SCOTLAND.

APPEALS FROM THE FIRST AND SECOND DIVISIONS OF THE COURT OF SESSION.

MONTGOMERY and others—*Appellants.*
CHARTERIS (Earl of Wemyss)—*Respondent.*

AND

DUKE OF BUCCLEUCH—*Appellant.*
MONTGOMERY and others, &c.—*Respondents.*

Feb. 3, 5, 7, 10, 13, 14, 17, 18, 21; July 9, 1817.

QUEENSBERRY LEASES.

WHETHER a fifty-seven years' lease is struck at by the prohibition to alienate in an entail? Whether the taking of grassum is struck at by the prohibition to alienate, and the proviso against diminution of the rental? Whether there may be a fraud on an entail, distinct from what is prohibited? Whether a lease for thirty-one years; or, in case that should not be good, for the longest of certain alternate periods from twenty-nine to nineteen years, for which the granter should be found by the Court of Session, or House of Lords, to have power to make a lease, may be a good lease for the restricted periods of twenty-one or nineteen years, notwithstanding the indefinite *ish?* &c. &c.

IN the Neidpath, or March entail, there is, among other prohibitions, a prohibition to *alienate:* and, with respect to leases, there is a clause that it shall be lawful and competent to the heirs of tailzie, to set tacks during their own life-times, or the life-times of the receivers thereof, the same being set without evident diminution of the rental. In the Queensberry entail there is a proviso, that the

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heirs shall not set tacks nor rentals for any longer space than the settler's life-time, or for nineteen years, and that without diminution of the rental, at the least for the just avail at the time.

The late Duke of Queensberry had, some years before his death, granted several leases of farms forming part of the Neidpath, or March, and the Queensberry, entailed estates, at low rents (not less, nominally, than the rents at which the lands had been previously let), and taking large grassums. The Earl of Wemyss was the next substitute heir, entitled to succeed to the Neidpath or March estate; and the Duke of Buccleuch the next heir, entitled to succeed to the Queensberry estate. Actions were brought by the Duke himself, by his trustees after his death, by the heirs of entail, and by several of the tenants; the object of all of which was to have the judgment of the Court upon the question, whether the leases, or any, and which of them, were or was valid. With this view, certain particular cases were selected for litigation and discussion, in each of which the principles of decision, it was expected, would govern and decide a class of cases. It had been before decided by the Court below, and the House of Lords, in the Wakefield case (*vid. ante* vol. ii.), that a ninety-seven years' lease was bad as being an alienation.

Wakefield case. 2 vol. p. 90.

1st Division of the Court.

Neidpath or March entail.

Case of Harestanes.

With respect to the Neidpath or March estate, the first case, that of Easter Harestanes, was a case of a fifty-seven years' lease, at 74*l.* rent, and 310*l.* grassum. This was, by the Court below, held bad, on account of the long duration, which brought it within the prohibition to alienate.

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Case of Whiteside.

The second case, the case of Whiteside, was that of a life rent lease (permitted by the entail), taken without grassum, upon the surrender of a fifty-seven years' lease, with a considerable grassum, the rent remaining the same as before. With reference to this and the next class of cases it is to be observed that there were contracts between the Duke and the tenants, thus surrendering their leases, by which the Duke bound himself to give them longer leases for grassums, if it should be found that he had the power.

Case of Edstoun.

The next case (or class), the case of *Edstoun*, was that of a thirty-one years' lease; or, in case that should be found beyond the power, then it was to be a lease alternately for twenty-nine, twenty-seven, twenty-five, twenty-one, or nineteen, years—" whichever of the said several terms " of years short of thirty-one years, the Court of " Session, or House of Lords, should find to be the " longest period of those above specified, for which " the Duke had power to grant a valid lease." This lease also was granted without grassum upon the surrender of a fifty-seven years' with grassum, the rent remaining the same as that under the fifty-seven years' lease.

These Whiteside and Edstoun leases were held by the Court below to be bad, on account of the grassum taken on the fifty-seven years' leases, for which they were substitutes, grassum being a diminution of the rental and an alienation of the profits; and they were held bad also on the ground of fraud on the entail, in which the tenants, as appeared by the contracts, were implicated. The

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2d Division of the Court.

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Buccleuch cases.

Court below appears not to have considered the above indefinite kind of *ish* as any objection to the validity of a lease for the restricted periods of twenty-one or nineteen years. From these decisions the trustees of the late Duke appealed.

The late Duke of Queensberry also granted several leases of farms on the Queensberry estate for nineteen years, taking large grassums. These leases were divided into four classes:—1st, Leases granted to the tenants in those tacks which were current, or to strangers, under the burthen of the current tacks; and with obligations in both cases to grant a new lease for nineteen years, annually, during the Duke's life:—2d, Leases granted under a similar obligation to renew, where the current leases had expired:—3d, Leases granted without an obligation to renew, but where the current leases were not near their natural expiration:—4th, Leases without obligation to renew, and not granted till the previous leases had expired. Upon a declarator by the trustees of the late Duke of Queensberry before the second division of the Court, all these leases were sustained, the second division of the Court considering grassum as no objection. From that decision the Duke of Buccleuch appealed.

The cases of some of the tenants were brought separately, both before the Court below, and the House of Lords; but the above general statement will, it is apprehended, be sufficient in this place. A more detailed statement of the cases, and proceedings, and of the material clauses in the entails, will be found in the Lord Chancellor's speech. It

is not deemed expedient in the actual state of the proceedings to go at all into the argument at present.

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Mr. Leach and *Mr. Jeffray* for the Heirs of Entail; *Sir S. Romilly* and *Mr. Cranstoun* for the Trustees; *Mr. Moncrief* for the Tenants.

Judgment. July 9, 1817.

Lord Eldon (C.) Your Lordships' attention has been called, in the discussion of the various cases which are in controversy between the Heir of Entail, the present Lord Wemyss, and the executors and disponees in trust of the late Duke of Queensberry, and the several tenants, either by particular action or otherwise, who may be represented as having interests in the questions under your Lordships' consideration, to the decision of cases which may, I think, be represented as cases of considerable difficulty; but I am sure they may be represented as cases of importance, at least, altogether unexampled by any that have fallen within my observation in the course of my professional life.

My Lords, When I so state the points to your Lordships which are now under consideration, I am impressed undoubtedly with the notion that this House never had a more important duty to discharge than it is called upon now to discharge. The consequences of your Lordships' decisions upon these causes, to the parties immediately interested, are very weighty and very important. The parties interested have now at stake a property of very great value; but it is not only with reference to the value of the interest your Lordships are to decide,

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when you think it proper to come to a decision upon these causes; but your Lordships are now to establish principles of decision, which must in a great measure settle the law of Scotland, as far as it has hitherto been considered as unsettled, in respect of entails; and if, on the one hand, your Lordships feel any degree, if I may so express myself, of judicial uneasiness in disappointing the dispositions made by the late Duke of Queensberry, you have, on the other, to recollect that your decision must affect the powers and interest of every owner of an entailed estate in Scotland, where his powers and interests are not defined in express terms, and that if you can establish the acts, which are now complained of as done in prejudice of the entail by the late Duke of Queensberry, you may probably be thought to establish principles that may open to the destruction of most of the entails in Scotland, not only affecting patrimonial interests, but, if we were at liberty so to view any cases which come before us in judgment, affecting very much the political state of the country. But I put that out of the question.

My Lords, We are bound, unless I misunderstand this case, whenever we come to the decision of it, to determine what opinions we ought judicially to adopt among those, various as they appear to me to be, which are stated by the lawyers, and delivered by the judges. The present case has this circumstance belonging to it, all the present cases, I should say, have this circumstance belonging to them, that your Lordships have to determine, whether the first division of the Court of Session,

which has held most of the acts of the late Duke of Queensberry, the subjects of consideration before your Lordships, to be utterly null and void; or the second division of the Court of Session, which has, as it appears to me, in substance and effect, held those acts to have perfect legal validity, is right.

My Lords, There are two deeds of entail, under which the Queensberry family claim. The one has been distinguished, I think, in the course of the discussions at the bar, by the name of the March or Neidpath entail; and, upon the construction of that entail, questions arise in several different cases. The first of those cases is that of the Duke of Queensberry's executors, together with a Mr. Alexander Welsh, who is a tenant under a lease of a farm called Easter Harestanes; and the questions in that case, are, *first*, Whether the lease granted by the Duke of Queensberry for a term of fifty-seven years is bad, as an alienation prohibited by the entail of that estate? and, *secondly*, Whether the lease is bad on account of a grassum or fine having been taken by the lessor?

My Lords, In the consideration of this case, the Court below, that is, the First Division of the Court of Session, have thought that it was not necessary to give much of attention to the second of those questions, namely, whether the lease was bad on account of a grassum or fine having been taken by the lessor, that Court being of opinion, that a lease for fifty-seven years, if granted without a grassum, was to be considered as being an alienation, prohibited by the deed of entail, it being a lease of

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more than ordinary endurance, that it did not operate, as they call it, as location, but in fact amounted to an alienation of the property; and if the Court was right in so holding upon the circumstance of the duration of that lease, it becomes unnecessary to consider, in that particular case, the second question, whether the lease was bad on account of a grassum or fine having been taken by the lessor; and if your Lordships should be of opinion, that that lease having been granted for fifty-seven years, is not a lease which can be considered as being granted according to the powers of the entail, when your Lordships decide upon that case, it will not be necessary to give attention to the circumstance, that a grassum or fine was paid.

My Lords, Since the case was decided, however, as I understand the matter of fact, in the Court of Session in Scotland, an Additional Case, by which I mean an additional printed case, an additional representation upon the subject, has, by your Lordships' leave, been laid upon your table; and that case contends, that, though a lease for ninety-seven years in the case of Wakefield was held by your Lordships some little time ago to be bad as an alienation, yet this lease, being for an inferior term, fifty-seven years, ought not to be considered as an alienation, and more especially as there has been an usage in Scotland of granting leases for fifty-seven years, not only by heirs of entail, but by proprietors of estates held in pure fee; and that therefore that usage, if the principles of administration are to be applied in these questions to the granters of leases of entailed estates, is very mate-

rial to be considered on the question, whether there has been an ordinary and due administration. My Lords, besides that, the additional case argues, that a plea may be maintained for this tenant for fifty-seven years, under the statute of 1449, a statute which, your Lordships will recollect, sustains the interest of a person claiming under a lease, declaring him, as it were, to have a real right in lands as against singular successors, against any persons who took the estate, he paying the like duties as were paid to the grantor of the lease; and it is submitted, that that statute of 1449 would protect this tenant, whatever construction is put upon the deed of entail. My Lords, the additional case also insists, as the original case had done, that there is an essential distinction between a fine or grassum, and rent; that taking a grassum is not diminishing rent; and that therefore if this lease is not bad in point of duration, as the original case insisted, it cannot be considered as invalid, in consequence of the original lessor having taken a fine or grassum.

I have taken the liberty to mention to your Lordships what I consider to have been insisted upon by this additional case, because it will be obvious, that, if the tenant could be protected in this case by the act of 1449, the same protection may be contended for in other cases, and it does not appear to me that that point was insisted upon in the Court below, to the extent of enabling us to determine absolutely and clearly what would have been the judgment of the Court below upon that point. My Lords, I do not hesitate to state to your Lordships, that I entertain an opinion upon it which I will not be con-

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sidered however at present as delivering in judgment, but I apprehend it may be made out, that, although the statute of 1449 has the effect which it is contended in this case that it has, generally speaking, yet, it will be difficult to contend that, if the grantor by an entail has not power to make a lease for fifty-seven years (I am not now saying whether he can or not in this case), the succeeding heir of tailzie can meet with an answer from the lessee of the person who went before him in the enjoyment of the entailed estate, under the act of 1449. The act of 1685 *quoad hoc* must perhaps be taken to be a repeal of the act of 1449, if the lease which is made by the heir of entail is not otherwise a good lease, and does not otherwise give a valid title. I will not farther discuss that at this moment.

