# CASES

## DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

## COURTS OF SCOTLAND,

## 1824.

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EARL OF WEMYSS AND MARCH, Appellant.—*Sugden—Jeffrey.* No. 1.

SIR J. MONTGOMERY, of Stanhope, Bart. Respondent.—
*Moncreiff—Abercromby.*

*Entail—Sale—Statute* 38. *Geo. III. c.* 60. *and* 39. *Geo. III. c.* 6. *and* 40.—*Counsel.*

Held, (affirming the judgment of the Court of Session), 1. That it is not relevant to set aside a sale of part of an entailed estate for redemption of the land-tax under the above statutes, that the Court has committed an error in judgment as to the execution thereof. And, 2. That it is not a valid objection that the lands have been purchased by the Counsel, who subscribed pro forma the petition and other papers necessary for obtaining the authority of the Court for the sale.

Feb. 25. 1824.

1ST DIVISION.
Lord Gillies.

IN the month of July 1799, William, late Duke of Queensberry, presented a petition to the Court of Session, stating that he was 'proprietor and heir of entail in possession of the estates of 'Queensberry, Tinwald, and March, lying in the counties of 'Dumfries and Peebles; and intends, under the authority of the 'Acts of Parliament, 38. Geo. III. c. 60. and 39. Geo. III. c. 6. 'and 40. to sell certain parts of these entailed estates, and to 'apply the prices to the redemption of the land-tax payable from 'them respectively.'

After mentioning that he had not exactly determined what parts of these three entailed estates were most proper to be sold, he suggested, that 'for the purchase of the land-tax of the estate 'of March, the lands of Easter-Happrew, in the parish of Stobo, 'at present let to Charles Alexander at a free rent of L.105,' should be sold. This petition was subscribed as Counsel by the respondent, who was then Mr Montgomery. The amount of

Feb. 25. 1824. the land-tax payable from the March estate was L. 96. 18s. 11d.; and as by the above statutes it was requisite, in order to the redemption of it, that Government stock should be transferred affording a dividend equal to the land-tax and one-tenth more, the total amount necessary to be provided for was stock yielding L. 106. 12s. 9d.

By the 26th section of the above statute, 38. Geo. III. c. 60. it is enacted, that it shall be competent to the heir of entail in possession 'to apply by petition to the Court of Session, stating 'the amount of the land-tax payable out of the said estate, what 'part of the estate it is proposed to sell, and the rent or an- 'nual value of that part of the estate; and praying the Court, 'upon the allegations on these points being proved to the satis- 'faction of the Court, and it being shewn that the sale of the 'part of the estate proposed to be sold will not materially injure 'the residue of the estate remaining unsold, and that the part so 'proposed to be sold is proper (considering all circumstances) to 'be sold for the purpose aforesaid, to authorize such sale to pro- 'ceed in manner herein after enacted; and the Judges of the 'said Court are hereby authorized and required to order such 'petitions to be intimated upon the walls of the Outer and Inner 'House of the said Court, in common form, for ten sederunt 'days; which intimation shall be a valid and effectual intimation 'and service to all intents and purposes, as much as if the said 'petitions had been personally intimated to, or served upon, 'all persons having, or pretending to have, an interest with 'regard to the said estate, as substitute heirs of entail, creditors 'on the said estate, or in any other way or character whatever; 'and such intimation being duly made, the Court shall proceed 'summarily in the matter, and shall authorize the sale of that 'part of the estate which the petitioner or petitioners are willing 'to sell, which the Court thinks ought to be sold for the pur- 'pose above-mentioned, and against the sale of which no suffi- 'cient reason is stated by any person having interest: and the 'extract of the decree of the Court authorizing the sale, shall 'be sufficient authority to the commissioners appointed by this 'Act to carry on the sale in the manner herein after directed.'

