

[16th *July* 1832.]

No. 8. JOHN REID, Appellant. — *Lord Advocate (Jeffrey)*.
Dr. Lushington.

PETER LYON, Respondent. — *Knight — Russell.*

Trust. — Circumstances under which an assignation of a lease *ex facie* absolute was held (affirming the judgment of the Court of Session) to have been granted in security only, and to be redeemable by the heir of the assignor, on repaying to the assignee the advances made by him in relation to the lease.

1ST DIVISION.

Ld. Corehouse.

IN April 1798 Peter Lyon, druggist in Edinburgh, entered into a contract of lease with Sir James Montgomery of Stanhope, whereby Sir James let to Lyon, his heirs, assignees, and sub-tenants, the lands of Comely Garden, lying near Edinburgh, for the space of 500 years from Martinmas 1797, at a rent of 46*l.* 12*s.* 4*d.* per annum, but which, after the lapse of seven years, was to rise to 60*l.*, with a power of granting sub-leases for the purpose of building. Lyon entered into possession; but having afterwards incurred an arrear of rent from Candlemas 1812 to Candlemas 1815, amounting, with interest and expences, to above 218*l.*, an action was raised against him by the trustees of Sir James Montgomery, then deceased, for payment of the amount due and for avoiding the lease, and decret was obtained, declaring the lease to be at an end, and ordaining removal from the premises. On being charged, in virtue of the sheriff's precept, to remove, Lyon applied to John Reid, with whom he had

been connected in business, to advance to the trustees the above amount; and, in consequence, Reid, by the hands of his son, John Reid junior, writer in Edinburgh, paid the amount to Robert Stuart, factor for the trustees, who thereupon gave the following receipt: “Edinburgh, 14th July 1815. — Received by me, factor for Sir James Montgomery’s trustees, from Mr. John Reid, writer in Edinburgh, the sum of 218*l.* 17*s.* 4½*d.* sterling, in payment of the annexed account of rents, and interest, due by Peter Lyon, druggist in Edinburgh, to said trustees; to the extent of which sum I oblige the said trustees to grant you an assignation to said rents and diligence, but upon your own expences.” In the same month Reid junior drew and extended an assignation by the trustees in favour of Reid senior, on the narrative of the lease and trust deed in their favour, the falling into arrear, the above-mentioned payment, and stating that in respect thereof the trustees suspended the ejectment of Lyon from the premises, and waived the effect of the irritancy incurred and declared by the decree at their instance, and agreed to assign the same to Reid senior, as a collateral security to him against Lyon, and his heirs and successors, for the reimbursement of the sum so advanced and paid to the trustees by Reid, and future interest and expences which should ensue thereupon, but always under the qualities and conditions after specified: and the assignation then proceeded, “we (the trustees) do hereby not only acknowledge the receipt from him of the said sum of 218*l.* 17*s.* 4½*d.* sterling, but also assign and convey to him, and his heirs and assignees, the aforesaid decree and precept of the 15th of March last, and execution thereof of the 23d of May last, and sums thereby due,

No. 8.

16th July
1832.

REID
v.
LYON.

No. 8.

16th July
1832.

REID
v.
LYON.

and consequents, with all action and execution competent against the said Peter Lyon and his heirs, and estate and effects, in so far only as the same shall not interfere with or impair our security under the aforesaid contract of lease, and subject-matter thereof, for payment of the future rents, interest, and penalties, if incurred, and the fulfilment and performance of the other obligations, conditions, and regulations undertaken by and incumbent upon him, as therein expressed; and with full power of recovery to the said John Reid and his aforesaid, whom we hereby substitute in our full right, in relation to the security and recovery of the sums now paid to us, and consequents, but under the qualities aforesaid; and having herewith delivered to him the said precept and execution thereof, we warrant these presents from our own acts and deeds derogatory hereto, but no further.”

Next day Lyon executed an *ex facie* absolute assignation (drawn by Reid junior) in favour of Reid senior, narrating the contract of lease, the circumstances which had led to the lessee's pecuniary embarrassments, and then stating that the trustees “brought an action before the sheriff of Edinburgh against me of irritancy of the lease, and for payment of the arrears of rent, interest, and expenses; and on the 15th day of March last obtained decree of declarator of irritancy, and forfeiture of said lease, and for payment of said arrears, interest, and expences, and also for removing and ejecting me, my family and dependents, from the premises; and on the 23d of May last I was served with an execution to the effect aforesaid, but by the interposition of friends, the pursuers were prevailed upon to postpone my actual ejection: and whereas John Reid having,

