

the debtor. Bankton, vol. ii. p. 222, says, “ If the debtor “ was infest, the adjudication does not denude him without “ a charter thereon, and an infestment in the adjudger’s “ person.” Here no charter of adjudication and infestment followed; and until this took place the right of the appriser was not complete as an irredeemable right. This being the case, and the plea regarding the expiry of the legal being always an equitable consideration disregarded by the Court, in the present case there ought to be less hesitation in so dealing with it, when it is considered the adjudication, as first resorted to, was unnecessary—the creditors being already secured by heritable bond over the subjects, and also, when the appellants are only called on to account by co-adjudging creditors.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be affirmed, without prejudice to any question which may arise, whether the debt of the respondents, or any and what part of it, had been paid.

For Appellants, *Jas. Boswell, W. Grant.*

For Respondents, *Adam Rolland, Wm. Adam.*

NOTE.— Unreported in Court of Session.

[Bell’s Cases, 202 ; More’s Stair, Note clxxxvi.]

ROBERT KERR of Chatto, Esq.,	.	.	<i>Appellant;</i>
WILLIAM REDHEAD,	.	.	<i>Respondent.</i>

House of Lords, 5th Feb. 1794.

LEASE—POSSESSION—INFORMAL WRITING.—A jotting or agreement was gone into with the tenant while his former lease was not yet expired, for 38 years’ lease of the farm after the expiry of the old. The landlord in the meantime died. Held that the heir was not bound by this lease.

The question was, Whether the nature of a tenant’s possession of the farm was sufficient to cure the defects of a writing, informal and unstamped, but signed by the landlord and tenant, agreeing to a lease after the expiry of the lease then current; and, whether a succeeding heir was bound to grant a formal lease in terms of the obligation in that writing?

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A lease had been granted by the appellant's ancestor, Mrs. Kerr, to Thomas Turner, his heirs and assignees, for 38 years, at a rent of £177, which was afterwards assigned to the respondent Redhead. Mrs. Kerr was then proprietor in fee simple, but afterwards executed an entail limiting the power to grant leases to 19 years. The above lease, which was granted at Whitsunday 1753, expired at Whitsunday 1791, and before the expiry of which, the lease was gone into which raises the present dispute.

The facts of the case appear from the Lord Ordinary's interlocutor. His Lordship first pronounced this interlocutor: " Allows the before mentioned summons of removing to be repeated in this process, conjoins the action of removing with the present action; and in the action at the instance of William Redhead against Robert Kerr, Esq., assoilzies Robert Kerr from that action, and decerns; and in the process of removing at the instance of Robert Kerr against William Redhead, decerns conform to the conclusions of the libel."

And, on a representation against this interlocutor, his Lordship pronounced this judgment: " Finds, that on the 5th March 1752, Mrs. Kerr, then of Chatto, granted a lease of the lands of Over Chatto to Thomas Turner for 38 years from Whitsunday 1753, for the yearly rent of £177. 15s. 6d. Finds, that on the 17th May 1759, the said Mrs. Kerr executed a strict entail of the said lands and others in the county of Roxburgh belonging to her, whereby, *inter alia*, the heirs of entail were disabled from letting leases for a longer time than 19 years, or for a less tack duty than at the time of the heir's succession; Finds, that about 15 or 16 years ago, the said Mr. Turner granted a sublease of the said farm to the representer (respondent), at the yearly rent of £355. 11s. 1d. Finds, that upon the death of Mrs. Kerr in 1763, she was succeeded by the respondent's father, the institute in the entail, and that upon his death in 1782, the succession opened to Alexander Kerr, his eldest son, who, it is alleged, was then a minor, and soon after went into the army; Finds, that on the 3d March 1788, when the said Alexander Kerr was just come of age, and returned to this country on leave of absence, he entered into what is called a jotting (to be afterwards extended into a tack), of the terms upon which he was to let the said farm to the representer for 19 years as a grazing farm only, to com-

