

Feb. 14, 1831. from in the original and in the cross-appeal, and remitting the cause to the Court of Session, with an instruction to them to direct an issue or issues to be tried by a jury with regard to the whole matters in dispute between the parties.

The House of Lords ordered and adjudged, That the interlocutors, so far as complained of, be reversed; and it is further ordered, That the cause be remitted back to the Lords of Session, of the first division, in Scotland, with instructions to them to direct an issue or issues to be tried by a jury, which issue or issues shall include the whole matters in dispute between the parties in this cause; or to proceed otherwise in the said cause as they shall deem just, and shall be consistent with this judgment.

*Appellant's Authorities* — Anderson, May 22, 1828 (6 Shaw & Dun. 836); Peacock, 16 Vesey junior, 49; 2 Campbell, 45.

*Respondents' Authorities.*—1 Stair, 16, 3; 3 Ersk. 3, 19; Brock, Dec. 9, 1696 (14,563); M'Whirter, Feb. 14, 1822 (1 Shaw and Dun. 3 Gow on Partnership, 9; Struthers, May 19, 1826, (ante Vol. II. 153.

J. CHALMER—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 3. GEORGE PENTLAND, Appellant.—*Robertson—M'Neil.*

Hon. J. WOLFE MURRAY, and Others, (for the Hon. ALEX. OLIPHANT MURRAY,) and TRUSTEES of Lord and Lady ELIBANK, Respondents.—*Lord Advocate (Jeffrey)—Walker.*

*Landlord and Tenant.* — Circumstances in which it was found (affirming the judgment of the Court of Session) that a party had acquired no real right to a farm under an improbativ lease.

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1ST DIVISION.  
Lord Meadow-  
bank.

THE Hon. Alexander Oliphant Murray, eldest son of Lord Elibank, is the proprietor of the entailed estate of Pitheavlis, (situated in Perthshire,) subject to a reserved right of liferent in favour of his mother. For some time prior to 1818 the appellant Pentland was in possession, under a lease, of certain parts of the estate called Greenyards and Unthank. On the 13th of April 1818 Lord Elibank (then the Hon. Mr. Murray,

and at which time his son was a pupil,) addressed to Pentland this letter :—“ I, as administrator-in-law for my son, Alexander  
 “ Oliphant Murray, as proprietor of the lands of Pitheavlis,  
 “ authorize you to prepare building leases, of five acres each, for  
 “ yourself and children, at the present rents, of ninety-nine  
 “ years, as authorized by Act of Parliament ; as also to prepare  
 “ a lease to you, of nineteen years, of the quarry of Pitheavlis,  
 “ at ten pounds of rent per annum, with liberty to open others, if  
 “ wished, on the grounds. The building leases to be on the  
 “ grounds you point out proper on the estate, and with the  
 “ regular qualifications attending such leases, according to Act of  
 “ Parliament ; and I bind myself to implement the same when  
 “ drawn out. I am,” &c. Feb. 15, 1831.

Nothing farther appeared to have been done till 1822, when Pentland caused a draft of two leases to be prepared, one in favour of himself, of five acres of the lands of Greenyards, and another in favour of his son Colin, of four acres of the lands of Unthank and one acre of Greenyards. These drafts were said to be marked thus : “ I approve, and to be extended. A. O. Murray.” At this time Mr. Murray was about seventeen years of age. The leases were extended and signed by Lord Elibank, but not by Mr. Murray, who, having gone abroad, granted a commission in favour of Lord Cringletie and others. Lord and Lady Elibank about the same time executed a conveyance of their property to trustees for behoof of their creditors.

The commissioners of Mr. Murray, with concurrence of the trustees, presented a petition in 1825 to the sheriff of Perthshire, stating, that Pentland was in arrears of rent for the lands of Greenyard and Unthank from Candlemas 1823, and praying for warrant of sequestration and of sale. In defence, Pentland founded upon the above documents, and averred that, in virtue of them, he and his son had possessed the lands, and on the faith of them had erected buildings.\* Of this averment the sheriff allowed a proof, on advising which he pronounced this interlocutor :—“ Finds nothing proven tending to  
 “ show any alteration in the mode of occupation of Greenyards  
 “ and Unthank, after Whitsunday 1822, from what previously

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\* Pentland farther alleged that he had a claim of compensation against Lord Elibank, who had right to the rents *jure mariti*, and was due him large sums ; but both debt, and right to compensate, were denied.