My Lords, The next case is the case of the Trustees of the Duke of Queensberry and the Earl of Wemyss, and a person of the name of William Murray, tenant in a farm called Whiteside. My Lords, with respect to this farm called Whiteside, which appears to have been let at a particular period, together with another farm called Fingland, and another called Flemington, I pass over at present, and perhaps not meaning to resume the consideration of some circumstances. I pass over them, because I understand it to be the wish of both parties that such circumstances should be passed over, namely, that Whiteside, Fingland, and Flemington were let together for a gross or cumulo rent of, I forget what sum, I think somewhere between 200*l.* and 300*l.*; and that afterwards these

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three farms having before been so let together, were let separately, and then a question might arise, at least a question would have arisen in our law, whether the letting them separately, though the three different rents constituted the same quantum of rent, which was reserved upon the grant of the lease when the three were let together, was a letting at the old rent? and perhaps it would be very difficult, in matter of English law, to say it was so, because there is an essential difference between one rent of the amount of three, and three rents of the amount of one, and the respective rents so constituted. I understood, however, that it was intimated, I think by Mr. Leach, that that should be passed over.

The objections then in this case are, that there had been a lease granted to the tenant for fifty-seven years, upon which a grassum was received; that that lease for fifty-seven years, upon which a grassum was received, an alarm being taken about the validity of such leases, was in effect renounced, and the present lease taken; but that the present lease, under the circumstances, under which it took effect, was in truth nothing but a substitute for the former lease, and, being a substitute for the former lease, and a grassum having been taken for the former lease, that the latter lease, a substitute for the former, is also to be considered as affected by the same objections, arising out of the fact of payment of a grassum, as would have applied to the first lease. There are likewise intimations given, that this tenant, and that in truth all the tenants, were in conspiracy with the late Duke of Queens-

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berry, to defeat the entail, to commit a fraud upon the entail, a notion which I observe the Judges of the First Division have adopted; and one material consideration with respect to this case I will notice whilst it occurs to me, is, that I think the Judges of the Second Division have not, fully at least, adverted to the case put upon fraud. It is, however, to be considered also, whether the pleadings, such as they are, authorize the Courts to look at the case in that view: whether there are in the pleadings, allegations enough to authorize them so to look at it, whatever may be the real nature of the case, and especially with but few of the tenants before the Court. If the second lease is to be considered as a substitute for the first lease, and, because the first lease was affected by the grassum, the second lease must be considered as affected by the grassum, this case necessarily involves, in that view of it, the duty of considering what is the effect of grassum in a lease of this sort. I mention here, too, because it is also a material circumstance, not only with respect to this lease of Whiteside, but with respect to other leases, that it is insisted further, on the part of the tenant, that, if this lease could be affected, either upon the ground of grassum, or upon any other ground that operated an irritancy, yet that irritancy may be purged; and that introduces a question into this case, which is,—Whether the irritancy, which is admitted might be purged, if purgation of it had been sought during the life of the grantor of the lease, could be purged when the grantor of the lease no longer exists.

My Lords, The next case, which you have had

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opened to you, is a case of Lord Wemyss on the one side, and on the other a person of the name of Symington, who is a tenant of a farm called Edstoun. My Lords, this is a lease which was granted by the Duke of Queensberry, in consequence of the doubts entertained as to his leases in general, by reason of the controversy in the Wakefield case. This is a lease by the Duke of Queensberry for thirty-one years (not under the statute of 10th George the Third, which grants the power of leasing, under certain restrictions and limitations, for thirty-one years,) with this proviso, that if the Court of Session or the House of Lords shall think it was *ultra vires* of the Duke of Queensberry to grant for thirty-one years, the lease shall be considered, as being a good lease for twenty-nine years, for twenty-seven years, for twenty-five years, for twenty-one years, or for nineteen years, or for the longest of those periods for which the Court of Session, or the House of Lords, should think it good. When this lease was granted, the Duke of Queensberry at the same time entered into agreements, or it was fully understood by him and the tenants, that if leases for fifty-seven years could be effectually sustained, they were to have such leases, notwithstanding this transaction. My Lords, the First Division of the Court of Session found, that this lease (I think that was their first interlocutor) might be sustained for nineteen years, and for no longer time; that it was competent to the Duke of Queensberry to make a lease with those alternate periods; and that although it was impossible, at the moment it was executed, to de-

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termine what, in point of endurance, was the bargain between the parties, if the lease was to have an ish to be settled by the Court of Session, or if the parties did not like that, by the House of Lords, yet the Court was of opinion such a lease was a good lease, and they would have been disposed (so they state, I think, in effect, in their interlocutor) to have maintained that lease as a good lease for nineteen years, if it had not been that the tenant had mixed himself with that system of management, which they look upon as *fraud* upon the entail, and that therefore, as they express it in their interlocutor, he had no equity to have a lease for nineteen years. My Lords, upon what particular ground they found that the lease would have been good for nineteen years, I am not able to learn from the papers before us. I take for granted they must have gone, in some measure, upon a notion, that, as upon a species of *præsumpta voluntas*, an heir of entail may make a lease for nineteen years (whether with grassum is another question), the Duke of Queensberry could, in this manner, make a lease for nineteen years; and it is the law of Scotland, as I understand it, upon this head of *præsumpta voluntas*, that, a nineteen years' lease being considered (whether tacks of longer endurance can or cannot be said so to be) to be an act of necessary and ordinary administration, necessary for the cultivation of the land, such a lease is good. The Court seems to hold that doctrine somewhat upon the principle, which the courts of law in England applied to leases granted by tenants in tail before the statutes about their leases. The courts in Scot-

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32 Hen. 8. cap. 28.

land, I understand, held the nineteen years' lease to be good, as of the ordinary endurance, upon the grounds of good policy and husband-like management of the estate: the Judges in England held a lease made by a tenant in tail for a term that endured beyond his life to be not *ipso facto* void, but voidable, if the heir of entail chose to have it avoided. My Lords, having in their first interlocutor determined that he had a right to a nineteen years' lease, if it was not affected by that, which they state, as barring the equity to have the nineteen years' lease, they resumed consideration of the matter, and, still abiding by the principle that he had not any equity, they found that he might have been entitled to a twenty-one years' lease; and they state the principle upon which they held that he might have been entitled to a twenty-one years' lease, that it was a lease of a duration according to the custom of the country.

The question, therefore, my Lords, in that case, will be, whether, attending to all the circumstances that had taken place between the Duke and the tenant of Edstoun, prior to the grant of the twenty-one years' lease, and attending (if the allegations in the pleadings will permit you to attend) to the circumstances that have taken place between the Duke and the other tenants, so as to bring them all into concert on the head of collusion or fraud, and attending also to the circumstances of the uncertainty of the duration of the lease, until the Court, by its judgment, should give certainty to that which was uncertain, and attending also to the obligation

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which the Duke came under, in case leases of longer duration could be sustained, to grant leases of longer duration, whether this lease ought to be sustained, either for nineteen years, or for twenty-one years, or any term under thirty-one years.

My Lords, the other two cases, which relate to the March or Neidpath estate, are, the cases of Flemington Mill and the leases of Crook. I do not think it necessary to take up your Lordships' time in stating the particular circumstances of those cases. They do not appear to me to be of considerable moment, certainly not of value, though they may be of moment as to value to the persons claiming the interest, considering their situation of life; but they involve likewise the point of grassum, and the question, whether there is or is not a diminution.

Now, my Lords, upon these cases, thus briefly stated to your Lords, I beg leave, with your permission, for the purpose of enabling me to represent to you the ideas of the First Division of the Court of Session, to call your Lordships' attention to the interlocutors that were pronounced by that Court. The first interlocutor pronounced by the Lord Ordinary was to this effect: "The "Lord Ordinary having considered the memorials "for the parties, and whole cause, repels the reasons "of declarator, assoilzies from the conclusions of "the libel, and decerns; reserving to the pursuer "his recourse, upon the warrandice in his tack, "against the Duke of Queensberry and his repre-

" sentatives, in the event if the said tack should be " set aside as *ultra vires* of the grantor, and regu- " lar process brought for that effect"—the operation of this interlocutor being to deny to the tenant of Harestanes a right to a judgment in his favour in his action, and to assoilzie Lord Wemyss from that action of declarator; reserving to the tenant the benefit of the warrandice against the assets of the late Duke of Queensberry and his representatives, in case the tack should be set aside as *ultra vires* of the grantor, in a regular process brought for that effect. They were of opinion that this tack could not be maintained against Lord Wemyss, and therefore they dismissed that action of declarator; but there must be, as I understand, an action of reduction to get rid of the tack itself, and if, in the action of reduction of the tack, the pursuer should succeed, then would arise the benefit of that part of the interlocutor to the tenant, by which his recourse upon the Duke of Queensberry and his representatives is reserved.

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This came, my Lords, in different forms before the whole Court; and they likewise sustained the defences in the process of declarator at the instance of Alexander Welsh against the Earl of Wemyss and others, substitutes under the deed of entail, and assoilzied the said defenders from the conclusions of the libel, and then remitted to the Lord Ordinary in the usual manner.

My Lords, Here it is necessary for me to mention, that the Earl of Wemyss had brought an action of declarator against the late Duke of Queensberry and the tenants of the estate, that action of

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declarator being levelled against William Duke of Queensberry, a tenant of the name of Anderson, another tenant of the name of Tweeddie, another tenant of the name of John Murray, another tenant of the name of Welsh, another tenant of the name of Hutchison, another tenant of the name of James Murray, and several other tenants, including the tenants of Whiteside, Flemington Mill, Fingland, Wakefield, and Edstoun, all tenants and possessors of the said tailzied lands and estates, stating, that "it ought and should be found and "declared, by decree of our said Lords, that it "was not competent to, nor in the power of the "said William Duke of Queensberry, to set or "grant any tacks or leases of any part of the en-"tailed lands and estate before written, to endure "for any longer term or period than his own life, "or the life-time of the tenants receivers thereof, "except in terms of, and under the provisions of "the act of 10th Geo. III. for encouraging the "improvement of lands in Scotland held under "settlements of strict entail; nor to grant any tack "of the said lands and estate in consideration of "fines or grassums, and thereby diminish the "rental." My Lords, I take the liberty to lay some emphasis on these words "and thereby di-"minish the rental,"—because one of the most considerable questions in this cause is, whether that species of diminution of rental which has taken place here is a diminution of rental within the meaning of these deeds, "And that all such tacks or leases "so granted, either for a longer period than pre-"scribed by the said entail (unless they are in the

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" terms of the act of Parliament), or upon pay-" ment of grassums by the tenant, are void and " null, and shall be of no force or effect in prejudice " of the pursuer, as heir of the entail aforesaid." The Court of Session having sustained the interlocutor of the Lord Ordinary which assoilzied Lord Wemyss from the action of declarator, it then goes on to say, " that with respect to the process of de-" clarator at the instance of the Earl of Wemyss " against the late Duke of Queensberry and John " Anderson, and others, tenants of the tailzied " lands and estate of Queensberry and others, the " Lords remit the process to the Ordinary, to hear " parties on the conclusions of the same as appli-" cable to the cases of the several defenders, and to " do therein as he shall see just."

My Lords, Such being the judgment in the case of Easter Harestanes, I have only again to repeat, in one short word, that it appears to me, that the Court have decided that case purely upon the length and duration of the fifty-seven years' term. There can be no doubt however, when you look to the principles upon which the Court have proceeded in the other cases, that if it had been necessary for them to have decided upon the point of grassum, the First Division of the Court would have held that the taking of grassum operates a diminution in the rental, and that a diminution of the rental *thereby*, is a diminution of the rental prohibited under this deed of entail.