on the 14th day of July current, made payment to the pursuers, the said trust-disponees, of the said arrears, interest, and expences, amounting to 218*l.* 17*s.* 4½*d.* sterling, conform to receipt of that date, by Robert Stuart, their factor, containing an obligation to obtain an assignation from the said trustees, and also conform to an assignation granted pursuant thereto by the said Sir James and Archibald Montgomerys, being a quorum of the said trust-disponees, of the said decree, precept, and execution, and of the whole sums thereby due to the said John Reid, and his heirs and assigns, dated the 26th and 28th days of July current, all upon condition of my executing and delivering to him, simul et semel, the assignation and conveyance of the said lease as after written : therefore, and in consideration thereof, I have assigned, as I do hereby assign, dispone, and convey to the said John Reid, and his heirs, assigns, or sub-tenants, the aforesaid contract of lease of the said lands of Comely Garden, &c., with the whole clauses and obligations therein contained, incumbent on the lessor and his heirs and disponees ; but with the burden also of implement and performance of the whole conditions, clauses, and obligations therein contained, imposed on, and thereby undertaken by me for myself, and my heirs, assignees, and sub-tenants, in all respects ; and that for all the years and space to run thereof, from and since the term of Martinmas last, which is hereby declared to have been the entry of the said John Reid to the premises, notwithstanding the date hereof, and as for this present crop and year 1815 ; with full power to the said John Reid and his foresaids, whom I hereby substitute in my full right therein, to exercise all the powers and privileges thereby conferred, he and they always paying

No. 8.

16th July
1832.

REID
v.
LYON.

No. 8.

16th July
1832.

REID
v.
LYON.

the rents, fulfilling and implementing the whole obligations, conditions, and regulations undertaken by me as thereby prescribed, and freeing and relieving me and aforesaid thereof in all time coming. And having herewith delivered an extract of the said contract of lease, I bind and oblige myself, my heirs and successors, to pay and discharge the rent due at Lammas next, being the first term for crop 1815, and relieve them thereof, and of all public and parochial burdens affecting the same, in respect of that crop and antecedents; and also to warrant this present assignation to the said John Reid and his aforesaid, from all acts and deeds done or to be done by me, derogatory hereto in any shape." This assignation was intimated to the trustees, and Buchan, a friend of Reid, gave their factor the following letter: "In respect you have this day delivered
"to me the assignation by Peter Lyon to Mr. John
"Reid, late of the Tontine, Glasgow, of the lease of
"Comely Garden, granted by the late Lord Chief
"Baron Montgomery to Mr. Lyon, duly intimated to
"the trust-disponees, upon condition that the said John
"Reid, who paid up the arrears due at Candlemas last,
"shall grant an obligation for the punctual payment of
"the rent of this and the four subsequent crops, which
"I engage to procure and exchange with this, other-
"wise shall stand bound to the same effect to the said
"trust-disponees; and remain," &c. Lyon continued in possession of the premises until June 1826, when he died; but it was alleged that the rents had been paid by Reid senior.

A few months before Lyon's death, John Reid junior, upon a requisition by Grant, solicitor for Lyon, for a statement of the nature and extent of Reid senior's

claim against Lyon, and to be allowed to borrow the grounds of the claim, transmitted to Grant an account, with relative documents, (consisting of extracts of the two assignations, the sheriff's precept and charge thereon, the state of rents, and receipts given by the factor,) of the sums of money, amounting to above 800*l.*, paid by Reid senior on behalf of Lyon, and which was in part composed of 218*l.* 17*s.* 4½*d.*, being precisely the sum of arrears advanced to the factor in 1815, with progressive interest, deducting property tax, down to February 1826. Immediately on Lyon's death, on the 12th June 1826, Reid junior demanded and obtained back the papers and documents from Grant; and on the 19th of the same month Reid senior presented a petition to the sheriff, designing himself "principal tacksman of the "lands and others after mentioned;" setting forth, that Lyon had occupied and possessed the premises under the petitioner, as principal tacksman, ever since the date of the assignation; that the rents were never paid by him to Reid senior, and now amounted to above 800*l.*, besides the rent of the current crop: and praying that the sheriff would grant warrant of sequestration of the effects on the premises, and also to authorize a person of skill to take possession of the subjects, (which in the meanwhile, from the absence abroad of the person understood to be the nearest heir to Lyon, remained untenanted,) and manage the same, under the orders of Court; and he farther craved service on Peter Lyon, residing at Comely Garden, grand-nephew of the deceased, and nearest relative in Scotland. The sheriff granted warrant to sequester in the usual form; and authorized an interim manager to take possession. Lyon, the grand-nephew, put in answers, not opposing the

No. 8.