By the 28th section it is declared, that property so sold shall be as effectually transferred to the purchaser as if it had been held in fee-simple; and by the 8th section of the 39. Geo. III. c. 40. it is declared, that in addition to the above intimation the application shall be advertised weekly for two weeks in the Edinburgh Gazette. After these advertisements have been made, it

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is enacted by the 9th section, 'that in case such sale shall be 'authorized by the Court, such sale shall be carried on by 'public auction, at such time and on such notices as the Court 'of Session shall from time to time direct: And farther, that 'previous to any sale to be made in the terms and by virtue 'of the powers so required and given by the said Acts, the 'Court of Session shall cause articles of sale to be drawn up, 'in the usual forms required by the law of Scotland for making 'such sale effectual, and whereby the purchaser shall be taken 'bound to pay the price to a trustee, to be named by the person 'or persons in whose name or for whose behoof the said sale or 'sales is or are carried on; and which trustee shall be approved 'of by the said Court, and shall find security to their satisfaction, 'that the sum or sums of money so to be paid to him by the said 'purchaser or purchasers shall be duly and faithfully applied in 'the manner and for the purposes herein and by the said Acts 'enjoined and directed; and farther, that the said trustee, upon 'receipt of the said price or prices, shall be forthwith bound to 'pay the said sum of money into the Bank of England, to be 'there placed to the account of the commissioners for the reduc-'tion of the national debt, to be by them applied in the manner 'and for the purposes directed and specified by the said Act of 'the 38th of his present Majesty; and the receipt of the cashier 'or cashiers of the Bank shall be a full and sufficient discharge 'to the said trustee, and to the said purchaser or purchasers, of 'the sum or sums of money so agreed to be paid by him, her, or 'them, in manner aforesaid; and which purchaser or purchasers, 'upon payment of the sum or sums by the said trustee into the 'Bank of England, as aforesaid, shall be entitled to demand and 'obtain from the said heir of entail, or other person or persons 'in whose name, or at whose instance, or for whose behoof, the 'said sale or sales is or are carried on, such disposition, convey-'ance, or other title to the subjects so sold, containing all usual 'and necessary clauses for rendering complete the right to the 'same in favour of the said purchaser or purchasers, under the 'direction of the said Court.' It is likewise enacted, 'that if any 'action or suit shall be brought against any person or persons 'for any thing done in pursuance of this Act, such action or suit 'shall be commenced within six months next after the fact com-'mitted, and not afterwards.'

The petition of the Duke was intimated upon the walls of the Inner and Outer-House, and an advertisement was inserted weekly for two weeks in the Edinburgh Gazette in these terms:—

Feb. 25. 1824. ‘ Intimation.—That his Grace, William Duke of Queensberry, ‘ has by petition, dated the 9th day of July last, made application ‘ to the Court of Session for authority to sell certain parts of the ‘ entailed estate of Queensberry, Tinwald, and March, situated in ‘ the counties of Dumfries and Peebles, for the purpose of redeem- ‘ iiig the land-tax payable out of these estates, in terms of the Acts ‘ of Parliament, 38. Geo. III. c. 60. and 39. Geo. III. c. 6. and ‘ 40.—Of which public notice is hereby given to all concerned.’

A proof was then allowed and taken as to the amount of the land-tax,—the rent or annual value of the lands proposed to be sold,—and as to which lands it was most expedient to sell. From that proof it appeared, that the lands of Easter-Happrew had been let on a lease of 57 years at the above rent of L.105; that a grassum had been paid, the annual value of which was estimated at L.11. 14s. $\frac{6}{12}$d., so that the total annual value of the farm was L.148. 6s. $\frac{6}{12}$d.; but as the public burdens amounted to L.39. 17s. $1\frac{5}{12}$d., the free rent was L.108. 8s. $11\frac{1}{12}$d. In calculating the price at which the lands should be exposed, they were stated to be worth 24 years' purchase of the above free rent, making L.2602. 14s. 2d. But from this was deducted the sum of L.207. 2s. 7d. being the amount of the annual value of the grassum for the remaining period of the lease; so that the lands were estimated at the price of L.2395. 11s. 7d. At this price, accordingly, the Court appointed them to be exposed to sale, which, after several advertisements, was done before the Sheriff-depute of the county on the 1st of October 1801; and, after a keen competition between the respondent and Alexander, the tenant on the farm, the respondent was preferred at the price of L.3720, being thirty-four years' purchase including the value of the grassum, or thirty-eight years' purchase without the grassum. On the following day the respondent paid the price to Crawfurd Tait, Esq. writer to the signet, who had been appointed the trustee under the statute, and by him it was remitted to Mr James Chalmer, solicitor in London, who invested it in terms of the statutes on the 20th of the same month, and within four months thereafter the respondent was infeft in the lands. The land-tax, however, was not actually redeemed by the Duke till 1805.

