entered into in 1788, was paid for the two former alone, Mr Tait's letters abundantly prove. In favour of the respondent, the evidence of these letters is unexceptionable; and they establish, beyond a doubt, that the respondent's father expressly refused to give any grassum for the farm, either in 1782 or in 1788, and that the lease, so far as regards Flemington Mill, was granted without grassum accordingly. Had it been otherwise, the respondent would have maintained upon the grounds stated in the cases of Whiteside and Edstoun, that the taking of grassums on entailed estates was in general practice, and completely legal.

2. Mr Tait's letters prove, also, the necessity of reducing the rent from £107 to £90. Every effort was made by the Duke's agent, by public advertisements, and otherwise, to get the highest possible rent for the farm. To hold that the restriction as to diminution of the rent would apply in such circumstances, would be to contend that an heir of entail might, by a fall in the value of agricultural possessions, be altogether incapacitated from letting any part of an entailed estate—a proposition obviously absurd. The rent obtained in 1782 was a *bona fide* rack-rent, and must be the standard by which diminution in the succeeding lease of 1788 must be judged of. No diminution, however, then took place; and the present lease is to be considered not as a new one, but as a substitute for the lease of 1788, fairly entered into in 1807, by both parties.

But the respondent further maintains, that the restriction as to diminution of the rental, applies only to liferent leases: it occurs in no part of the deed of entail, but in the permissive clause, where it is imposed in relation to liferent leases only.

Journals of the House of Lords.

After hearing counsel upon this appeal, and likewise upon the cross appeal of James Murray, tenant in Flemington

Mill. As also upon the answer of James Murray, tenant in Flemington Mill, and the answer of Sir James Montgomery and others, trustees appointed by the late Duke of Queensberry, put into the said original appeal; and the answer of the Right Honourable Francis Charteris, Earl of Wemyss and March, put into the said cross appeal; and consideration being had of what was offered on both sides in these causes, it is ordered by the Lords Spiritual and Temporal in Parliament assembled, that the said causes be remitted back to the Court of Session in Scotland, generally to review the interlocutors therein complained of.

1819.

THE EARL OF WEMYSS *v.* MURRAY.

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

For the Respondents, the Executors and Trustees, *Jas. Moncreiff, John Cunninghame.*

For the Respondent, the Tenant, *Jas. Moncreiff, John Cunninghame.*

[Liferent Leases; Whiteside.]

1819.

MURRAY *v.* THE EARL OF WEMYSS.

WILLIAM MURRAY, Tenant in Whiteside, *Appellant;*
The EARL OF WEMYSS AND MARCH, . *Respondent.*

House of Lords, 12th July 1819.

ENTAIL—PROHIBITORY CLAUSE—POWERS TO GRANT LEASES—GRASSUM.—(1.) 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. There was a permissive clause to grant leases for the lifetime of the heir, or lifetime of the receiver, the same being granted without evident diminution of the rental. In this case, a lease had been granted in 1788, for fifty-seven years, with a grassum paid. That lease, in 1807, was renounced for a lease for the tenant's life, at the same rent as the former. Held, that this latter tack must be held as merely a substitute for the former, and subject to every objection on the ground of grassum, and that, though the new tack was in compliance with the entail as to endurance, yet, as it was affected by the grassum formerly paid, and as it was granted at the same rent, plus the cess and other rogue money, it was to be held as granted in diminution of the rental. Affirmed in the House of Lords. (2.) The tenant pleaded, that whatever