 16th July
 1832.

 REID

 v.
 LYON.

No. 8.

16th July
1832.REID
v.
LYON.

petition, but reserving all right to the subjects in question, and in March 1827 raised a summons of declarator against Reid senior on the above facts, and concluding to have it found and declared that the pursuer was the nearest and lawful heir in heritage of the deceased Peter Lyon, and as such had good right and title to succeed to the contract of lease, and the subjects thereby let, in so far as the said Peter Lyon had right or interest therein; and further, that the assignation by the deceased was not an absolute and irredeemable assignation of the contract of lease and subjects therein mentioned, but was granted to the said defender merely in security of the repayment of the sum of 218*l.* 17*s.* 4½*d.*, and interest and expences thereon, and was redeemable by the said Peter Lyon on repayment of the said sums; and that the same was still liable to be redeemed by the pursuer on making payment thereof. The pursuer represented that the lease was now worth 5,000*l.*, and that no party engaged in the transaction ever considered Reid senior as principal tacksman, but merely creditor of the deceased for the amount of the advances.

In defence Reid senior contended, that the decree obtained by the trustees of Sir James Montgomery became final, and that Peter Lyon's right to the lease was thereby terminated for ever; and further, that the assignation was absolute and not by way of security; and that this was evident from the circumstances of the case.

A supplementary action was subsequently brought by the pursuer, who had erroneously served himself heir of conquest, in place of heir in general; but which mistake he rectified by being served in the proper character.

The Lord Ordinary conjoined the two actions, and found, “ that although the assignation by the late Peter Lyon, the pursuer’s grand-uncle, to the defender, of the lease in question, bears to be an absolute conveyance, it is proved by the admitted facts and circumstances of the case, and the written evidence produced, to have been intended and understood by the parties merely as a security for repayment of certain arrears of rent advanced by the defender to the trustees of the late Sir James Montgomery the landlord, for behoof of the tenant, Peter Lyon; therefore finds and declares, that the pursuer, in right of his grand-uncle, is entitled to succeed to the lease; that the assignation by Peter Lyon to the defender is redeemable by the pursuer, on repayment of the sum of 218*l.* 17*s.* 4½*d.*, the sum advanced at the date of the assignation, and whatever other sums the defender can instruct that he advanced for the said Peter Lyon, on the faith of the security, with interest at the rate of five per cent. from the date of the said advances respectively till payment, together with the expences incurred by the defender in the transaction; and allows an account of the said advances, interest, and expences to be given in.”

On appeal to the First Division, their Lordships, without hearing the pursuer’s counsel, refused the desire of the reclaiming note, and adhered to the interlocutor of the Lord Ordinary, and found the defender liable in the expences incurred since the date of the Lord Ordinary’s interlocutor; and remitted to his Lordship, to modify and decern for the same*.

No. 8.

16th July
1832.

REID

v.
LYON.

Dec. 4, 1829.

May 25, 1830.

* 8 Shaw and Dunlop, 789.

No. 8. Afterwards the Lord Ordinary modified the expences, and found, decerned, and declared against the
 16th July 1832. “ defender in terms of the libel, upon payment being
 REID “ made to the defender of the sum of 1,217*l.* 19*s.* 7*d.*
 v. “ sterling, being the balance due by the pursuer to the
 LYON. “ defender upon the state of the payments of rents, &c.
 June 17, 1830. “ made by the defender upon the faith of the security
 “ in question, with interest on the amount of the
 “ defender’s advances from 2d February 1827, at the
 “ rate of five per cent., till payment; finds the pursuer
 “ entitled to the expences incurred by him in the con-
 “ joined actions; but, in respect that the first summons
 “ was rendered unnecessary by the pursuer’s claiming
 “ as heir of conquest, finds him not entitled to the
 “ expence of that summons, or the proceedings occa-
 “ sioned by the pursuer’s claiming in the said character;
 “ appoints an account thereof to be given in, and
 “ remits to the auditor to tax and to report.”

The defender reclaimed, and maintained that it was incompetent for the Lord Ordinary to award any expences of the Outer House prior to the date of the interlocutor of count, by which only the expences of opposing were found due; but the Lords adhered to the interlocutor complained of, and refused the note, and
 Jan. 21, 1831. found the complainer liable in farther expences*, which they afterwards decerned for.
 Feb. 4, 1831.

Reid senior appealed.