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“ mence at the expiry of Mr. Turner’s tack of that farm, of  
 “ which there were three years to run; by which jotting  
 “ the rent was to be £345, which is more than £10 less  
 “ than the representer was bound to pay by the sublease to  
 “ Turner; and various considerable allowances were to be  
 “ made to the representer: Find, that this jotting was sub-  
 “ scribed by the parties; but was null for want of the sta-  
 “ tutory solemnities: Find, that the said Alexander having  
 “ died abroad, he was succeeded by the respondent, who  
 “ alleges that he did not hear of his brother’s death till  
 “ March 1791: Finds, that on 6th August of that year the  
 “ respondent wrote to the representer a letter, from which  
 “ it appears that the representer had made him an offer for  
 “ the farm about two months before, which he had taken  
 “ into consideration, but upon inquiry found not to be ade-  
 “ quate; and therefore in said letter desires him to give in  
 “ proposals immediately, otherwise he would advertise the  
 “ farm: Finds, that the maxim, that an obligation to grant  
 “ a tack is equal to a tack, does not hold good against an  
 “ heir of entail: Finds, that no actual possession did or  
 “ could follow upon the lease granted by Alexander Kerr  
 “ to the respondent till Whitsunday 1791, the former lease  
 “ not being renounced, and current till that term; and that  
 “ the representer cannot be allowed to ascribe his posses-  
 “ sion between the date of the new lease and the expiry of  
 “ the old to the former, because the latter was unrenounc-  
 “ ed, and current for that period: Finds, that there has  
 “ been no possession on the new lease, or homologation  
 “ thereof by the respondent (appellant), and decerns.”

On reclaiming petition to the Court, the Lords altered June 17, 1792.  
 and found the tenant entitled to the lease for 19 years un-  
 der the writing, and, on petition by the appellant, the Nov. 27, —  
 Court adhered.\*

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\* Opinions of Judges:

LORD PRESIDENT CAMPBELL.—“ Informal tack granted by heir  
 of entail. The case of Campbell of Blythwood very similar. *Res  
 non integra*. New term actually commenced at Whitsunday 1791, June 19, —  
 and no objection made till August. Case of Lord Kinnaird v.  
 Hunter, (Mor: p. 15,611.)

“ Petition incompetent. The petitioner has no right to plead in June 27, —  
 the name of Turner, who does not appear for himself; as indeed he  
 has no interest. The last interlocutor meant that the 19 years

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Against these two last interlocutors of the Court the present appeal was brought.

*Pleaded for the Appellant.*—A writing void or improba-  
 tive in law is no better than none ; and the statutory requi-  
 sites as to writings of this nature, and as to leases, cannot  
 be overcome by any *rei interventus*. What the statutes re-  
 quire as solemnities in this form of the contract, are not  
 suppliable by circumstances extraneous of the form of that  
 contract. No act of the individual, short of making a new  
 instrument, can make good what the statute declares null.  
 A different rule may hold in regard to such contracts as  
 may be binding without writing, and where homologation,  
 or posterior approbatory acts may have an important legal  
 effect ; but here, where the law declares the contract null,  
 unless probative according to the statutory solemnities, no  
 such rule can obtain. No doubt, it is laid down by the de-  
 cisions, that *rei interventus* will validate a contract respect-  
 ing heritage, though void by the statutes ; but then it is  
 laid down to be requisite that something must have happen-  
 ed on the faith of the agreement, which cannot be recalled,  
 and which makes it impossible to put parties in the same  
 situation as before ; but here no such circumstances exist.  
 The possession founded on is obviously applicable to the  
 old lease ; and the respondent's own conduct towards the  
 appellant, by his offer for a new lease, is itself evidence that  
 he did not consider the writing in question binding. On him,  
 as an heir of entail, it was not binding, because it was grant-  
 ed beyond the 19 years stipulated in the entail, being grant-  
 ed three years before the expiry of the old, it was equal to  
 a lease of 21 years.