During the course of these proceedings the respondent acted as counsel for the Duke, by subscribing the necessary papers; but it appeared that, till within two weeks prior to the sale, he had no intention of becoming a purchaser.

The Duke of Queensberry died in 1810, and, as the entail

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prohibited alienations, the Earl of Wemyss, who succeeded as heir of the March estate, brought several actions of reduction of leases which had been granted by the Duke on grassums, in which, after a great deal of difficulty, he succeeded in obtaining decree setting them aside as in contravention of the entail.

In the meanwhile, the respondent and the tenant had been allowed to remain in undisturbed possession of Easter-Happrew; but in the year 1819, the Earl of Wemyss brought an action against them, concluding for reduction of the act and warrant authorizing the sale, of the articles of roup, the disposition and the sasine, and also of the lease which had been granted to the tenant.

In support of this action the Earl maintained, that as the lease of Easter-Happrew was illegal, and liable to be reduced, the rent there specified could not be taken as the basis of calculation in fixing the price under the above statutes; that the lands were not only not those which, in all the circumstances, it was most expedient to have sold, but were the very reverse; and that, in carrying through the sale, the statutory requisites had not been observed.

The Lord Ordinary assoilzied the defenders, and the Court, on the 28th of February 1821, adhered.*

The Earl of Wemyss then appealed and pleaded,—

1. That as the lease of Easter-Happrew had been granted in consideration of a grassum for a long period of years, and as it had been decided that such leases were null and void, it was impossible that it could be taken into consideration in estimating the real annual value of the lands; but nevertheless the upset price had been arranged on the footing that it was a good and effectual lease: that even supposing it could be recognized, still the annual value of the grassum ought to have been taken into view in fixing the upset price, whereas it had been rejected; so that the lands had been exposed at a price below that required by the statutes.

2. That, as the respondent had been counsel in the cause, he was disqualified from becoming a purchaser; and, at all events, as he thereby must have been intimately acquainted with all the circumstances, he was identified with the late Duke: and therefore, as the sale was, in the circumstances, a fraud upon the heirs of entail, the validity of which the Duke could not have maintained, so the respondent was liable to the same objection.

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* Not reported.

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3. That the requisites of the statute had not been observed, *first*, Because the petition did not represent the true annual value of the lands,—the rent being calculated from an illegal and void lease, and the value both of the grassum and of a crown vassalage having been kept out of view: *second*, Because the advertisements in the Gazette did not announce in specific terms the nature of the petition: and, *third*, Because the redemption of the land-tax had not been made for several years after the sale.

4. That the lands of Easter-Happrew being situated in the very heart of the estate, while there were others discontiguous which it would have been much more expedient to have sold,—a fact which the appellant was willing to prove,—he was entitled to be allowed that proof, and, upon instructing the fact, to restitution of the lands.

On the other hand it was maintained,—

1. That as the lease at the period of the sale was (like others in the same situation) regarded as perfectly good; and as the statutes did not apply to one kind of lease more than another; and as the purchaser was not required to be aware of the conditions of the deed of entail; and as, at all events, the price realized was capable of producing a great deal more than the true annual value of the lands; it was impossible that the respondent could be affected by the circumstance of such leases being afterwards held to be invalid.