My Lords, With respect to the case of Whiteside, they enter more particularly in their interlocutor into the grounds, on which they have held that opinion which I have last stated; and as there is

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some little difference, I think, between the interlocutor of my Lord Ordinary and the interlocutor of the Court, I think it will not be improper to state to your Lordships both these interlocutors. The first interlocutor of the Lord Ordinary bears date the 14th day of June, 1814, and it states, "That having "advised the condescendence and answers in the "process of declarator, and also the condescendence "and answers in the process of reduction, at the instance of the Earl of Wemyss and March against "William Murray, and whole processes, conjoins "this process with the declaratory action between "the parties depending before the Lord Ordinary, "in so far as the declarator is applicable to the present case: Finds it stated in the condescendence, "and not denied in the answers, that the whole "farms, whereof the leases are now under reduction, "were formerly let by the late Duke of Queensberry "for fifty-seven years; and, with an exception "stated by the defender of the lands of Flemington "and Crook, under burthen of grassums, the interest "of which bore a considerable proportion to the "yearly rent: Finds it admitted in the answers, "that in or about the year 1807, many of the tenants "holding leases for fifty-seven years renounced their "leases, and took new ones for periods equal to the "terms unexpired of the old ones, but without paying any grassums for their new leases; and that "soon afterwards, the tenants of all the farms as "to which the present discussion relates, whether "they had got new leases of the nature above mentioned, or had continued to possess on their fifty-"seven years' leases, executed renunciations, and ac-

"cepted of the existing leases, for which they paid
"no grassums; as also, that when the tenants re-
"nounced their former leases, and took the present
"ones, contracts were entered into betwixt them and
"the Duke's commissioner, Mr. Tait, as stated in
"the condescendence: Finds, That although it be
"stated by the respondent, that, depending on a
"contingency not explained, but said not to have
"existed, these contracts never were acted upon, yet
"they afford evidence to show, that the new leases
"were, with the exception of the term of endurance,
"a *surrogatum* or substitute for those which had
"been renounced: Finds, That the rents payable
"under these renounced leases must, of necessity,
"have been, from the inconvenience and loss arising
"to the tenants from the advance of money, a con-
"sideration of the doubts of the powers of the lessor,
"held out in the contracts and other circumstances,
"have suffered a greater reduction than the amount
"of the interest of the sums paid in the name of
"grassum: Finds, That the entail founded on by
"the parties in this cause contains a clause by which
"it is expressly provided and declared, that not-
"withstanding of the irritant and resolutive clauses
"above mentioned, it shall be lawful and competent
"to the heirs of tailzie therein specified, and their
"foresaids, after the death of the said William Duke
"of Queensberry, to set tacks of the lands and estate
"during their own life-times, or the life-times of the
"receivers thereof, the same being always set with-
"out evident diminution of the rental: Finds, That
"the rent payable under the renounced leases, dimi-
"nished as it was by the payment of grassums,

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" cannot be considered as constituting a fair rental, " such as is implied in the above clause: Finds, " That the lease under reduction, though it might " be supported by the first part of that clause, as " granted for the lifetime of the receiver, is cut down " by the concluding part of it, being set with evident " diminution of the rental: Repels the defences."

Your Lordships observe in this interlocutor some of these are findings in a question between the pursuer and this particular tenant, having nevertheless relation, not to the acts merely of this particular tenant, but to the acts of all the tenants who have renewed their leases in like manner; and it concludes with what may be stated as in the judgment of the Lord Ordinary a proposition of law, that the fact being—that the original lease was granted for the life-time of the receiver, and the fact being—that the new lease is to be considered as a substitution for the old one, the new lease is to be affected by the circumstance of a grassum being paid for the old one, and that the grassum so affects both the new and the old lease, as to operate, within the intent and meaning of this deed of entail, such an effect upon the rental, as shall amount to that diminution of the rental which is prohibited by the deed of entail.

My Lords, This came under the review of the Court of Session, and they altered in some measure the finding. They say, " They find, That the entail " in question contains a strict prohibition against " alienation; but a permission to grant tacks of the " said lands and estate during their own life-times, " or the life-times of the receivers thereof, the same " being always set without evident diminution of the

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"rental: Find, That in the year 1769, the petitioner's father obtained a tack of Whiteside for "nineteen years, at a rent of 109*l.* for which he "paid a fine or grassum of 132*l.* 18*s.* 10*d.*" (a grassum very little exceeding a year's rent, which was 109*l.*): "Find, That in the year 1775, the "petitioner's father obtained from William Duke of "Queensberry a tack of the farm of Fingland for "twenty-five years, at the rent of 50*l.* 10*s.* for "which he paid a grassum of 480*l.* Find, That "in the year 1788, he renounced this lease, of which "twelve years were to run, and obtained a new lease, "for fifty-seven years, of the said farm of Fingland, "and also of the farms of Whiteside and Flemington, at the rent of 266*l.* 16*s.* 4*d.*" This 260*l.* 16*s.* 4*d.* it will be in your Lordships recollection, was the compounded amount of the three rents of Fingland, Flemington, and Whiteside, with the addition of the cess, and rogue and bridge money, amounting to 11*l.* odds, for which he paid a grassum of 400*l.* this grassum being declared to be (not declared upon the face of the lease, but declared in a collateral paper and memorandum) a grassum for Whiteside and Fingland only. And I mention this, because a question arises in another case, that of Flemington, whether it was competent to the Court of Session, or competent to the parties, who were disputing before the Court of Session, to allege that, the grassum, by force of that collateral paper, must be taken to be for two farms, if it did not so appear on the face of the tack. They "find, That in the year 1807 "the petitioner's father renounced the said tacks, "and took new tacks to himself and sons for their

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"life-times, at the rents payable under the tacks re-
"nounced: Find, That this current tack must be
"held merely as a substitute for the former ones,
"and subject to any objections, on the ground of
"grassum, diminution of rental, or otherwise, which
"were competent against the tack renounced: Find,
"That in estimating the rents of Whiteside and
"Fingland, the value of the fines or grassums paid
"at the commencement of the former tacks ought
"to have been added to the annual rent: Find,
"That this was not done, and that the new rent was
"made the same as the old rent, *plus* the cess and
"bridge-money: Find, That this was not equal to
"the value of the grassums taken, and therefore that
"the said last tack of Whiteside and Fingland was
"set with evident diminution of the rent, and in
"violation of the said clause in the entail: And fur-
"ther find, That the conversion of part of the new
"rent into a fine or grassum of 400*l.* was to the
"manifest prejudice of the succeeding heirs of entail,
"and operated as an alienation *pro tanto* of the uses
"and profits of the estate; therefore, although the
"said tacks in point of endurance do fall within the
"permission of the entail above referred to, find that
"they are struck at by the clause prohibiting aliena-
"tion, as well as by the condition in the said per-
"missive clause against evident diminution of the
"rent; therefore in the process of declarator repel
"the defences, and in the process of reduction repel
"the defences, sustain the reasons of reduction, and
"reduce, decern, and declare accordingly, so far as
"concerns the said tacks of Whiteside and Fing-
"land: But in regard no grassum appears to have

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"been taken for the farm of Flemington, and that "by the tack renounced the rent has been raised, "they so far sustain the defences in the process of "declarator." With respect to this last proposition in this interlocutor, they afterwards reverse it, as not coming properly before them.

My Lords, Such being the case with respect to Easter Harestanes and Whiteside, as it may be proper to call your Lordships attention to every circumstance in a case of this great importance, the finding in the interlocutor with respect to Edstoun is in these words: "The Lords having advised," and so on, "Find, That a tack of the lands and farm of "Edstoun was granted to the petitioner, to commence at Whitsunday, 1792, for the period of fifty-"seven years, at the rent of 155*l.* 7*s.* for a fine or "grassum of 300*l.*: Find it admitted in the peti-"tion, that doubts having been entertained of the "validity of the above lease, the petitioner, along "with most of the other tenants on the estate," and your Lordships will permit me to repeat these words, "along with most of the other tenants on the estate," that the Court find as a fact, but whether that fact is founded on sufficient pleadings and evidence, may be a very different consideration, "along with most "of the other tenants on the estate, renounced the "said tack from and after Whitsunday, 1807, and "obtained a new tack at the same rent for thirty-"one years, or for several alternative periods, down "to nineteen years, according as the Duke should "be found to have powers to grant tacks under the "entail: Find, That this current tack must be "held to be merely a substitute for the former tack,

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"and subject to any objections, on the ground of "grassum or otherwise, which were competent "against the tack renounced: Find, That the conversion of any part of the rent which at the time "might have been obtained for the farm, into a price "instantly paid, was to the manifest prejudice of "the succeeding heir of entail, and operated as an "alienation *pro tanto* of the uses and profits of the "estate, and therefore find that the said tack is "struck at by the clause in the entail prohibiting "alienations: Find, That in estimating what was "the rent paid under the former lease, the value of "the grassum paid at the commencement of the "former lease ought to have been added, and that "this not having been done, the rent payable under "the new lease was in evident diminution of the "rental: Find, That the whole circumstances under "which the tack was granted, taken in connection "with the relative contract entered into between the "Duke of Queensberry and the petitioner and other "tenants, again to prolong the tacks to fifty-seven "years, or even to ninety-seven years, if found competent, together with the fact, that all the tenants "renounced their tacks under similar circumstances "and conditions nearly at the same time, do indicate "a fixed plan on the part of the Duke to defeat and "defraud the entail as far as possible; and that the "petitioner and the other tenants did lend themselves to, and co-operate with the Duke in the said "fraudulent scheme: Find, That the tack in question, and others now before the Court, were not "entered into in the fair, rational, and husbandlike "administration of the estate, but for the purpose

" of forestalling the rents and profits thereof, which " would otherwise have belonged to succeeding heirs " of entail, and thereby enriching the Duke at their " expense, by enabling him to draw from the estate " more than the value of his own liferent-interest in " the fruits of it: Find, That the permissive clause " in the entail, to grant tacks for the life-time of the " grantor or receiver, does not bar the heir in pos- " session from granting tacks for any definite period " which does not amount to alienation, and that the " tack in question might therefore have been re- " stricted to the period of nineteen years, being the " period then and now most usual in the practice " of the country, and analogous to the period" (according to the language of this interlocutor) " fixed " by the statute of the 10th of George III. when no " improvements are stipulated. But in respect that " the tack is otherwise objectionable on the grounds " above specified, and that the tenants on that ac- " count have no claim in equity in support of their " tacks, find, That the said tack cannot be restricted " to any shorter period than that for which it was " originally granted." Your Lordships therefore observe, that in this finding there are adjudications of law of very considerable consequence: *first*, That the conversion of any part of the rent which at the time might have been obtained for the farm, into a price instantly paid, operated as an alienation *pro tanto* of the uses and profits of the estate; and the question in law about it would be, whether the finding is just in law, which immediately followed this, namely, " that the said tack is struck at by the " clause in the entail prohibiting alienations;" and

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which, in other words, is a finding, that an estate taken at the old rent with a grassum, is the alienation of the future uses, and is an alienation within the meaning of the words, within the prohibitory, irritant, and resolutive clauses in this entail.

Then they proceed to state, that the whole circumstances under which the tack was granted, taken in connection with the relative contract entered into between the Duke of Queensberry, and the petitioner and other tenants, again to prolong the tack to fifty-seven years, or even to ninety-seven years, if found competent, together with the fact, that all the tenants renounced their tacks under similar circumstances and conditions nearly at the same time, do indicate a fixed plan on the part of the Duke to defeat and defraud the entail as far as possible: That introduces a consideration of much moment: We have heard of much difference of opinion as to what is to be the nature of the construction to be put upon the words of an entail,—Whether it is *strictissimi juris*, or to be a sound and reasonable construction; but there appears to have been no difference upon this point, that there may be a fraud upon the entail—at least in the opinions of those eminent lawyers, whose opinions they have stated in the printed cases as authority, which undoubtedly they are not, strictly speaking, but which are of great value to us, as giving us information as to what is considered to be the law of Scotland. In stating their notions as to grassum, they make a saving, if the entail is *defrauded*, reducing it in each case to the question—what is a fraud upon the entail, a question extremely difficult to solve, if an heir of en-

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tail, in Scotland may do any thing which he is not prohibited from doing, and he may commit a fraud on the entail by acts which he is not in words prohibited from doing.'

