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

Appellant's Authorities.—2. Ersk. 1. 25.; 1. Bank. 8. 12.; 1. Stair, 7. 12.; Oliphant, Nov. 30. 1790, (1721.); Wedgewood, June 13. 1820, (not rep.); Duke of Athol, June 20. 1822, (1. Shaw and Dunlop, No. 560.); Agnew, July 1822, (ante, Vol. I. p. 320. and 413.); Jackson, July 5. 1811, (F. C.); 4. Stair, 29. 2.

Respondent's Authorities.—Dig. t. 16. l. 109.; 1. Stair, 7. 12.; 2. Stair, 12.; 2. Stair, 2. 24.; 2. Ersk. 1. 29.; 1. Bank. 8. 12.; 2. Ersk. 1. 25.; Buchanan's Rep. p. 470.; Bonny, July 30. 1760, (1728.); Grant, Feb. 9. 1765, (1760.); Lawrie, June 21. 1769, (1764.); Bowman, June 11. 1806, (No. 4. App. Bon. et Mal. Fides); Jackson, July 5. 1811, (F. C.); Duke of Roxburgh, Feb. 17. 1815, (F. C.); Turner, March 30. 1820, (F. C.)

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

(Ap. Ca. No. 13.)†

No. 9. WALTER FRANCIS Duke of Buccleuch and Queensberry, and his Curators, Appellants.—*Sugden—Jeffrey.*

Sir JAMES MONTGOMERY, and Others, Executors and Trustees of WILLIAM Duke of Queensberry, Respondents.—*D. of F. Cranstoun—Moncreiff.*

Entail—Reparation.—An heir in possession under an entail prohibiting the granting of leases with evident diminution of the rental, having let the lands on payment of grassums, and for the former rents; and it having been found by the House of Lords,—contrary to the opinion of the majority of the Judges in the Court of Session, and contrary to what had been the practice under the above and similar entails,—that the heir had no power to grant such leases; and no declarator of irritancy having been brought against the heir during his life, but an action of damages having been instituted after his death against his representatives;—Held, (affirming the judgment of the Court of Session, with a qualification), That the representatives were not liable in damages.

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2D DIVISION.
Lord Cringletie.

AFTER the actions of declarator and reduction, noticed in the preceding case, had been brought, and were in dependence, the late Charles Duke of Buccleuch and Queensberry, the father of the appellant, instituted an action against the executors and trustees of the late William Duke of Queensberry, in which, after reciting the provisions of the entail, he set forth, 'That, notwithstanding the prohibitions contained in the

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* See the Lord Chancellor's Speech, post, p. 84.

† This and the five following Cases are reported, not in the order in which the papers are bound up in the Collection in the Advocates' Library, but in that in which they are referred to in the Lord Chancellor's Speech.

'said deed of tailzie, against selling or conveying away any part 'of the said estate, or doing any other thing whereby the same, 'or any part thereof, might be affected, adjudged, apprized, or 'any ways evicted from the said heirs of entail, or granting 'tacks thereof for any longer period than his own lifetime, 'or nineteen years, and that without diminution of the rental, 'at least at the just avail for the time, the said William Duke 'of Queensberry did, in contravention of said deed of entail, 'enter into contracts with sundry persons, whereby he became 'bound, upon renunciation of leases which were then unexpired, 'to grant to them tacks or leases of sundry parts of said lands and 'estate, for the space of nineteen years, and to renew the said 'leases for the said space of nineteen years annually during his 'life; such contracts of lease thus extending the said persons' 'right and possession as tenants to a longer period than the said 'Duke's own lifetime, or nineteen years, the alternative periods 'permitted by said deed of entail; and in terms of which con-'tracts, various parcels of said lands and estate were, or still are, 'possessed by the persons after-mentioned, and others: That, 'from the time of his entering into possession of the said estate, '(in 1778), instead of letting the lands at fair annualrents, the 'said Duke did never raise the annualrent of any part thereof, 'but drew and put into his own pocket the whole surplus value 'or rent under each lease, by a single anticipated payment from 'the tenant at the time of granting the lease, which payments he 'called grassums; and thus the said lands were, in contravention 'of the prohibitions in the deed of entail, not only let respective-'ly for longer periods than is allowed by the said deed of entail, 'but were affected, disponed, and evicted, contrary to the prohi-'bitions in the said deed of entail; and, further, were let with 'diminution of the rental, and for rents known and intended to 'be inadequate, and far less than the just avail.'