2. That although it was true that the respondent was counsel for the Duke, yet he had merely signed the petitions for leave to sell as a matter of form, without being aware of their contents; and it was proved by documents in process, that he had not contemplated purchasing the lands till after the upset price had been fixed.*

3. That the petition and intimations, and the whole procedure, were precisely in the terms prescribed by the statutes; and as the heirs of entail had at the time made no objection; and as the period for making any complaint was limited to six months; the appellant was not entitled post tantum temporis to insist on any objection in point of form, nor could the respondent be affected by any delay on the part of the Duke in redeeming the

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* It is stated in the respondent's case, p. 8. in reference to the objection of his having acted as counsel, that 'all the Judges of the Court of Session, on the advising 'of the cause, stated explicitly, that the signing of such petitions as that of the Duke 'for leave to sell was a mere form, and that counsel constantly put their names to 'such proceedings without being aware of one word of their contents.'

laud-tax; but, in point of fact, it had been redeemed in due time, and prior to the appellant's succession to the estate. And, Feb. 25. 1824.

4. That it was not relevant to allege that the lands of Happrew were not those which it was most expedient to have sold, and that it was a sufficient answer both to this and the appellant's other objections, that a purchaser could not be affected by any error in judgment committed by the Court of Session in the course of the due execution of the statutes.

The House of Lords 'ordered and adjudged that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

LORD CHANCELLOR.—As I have about ten minutes to spare, I will just give my judgment in that case of Wemyss and Montgomery. It was a case of a sale which was made of part of an entailed estate, being for the redemption of land-tax on other parts of that entailed estate, and likewise for a right to reduce a lease which affected a part of the estate which had been sold, the lease of which had been held to be invalid.

My Lords, it will be within your Lordships' memories, that Acts of Parliament have passed for the purpose of authorizing the sale of particular parts of an estate, which parties could not alienate, for the purpose of redeeming land-tax on other parts; and this took place very frequently in Scotland with respect to entailed estates, and has taken place in England where persons have not had a power of alienating; and the question here is, Whether, under the circumstances of this case, the purchase which had been made by the present Sir James Montgomery, then Mr Montgomery of the Scotch Bar, is a purchase which, under the circumstances stated to your Lordships, can be sustained.

My Lords, being most decidedly of opinion that that purchase cannot be impugned, I might content myself with simply stating to your Lordships, that, in my humble judgment, your Lordships should refuse to reverse the interlocutors complained of; but I am anxious to say a word or two on this case, because it may be necessary in that word or two to distinguish the grounds on which my judgment at least is formed, in this case, from that which affected the case of Vans Agnew.* In that case, it was never meant by any body in this House to say, that if the Court of Session had been executing the Act of Parliament, (on the execution of which the question in that cause depended), that an error in the judgment of the Court of Session in the execution of the Act of Parliament would have affected any purchaser, or any person dealing on the authority of that judgment, such person dealing bona fide. The House there went on these grounds, among

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* See ante, Vol. I. p. 333.

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others, that they did not conceive that the Court of Session was executing that Act of Parliament.

Now, in this case, I have not the slightest difficulty in saying, that the Court of Session was here executing the Act of Parliament under which the land-tax was to be redeemed; and it is impossible to hold, without establishing a doctrine, so full of danger, and so frightful, that nobody can look at it, that if a purchaser purchases under the authority of the Court of Session,—they addressing themselves to the due execution of the Act, and acting according to the powers vested in them,—if it happen that there is a mistake in their judgment, that the purchaser is to be made answerable for that mistake. I am clearly of opinion that cannot be.