This, my Lords, is a very material part of this interlocutor, as it appears to me with reference to some observations I shall have to make on the Duke of Buccleuch's case. I just refer to it now, because it may enable me to carry your Lordships along with me, when I come to state the proceeding on the part of the Duke of Buccleuch, and these Executors and Disponees in trust. That is a proceeding by the Executors and Disponees in trust, by way of action of declarator in the Court of Session in Scotland, praying to have it found, that all the leases there referred to, which if I count them right, amount to from 290 to 300, all impeached in one action of declarator, are good and valid leases. My Lords (the Court, I suppose, overlooking that circumstance, or perhaps the print before us being inaccurate), it appears that, when they held all those leases to be good, they have in some cases held leases, stated to be for ninety-nine years, to be good. If there can be a fraud upon the entail, as something that is to be contradistinguished from a breach of the prohibition, I should submit to your Lordships, that it may deserve consideration, whether the Executors and Disponees in trust of the Duke of Queensberry, who as such are neither more nor less than his representatives, if he was a party to that fraud, have a right to come into Court with an action of declarator, not making the numerous tenants parties to that suit, but praying to have it declared at their instance,

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that leases granted under such and such circumstances are valid leases. To explain myself upon that: In the Roxburgh case, where we had a grantor of sixteen feus, and a grantee of sixteen feus, we had a case of A. and B. who were alleged to have been acting, if you please so to put it, who might be represented to be acting in fraud of the entail. I do not mean to use the term fraud offensively; and where two parties only to that transaction were represented to be acting in defraud of the entail, it was very difficult to consider one as guilty of that fraud, and the other as not mixed in it; but where the Duke of Queensberry is the party on one side, and between 290 and 300 persons are parties on the other side, if the leases of each are to be impeached on the ground of concert and collusion, it seems fair to contend, *first*, That each tenant, who is to be charged as affected by that concert and collusion, should be charged with it in the form of the pleadings; and, *secondly*, That it should be proved against each in point of fact; and it may possible be extremely clear, I do not say how the fact is, but it may possible be extremely clear, that the Duke of Queensberry, if you can separate breach of prohibition from fraud, and consider breach of prohibition as something different from fraud, that he might be engaged in a transaction which, when the whole circumstances were taken together, might be on his part a fraud upon the entail, but that the tenant A. or the tenant B. might be able to say we took our leases fairly, and in circumstances devoid of all fraud, whatever might be the case of other tenants. I am now looking at the ground of collusion as uncon-

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nected with the effect of a grassum being paid on any particular lease; but looking at the case as a transaction in fraud of the entail, the tenants, not proved to be parties to the fraud, may say we are entitled to have our leases sustained, and yet those, who stand only in a situation in which they represent the grantor of those leases, if he was guilty of fraud upon the entail, they having no character but as his representatives, may not be authorized to call upon the Court in an action of declarator, to sustain the leases, whatever rights tenants acting fairly may have.

My Lords, They have found another fact, "that "the tack in question, and others before the Court, "were not entered into in the fair, rational, and "husbandlike administration of the estate, but for "the purpose of forestalling the rents and profits "thereof;" finding in this in favour of a principle of law much contested between the parties; they say on the one side, that the heir of entail is the proprietor of the estate, that he is monarch of the estate, to use their expression (I think I shall show your Lordships that he is a limited monarch), and that he is not bound to attend to this thing called the fair, and the rational, and husbandlike administration of the estate, and that nobody can tell what that is; that that principle, if sustained, would furnish a question to be tried in every case; and, on the other hand, it is insisted, that the tenant in tail, though certainly he is not a mere factor, is nevertheless bound to a fair and rational treatment of the estate, giving a reasonable atten-

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tion to the interests of those who are to follow him. I am not now representing my own opinion, but only stating the substance of the controversy. It is contended on the one hand, that this finding cannot possibly be supported; and on the other hand, that it is a proposition which may be well maintained, by looking to what is the true law with respect to entails.

My Lords, This finding also supposes that the period of nineteen years is fixed by the statute of 10th Geo. III.; when I come to call your Lordships' attention to that statute, perhaps your Lordships may not think that it is an accurate assumption with respect to the operation of that statute. Then they go on to state, "that in respect that the "tack is otherwise objectionable on the grounds "above stated, and that the tenants on that account "have no claim in equity in support of their tacks, "find that the said tack cannot be restricted to any "shorter period than that for which it was origi-"nally granted." Your Lordships will observe, that here they not only determine that a lease for nineteen years is good, and that, if granted for thirty-one years, it might stand for nineteen, because it was within the power of the grantor to grant for nineteen years, but they must have taken this as law, that the lease may be good, though having an indefinite undetermined duration till the Court of Session shall say whether it is for thirty-one years, for twenty-nine years, for twenty-seven years, for twenty-five years, for twenty-one years, or for nineteen years.—My Lords, This seems a

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little unnecessary, unless they were to review the finding in the first part of the interlocutor, because, if the first part of the interlocutor could be sustained in law, it did not signify whether the lease was for twenty-one years or for what period it was; but it appears to have been discussed, and that they found that the lease might have been sustained, not for thirty-one years, but for nineteen years, if this equitable ground had not been interposed.

My Lords, With respect to the two other, the minor cases, I shall not trouble your Lordships with stating the different interlocutors in them. The case in them will be very much the same with respect to grassum; and with respect to the question, whether there is a diminution of rent, they find the facts upon which the cases must be decided, and to which the law must be applied, as you find them stated in the former cases, in a great measure. I would represent, therefore, to your Lordships, that I take the First Division of the Court of Session to have determined that these leases are bad,—that they were *ultra vires* of the Duke,—that there was concert,—that there was collusion between the Duke and the tenants, all the tenants whose leases are not sustained,—and that there was fraud; and that upon all these grounds taken together, or upon some of them severally taken, the tenants were not entitled to have the benefit of their leases. And I presume the Court thought they had, in pleadings and otherwise, before them, sufficient to enable them to form judicially these determinations affecting all.

My Lords, The question in the other case, I mean the case with the Duke of Buccleuch, arises

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on another entail, which we have called, in the course of our discussions, the Queensberry entail. I shall have occasion to state to your Lordships, that there are some differences in the language of the deed of entail with respect to the March and Neidpath estate, and the deed of entail with respect to that estate which we call the Queensberry estate. But I proceed now to state the nature of the proceedings with respect to the Queensberry estate; because I think I am justified in saying, that the decision of the First Division of the Court of Session cannot be right, if the decision of the Second Division of the Court of Session is right; and that the decision of the Second Division of the Court of Session cannot be right, if the decision of the First Division of the Court of Session is right; for, though the deeds of entail are somewhat different in the circumstances, the principles, on which they must be determined, are for the most part the same; one Court, by the application of those principles, thinking itself at liberty to cut down the leases; the other stating, that the true principles, affecting deeds of entail, will not warrant them to hold that such leases are bad. Perhaps I may be allowed to say, and if I am inaccurate it is not for want of attention and of looking into it, that I do not find in the course of the discussions, either of the Bar or the Bench, when the cause was heard before the Second Division, that this question of concert or collusion, and fraud, was much discussed. Whether they forbore to discuss it by reason of finding any difficulty in distinguishing between what is fraud and

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what is matter prohibited, or that they thought the nature of the pleadings did not open that view of the case, or for what other reason, I will not say; but it does not appear to me, that they did very much enter into a consideration of that part of the case, and yet it certainly does appear, not only in the papers we have before us, but in the cases we have had occasion to look into, that lawyers of great eminence, and great judgment too, seem to have thought that there was a distinction between a fair and a fraudulent use of the power in an entail, as distinguished from the doing that, which was prohibited or not prohibited.

My Lords, The parties seem to have reproached each other in the Court below with respect to the delay. These charges appear to have commenced on the part of the Duke of Buccleuch; and they likewise intimate, that there has been some degree of management in bringing forward, on the other part, particular tenants with their actions, in the decision of whose cases the titles under the leases might be more favourably attended to, than perhaps in other cases, which might have been selected. But I pass all that by, as not at all assisting us in the decision of that, which we may have now or hereafter to decide upon.

My Lords, The first proceeding which is stated with respect to the Buccleuch business, is the proceeding of the Trustees and Executors of the late Duke of Queensberry; and it may be important here to call your Lordships' attention to the summons. My Lords, that summons states, "That "the late Duke of Queensberry was proprietor of

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" all and whole the dukedom of Queensberry and " other places, as nearest and lawful heir of tailzie " and provision to the late Charles Duke of Queens- " berry;" stating the limitations and restrictions and stating the clauses prohibitory, irritant, and resolutive, of a certain entail or entails: " That the " said William Duke of Queensberry, during the " time that he possessed the said lands and estate, " did, by himself, or his commissioners, factors, or " others properly authorized by him, grant a great " variety of tacks or leases of the said lands, and " particularly the following;" And then they proceed to state, as I before mentioned to your Lordships, what, unless I am inaccurate, amount to about 298 leases; and I observe in page 12, of the summons I am now reading, that here are leases mentioned for 99 years. Then it states, " That " the said lands and estate now belong to his Grace " Charles William Duke of Buccleuch and Queens- " berry, who has threatened to challenge the leases, " and the possession of the tenants in the lands, in " processes of reduction and declarator, and pro- " cesses for removing the tenants therefrom; and " also to bring actions of damages against the pre- " sent pursuers, as the Executors and Trustees of " the late William Duke of Queensberry, founded " on allegations that the said leases are void and " null, or at all events are granted by the deceased " William Duke of Queensberry without sufficient " powers to grant the same, as having been re- " stricted by the terms of the entail or entails, and " the investitures under which he held the same: " That in consequence of those threats, the pursuers

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" have also been threatened and molested by the " tenants on the said lands and estate, who have " made large claims against them as Trustees fore- " said, for relief of the claims of the said Charles " William Duke of Buccleuch and Queensberry " against them, and for damages, in the event of his " proceeding in his threatened challenges of the said " leases: That the pursuers, as Executors and Trus- " tees, are bound to recover the whole of the estate " and funds which belonged to his Grace, and to " apply the same to the uses and purposes expressed " in the said trust-deed; but that, in consequence " of these threats, they are prevented from proceed- " ing in such execution of their duty, and from " winding up the affairs committed to their manage- " ment. And although the pursuers have oft de- " sired and required the said Duke of Buccleuch to " desist from his threats, yet he will by no means " desist therefrom, but refuses, or delays so to do, " and continues to insist therein." Then it prays, that it should be " found and declared that the late " Duke of Queensberry had full power to grant the " said tacks, and was no ways limited from granting " the same, by any entail or entails or investitures " of the said estate."

My Lords, Then it prays, in the nature of an injunction bill. The proceeding therefore is a proceeding on the part of the Executors and Trustees of the Duke of Queensberry, to have each and every of 290 or nearly 300 leases declared to be all valid against the heir of tailzie, the tenants, as I understand, not being parties to these proceedings; and

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therefore, if the Duke of Buccleuch can be taken in this suit to have joined issue upon any matters, either of fact or of law, which the tenants are interested in sustaining; and, if this judgment had been a judgment in favour of the Duke of Buccleuch upon any matter in fact or law, and had therefore been consequentially adverse to the interests of the tenants, who are no parties to the proceedings, certainly it seems to be a matter of great difficulty, at least to a mind formed in the habits of an English lawyer, to know how that judgment could be applied as against the tenants. On the other hand, it appears to me a proceeding, though not objected to, I observe, a proceeding a little extraordinary in its nature, because, taking it that the tenants are not parties, the Duke of Buccleuch is called upon to set up his defence, I should suppose, as against each of these 290 or 300 leases; and, if there can be a distinction made between the rights of the Executors and Trust-disponees of the late Duke, as representing the late Duke, and as having no interest or title, except such interest or title as the late Duke had; and if there be any foundation for the judgments, which have been pronounced, as I have read them to your Lordships, of the First Division of the Court of Session, that this was concert and fraud upon the entail, it seems a singular thing to say, that all these leases should be sustained, not at the instance of the tenants, or such of them as might have innocently maintained their leases, but at the instance of the Trust-disponees of the Duke, who, if a case of fraud of that nature can be

sustained, must be affected in their titles precisely as the Duke himself would be.

