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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 commission in favour of the said Craufurd Tait.' The lease con-

March 10. 1824. tained a clause of absolute warrandice, in these terms:—'Which 'tack his Grace binds and obliges himself, his heirs and successors, to warrant to the said John Hyslop, and his aforesaid, 'at all hands and against all mortals, as law will.' In virtue of this lease, Hyslop thenceforth enjoyed possession. On the 23d of December 1810, Duke William died, and was succeeded by Duke Henry, who having died in January 1812, Charles William, Duke of Buccleuch and Queensberry, obtained possession as the next heir of entail.

Duke William appointed two separate sets of executors, by two different deeds, the one being a will in the English form, under which certain gentlemen were appointed to act as executors in England; and the other being a Scotch deed, under which the appellants were nominated executors in Scotland.

Duke Charles William having announced an intention to object to the leases which had been granted by Duke William on grassums, amounting in number to upwards of 300, and the tenants having threatened to seek relief, the executors who resided in England filed a bill in Chancery, to the effect of having the executry distributed among the claimants by that Court; and an advertisement was inserted in the newspapers, requiring all persons having claims to lodge the same with the Master within a certain period. Claims were accordingly lodged by the tenants to the extent of upwards of L.460,000; and in particular, a claim was given in by Hyslop, stating the nature of his lease,—the warrandice it contained,—the chance of the farm being evicted,—and that, in such event, 'the estate of the said late 'William Duke of Queensberry will become justly and truly 'indebted to the said claimant in the said sum of L.830, as and 'for such compensation as aforesaid;' and therefore concluding with a prayer, that 'the executors of the said late Duke of 'Queensberry, or this honourable Court, taking on itself the 'administration of the personal estate of the said late Duke of 'Queensberry, will be pleased to set apart as much of the estate 'and effects of the said late Duke of Queensberry as will be sufficient to indemnify and compensate this deponent.'

Thereafter, in 1814, Duke Charles William raised an action of reduction of the whole leases which had been granted by Duke William, on the ground that they were contrary to the powers enjoyed by him under the entail. (See the two preceding cases). Hyslop thereupon brought an action against the appellants, the executors of Duke William, in which he concluded, that they 'Ought and should be decerned and ordained, 'by decree of the Lords of our Council and Session, to maintain

'and defend the pursuer, and his foresaids, in the peaceable 'possession of the said lands and others, let by the said tack in 'manner foresaid, during the whole years and terms thereof yet 'to run, and according to the terms, and under the conditions 'therein specified; and to make payment to him of the expenses 'incurred, or to be incurred by him in defending the said pro- 'cess of reduction;—and, generally, to relieve him of the said 'action, and all its consequences; or otherwise, the said defen- 'ders ought and should be decerned and ordained, by decree 'foresaid, to make payment to the pursuer of the sum of '   , or such other sum as shall be ascer- 'tained in the course of the process to follow hereon, as the loss 'and damage occasioned to the pursuer by the said defenders, 'as disponees and executors foresaid, and their said factor, their 'failure to maintain and defend the pursuer in his said posses- 'sion, in manner foresaid, in terms of the obligations by the 'said deceased William Duke of Queensberry, in the said tack 'to the pursuer before-mentioned.'

As the same principle of decision in the question as to the validity of the leases would apply to them all, that of Hyslop was selected to try the question with the Duke; and for the purpose of resisting his action, the executors supplied Hyslop with funds to carry on the litigation. After a great deal of discussion, the House of Lords ultimately pronounced a judgment on the 12th of July 1819, reversing the interlocutors of the Court of Session, and finding that the leases were reducible; in consequence of which the Court, on the 29th of February 1820, decerned and declared accordingly; and a remit was made to the Lord Ordinary to hear parties on a claim, made by the Duke, for the violent profits during the period the tenants had been in possession.

In the meanwhile the action of relief brought by Hyslop had been allowed to fall asleep; but in consequence of the reversal it was wakened in 1822, and the executors thereupon lodged these defences:—

'1*st*, The defenders are trustees and executors, named by the 'late William Duke of Queensberry, for the administration of 'his property in Scotland only. The funds in Scotland, with 'the exception of a debt which the debtor retains till he is re- 'lieved of an obligation come under to the tenants on the March 'estate, are trifling and already exhausted. The funds in Eng- 'land are under the administration of the English executors, or 'are more properly in the hands of the Court of Chancery. The 'pursuer has made a claim in that Court for the sum of L.830,

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'*2d*, Were it competent to try the question in this Court, it 'is premature to proceed with it at present. The pursuer's 'lease expires naturally at Whitsunday next, the term at which 'he is decerned to remove. He has, therefore, no claim to be 'relieved of any thing but the violent profits which may be found 'due to the Duke of Buccleuch. But it is as yet quite uncertain 'if any sum will be found due on this head; for although the 'Lord Ordinary found the pursuer liable in violent profits for 'the two last years of the lease, yet this judgment is not acqui-'esced in.