Now, my Lords, in this case, we must hold that the lease of Alexander the tenant was a lease that could not have been held valid between the heirs of entail and the tenant; but at that period a lease such as this was understood to be, and certainly was, in this case itself, understood by the Court of Session to be a valid lease. They sell, therefore, after ascertaining the rent according to their notion,—they sell, after ascertaining the rent in the manner in which the Act of Parliament directed the worth and value of the property that was to be sold to be estimated; and if, in point of law, the Court of Session did mistake, it is impossible to inflict the consequence of that mistake on the purchaser. It was very ingeniously put, I think, by Mr Sugden, who asked, What if the tenant himself had bought this estate? What if Alexander had bought this estate, and had paid the price for it, of course deducting, as Sir James Montgomery in fact deducted, the value of this grassum? Why, my Lords, if Alexander the tenant had bought the estate under the authority of the Court of Session, exercising its judgment in the manner the Act of Parliament directed, that tenant would have been, as I think Sir James Montgomery is, safe in making the purchase.

My Lords, there is another reason which has induced me to say, rather contrary to your Lordships' practice, a word on this subject, which is this, that it has been attributed to the present Sir James Montgomery, then Mr Montgomery at the Bar, that he acted with a want of good faith in this proceeding;—always distinguishing, as we are in the habit of doing, that by fraud we do not mean that sort of malpractice which is denominated fraud out of Courts of Justice,—but that Mr Montgomery happened to be at that time a gentleman at the Bar, that he was consulted, or framed some petition, or looked at some of the pleadings that took place in the course of this transaction.

My Lords, as this sort of distinction between fraud in Courts, and fraud out of Courts, sometimes may be misunderstood out of Court, I do feel extremely anxious to say, that there does not appear to me, and I feel myself bound to say, that there is not the least ground in the world for any reflections of that kind whatever,—not the least in the world, my Lords. I go beyond that and say, the very nature of

his interposition—the extent of his interposition as counsel in that business, never can bring him within the authority of such cases as Mackenzie, which was quoted at the Bar; and therefore there is not the slightest reflection of that sort upon him. Feb. 25. 1824.

My Lords, another object was to reduce this lease, for Alexander, the tenant, is a party in the cause. If, however, the sale to Sir James Montgomery is a good sale, then there is an end of all right to reduce the lease on the part of those who were claiming to do so. But, my Lords, independent of that, there is another question, which is this, if Sir James Montgomery bought, subject to the lease, query, Whether any body can affect that lease, if Sir James Montgomery bought subject to the lease?

My Lords, on all these grounds it does appear to me, and I took the liberty of interrupting your Lordships at this time of the evening, as I was the only law Lord present at the time the cause was heard, and I take the liberty of stating it to be my humble opinion, that your Lordships ought to affirm the decision.

*Appellant's Authorities.*—1. Ersk. 1. 5. 3.; Laurie, July 27. 1814. (2. Dow, 556.)

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

*(Ap. Ca. No. 2.)*

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Mrs MUDIE, and Trustees of the late JOHN AITKEN, Appellants. No. 2.
*Clerk—Greenshields—Jeffrey—Jameson.*

Mrs MOIR, and Others, Respondents.—*Cranstoun—T. H. Miller.*

*Deathbed—Revocation—Approbate and Reprobate.*—A party having executed a mortis causa disposition of his heritable property in liege poustie, excluding one of his heiresses portioners, with a power of revocation; and having executed a second disposition on deathbed in favour of the same parties, but making alterations affecting interests provided for in the first deed, and having revoked that first deed. Held, (affirming the judgment of the Court of Session), 1. That the heiress portioner was entitled to found on the revocation, as recalling the first deed; and, 2. That she was at the same time entitled to object to the disposition of the property, as executed on deathbed.

THE late Reverend John Aitken, minister of the parish of St Vigeans, and proprietor of the estate of North-Tarry, in the county of Forfar, had three nieces,—the respondent, Cornelia Isabella Aitken, wife of William Moir of Newgrange; the appellant, Jane Aitken, wife of James Mudie of Pitmuis; and Catherine Aitken, wife of James Ford of Finhaven,—these ladies being sisters, and co-heiresses portioners of Mr Aitken. March 1. 1824.

2D DIVISION. Lord Pitmilly.