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My Lords, In answer to this, the Duke of Buccleuch states this: he admits that he has brought an action of reduction, and then he states the prohibitory and irritant clauses, and so on, and then he proceeds to do that which I apprehend he meant, whether he has sufficiently executed that purpose is another question, but which I apprehend he meant to amount to allegation, not only that this was *ultra vires* of the Duke of Queensberry, but that it was fraudulent on his successor, "the said "deceased William Duke of Queensberry suc-"ceeded to the estate of Queensberry in the year "1778, as an heir of entail, under the foresaid deed "of tailzie, and made up titles accordingly, under "the conditions therein contained; but after en-"tering on the possession of the estate, he did not, "as the leases gradually expired, let the lands at "the just avail for the time, in terms of the en-"tail;" and, if your Lordships will look at the leases, you will see that great numbers of them were under treaty at the same time, "but granted "leases for nineteen years, below the true value, "and in consideration of large grassums received, "and after having continued this system for a "period of eighteen or nineteen years, during "which time he had consequently drawn a grassum "for the letting of every farm on the estate, not "satisfied with the slower mode of again exacting "grassums as the leases might periodically fall, he, "from the desire of speedily raising a large sum of "money to add to his great wealth, and with the

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"view of defeating the prohibitions contained in "the said deed of tailzie, thought fit, about the "year 1796, when the whole estate was then under "current leases, which had been granted by him-"self, to form a device, without waiting for the "expiry of these leases, of letting of new the "whole estate, both for his own life, and for nine-"teen years after his decease, and also in diminu-"tion of the rental, contrary to the conditions of "the entail, but thereby to obtain immediate pay-"ment of large sums of money." My Lords, When I come to explain the circumstances, to which this allegation alludes, your Lordships will see more distinctly what the operations of the grassums were. If the law allowed them so to operate, and if the advantage he made of the property was an advantage he was entitled, by the terms of the entail, to make of the property, no person can quarrel with it; but, when I come to state to your Lordships the circumstances and the transactions of the Duke of Queensberry with respect to these leases, and the effect of those transactions, your Lordships will see, that it is at least incumbent upon your Lordships to be quite sure that he had these powers, and that he has executed them in the manner in which he was authorized to execute them.

My Lords, I wish to state it in the way I am now doing; for I know it does not become any man in a judicial situation to look at the conduct of the parties with reference to any other consideration than the legal effect of it. Therefore I dismiss all observation of any other kind. I consider myself as having this duty imposed upon me, and this

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duty only, to consider what is the legal effect of these acts, always attending to this, that, if the law pronounces it to be fraud, it must be so pronounced. In pursuance of that device, it is alleged, his Grace entered into transactions with tenants of different farms on the estate, by which it was agreed, that the latter, upon renouncing the leases, which they then held, and for which they had already paid large sums of money, should, on payment of additional large sums to the Duke, obtain new leases for nineteen years at the same rent as that, which was payable at the period of the said Duke's succession to the estate in the year 1778, or which was stipulated in their said original leases, and without any regard being had to the large sums of money, which had then been paid, his Grace or his factors authorized by him becoming bound, at the same time, to renew the said leases to the said tenants annually during the Duke's life, for the space of nineteen years from the time of his said renewal, without any increase in the amount of the rent being stipulated. Your Lordships will be pleased to give your attention to that circumstance, —that there were grassums taken,—that the grassums were paid on the surrender of many leases, which had not yet expired, upon which leases also grassums had been paid; and that at the time when the leases were made for nineteen years, the author of the entail granted leases, not only for his life-time, or nineteen years, but that the Duke entered into an obligation, that he would grant for a longer period, if it was declared lawful, and that

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he would renew from year to year; and that the question is, Whether the lease existing for the time ought, in point of law and equity, to be considered as a lease for nineteen years? It is stated in argument, that it is settled, that the statute of 1449, as to singular successors,—if no possession has been taken during the life of the grantor, does not protect the tenants, and that therefore this engagement to renew *de anno in annum* left at last only a nineteen years' lease upon the estate; which nineteen years' lease, they contend, the Duke had a right to let at the last moment of his life, provided there was a surrender of the former lease; and that, therefore, this amounts to no more than a surrender of the former lease, and a nineteen years' lease, subject to the question about grassum.

Then it states, That these leases were granted in execution of the above-mentioned device of the said late Duke, and all of them are contrary to the provisions of the said entail, and liable to reduction, among other, for all or part of the following reasons. *Primo*, Because they are not proper leases, but complex contracts, conveying away the lands for a term of years, partly for yearly rent, but in great part for a grassum or price payable to the Duke himself. *Secundo*, Because they were granted for a space longer than the setter's life-time, or nineteen years, the obligation of renewal being part of the contract, and elongating the terms of possession for which the lands were let. *Tertio*, Because the leases were not let for the just avail, but for a rent known and intended to be inadequate, and far less

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than the avail. The validity of that reason will depend upon the construction your Lordships shall put on the clause in the deed of entail. *Quarto*, Because they were let with diminution of the rental actually existing previous to letting them, the Duke having previously, by grassums, received an additional rent for the lands beyond that stipulated in these leases.

Then, my Lords, with respect to a tenant of the name of Hyslop, the summons, with respect to him, contains nearly, though not exactly in the same words, all this allegation about frauds; and this case so coming before the Court as between the Executors and Trust-disponees of the late Duke of Queensberry and the present Duke, and between the present Duke and one of the tenants, whose lease is mentioned among the 290 noticed in the proceeding of the Executors and Trust-disponees, the Court of Session proceeded to consider these cases and the judgment, which they gave at the instance of the Executors of the Duke of Queensberry, is to this effect. I do not know that it is necessary to trouble your Lordships with the very words of it; but I may state, that the effect of it is to sustain all these leases without exception. My Lords, in the case of Hyslop, he says, that he has nothing to do with the question between the Representatives of the Duke of Queensberry, and the present Duke of Buccleuch; that he is no party to any concert or collusion; that he knows nothing about it; that the only question he has to discuss with the Duke of Buccleuch, is, whether his lease ought to be sustained? and I believe I represent the effect of the

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words of the Second Division of the Court of Session, when I say, that they were of opinion, *first*, That the taking grassum was no objection; *secondly*, That there was no diminution of the rent, in the sense of diminution of the rent, as abstracted from the taking of grassum. They say further, that supposing there had been no such objection as grassum; that, according to the true construction of the clause in the Buccleuch entail, if the Duke let at the old rent, he let without diminution of the rent; that he was not obliged to look out for an increased rent; and that therefore this lease being let for the old rent, and the grassum being no objection, this is a good lease. A question arose also, in the course of the discussion before the Judges of that Court, as to the effect of the word "dispone." Your Lordships will recollect, that in the Wakefield case (and indeed it is some consolation, after what we have heard of that Wakefield case, that I see it admitted in this case, that the Wakefield case was rightly determined, and that the ninety-seven years' lease was, according to the law of Scotland, an alienation), the word "alienate" occurred. In the Buccleuch case, there is no such word as the word "alienate." The prohibition is a prohibition against disponing,—and according to the case of *Stirling of Law against Macdowall* and others, lately decided by the Court of Session, the word "dispone," it is said, is not of the same effect as the word "alienate;" that though "alienate" would prohibit such leases, "dispone" would not: but how that question would have been settled by the Court, if it had been necessary to determine

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the case of Hyslop on that point, and that point only, it does not appear to me that we are informed by the account we have of the judgment; and therefore that judgment also has left us in this situation, that it is a judgment which informs us, that the Judges of the First Division are altogether wrong as to the principle which they apply in construction; that they are altogether wrong in their interpretation of the words "diminution of the "rental;" that they are altogether wrong in their notions as to the legal effect of taking grassum; and it leaves us further in this situation, that we have a decision prior to this, in which the Court held, that a prohibition to dispone was not a prohibition to alienate; and in the present case we do not know what the judgment of the Court would have been, if it had been necessary to determine the effect of the word "dispone."

Having stated to your Lordships generally the outline of the case, I will take leave, with your Lordships' permission, to draw your attention to the instruments, the construction of which has given rise to the respective judgments of the Court of Session, premising, in a short word, that your Lordships see the great consequence and the great importance of whatever may be your decision in this cause; it bears upon property included in between 290 and 300 leases in the Buccleuch estate; it bears upon property to a very large amount in the March estate; it bears upon the interests of all persons, who claim under the disposition made by the Duke of Queensberry, of his sup-

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posed great fortune; a decision against those persons, therefore, is a decision that strikes very strongly against very large interests, which they are contending for: on the other hand, your Lordships are to recollect, that a decision, that will support their interests, is a decision that goes to cut down what is contended on the other hand to be the absolute right of the Duke of Buccleuch; and it is further stated, and stated with great probability of truth, that if a Scotch entail could be got rid of in effect by the means which the Duke of Queensberry has used, the present holders of most of the entailed estates in Scotland (I mean where there are not special prohibitions and special clauses about leasing), may destroy the hopes of all persons, who feel themselves at this moment entitled to those estates in expectancy.

My Lords, With respect to the Buccleuch entail, your Lordships will find the disposition and tailzie bears date the 25th December, 1705, it was registered in the Register of Tailzies the 21st February, 1724, and the Books of Sessions, 17th June, 1724. The recital of this is in these terms: "Forasmuch "as we having considered the state and condition "of James Earl of Drumlanrig, our eldest lawful "son, are fully convinced of his weakness of mind "and unfitness to manage our estate, or represent "us in our dignities and in our said estate, and "being well resolved to leave no place for any "question concerning the said James Earl of Drum-"lanrig his condition and capacity after our de-"cease, for preventing all process or arbitrement on

" that subject, or on the succession to our honours " and estates, and also for preventing the snares that " may be laid for the said James Earl of Drumlanrig, to the visible prejudice of our estate and family; therefore, and for the other weighty causes " and good considerations us moving, we have " thought fit (with and under the reservations, conditions, provisions, limitations, restrictions, clauses " prohibitory, irritant, and resolutive, under written, " allenarly and no oyrways), to be bound and obliged " to sell, annailzie, and dispone." Your Lordships will recollect, it has always been contended, that these words have, and must have some technical narrow meaning, and yet you perceive the very first word which occurs is the word sell, which has certainly a definite meaning in the law of England, and in the law of Scotland, and yet it is here unquestionably applied to a gratuitous deed, " to sell, " annailzie, and dispone, like as we by these presents, sell, annailzie, and dispone."