'Independently of this, it is premature to proceed with the 'present action until the question of violent profits shall be de-'termined by the Court. The Duke of Buccleuch claims these 'profits from the death of the late Duke of Queensberry,—a 'claim which can only proceed on the ground that the pursuer 'was in mala fide at the time he took his lease. But the bona 'or mala fides of the tenant, at the time of contracting, must 'have a material influence on his right to claim relief; and this 'cannot be judged of with any propriety, so long as the point 'has not been settled in the principal and leading action with 'the Duke of Buccleuch.'

In answer to these defences Hyslop maintained,—

1. That the plea of lis alibi was unavailing, because the claim which he had lodged in the Court of Chancery was merely of the nature of a notice that he had a demand, to the extent there specified, on the executry, and was not intended for the purpose of trying the question as to his right of relief, but merely as a caveat to the executors not to distribute the funds till the matter of right had been settled: that accordingly no bill had been filed by Hyslop, nor had any discussion taken place equivalent to litiscontestation between the parties: that even if litiscontestation had taken place, still, as the judgment of the Court of Chancery would not be res judicata, and could not be carried into immediate execution in Scotland, and as lis alibi pendens could not be pleaded where the judgment would not form res judicata between the parties, so the proceedings in the Court of

Chancery could be no bar to the action of relief; and besides, the executors who appeared in Chancery were different from those against whom the action had been brought.

2. That as the action of reduction was brought in 1814, and the present process of relief was then instituted; and as it was not necessary, in order to found such a process, that there should be actual eviction, it was not premature: and at all events, as that eviction had now occurred, and as Hyslop had been found liable in violent profits subsequent to the judgment of the House of Lords, he was entitled to insist for relief against the executors. And,

3. That although the question of bona fides was still under discussion with the Duke, and although it was alleged by him that Hyslop, by his knowledge of the terms of the entail, must be held to have been in mala fide all along; yet even if he should succeed in establishing that proposition, it could not affect Hyslop's right of relief from the executors, as the representatives of Duke William.

The Lord Ordinary found the executors liable in relief, and at the same time communicated his opinion in this note:—' In ' pronouncing the above interlocutor, the Lord Ordinary was ' influenced by the consideration, that the pursuer is entitled to ' have the point determined, whether he has a right to relief or ' not; because that matter being left in abeyance, must injure ' his credit, and possibly prevent him from obtaining a lease, ' which otherwise he might acquire.

' *2dly*, That as some violent profits are indisputably due by ' him to the Duke of Buccleuch, he is entitled to receive them ' from the defenders, that he may pay them to the Duke, and is ' not to be forced to pay these, and only then begin to try the ' question, whether he is entitled to relief or not?

' *3dly*, That, therefore, he is not obliged to wait to see what ' grounds the Duke may state for subjecting the defenders and ' pursuer to violent profits; since, whatever the Duke may or ' can state, the defenders may now plead the same, both in law ' and in fact; and as they are the only party in this cause, the ' Lord Ordinary thinks that the pursuer is entitled to call on ' them to plead it, or allow a decree of relief to pass against ' them.'

The executors having represented, the Lord Ordinary refused the representation, on the grounds stated in the following note:— ' The Lord Ordinary cannot consider the claims made in Chan-

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'cery by the respondent, and the other tenants of the late William Duke of Queensberry, as forming a lis alibi pendens. These claims were made at the requisition of his Grace's executors, to shew them the amount of the money demanded by the tenants in the event of their being deprived of their leases. The claims acted merely as a caveat to the executors not to part with the money until the tenants should be heard.

'*2dly*, In order to enable the tenants to claim effectually, they would be obliged to shew that they have been dispossessed while their leases were current, or obliged to pay higher rents than those reserved in their leases; they would also be obliged to shew the consequences resulting from such molestation: and as all this depends on Scotch law, no such proper measure can be adopted, as to have these consequences declared and ascertained by a judgment of this Court.

'*3dly*, It appears to the Lord Ordinary that the fears of the representers are affected, when they anticipate injury to themselves or their co-executors from a judgment finding the tenants entitled to relief. For, what use can they make of it in Chancery? Were they to go there with their judgment, they would be told, that, being indefinite, nothing could be done upon it, and that they must ascertain the quantum of relief before they could draw a farthing.

'It is next said, that this action is prematurely insisted in; and, on this topic, the representers argue their cause as if this were an insulated action, brought for the purpose of obtaining relief, before it could be known whether or not there was any distress. But before the Lord Ordinary there is an action for reducing Hyslop's lease, and for violent profits; and the lease has not only been reduced, but he has been found liable for violent profits; and consequently his action claiming relief is a natural and reasonable concomitant of the other, and falls to be disposed of at the same time. It is true that Hyslop's lease expires at Whitsunday next, and that he will not be dispossessed during his lease; and the Lord Ordinary believes it to be also true, that the representers have hitherto paid Hyslop's expenses of litigation: but still the only consequence of that is to diminish his claim of relief, not to take it away; for the Lord Ordinary has found him liable for violent profits from and after Martinmas 1819; and to that extent he has a claim of relief.