*Pleaded for the Respondent.*—The agreement of 3d March  
 1786 was a fair and equal bargain, which the appellant does

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should be counted from Whitsunday 1788, no matter whether the  
 old lease was renounced or not ; but the words conform to a  
 agreement never could mean that the old rent should be raised dur-  
 ing these three years, contrary to agreement. As to the £200, were  
 there any room for question about it, the parties might still be heard  
 before the Ordinary in consequence of the remit. But the import  
 of the agreement is, that the rent shall be £50 minus for each of  
 the four first years, *i. e.* 1791, 2, 3 and 4.—The wording of the in-  
 terlocutor was taken from the case of Blythswood. It might have  
 been 16 years from Whitsunday 1791.”

President Campbell's Session Papers, vol. 67.

not pretend to dispute. From the moment he got it, he proceeded to cultivate the farm agreeably to the conditions of the new lease. He expended large sums of money on buildings and improvements. He abstained from ploughing and cropping the farm, and laid down in grass what had formerly been in tillage. All these different acts on his part, when rivetted to the alleged defective writing, and when known and acquiesced in by the respondent, create such a *rei interventus* as validates and makes good the contract defective in the solemnities required by law.

After hearing counsel,

LORD THURLOW said :

“ MY LORDS,

“ I yesterday moved for an adjournment in the consideration of this case, that there might be full time to weigh both sides of the argument. I have now paid it a particular attention, and I shall therefore not hesitate to deliver my opinion.

“ The question to be determined is, Whether Redhead the tenant, has in equity, under the circumstances stated in this case, a right to that to which by law he has no right ?

“ When a Court is to decide a question in equity, it is essentially requisite that they proceed upon principles as generally established, and by rules as clear, permanent, and precise, as a court of law would do, did the question depend upon the words of an act of parliament. For if a court shall proceed upon principles peculiar to a particular case, and depart from those broad lines with which every person may be acquainted, it must inevitably happen, that no subject will be able to say by what tenure he holds his estate, or even that his property is secure to him.

“ If this observation will in any case hold good, it is where a court, like the Court of Session, has, by a mixed authority, the power of deciding both in law and in equity. For there, unless the grounds be strongly marked by which their decisions are regulated, law and equity may be so easily confounded, that though the subject be injured, it is impossible for him to discover where the law has failed him. When courts of law are distinct from courts of equity, there is little danger of such a confusion ; because, by the very act of applying to a court of equity, the party virtually admits that the law is against him. Here, therefore, it must with certainty be known upon what principles the judgment is founded. But the case is exceedingly different where law and equity are at the discretion of the same court ; for it is by no means impossible that these

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two may sometimes be so blended together as to make it impossible to discover which of them predominates.

“ To apply this doctrine.—It is equity, that the owner of an estate should have the absolute power over and disposal of that estate—that he should be at liberty to possess it as he pleases during his life, and to settle the succession after his death in what manner he thinks fit. Nay, he may fetter, as it is termed, the succession according even to his *caprice*; for it is the very essence of property, that a man should have an unlimited power to exercise his right of ownership in every respect as most agreeable to himself.

“ I know, that notwithstanding this, it has been determined that, if a tenant for life shall, for a valuable consideration, grant a lease of the estate to endure beyond the period to which he is restricted, still the reverser shall be bound to fulfil the contract, in as far as it can be brought into consonance with the tenure under which the tenant for life held the estate; because the most favourable construction must be put upon a man’s intentions, and consequently that it is not to be presumed he intended to do wrong, if his conduct can be otherwise accounted for. To illustrate this,—if a tenant for life, having power to grant a lease for nineteen years, shall grant a lease for twenty-nine, the same rent to be paid during the whole term; and if he shall not live long enough to give effect to his contract, still the reversioner must confirm the lease, upon the original terms, for nineteen years, because the tenant for life undoubtedly intended a lease for that period; while, at the same time, though he might give a lease for twenty-nine years had he lived to execute his intention, he could not mean to do that which he must have known to be absolutely impossible; to wit, to burden his successor for a number of years exceeding the nineteen; and therefore his conduct may thus be brought within the limits of his power.