The conclusions were, 'That it ought and should be found 'and declared, by decreet of our said Lords, that it was not com-'petent to, nor in the power of the said William Duke of 'Queensberry, to let or grant any tacks or leases of any part of 'the said lands and estate, by contracts of lease for nineteen 'years, to be renewed yearly for the same period during his life-'time as aforesaid, nor for any longer term or period than his 'own lifetime, or nineteen years, except in terms of, and under 'the provisions of the Act of the 10th of our reign, chap. 51.; 'nor to grant any tacks of the said lands and estate in conside-'ration of rents paid by anticipation as aforesaid, nor with the

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'diminution of the rental as aforesaid, nor under the just avail as 'aforesaid; and the several contracts of lease, tacks, and leases, 'above-mentioned, having all and each of them been so granted 'in contravention of the provisions in the said deed of entail, 'are void and null, and of no force or effect, in prejudice of the 'pursuer as heir of entail aforesaid: And the pursuer having 'suffered great loss and damage, by reason of the said respec-'tive contracts and leases having been granted by the said 'deceased William Duke of Queensberry, in contravention of 'said deed of entail as aforesaid, the said Sir James Montgo-'mery, Thomas Coutts, William Murray, and Edward Bullock 'Douglas, executors and trust-disponees aforesaid, ought and 'should be decerned and ordained, by decreet foresaid, to 'make payment to the pursuer of the sum of L.500,000 Sterling, 'or such other sum as our said Lords shall modify as the da-'mages sustained, or which may be sustained by the pursuer, 'by and through the said William Duke of Queensberry his 'illegal and unwarrantable granting of the said leases,' &c.

In defence against this action the executors maintained, that it was incompetent; and that, at all events, if the leases should not be reduced, then the action would be entirely groundless; and if, on the other hand, they should happen to be reduced, then the Duke would be restored against the effect of the leases; and as the executors would be liable in relief to the tenants, they could not also be subjected in damages to him. The action was sisted till the ultimate issue of the declarator and reduction; and the proceedings having thereafter been resumed, and the present appellants being sisted in place of the late Duke Charles William, the Lord Ordinary assoilzied the respondents, reserving entire to the appellant to claim from the respondents the whole or part of the grassums taken and received by the late William Duke of Queensberry from his tenants, and to the respondents their defences. On advising a representation for the appellants, his Lordship adhered, and issued the following opinion:—'The ground on which damages are demanded from 'the executors of William Duke of Queensberry, is, that his 'Grace entered into a combination with his tenants on his estate 'to defraud the heirs succeeding to it, and let leases, reserving 'therein a small rent, and taking sums of money as grassums 'from these tenants; that it has been found that these leases are 'void and null; and as, by means of them, the present Duke of 'Buccleuch has been prevented from drawing the full value of 'his estate since the death of the said Duke William, his Grace

'is entitled to damages from the defenders, the executors of Duke 'William. March 10. 1824.

'The Lord Ordinary delivered his opinion, that damages 'could only be due when they arose out of some real or pre- 'sumed delinquency; and as the leases were granted by Duke 'William in conformity to the received law of the country, 'as was even afterwards declared by the Lords of the Second 'Division, his Grace, by managing his estate in conformity to 'what was understood to be strictly legal, cannot be held to have 'committed any delict whatever. The judgment of the House 'of Peers ascertains, that the received opinion was wrong; it has 'established, that Duke William *had no power* to grant such 'tacks, and of course that they are null; but it has not found, 'that the Duke granted these leases with the single intention of 'defrauding his heirs. His Grace granted them with the view 'of amassing money to himself; and the injury of the heirs was 'only the consequence, but not the object of his conduct; and 'therefore the Lord Ordinary thinks that the noble representer 'pleads his cause too highly, when he accuses the Duke of being 'actuated by the desire to injure his heir.