Then the deed states the institute and substitutes, reserves life-rents, provides an annuity for James Earl of Drumlanrig, creates an obligation for the payment of the entailer's debts, and the powers reserved to him; and then there is this clause, " That " notwithstanding the right of fee of the said whole " earldome, lands, baronies, and others above specified, be devolved and secured by this present disposition and tailzie, in favours of the said Lord " Charles Douglas and his foresaids, and the other " heirs of tailzie above mentioned, yet it shall be " lawful for us to contract debts which shall affect " the said Lord Charles Douglas, and the heirs of

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"tailzie, and the foresaid tailzied estate, in the "same manner as if they were consenting with us "in the several bonds, contracts, obligations, dis- "positions, or other writs whatsoever to be granted "by us, or as if they were served heirs to us in our "lands and estates; and also, it shall be lawful to "us to sell, annailzie, and dispone the said lands "and others above and after mentioned in the whole "or in part, redeemably or irredeemably, for what- "soever cause, or in whatsoever manner of way;" an expression which seems to intimate, that the author of this deed, when he uses the words "sell, "annailzie, and dispone in whatsoever manner "of way," must have had in his contemplation the different ways in which selling, alienation, and disponing, might be effected, "and to revoke, alter, "or innovate this present disposition and tailzie, "and order of accession, in whole or in part, and "generally to do every other thing without consent "of the said Lord Charles Douglas, and the other "heirs of tailzie, and others above and after men- "tioned, as freely in all respects as we might have "done before the making hereof, or as if these "presents had never been made nor granted; and "likewise, by the tenor hereof, it is expressly pro- "vided." I am now about to state the prohibitory clauses to your Lordships: "Provided and declared, "and so to be provided and declared in the instru- "ment of resignation, charter and infeftments to "follow hereon, and in all the subsequent procura- "tories of resignation, retours, precepts of infeft- "ments, and rights of the said estates, that it shall "not be lawful to the said Lord Charles Douglas,

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" and the heirs-male of his body, nor to the other " heirs of tailzie above mentioned," the very expression in the Duntreath case, " nor any of them, " to sell, wadset, or dispone," not using in that prohibitory clause the word alienate, " to sell, &c. " any of the aforesaid earldome, lands, baronies, " offices, jurisdictions, patronages, and others fore- " said, nor any part of the same, nor to grant in- " feftments of life rent or annual rent out of the " same ; " which words I apprehend contain a prohibition, which would be contained in the word alienate ; " nor to contract debts, nor do any other " fact or deed whereby the same, or any part thereof, " may be adjudged, apprised, or any ways evicted " from them, or any of them, except so far as they " are empowered, in manner after mentioned ; nor " to violate or alter the order of succession foresaid, " any manner of way whatsoever : and also with " this provision, that the eldest heir-female and " tailzie above specified, and the descendants of " their bodies, shall exclude the younger and her " descendants as heirs-portioners, and shall succeed " always without division ; " the author of this deed, therefore, intending as one of his purposes, to keep the whole of the estate in one individual ; " and that " the whole heirs and descendants of their bodies " so succeeding, shall be obliged in all time coming " upon their succession, to assume, and use, and " bear, the sirname of Douglas," thereby also expressing his anxiety that it should be a Douglas, " and the title, designation, and arms of the family " of Queensberry, as their own proper sirname, " title, and designation ; and that the said Lord

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" Charles Douglas, nor the other heirs of tailzie " above specified, shall not set tacks nor rentals of " the said lands for any longer space than the setter's " life-time, or nineteen years." " Shall not set " tacks or rentals ; " rentals may be represented to your Lordships as a species of tack held by what are called in Scotland, Kindly Tenants, who usually pay, if not always, what is called entry-money, " and that without diminution of the rental, at the " least at the just avail for the time." Here the words, " the rental," cannot mean the same thing as the word rentals used before, but it means rent; I take notice now, that it has been insisted, that this clause itself shows, that it was lawful to take grassums, because it is said, you shall not set tacks nor rentals of the said lands for any longer space than the setter's life-time, or for nineteen years, and that without diminution of the rental; then they say; if you set a rental, taking what they call entry-money, you cannot set a rental of that sort without a diminution of the rent, if taking grassum is diminution of the rent: Whether taking a grassum be a diminution of the rent, will be to be considered by and by; but this reasoning upon the application of the words " diminution of the rental," to rentals, where entry-money is taken, has been met by argument against it in the papers on your table. Then follow these words, " without diminution of " the rental, at the least at the just avail for the " time." The construction the Court has put upon these words, and has put upon these words without the least expression of doubt that they rightly construe them, is this; they say, that it should be read

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"without diminution of the rental, *or* at least at "the just avail for the time," meaning that you should take the old rent, but, if the circumstances of the times do not allow you to obtain the old rent, you shall at least let for the just avail at the time, that is, for such rent as you can reasonably get, and that you must get that by auction, or in some other mode. I own, I think that a little doubtful, because you must construe the words "at least" recollecting that the word "or" is no part of this deed, and that the words stand, "without "diminution of the rental, at the least at the just "avail for the time;" and it seems to me questionable whether the words "at the least at the just "avail for the time," words, according to the text, additional to the words "without diminution of the "rental," can, according to just construction, be taken to introduce an alternative, although no such word as the word "or" is used to create an alternative, and therefore questionable, whether those words are really to be considered as the Court has construed them,—that you shall take the rent presently payable, or, if you cannot get that, you shall take such rent below that, as is the just avail at the time.

My Lords, Here I take leave to say again, as I took the liberty to say in the Wakefield case, that I cannot bring my mind to be much affected by what we have heard so much of at the Bar in this case, in the Wakefield case, and in others, that if you construe a clause of this kind, where you have these words, as meaning that you shall, on all occasions, get the rent, which is the just avail at the time, a

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court of justice must, in each case, be called upon to determine the fact, whether you have so acted or not. The answer to that is, first, if that be the meaning of the words, there is no more difficulty in construing the instrument, than if those words had been expressly inserted in it:—if it had been inserted in the instrument, that you shall get the rent, which is the just avail at the time, you could not let a lease unless you should get the rent, which is the just avail at the time; and that it is interposing a difficulty of no consequence, when once you have established the meaning of the words to be the same, to say that that difficulty is imposed, because in each case you must meet it as well as you can. I do not believe there is a marriage-settlement in this part of the kingdom, made between year's end and year's end, in which a power of leasing is granted to a tenant for life, in which he is not under the condition of letting for the best rent, which can be got at the time; and yet, in forty years and upwards, which I have lived in the profession, I do not recollect more than one or two questions at most, arising on such a case as that; and there is but one criterion which our courts always attend to as a leading criterion in discussing the question whether the best rent has been got or not, that is, whether the man who makes the lease has got as much for others, as he has for himself; if he has got more for himself than for others, that is decisive evidence against him: the Court must see that there is reasonable care and diligence exerted, to get such rent as care and diligence being exerted, circumstances mark out as the rent, likely to be produced.

Then the deed proceeds, "nor to do any other "fact or deed, civil or criminal, directly or indi-"rectly, by treason or otherwise, in any sort, "whereby the said tailzied lands and estate, or any "part thereof, may be affected, apprised, adjudged, "forefaulted, or any manner of way evicted from "the said heirs of tailzie, or this present tailzie in "order of succession thereby prejudged, hurt, or "changed; neither shall the said Lord Charles "Douglas, nor any of the said heirs of tailzie, suf-"fer the duties of ward, marriage and relief, either "simple or taxed, nor the feu, blench, and teind "duties, nor any other public burdens or duties "whatsoever, payable furth of the said tailzied "lands and estate, to run on unsatisfied, so as "therefore the lands and others foresaid may be "evicted, apprised, or adjudged."

My Lords, I point your attention to the last clause, because it shows an anxiety on the part of the author of this deed, not only with respect to other public burdens, but with respect to teinds; and I think I shall be able at least to satisfy your Lordships, that the question, whether throwing the public burdens on the old reserved rent is not a diminution of the rental within the meaning of authors of such deeds, is at least a question, that deserves a great deal of consideration before you determine it in the negative. I would illustrate that now, for the sake of leading your Lordships to what I shall say more particularly by and by. Here is one lease let at 3*s.*; the grassum taken is above 200*l.* Now, if we were, instead of considering those great cases which the gentlemen have adverted

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to in their arguments, to take a case of inferior amount of property, the operation of this doctrine would appear. Your Lordships know, that by an act of 1633, teinds are payable out of the estates according to a proportion of the rent, which is paid, or, as the expression is in that statute, of the rent, as constantly paid. Now, in the case I have stated, the rent, as constantly paid, is not the whole rent, that is paid; that is clear enough; but in construing that statute, in order to do justice, the Courts in Scotland, after putting quite a different construction upon it, as we have been told, from 1633 to 1731 or 1732, in 1731 or 1732 said this, When we are valuing those teinds, we are not to value them by looking merely at the rent which is constantly paid, though such is the statute expression, because if we do, the person, who has the land, may let the land for 3*s.* a-year, and may take a grassum of upwards of 200*l.*; then, when the man, who is entitled to the teinds, comes, he will have two fifths, or some certain proportion of 3*s.* What has the Court of Session said? The Court of Session has said from 1731 or 1732, this is not the rent, which is constantly paid; and, while they are contending that grassum cannot be rent, what they say is this, that in ascertaining what is the *rent* constantly paid, the grassum shall be taken into consideration, and that the *rent* shall be, not the 3*s.* but the 3*s.* and one tenth, or some other proportion of the grassum that was paid. See what the consequence may be as to the diminution of the rent, if the man who is to receive 3*s.* a-year, the reserved rent, that is, the old rent under the old lease, is to have his assessment made

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upon him, not at the rent of 3*s.* a-year, but at the rent of 3*s.* a-year, *plus* 10*l.* a-year. You may say his rent is not diminished, but then you must determine this, that a man who gets nothing, is in the same situation as if he got something; that is the plain English of it. But I mention this passage about teinds, because it shows that the author of this deed was attending to these things.

Then with respect to the irritant and resolutive clauses, it goes on thus; That if they do not do all these things, or they shall, "by altering and "changing the order of succession, or disponing, "selling, wadsetting, or burdening with infeftments "of annual rent or other servitudes and burdens, "the said lands and others aforesaid, or any part "thereof, or by granting tacks or rentals otherwise "than as above, or by contracting debts, except in so "far as they are empowered in manner underwritten, "or by doing any other fact or deed, civil or crimi-"nal, by treason or otherwise, whereby the said "lands may be burdened, evicted, forefaulted, or "adjudged;" then it refers to public burdens again, those are all to be paid: and there is a resolutive clause, evicting the estate from the person who does those acts. Then there is a provision, that the next heir shall, in such cases, succeed, the succession opening again to the person who would have taken. If the father contravenes, the son shall succeed, "reserving always to the person, who shall "succeed by virtue of the contravention, the rents "and profits of the said estate, until the existence "of the said nearest heir, with the burden of the "payment of current annual rents and public bur-"dens;" so that the person, who was to take the

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estate, you see, was to take it with the liability to public burdens, that is, if you were to suppose that persons in this part of the world would descend so much from their dignity as to make an entailed estate of 3*s*. a-year with a grassum of 200*l*., the man with the 3*s*. would be bound to pay the public burdens, though he had but 3*s*.

Then there is the clause, "That it shall be lawful "to, and in the power of, the said Lord Charles "Douglas, and of the other heirs of tailzie above spe-"cified, whether male or female, to provide and in-"feft their lawful spouses in competent life-rent "provisions of a part of the lands and estate, not ex-"ceeding the sum of 1000*l*. sterling of yearly rent." Now, I beg leave to state to your Lordships, that this is a clause which I think deserves more attention, than has been given to it; for this is an estate, which it was in the consideration certainly of the author of this deed should always be such an estate, as would give to the spouse of a lady, or to the spouse of a gentleman, for both males and females are provided for, "in competent life-rent "provisions of a part of the said lands and estate, "not exceeding the sum of 1000*l*. sterling;" of course leaving to the heir of entail a property, that was useful and valuable to him, after that 1000*l*. sterling was paid to the spouse; but it is not only that, but "if there shall happen to be two life-rent "provisions upon the said estate, then and in that "case the second life-rent provision, during the "existence of the first, shall not exceed 800*l*. "sterling;" so that there is 1800*l*. if there are two. Then, thinking it not improbable there might be three, there is a third provided for, which is not to

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exceed 500*l*.; so that 2300*l*. may be the burden upon this estate at the same time. Now, when your Lordships come to see, that the Duke of Queensberry, when he came into possession of his estate in 1778, received an estate, which netted to him about 11,300*l*. a-year; and when, instead of letting that estate from time to time, with such a rise in the rent, as the circumstances of the country would enable him to get for it, he lets it at the old rent of 11,300*l*., taking grassum upon grassum, three times over in some cases; when you recollect that, which I have before intimated to your Lordships, that the public burdens are to be assessed, not with reference to the rents, but to the grassums, or a proportion of the grassums (in other words, that rent, and a proportion of grassum, are understood to be meant by the words 'rent constantly paid'), you will not be very much surprised when I state to your Lordships, as we are informed, that that estate, which in 1778 yielded to the Duke of Queensberry 11,300*l*. in the year 1817 pays to the Duke of Buccleuch, provided he has not three jointresses upon it, the sum of 3600*l*. Nevertheless it is a question in law, and a nice question in law, whatever it may be in any other view of the case, whether a rent of 11,300*l*. still a nominal rent of 11,300*l*. a-year, the estate yielding only in true rent 3600*l*. a-year, and which may happen to be subject to three jointures, is a rent that can be at all impeached, in the sense of the law, for diminution?