Appellant. — It was never intended or understood, when the appellant acquired right to the lease in

* 9 Shaw and Dunlop, 308.

question, that he should hold the same in security or in trust for the late Peter Lyon or his heirs, and there is no fact or circumstance from which it can be inferred that this was the intention or understanding of the parties.

The appellant has good ground of complaint of the way the suit has been allowed to be conducted. The inept summons should have been at once dismissed; and it was irregular to conjoin an incompetent with a competent process. It was equally irregular to find him liable in expences.

Injustice is done to the appellant, even on the assumption that the respondent could establish his pretended right to the lease in question. He is not fully indemnified by the mere return of the sum, with interest, advanced. He is entitled to more.

Respondent.—The respondent has a good right and title to insist on the present action. The conjunction of the processes was agreeable to practice, and quite in form, and the award of expences regular.

The assignation was merely in security, and not an absolute conveyance, which is quite plain from the facts of the case, and amply supported by documentary evidence.

LORD CHANCELLOR. — My Lords, this case brings before your Lordships an appeal from six different interlocutors of the Lord Ordinary and the First Division of the Court of Session. I do not feel it to be necessary to enter at large into the circumstances of the case, nor assign reasons for the judgment I am about to recommend to your Lordships to pronounce. The point to which the argument has directed the attention

No. 8.

16th July
1832.

REID

v.
LYON.

No. 8. of your Lordships is, Whether the assignation of a lease, which was made by the ancestor of the respondent to the appellant, was granted to him for the purpose of conferring upon him an absolute right of property, or only with a view of being a security to him for the payment of a debt, and therefore redeemable. The conveyance or assignation appeared upon the face of it to be absolute; and the principal question now to be determined by your Lordships is, whether we can look beyond the words of the conveyance; and whether, if we can, the facts do afford sufficient evidence of an intention distinct from that which the words express. The terms of the conveyance appear to vest in the assignee, the party to whom the lease was assigned, the absolute lease; and it is contended, that those words cannot be qualified by the facts of the case evidencing the intention of the parties. The Lord Ordinary was of opinion that the facts might be looked to, and the First Division of the Court of Session affirmed the judgment of the Lord Ordinary, on reference to those facts, that this lease was assigned only as a security for a debt. I am quite aware that it is necessary that great attention should be paid, in order to restrain this principle within its due bounds, and to prevent courts adopting a possible conjectural construction, as showing the existence of intention — travelling out of the deeds themselves for the purpose of fixing an intention upon the party by conjecture only; not attending to that which is done so much as to that which is supposed to have been the intention of the parties. But, my Lords, upon looking fully into this case, and the grounds upon which the decision has proceeded, I do not think that it can be said that it was

16th July
1832.
REID
v.
LYON.

decided on such conjecture. Without travelling out of the deed, I think it appears that the judgment is right, and that the learned Lord Ordinary has proceeded on the legitimate rules of construction.

This was the residue of a term of 500 years of very valuable property, consisting of six acres in the immediate neighbourhood of Edinburgh. The consideration paid at the period of the execution of the assignation, it appears, was 218*l.* 17*s.* 4*d.*; and the interlocutor of the Lord Ordinary, affirmed by the Court, has held, on the account which was taken, that it was redeemable on the payment of 1,217*l.* 19*s.* 7*d.*, the principal and interest, the assignation being a security for the sum originally advanced, and the interest upon it to the date of payment. It is alleged that the property is worth no less than 5,000*l.* That precise value is, in terms, denied on the opposite side, but the denial is very loose; the utmost extent to which it goes is, that it is not so valuable. That may be taken to mean that it is not *quite* so valuable; but the appellant does not go on to say that it is not of much more value than the sum advanced, with the interest which has accrued upon it.

My Lords, there was an exception in respect of the expenses, but the appellant has no good ground of complaint there, as the expenses of the first, the incompetent summons, were not given against him. It is not necessary to enter into those circumstances. It is sufficient, upon the whole, to state to your Lordships, that I am, on consideration of the case, quite satisfied that the judgment of the Court below is right, and that I would advise your Lordships to affirm the several interlocutors complained of; but as the case has appeared to me not

No. 8.

16th July

1832.

REID

v.

LYON.

No. 8. altogether free from doubt, I shall not advise your Lordships to allow the costs.

16th July

1832.

REID

v.

LYON.

The House of Lords ordered and adjudged, “ That the
“ appeal be and is hereby dismissed this House, and that
“ the interlocutors therein complained of be and the same
“ are hereby affirmed.”

RICHARDSON and CONNELL — MACQUEEN, — Solicitors.