'But, secondly, it is pleaded, that even admitting the Duke 'to have been in bona fide, yet his granting these leases was 'an illegal act; and as ignorance of law excuses no man, his 'Grace's executors are liable to redress the damages suffered by 'that illegal act. The Lord Ordinary readily allows the truth of 'the maxim, "Quod ignorantia juris neminem excusat;" which 'is demonstrated by what has happened to the tenants. Their 'leases, which they considered to be good, are set aside, and they 'have been removed from their farms. Had the Duke of 'Queensberry been alive, and a reduction of these leases been 'brought, accompanied by a declarator of irritancy, his Grace 'might have forfeited his estate, if he could not redeem the leases. 'A person who purchases an estate a non domino, will have it 'evicted from him by the true owner; and to these lengths igno- 'rance of the law excuses no man, nor covers him from loss. 'But to make him liable for damages on account of an innocent 'error in law, is going a step further, for which the Lord Ordi- 'nary is not aware of any authority. By the law of Scotland, 'an entail must be recorded in the Register of Tailzies, in order 'to be effectual against the public; and after it is so recorded, 'every man is understood by law to be as well acquainted with 'its contents as the heirs who possess under it. If, therefore, the 'Duke of Queensberry was guilty of a fraud, the whole tenants

March 10. 1824. 'were participants in it, and ought equally to be liable as his 'Grace's executors, because ignorance of law cannot protect the 'former, more than it does the latter. But the Lord Ordinary 'has found, that they are not liable for additional rents, but are 'protected by their bona fides till July 1819, when the error in 'law was declared by the House of Lords; which he did in con-'formity to all opinions of our authors, and decisions of this 'Court. The loss suffered by the noble pursuer is one arising 'out of the law itself, since it is occasioned solely by the princi-'ple of bona fide possession, for protecting the tenants during 'its existence; and consequently it seems impossible to find the 'Duke's executors liable for damages, who have not reaped any 'benefit by the leases since the Duke's death, when the tenants, 'who were participants in the wrong, and have enjoyed all the 'advantages, have been absolved.'

The appellants having reclaimed,

Lord Craigie observed:—I am of a different opinion from the Lord Ordinary. The question of bona fides must not be mixed up with the one which is before us, and cannot affect our judgment. In regard to the grassums, the claim for them is reserved; and I have no doubt that it is well founded. These grassums, according to the judgment of the House of Lords, were just anticipated rents, which it is impossible could be bona fide percepti et consumpti by Duke William. But the question here is, whether the loss actually sustained by the present Duke, must not be made up by the representatives of Duke William? I cannot hold that he was in bona fide in granting the leases. He did what by his own title he was prohibited from doing. He took payment of rents by anticipation, and let the lands at a rent diminished in a corresponding proportion. But a party who has suffered wrong by the act of another, is entitled to reparation. An excess of power is sufficient to give rise to such a claim. But here there is more than a mere excess of power, because the Duke did what, it has been now settled, he was prohibited from doing by his own titles.

Lord Glenlee.—The question as to restitution of the grassums has been properly separated from that relative to the claim of damages. To create such a claim, the party from whom the damages are sought must have done something contrary to an express or implied obligation. There was no obligation on the Duke to raise the rental; and suppose that the Duke, without taking grassums, had let the lands at the same rent as formerly, could the present Duke have claimed damages on that account?

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I apprehend not. Although this might have been a wrong on his part, yet it is not one of that tortious or criminal nature which can give rise to a claim of damages against his representatives.

Lord Robertson.—It cannot be denied that an injury has been suffered by the present Duke and his predecessors in consequence of the act of Duke William; and I doubt extremely whether his bona fides can protect him or his representatives against a claim for reparation of loss actually sustained by his illegal act. There is nothing in the plea, that the damage has been occasioned by the tenants maintaining the possession; because they are the mere instruments by which the damage has been committed. There is, however, much more in the argument, that the act of the Duke, whereby an injury has been sustained by the heirs-substitute, is not one which falls under the entail or the Act 1685. The only remedy provided for a violation of any of the prohibitions, is a declarator of irritancy. But the substitutes have never availed themselves of that which was their only legal remedy; and now when the contravener is dead, they bring an action of damages against his representatives, and when it is no longer possible to purge the irritancy. Such an action, I apprehend, is incompetent.

Lord-Justice Clerk.—I concur in opinion, that the claim for the grassums has been properly reserved. We have already found, that the tenants are liable for violent profits posterior to the judgment of the House of Lords; and the question which we have now to decide is, whether, independent of that claim, the present Duke is entitled to demand damages from the representatives of Duke William? It is remarkable, that there is no instance of any action similar to this. It is also a material feature in the case, that although Duke William acted for upwards of thirty-two years in open violation of the entail, no attempt ever was made till after his death to dispute his powers. If a declarator of irritancy had been brought during his life, he might have purged; but this could not be done after his death. The heir-substitute now claims damages; and the question is, whether he can competently do so? The statute 1685 points out the remedy for contravention, which remedy is the voidance of the right of the contravener; but there is no provision, that over and above voidance, the heir-substitute shall be entitled to claim damages from the contravener. Independent, however, of this, it is impossible to hold, that Duke William was doing an act, when he let the lands for grassums, which he either knew or thought to be contrary to his powers under the entail.