My Lords, Besides this, the heir of entail is empowered to provide the younger children of the marriage with a sum of 3600*l*. for their portions;

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so that he may have upon this estate, which it is contended may be thus let, 2300*l.* for jointresses, and 3600*l.* for younger children. I have pointed out all these clauses of the entails to your Lordships, because it does appear to me that they are very material.

It may be now necessary to state to your Lordships shortly, the effect of the other entail,—the March and Neidpath entail. My Lords, that deed of entail is likewise important in some parts of it. That entail is dated the 12th October, 1693, and was recorded in the books of Session the 3d Sept. 1781. There are, first, the clauses which are usually found; and then there is a clause in these words: "That it shall be always lawful to, "and entirely in the power and liberty of, the said "William Duke of Queensberry, by himself alone, "at any time during his life, without consent of "Lord William Douglas, or any other of the heirs "of tailzie, and so on, to sell, alienate, and dispone "the foresaid lands of Newlands," and so on; and then the way in which the power is given to set tacks is this, "reserving power and liberty to "the said William Duke of Queensberry, during "his life-time, to set tacks of the haill lands, baro-"nies, and others immediately above rehearsed, "for payment of such yearly duties, and for such "space and endurance as he shall think just." The author of this entail, therefore, reserves to *himself* the power of setting tacks as large as he pleases; but when he comes to give the power to others, he says, "It shall not be lawful to Lord William "Douglas, and the heirs male of his body, nor to

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"the other heirs of tailzie respectively above mentioned, nor any of them, to sell, alienate, wadset, or dispone any of the said haill lands, and so on above rehearsed; nor to grant infeftments of life-rents, nor annual rents, forth of the same; nor to contract debts, and so on; and the person contravening is to lose his estate: But he says, it is expressly provided and declared, that notwithstanding the irritant and resolutive clauses above mentioned, it shall be lawful and competent to the heirs of tailzie above specified, and their foresaids, after the decease of the said William Duke of Queensberry, to set tacks of the said lands and estate during their own life-times, or the life-times of the receivers thereof, the same being always set without evident diminution of the rental; and likewise, that it shall be lawful and competent to the said heirs of tailzie to grant suitable and competent life-rent provisions in favour of their wives, not exceeding the sum of 5000 merks of yearly *free rent* of the said estate, and to grant provisions in favour of their children, not exceeding two years' free rent of the same." Your Lordships observe the expression, "5000 merks of yearly free rent of the said said estate," and the expression, "yearly free rent of the same," at the close of the paragraph. And in this deed there is this distinction also, that it does contain the word *alienate* in the prohibitory clause.

Having stated this deed to your Lordships, I will proceed. I promised your Lordships, I fear, more than I can possibly perform, because it appears necessary, in order to lay the groundwork, to call your

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Lordships' attention to the statute of 10th Geo. III. which one of the interlocutors I have read states to have fixed the term of nineteen years. My Lords, that statute recites, "That by an act of the Parliament of Scotland, made in the year 1685, entitled, An act concerning taillies, all his Majesty's subjects are empowered to tailzie their lands and estates in Scotland with such provisions and conditions as they shall think fit, and with such irritant and resolutive clauses as to them shall seem proper," a recital which, by the way, tends, as your Lordships observe, to clear up a question which occurs in all these cases, what is the effect of inserting in these tailzies other provisions and conditions than those which are expressly mentioned in the statute; "and which tailzies, when completed and published in the manner directed by the said act, are declared to be real and effectual against purchasers, creditors, and others whatsoever," a recital quite correct. Your Lordships recollect, that the statute of 1685 is not effectual as against purchasers and others, unless the tailzie is registered in the manner directed by the said act.

Then follow these words: "And whereas many tailzies of lands and estates in Scotland, made as well before as after passing the said act, do contain clauses limiting the heirs of entail from granting tacks or leases of a longer endurance than their own lives, for a small number of years only, whereby the cultivation of land in that part of this kingdom is greatly obstructed, and much mischief arises to the public." Your Lordships will see that expression is not common sense; but on look-

ing at the original roll of the Parliament office, it is found, that this is printed with the omission of that word, which they may very much desire to have in the Buccleuch entail, the word *or* "of a longer en-"durance than their own lives, *or* for a small num-"ber of years only." Now, to prevent that mischief, it is thereby enacted, "that it shall and may be "lawful to every proprietor of an entailed estate "within that part of Great Britain called Scotland, "to grant tacks or leases of all or any part or parts "thereof, for any number of years not exceeding "fourteen years, from the term of Whitsunday next "after the date thereof, and for the life of one per-"son to be named in such tacks or leases, and in "being at the time of making thereof, or for the "lives of two persons to be named therein, and in "being at the time of making the same, and the life "of the survivor of them, or for any number of "years not exceeding thirty-one years from the "term aforesaid." This clause, therefore, is a clause which enables every proprietor of an entailed estate to let according to this clause, whatever may be the clauses in his deed of entail; but if he does let according to this clause, then, by virtue of a subsequent section, he can only let under the particular restrictions and conditions which in such case this act imposes. "Every such lease for two lives shall "contain a clause obliging the tenant or tenants to "fence and enclose, in a sufficient and lasting man-"ner, all the lands so leased within the space of "thirty years, and two-third parts thereof within "the space of twenty years, and one third part "thereof within the space of ten years, if the said

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"lease shall continue for such respective terms," the Legislature calculating, that a lease of thirty-one years would be about as long as two lives; "and "that every such lease for any term of years exceed-"ing *nineteen* years shall contain a clause obliging "the tenant or tenants to fence and enclose, in like "manner, all the lands so leased during the con-"tinuance of such term, and two third parts thereof "before the expiration of two third parts of such "term, and one third part thereof before the expira-"tion of one third part of such term." Then there is a clause compelling the tenants to keep up the fences. Then there is a clause enabling every proprietor of an entailed estate, without exception, to grant leases of land for the purpose of building, for any number of years not exceeding ninety-nine years; but that is followed by a clause limiting the number of acres he is to let for that purpose.

Then there follows the clause "that the power of "leasing hereby given shall not in any case extend "to or be understood to comprehend a power of "leasing or setting in tack the manor-place, office-"houses, gardens, orchards, or enclosures adjacent "to the manor-place." That clause was introduced in consequence of what is the known law of Scotland; that although we say, in a sense, and in a strong sense, that the heir of tailzie is the absolute fiar and proprietor, and so on, unless so far as he is limited, yet it is extremely clear he is limited, though there are no conditions in the deed of tailzie; and he is limited, as your Lordships will recollect, by a judgment we have had here, from letting the manor-house, and the lands about the house, it being

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understood that it shall be kept up, and shall not be let. Then there follows these words: "That all "leases made or to be granted under the authority "of this act" (for the Legislature seems determined to put this out of the question as to such leases as they authorized, but I cannot agree with what is said in another place, that because they meant to put this out of the question as to such leases as they authorized, therefore they put it equally out of the question as to all other leases), "shall be made or "granted for a rent not under the rent payable by "the last lease or sett, and without grassum, fine, "or foregift, or any benefit whatsoever, directly or "indirectly, reserved or accruing to the grantor, "except the rent payable by the lease; and that no "such lease shall be granted till after the end or "other determination of any former lease of the "same premises, or that such lease, if granted for a "time certain, shall be within one year of being "determined: and that all leases otherwise granted "shall be void and null;" then it is "provided and "declared, that if any tailzie shall, either expressly "or by implication, contain powers of leasing more "ample than are hereby given, the heirs of entail in "possession shall be at liberty to exercise all such "powers in the same manner as if this act had never "been made;" the Legislature, therefore, authorizing us to say, that deeds of entail, if they cannot contain prohibitions about leasing by implication, may at least contain by implication powers and permissions to do so.

Now, my Lords, upon the construction of all these clauses taken together, this act of Parliament

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says, that if a lease is for more than nineteen years, such and such things shall be done; and I apprehend the meaning of this act is this, that if you do things beyond your power of leasing, which, being beyond your power of leasing, you can do only by the authority of this act, that every thing you so do shall be done according to this act. This act seems to me not to be the foundation of the right, if there be such a right, of the heir of entail to let for nineteen years, unless he is specially prohibited: It speaks, indeed, of leases made under the authority of the act exceeding nineteen years, and under what restrictions and conditions such leases are to be made; but it does not appear to be an act declaring that, independently of the effect of the act, any heir of tailzie, not specially prohibited, may make a lease for nineteen years. It seems, however, upon reading this statute, very reasonable to suppose, that the person who drew this act thought that the *præsumpta voluntas* would give a power to grant leases for nineteen years.

I will now proceed to state to your Lordships what are the actual facts of this case, always taking the liberty to repeat, I may very much mistake the case, but I have never been able to look at it without considering it as a matter of some importance, that the action, in which all these leases have been held to be good, is an action at the suit of the Executors and Trust-Disponees of the Duke, standing in no other right than that in which the Duke himself would have stood if he had been in Court. I proceed now to state what I conceive to be the facts of this case.

It has been represented to us, that the grantor of

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this deed of entail never had let with grassums. He was succeeded by his son Charles Duke of Queensberry: commissioners were appointed to manage his estate, and it is undoubtedly the fact, and an important fact to be recollected in the consideration of this case, not only that in his time leases were let, though for comparatively short periods, but that they were let also for grassums, and they were not only let for grassums, but they were let for grassums by commissioners, some of whom were persons unquestionably in the highest situations in the law in that country; and therefore it is fit to be recollected, that those persons must either have thought, and I think it but fair to say that they must have thought that they had power to grant such leases, or that they were determined to take the chance in the case of a young man who might outlive all the short leases they might grant. I think it is not proper to take it in the latter way, but that the Executors of the Duke of Queensberry have a right to the inference, that the persons who made those leases thought they were entitled to make those leases in point of law; and I think, if they so thought, that their opinions are deserving of considerable weight.

My Lords, As I understand it, the taking of grassums was discontinued before the death of Duke Charles in 1772, and the rental, which in 1720 had been about 6500*l.* was increased to the sum of about 8000*l.* The late Duke succeeded to the estate in 1778; at that time, unless I have collected the facts of this case inaccurately, there were no leases for

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grassums on the estate. My Lords, It has been stated to your Lordships, that the Duke of Queensberry went to great lengths in cutting down all the timber upon the estate. I make no observation upon that; he had a right to cut down all the timber upon the estate if he thought proper, and the same as to the house; he so dealt with the house, I presume, as he had a right to do, for I do not find that made the subject of complaint; but though he had a right to cut down the whole of the timber upon the estate, I apprehend, that, in point of law, however much he may have been entitled to be represented as monarch of his estate, he could have made no contract that would have given any person a right to cut down that timber after his death, though he could have sold the whole of it for 30,000*l.* now paid, and if the wood was severed from the land before he died, the purchaser would have the benefit of the bargain, but if it was not severed from the land before he died, then he would not have the benefit of the bargain; and I apprehend, that if he had sold wood to the amount of 30,000*l.* to be paid *de anno in annum* 1000*l.* whatever was uncut at the time of his death, the person, who had so bought that wood, could not touch a stick of it: so that if a person sells wood to be cut off an entailed estate after his death, whatever may be his disposition to carry his prerogatives high as the monarch of the estate, that is one particular in which he cannot do so, for he cannot sell wood to be cut after his death.