'*Lastly*, The representers plead, that they have not been heard on the point of law—how far Hyslop is entitled to relief from

'them. To which the Lord Ordinary answers, that if they have 'not been heard, it is their own fault. Every litigant is bound 'to bring out all his defences at once, and not to pop them out 'one by one, in order to procure delay, as seems to be the object 'of the representers. They have specified shortly their different 'grounds for not being liable to relieve Hyslop, which the Lord 'Ordinary confesses do not move him to alter his opinion. The 'lease in question contains a clause of absolute warrandice in 'favour of Hyslop, the very purpose of which was to secure him 'against molestation in his possession. The very nature of ab-'solute warrandice proves the anticipation of the possibility of 'the granter of a deed having no power to grant it; and it is 'for the purpose of securing the grantee against some unknown 'ground of challenge that it is introduced. In this particular 'case it is known to a certainty, that the contracting parties were 'in bona fide to believe that the one was in safety to give, 'and the other to receive the lease. There is, therefore, no 'ground for any allegation of turpe pactum to void the obliga-'tion of warrandice; and, accordingly, the Lord Ordinary has 'found, that Hyslop's bona fides protects him from being liable 'for violent profits sooner than from Martinmas 1819. On the 'whole, after judging of this case, in combination with the others 'before the Lord Ordinary, he has no hesitation in refusing this 'representation.'

The executors having reclaimed,

Lord Robertson observed:—The defence rested on the proceedings in Chancery is not well founded. They were at the instance of a different set of executors from those who are here. Besides, they afford no reason for our not deciding the general point of liability.

Lord Justice-Clerk.—The Chancery proceedings afford no plea of lis alibi. The warrandice is effectual to sustain the claim which is here made. It binds the Duke to secure the peaceable possession of the farm, which has not been done, and the tenant has been found liable in violent profits.

The other Judges having concurred, the Court, on the 13th of November 1822, adhered.*

Against these judgments an appeal having been entered by the executors on the grounds urged by them in defence, the House of Lords 'ordered and adjudged that the appeal be dismissed, 'and the interlocutors complained of affirmed, with L.200 costs.'

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* See 2. Shaw and Dunlop, No. 6.

March 10. 1824. *Respondent's Authorities.*—(1.) Cunninghame, Feb. 27. 1705, (8284.); Meres, Jan. 2. 1728, (8384.); Coutts and Co. March 8. 1769, (8292.); May 25. June 1799, (8293.)—(2.) 2. Stair, 3. 4. 6.; 2. Ersk. 3. 36.

J. CHALMER—J. CAMPBELL,—Solicitors.

(Ap. Ca. No. 12.)

No. 11.

FRANCIS Earl of Wemyss and March, Appellant.—*Sugden—Jeffrey.*

Sir JAMES MONTGOMERY, and Others, Executors of WILLIAM Duke of Queensberry; and WILLIAM MURRAY, Tenant in Whiteside, Respondents.—*D. of F. Cranstoun—Moncreiff.*

Et e Contra.

Bona Fides—Entail—Reparation.—An heir possessing under an entail prohibiting the granting of leases with evident diminution of the rental, having let the lands for payment of the former rents and grassums; and the First Division of the Court of Session having, at the instance of a succeeding heir, set aside the leases, as being granted in fraud against the entail; but the Second Division having sustained similar leases; and it being the opinion of a great majority of the Judges, on a remit from the House of Lords, that they were valid; and this being also the prevailing opinion of lawyers and others; and the House of Lords having found that the heir had no power to grant such leases, and the leases having been reduced on that ground;—Held, 1. (reversing the judgment of the Court of Session), That no claim of damages lay against the representatives of the granter, by the succeeding heir, but reserving his claim for payment of the grassums; and, 2. (affirming the judgment), That the tenants were protected by bona fides from payment of violent profits prior to the judgment of the House of Lords.

March 10. 1824.

1st Division.
Lord Hermand.

BY the entail of the Neidpath or March estate, executed in 1693, it is declared,—'That it shall noways be leisome to the 'said Lord William Douglas, and the heirs-male of his body, 'nor to the other heirs of taillie respectively above-mentioned, 'nor any of them, to sell, alienate, wadset, or dispone any of the 'said haill lands, lordships, baronies, offices, patronages, and 'others above rehearsed, as well these to be resigned in favours 'of the said Lord William in fee, as these reserved to be disponed by the said Duke of Queensberry, in manner foresaid, 'or any part thereof, nor to grant infeftments of liferents nor 'annualrents furth of the same, nor to contract debts, nor do 'any other fact or deed whatsoever, whereby the said lands and 'estate, or any part thereof, may be adjudged, apprized, or 'otherways evicted from them, or any of them, nor by any other