“ I do not wish to impugn the principles of this decision, though, were the case new, I would not promise to adopt that principle. I wish, however, to show that courts of equity have gone the utmost length which they will be suffered to go, and as far as they will be followed.

“ But it is a case very different from the former, where a tenant for life ventures upon a transaction, clearly at variance, and irreconcilable with those powers under which he holds the estate, and dies before that period when he would be able to give it effect. That I may be understood, suppose a tenant for life, empowered to grant leases for nineteen years, for a valuable consideration, to execute a lease for twenty-nine years, at a high rent for the last ten, but at a low rent for the anterior nineteen years. In such a case, should the tenant for life die within the first ten years, the reversioner, in my opinion, would not be obliged to satisfy his contract; because, in the first place, it was disposing of the estate in a manner irreconcilable

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with the declared will of the donor. 2. There was, besides, no controul betwixt the lessee and the reversioner ; and, 3. The reversioner, was to be an immediate sufferer by means of the low rent for the first nineteen years, while perhaps he might live to enjoy the advanced rent of the ten last years.

“ This doctrine applies directly to the present case. Your Lordships have an application from an assignee to a lease, praying that, in equity, the appellant, a tenant in tail, might be compelled to execute a contract, which, had Alexander Kerr, the former tenant in tail, lived, he could have been forced to execute, when the contract is in direct and irreconcilable opposition to those restrictions, under which alone the estate could be held.

“ The intention of a Scotch entail is, to prevent the commission of certain acts. If, in the face of such an entail, part of these acts be done, the person transgressing forfeits his title to the estate ; in other cases, the doing what is prohibited, only resolves the act itself into a nullity—as for example, where a party dies before his act can receive a legal sanction, agreeably to the deed of entail, as in the case before stated. The whole restrictions laid upon a tenant in tail, must be entered in a record kept for the special purpose ; and they must likewise be engrossed in each subsequent investiture of the estate. If, therefore, any one shall contract with such a tenant, for that which he is prevented from performing by the investitures of his estate, the non-performance of such an engagement on the part of the tenant in tail cannot be deemed a hardship, by the party contracting with him, because every person is enabled to know, and therefore ought to know, the extent of those powers to which he is limited.

“ In this case, the agreement with Alexander Kerr, had he outlived the 1791, would have been effectual against him ; but as he died before 1791, it will not apply to his successor. For Kerr was authorised to grant leases for 19 years only, not for a longer period. In the year 1788 he executed the contract for 19 years, to commence three years afterwards. That was disposing of the farm for 22 years, and therefore exceeding the term to which he was limited. Had he lived, however, he must have fulfilled his agreement, but as he did not live, it cannot be transferred against a singular successor, which is precisely the character of an heir of entail.

“ But the lease to Turner being current till the year 1791, and Redhead being assignee of that lease, the argument bearing chiefly upon the point is, that the new lease was a prorogation merely of the old one, that it must therefore be considered a lease *de presenti*, and not a lease in reversion. Could this be made out, the question would have a very different appearance ; but the proposition cannot be supported. For though, by the law of Scotland, the assignee be what is termed procurator for his own behoof, and irrevocable

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procurator for the assignor ; yet, in the case of a lease, the original tenant is equally bound in payment of the landlord's rent as when himself in possession. It is true that the assignee, by his possession, makes himself also liable to the landlord, and that his property may be distrained, should the rent not be paid. Still, however, that does not liberate the assignor, but only operates to the landlord as a double security.