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“ took place, from which it can be inferred that at the said term  
 “ a change of possession was adopted, and the building leases  
 “ then entered upon; but that, on the contrary, the same mode  
 “ of possession continued after that term as was enjoyed by the  
 “ defender previous thereto, when he occupied the lands of  
 “ Greenyards at a rent of £60, and the lands of Unthank at a  
 “ rent of £30; refuses, in these circumstances, to sustain  
 “ the building leases founded on by the defender, which are  
 “ incomplete, and do not appear to have been acted upon;”  
 and therefore decerned in terms of the prayer of the petition.  
 Pentland having complained by advocacy, the Lord Ordinary  
 pronounced this judgment:—“ Finds, that none of the documents  
 “ founded on by the advocator (whether taken individually or col-  
 “ lectively) are, even if the same had been followed by possession,  
 “ sufficient to constitute a lease, binding and effectual upon the  
 “ Honourable Alexander Murray, who was, at the date thereof,  
 “ under the age of majority, but above the years of pupillarity:  
 “ Finds, that even if the said documents could have been held,  
 “ if followed by possession upon his part, to be sufficient for  
 “ constituting the contract of lease between the parties, there has  
 “ been no proof of such possession adduced, or offered to be  
 “ brought; and that the proof led in the inferior Court is, upon  
 “ this point, altogether defective and incomplete: Therefore  
 “ repels the reasons of advocacy, remits the cause simpliciter  
 “ to the sheriff, and decerns; finds the advocator liable in  
 “ expenses.” Against these interlocutors the appellant reclaimed;  
 but the Court, on the 3d of March 1829, adhered.\*

Pentland appealed.

*Appellant.*—To constitute a real right of lease, it is not necessary, according to the law of Scotland, that there should be a formal probative deed; it is sufficient if there be any writing intervening between the parties, and that possession follow thereon. In the present case Lord Elibank, as administrator of his son, and as such having full power, granted the missive of April 1818; and Mr. Murray, at a time when, although minor, he was entitled to act for himself, subscribed the draft of the lease, and his father subscribed the extended deed. These were quite suf-

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\* 7 Shaw and Dunlop, No. 256.

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ficient to afford a valid title to the appellant. But it is said that he had no possession in virtue of this title. The fact that he was in possession is not disputed, and the allegation merely is, that the possession was not imputable to that title. But the appellant has a right to impute his possession to that title, and there was no necessity to go through the ceremony of removing and again taking possession; besides, the proof established that acts had been done on the faith of the title.

*Respondents.*—As Mr. Murray was the proprietor of the estate, his father had no power to grant leases, and more especially such as those alleged to have been made; and as Mr. Murray was a minor, without tutors or curators, and besides was an heir of entail, he could not execute such deeds, which were equivalent to an alienation. But, independent of this, no such deeds were ever executed; and it is not even alleged that the appellant ever subscribed any lease, so that he remained free. It is farther established by the judgment of the Court of Session, (which is equivalent to a special verdict, in terms of the late Judicature act,) that he never had possession with reference to the leases, and consequently he cannot found on them as affording him any real right in the lands, or any defence against the present claim.

LORD CHANCELLOR.—Under all the circumstances of this case, the interlocutors complained of appear to me to be quite free from objection. Merely, therefore, expressing my concurrence in the judgment of the Court below, I shall make no apology for simply moving your Lordships, that the interlocutors complained of be affirmed, but without costs.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed.

*Appellant's Authorities.*—10 Geo. III. c. 5; Moray, July 23, 1772 (4,392); Grant, July 10, 1718 (15,180); Grieve, June 15, 1797 (5,951); M'Pherson, May 12, 1815 (F. C.); 1 Bell on Leases, 307,316; 1 Ersk. 7, 14, and 23.

*Respondents' Authorities.*—1 Ersk. 7, 16; 6 Geo. IV. c. 120, § 40.

G. W. POOLE—RICHARDSON and CONNELL,—Solicitors.