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The Court, therefore, on the 13th November 1822, adhered to the interlocutor of the Lord Ordinary.*

Against these judgments the appellant entered an appeal, and maintained that they ought to be reversed,—

1. Because the leases were granted by Duke William in contravention of the entail under which he held the lands, and in violation of the personal obligation under which he lay to fulfil the conditions of that entail; and having been the cause of patrimonial loss to the appellant, the respondents, who were his representatives, were bound to repair that loss. In support of this plea it was maintained, that every heir who enters into possession of an entailed estate, undertakes a personal obligation to observe all the different conditions of the entail; but in this case, the leases were granted in contravention of a prohibition in the entail, whereby the Duke was guilty of a wrong. By that wrong, damage had been sustained by the present Duke; seeing that, in consequence of the leases, he and the two immediately preceding Dukes (whom he represented) had been excluded for eleven years from the enjoyment of a large proportion of the rents of the entailed estate. For reparation of this damage, the estate of Duke William was clearly responsible; and therefore the respondents, who were in possession of that estate, ought to be subjected in these damages. Such a claim was perfectly competent; because, although this was an entail fortified by irritant and resolutive clauses, which were made to preserve the estate to the succeeding heirs, yet the prohibitions created a personal obligation, which, if violated, gave rise to a claim of reparation or damages. It was true, that inhibition or interdict could not be executed so as to protect the heirs against the violation of that personal obligation, and that they could only have recourse during the life of the contravener to a declarator of irritancy; but, nevertheless, a claim of damages was perfectly competent, and was so more especially where the demand was (as in this case) for restitution of the profits illegally acquired out of the very fund which had been created by means of these profits. It was also true, that no declarator of irritancy had been brought during the life of the Duke, but that was res mere facultatis, and the omission to institute it could not have the effect to deprive the injured party from obtaining reparation in the shape of damages.

2. Because the circumstance which occasioned the appellant's

* See 2. Shaw and Dunlop, No. 7.

loss was the occupation of his estate by the tenants, and which occupation was maintained at the instigation and at the expense of the respondents, to whom it was profitable in the same proportion in which it had been prejudicial to the appellant. The fact that the litigation had been maintained at the expense of the respondents was admitted, and therefore the plea, that if any damage was created, it arose from the act of the tenants, was untenable; neither could it be contended that the bona fides of these tenants could be available to the respondents. On the contrary, if that defence were effectual to the tenants, the claim of the appellant against the respondents was just so much the stronger; seeing that the illegal title on which that bona fides was rested had been granted by the constituent of the respondents; and if the appellant could not get redress from the tenants for that which was undoubtedly an injury, he ought to obtain reparation from the respondents.

In answer to these pleas, it was contended on the part of the executors,—

1. That an action of damages was not competent under the Queensberry entail, the remedies given by the entailer in cases of contravention being of a quite different nature. In reference to this plea it was argued, that in a regular entail the maker lays certain injunctions on the heirs, or prohibits them from doing certain things, and he gives effect to these injunctions and prohibitions by the irritant and resolutive clauses. He makes his will effectual by declaring all acts done in contravention to be null and void; and he further secures obedience by inflicting a most severe penalty on the contravener,—the forfeiture of his right to the estate. He gives power to the remoter heirs to protect their rights by reducing the deed prohibited, and by declaring an irritancy against the granter. These are the only remedies which the entail gives, or which are sanctioned by the statute 1685, no mention being made of the payment of damages in the event of contravention, in lieu of, or in addition to the forfeiture. Accordingly, in the Queensberry entail there is no provision for payment of such damages; and as it was made conformable to, and under the Act 1685, which declares the irritant and resolutive clauses to constitute the only effective part of an entail, an action for damages was incompetent. It had been settled, that entails were liable to the same strict interpretation inter hæredes as in a question with third parties; and therefore, the provisions could not be extended beyond those which were contained in the deed itself. But the non-existence of such a personal obligation

March 10. 1824. as was alleged by the appellant, was demonstrated from the circumstance that it could not be made effectual by protective diligence, and that an heir of entail, who is not effectually tied up by an irritant or resolutive clause, has not only the power, but the *right* to violate the most express prohibition, and is entitled to have this right declared by a court of law. The remedy, therefore, which the appellant or his predecessors ought to have taken was, to have brought an action of declarator of irritancy and of forfeiture against the late Duke, which, however, they had not done.