“ This proves, that notwithstanding an assignment, the interest of the assignor is not extinguished, and therefore, that a new lease to the assignee, to commence at a future period, cannot be termed a prorogation of the old lease, because the parties contractors are different. But independent of this general reasoning, the assignment to the respondent Redhead expressly stipulates, that if the rents and over rents shall be unpaid for two years, the assignor may re-assume possession. Such an event being by no means impossible, Turner, the assignor, must be considered as still tenant of the farm at the date of the agreement betwixt Redhead and Alexander Kerr, the appellant's brother. Hence, it follows that the agreement was not a lease *de presenti*, but at most, a lease in reversion ; not a prorogation of the old lease, but a new lease, to begin when the old lease ended. It was on this account impossible that possession could follow upon the agreement, so as to support the respondent's argument ; unless he had previously surrendered his possession under the old lease, which he no doubt might have done, but which, as a matter of fact, he has not done.

“ This, however, is not all : For the conditions of the agreement differ so essentially from the lease to Turner, that I am satisfied the parties themselves considered this agreement to be altogether a new and separate transaction, perfectly distinct from the old lease ; and that the sole and only object of Redhead was to secure to himself possession of the farm for 19 years after the old lease should be expired. With a view to this, he covenanted that, for the remaining three years of the old lease, he would manage the farm in a manner different from what he might have done, and perhaps less profitably to himself. He has certainly executed his part of the agreement in the most complete, honourable, and ample manner :—For as to the ploughing 40 acres, it is mere *chicanery* to object to this as a deviation ; because the spirit of the agreement was, to convert the grounds into a sheep farm, and ploughing to the extent mentioned, was literally to fulfill that intention in the best manner. But Alexander Kerr, unfortunately for the respondent, died before it was possible for him to perfect his agreement, and the respondent therefore is disappointed. He has come to your Lordships, praying you, for certain reasons, to transfer this obligation upon Alexander Kerr, to the appellant, the present heir of entail, who refuses to ratify it. In this refusal, there is no *mala fides* ; and I do not think that, in equity, the heir of entail can be compelled to ratify it.”



“ I therefore move to reverse :—

“ It was ordered and adjudged that the interlocutors of the Lords of Session of the 19th June, the 10th of July, and 27th of November 1792, complained of be *reversed*. And it is further ordered and adjudged, that the interlocutor of the Lord Ordinary of the 16th of December 1791, and also the interlocutor of the said Lord Ordinary of the 10th of Feb. 1792, in so far as the same affirms the said interlocutor of the 16th Dec. 1791, be affirmed.”

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For Appellant, *Wm. Grant, Geo. Ferguson, Jas. Allan Park.*

For Respondent, *Sir J. Scott, R. Dundas.*

[M. 10971.]

WM. BLACK and ISAAC GRANT, W. S.	<i>Appellants ;</i>
GEORGE GORDON and Others, Creditors on the Estate of Kincaraigie,	} <i>Respondents.</i>

House of Lords, 5th Feb. 1794.

DECREE OF SALE—ENTAIL—PRESCRIPTION — SUBSTITUTE—MINORITY.—Circumstances in which held that an entail having lain dormant for more than forty years, was prescribed ; and that the minority of a substitute heir of entail did not elide the plea of prescription. Also that the decree of Sale connected with the adjudications led by the creditors against the estate, was a good title to the purchaser thereof.

Alexander Auchyndachy of Kincaraigie was heir of entail, under a deed executed by his grandfather, and also entitled to take up the estate of Kincaraigie as heir of line. He had made up no title to the estate, but possessed on apparency more than forty years. Having contracted debts, adjudications were led at the instance of his creditors, and a process of ranking and sale was brought, in consequence of which, the estate was judicially sold in 1786 to Mr. Byres, the purchaser.

Various attempts were made by Mr. Auchyndachy to overturn this decree of sale ; and in particular a reduction was brought in his own name, and that of his sister Sarah Auchyndachy, as being the next heir of entail, concluding that the decree of sale should be set aside, as contrary to