2. That supposing an action of damages were competent, the damage had been done by the tenants since the Duke's death, and the tenants alone were responsible for them. It was of no importance in this question by whom the expenses of the litigation were defrayed. The tenants had a sufficient interest to maintain the validity of their leases, and accordingly they did so, and retained possession. They might, if they had thought fit, have abandoned the possession, in which case no claim of damages could have been made against the respondents by the appellant. It was plain, therefore, that if any damages existed, they had been caused by the tenants; but as the tenants were bona fide possessors, no claim could be made against them, and if so, the loss sustained by the appellant was one which was thrown upon him by the law itself. And,

3. That as the Duke conceived that he was exercising the powers vested in him by the entail in granting the leases, the plea of bona fides was equally as available to him as to the tenants; and therefore, no claim for restitution could lie against him or his estate.

The Lord Chancellor asked the appellant's Counsel, in the course of the hearing, Can you bring an action for damages against the heir in possession for having done a certain act;—making a lease for example,—before you have brought a declarator of irritancy?

Jeffrey.—Certainly not during the life of the contravener.

Lord Chancellor.—Then, can you bring an action of irritancy, and then an accounting for profits? and supposing bona fides to protect the actual possessor, can you still have damages? To this no answer was made.

The House of Lords 'ordered and adjudged, that the interlo-'cutors complained of, so far as the same are judgments upon 'the subject in litigation between the parties, be affirmed.'*

* See Lord Chancellor's speech, post, p. 84.

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Appellant's Authorities.—3. Ersk. 8. 23.; 1. Bank. 584.; 2. Stair, 3. 59.; Hope's Min. P. 402.; 3. Ersk. 3. 86.; Cumming, July 29. 1761, (15,513.); Lockhart, June 11. 1811. (see foot note, 5. Shaw and Dunlop, p. 424.); 2. Stair, 3. 58.

Respondents' Authorities.—Strathnaber, Feb. 2. 1728, (15,373. and Craigie and Stewart, p. 32.); Bryson, Jan. 29. (15,511.); Lockhart, June 11. 1811, as remitted.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

(Ap. Ca. No. 14.)

No. 10.

Sir JAMES MONTGOMERY, and Others, Executors of WILLIAM Duke of Queensberry, Appellants.—*D. of F. Cranstoun—Cockburn.*

JOHN HYSLOP, Respondent.—*Moncreiff—Whigham.*

Warrandice—Reparation—Lis Alibi.—An heir in possession under an entail prohibiting alienation and granting of leases with evident diminution of the rental, having granted a lease for payment of a grassum, and binding himself to warrant the lease; and having died, leaving one set of executors in England, and another set in Scotland; and the former having lodged the executry funds in the Court of Chancery, in England, and called on all having claims to give them in; and the tenant having claimed a certain sum as damages in the event of his lease being set aside; and thereafter his lease having been reduced;—Held, (affirming the judgment of the Court of Session), 1. That the tenant was not barred by the proceedings in Chancery from raising an action before the Court of Session, claiming reparation on the warrandice from the Scottish executors; and, 2. That he was entitled to reparation.

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2D DIVISION.
Lord Cringletie.

IN 1787, John Hyslop, father of the respondent, obtained a lease from William Duke of Queensberry of the farm of Halscar, for 19 years, at the rent of L.30, and a grassum of L.26. He renounced that lease in 1797, and obtained a new one for 19 years, at the same rent, and for a grassum of L.28,—the Duke of Queensberry binding himself personally to renew the lease for 19 years in every year of his own life if required. This lease of 1797 was renounced in 1803, and a new one was granted at the former rent, without any grassum, by Mr Craufurd Tait, as commissioner for, and 'as having full powers 'from, the said Duke, to grant, subscribe, and deliver tacks or 'leases of all lands pertaining to his Grace in Scotland, and that 'to the extent of such term or terms of years as permitted by the 'respective deeds of entail of the said estates; conform to com-'mission in favour of the said Craufurd Tait.' The lease con-