My Lords, About the year 1796, there having been a good deal of dealing in grassums before, the

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Duke of Queensberry having been very well advised, when I say very well advised, I mean advised by a person whose advice would have considerable weight, set about leasing all the estate for grassums; and until the Wakefield case disturbed the idea, which had been entertained, there was no further interposition; but at length, by a sort of act on his part, which I cannot represent, as far as he is concerned, to be an individual act with tenant A. or tenant B. but by an act of his, connecting himself with all the tenants of the estate, he made leases of the nature and kind, which I have endeavoured before to state to your Lordships, which I can now, having examined the case pretty accurately, state more correctly, by dividing them into four classes of leases.

There were leases granted to the tenants on renunciations of tacks which were current, or to strangers under the burden of the current tacks, and with obligations in both cases to grant new leases for nineteen years annually during the Duke's life. There were leases granted where the current leases had actually expired under similar obligations. There were leases granted without an obligation of renewal, but where the leases then current were not near their natural expiration; and there were leases granted without an obligation to renew, and which were not granted till the previous leases had expired.

In the first of these classes, if the person had a current lease for which he had paid a considerable grassum, we will say at the end of nine or ten years, the Duke enters into a new contract with him, and lets him a lease for nineteen years, taking another

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grassum; so that there has been a grassum paid as a consideration for the first lease,—a grassum as a consideration for the second lease, besides which, if the bargain was made with a stranger, he had, in order to come in, to pay a sum to the tenant in possession for a renunciation: and in the contract there was an obligation to renew *de anno in annum.* In such a case as that (I am not now observing upon the lawfulness of it, but upon the fact), you will observe, that the Duke of Queensberry got one grassum when he let the first lease, and that, long before the second lease was expired, he got another grassum; and having got both these grassums, he enters into an obligation to renew *de anno in annum,* which, whether it was legal or not, is a circumstance which must be represented as a consideration given on his part for the grassums, which had been so paid.

My Lords, I will give you examples of each class of leases, if your Lordships will take the trouble to look at them.—There is a lease of Crawick Mill, No. 69 of those that are libelled, the rent of which was 27*l.* 10*s.*; the consideration for this was the renunciation of the former lease for nineteen years, in which the grassum appears to have been 335*l.* paid at Whitsunday, 1796; and at Whitsunday, 1798, a further grassum of 447*l.* 15*s.*; so that upon that you observe that there are two grassums paid in the course of about three years, amounting to about 700*l.* upon a rent of 27*l.* 10*s.* I will not trouble your Lordships with other instances of this class; but the second class was where the leases had actually expired, and No. 67, for instance, is a lease renewable with the annual rent of 7*l.* 15*s.* a grassum

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being taken of 255*l*. Then there are leases granted without the obligation to renew; two leases, No. 212 and 147, granted each at the rent of 1*l*.; and there are three grassums taken in each of these cases; in the first case, 63*l*. at Whitsuntide, 1788; 18*l*. at Whitsuntide, 1806; and at Whitsuntide, 1807, 170*l*. 10*s*. making 251*l*. 10*s*.; and, in the second case, 103*l*. 48*l*. and 83*l*. making 234*l*. I have taken the trouble to put down the amount of the various sums paid as grassums, in order to show what the actual operation of this is, stating it again as a question, whether this is legal or not. Then, in the fourth class, there are three or four stated, and one is a lease of 1*l*. 11*s*. 6*d*. on which the sum of 171*l*. was paid; and another is that instance, which I mentioned to your Lordships, which you will find to be No. 267 of the libelled leases, where the rent is 3*s*. and the grassum paid for that lease is 231*l*. 3*s*.

My Lords, The amount of the several sums, which the Duke received in grassums, is stated very differently; but the result of the whole of this operation is, that the rent, which was a free rent in 1778, as I before mentioned to your Lordships, according to the representation of the case to us, of 11,300*l*. (there was no rise in any instance in the Duke's time, he taking grassums, and not only taking grassums in all his leases, but receiving fresh grassums, and receiving those fresh grassums, as they assert, in concert with all his tenants), was, at the death of the Duke, 3600*l*., chargeable, as your Lordships observe is stated by the entail, with a jointure of 1000*l*. if there

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was one Lady, and another jointure of 800*l.* if there were two, and another of 500*l.* if there were three; and chargeable also with 6000*l.* or 7000*l.* for children; and the question then is, Whether the interlocutors which I have read to your Lordships, are interlocutors, which do justice to the parties, stating their respective claims against each other.

Now, my Lords, when this case was argued before the Judges of the Second Division, as I have already stated to your Lordships, they were of opinion that there was no diminution of the rental according to the true intent and meaning of the entail, they construing the words "without diminution of the rental, at the least at the just avail for the time," as if the words stood "without diminution of the rental, *or* at the least at the just avail for the time;" and it is material to mention this, because it may be the ground of some misapprehension as to this case hereafter. As to that, I understand the fact to be, and if I am mistaken in that I shall be glad now to be set right, that that word "*or*" is not inserted in the deed of tailzie. The Judges of the Second Division of the Court of Session have certainly understood the case as I understand it; the word "or" is no part of that deed, and that therefore the clause stands thus: That the heir of entail is to let for his own life-time, or for nineteen years, without diminution of the rental, at the just avail for the time.

My Lords, Upon that part of the case, I have before taken the liberty to intimate to your Lordships (and I speak here with great diffidence when

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speaking on Scotch instruments), if this were an English instrument, I cannot find out the principle, upon which I should be entitled to insert that word "or," if those words were, as they are here, without diminution of the rental, at the just avail for the time; the very circumstance of having the words, at the just avail at the time, must show that the author of the deed meant something else besides "without "diminution of the rental." Then does it alter that, if you introduce words which still make the nature of the concluding words stronger? The question will be, Whether, because in many cases the words "diminution of the rental" have been held to mean diminution of the rental presently paid; therefore the words "diminution of the rental," when found in a context sufficient to give them a different sense, and where there is no word creating an alternative, are to be taken in that sense? I do not state that that difficulty is a difficulty which cannot be got over; but, speaking most respectfully, I cannot agree in that, which has been laid down, viz. that there can be no reasonable doubt about it.

They have futher held, that the taking grassums, and I must suppose they have held, that taking grassums, under all the circumstances, under which the Duke has taken them, is not to be considered as a diminution of the rental; that the words "di-"minution of the rental," affected in their sense, or not affected in their sense by the subsequent words, are to be taken to mean without diminution of the rental presently paid; and, if so, that they may not only take grassums at the expiration of the

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leases, but that they may take them at regular times, calling in by renunciation those leases; that, calling in those leases by renunciation, they may then take another grassum. The amount of the grassum paid appears generally to be, and I believe the fact is generally that it is, calculated with reference to the rent, and the intended endurance of the tack, when the lease is granted; they hold that you may call it in by renunciation, and that, on the tenant surrendering from time to time, if that plan is adopted, and acted upon, there may be at all times a nineteen years' lease upon the estate.

My Lords, I have before stated to your Lordships, that this opinion of the Judges of the Second Division of the Court of Session is an opinion, which, to me at least (I do not mean to say that it is not according to the law of Scotland, but that it is an opinion, which to me at least) is irreconcileable to the principles, upon which the First Division had given their judgment; though the circumstances are not exactly the same, nor the modes of considering them perhaps exactly the same, yet they do apply principles in the one case to the construction of deeds of entail, which are altogether different from those, which are applied by the other Division to the construction of deeds of entail; and we are therefore now involved in this situation, that the person, who has the honour to address you, most unfeignedly would represent that he is under the painful difficulty of coming to a determination, whether the Judges of the one court or the other are right in their decision; and to come to the determination,

previously to deciding such a question, whether, in a case of this sort, you have now all the information that you ought to have, before you should come to a decision.

Now, My Lords, there is one view of this case, which appears to me also to have been (I mean to speak most respectfully) but slightly treated in the Second Division of the Court, and what I mean is, whether there is not a diminution of the rental in this case. My Lords, the Judges of that Division, I see, have said, that where an entailed estate is let at the rent presently payable, though the rent presently payable may be reduced, as to the free rent received, very considerably by the public burdens and charges, yet, nevertheless, that is not a letting with a diminution of the rental, and, my Lords, I agree there may be cases, in which that doctrine is right; but I do entertain a very considerable doubt, whether in a case, circumstanced as this case is, there be not occasion to consider somewhat more, whether the effects of these transactions is not, in the sense and the meaning of this entailer, or according to the expressions of this entailer, if you choose rather to have it so, a diminution of the rental.

My Lords, I before stated to your Lordships that remarkable case of the 3*s*. rental, and 231*l*. grassum. I do not know how it may be in the law of Scotland, nor do I pretend to speak with any confidence, very much otherwise, but I have no conception, that if this was the construction of an English instrument, I should not be called upon to attend somewhat to this distinction. If I am called upon to let at the

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last rent, and it should happen that, after letting at the last rent, public burdens are imposed, the property-tax for instance, which the tenant is to pay, I have nevertheless fulfilled the obligation which the instrument placed upon me; but the case I apprehend may be very different, when you come to consider, not public burdens which may hereafter be imposed, but public burdens affecting the rent at the time, as, for instance, in this case, with respect to the teinds; here is a difficulty which has certainly induced me to think, and often to think, that this case wants further consideration. It is clear, as I understand the facts of the case, that from the year 1633, when the statute passed about teinds, down to the year 1731, the valuations were made upon the actual rent paid, the words of the statute being, that they should be charged upon certain proportions of the *rent constantly paid*. My Lords, In the year 1732, or thereabouts, the Court of Session said, this cannot be right; it cannot possibly be what the statute meant by the *rent* constantly paid; there must be such a meaning put upon these words, as that justice may be done to all parties concerned; and therefore, if you let with a grassum, in estimating what is the rent constantly paid according to the meaning of that statute, you shall not say that the rent rendered is the rent presently paid, but you shall take a proportion of the *grassum*, according to what would have been the rent paid but for that grassum. See, My Lords, what is the effect of that as to entailed estates. Here is a lease let, and let at 3*s*. that is the rent constantly paid;—here is a grassum paid on that lease of 231*l*. 10*s*.

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Does the heir of tailzie receive 3*s.*?—No. When he comes to account for the teinds, the court says, the grassum must be considered in ascertaining the rent constantly paid in the sense of that statute; for the purpose of doing justice grassum is rent, and we will therefore take a proportion of that 231*l.* the grassum, and add it to the money received, the 3*s.* and you shall pay your teinds according to the amount of the rent calculated on the addition of the 3*s.* to that proportion of the grassum. My Lords, I do not say whether that is annailzieing or not, I do not say whether it is disponing or not, I do not say whether it is or is not diminution of the rental; but this I know, that, if the Duke of Queensberry could let at 3*s.* because he could maintain that there was no diminution of the rental as against the heir of tailzie; and the heir of tailzie, on the other hand, is to pay the burden of teinds on a proportion of the grassum received by the Duke, in addition to the 3*s.*—the rent constantly paid or reserved to that heir of tailzie,—the heir of tailzie, unless I misunderstand the matter, must have that, which is not worth his acceptance.

Now, my Lords, if you apply the difficulties, which arise in the case so put, upon the 3*s.* rent, to the case in all its circumstances, how does it vary? It varies only in this; you are struck with that way of putting it, when you put it on the 3*s.* and 231*l.*, —but you are not quite so much struck, when you put it on the rent, which in 1778 was 11,300*l.* a-year, and which, by letting in this mode, is reduced, not as to that, which the Duke of Queensberry has reserved, but with reference to the

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proportion which the law takes in respect of all these grassums, is reduced to the free rent of 3600*l.* a-year, —a free rent of 3600*l.*, capable of being burdened, according to the terms of the entail, with three jointures of 1000*l.*, 800*l.*, and 500*l.*, and with 6000*l.* for children, that deed of entail providing anxiously too that the heir of entail shall from time to time pay the public burdens!—This, my Lords, is surely a case of very considerable importance,—a case which requires much of consideration, before we can be quite convinced that all this is according to clear law. Whatever was the law as to teinds in 1732, was the law as to teinds before 1732, before the entails in question were made, and was the law in 1633;—the construction has been different, but the law was always the same, and the true construction of it was always the same; and when the court put a new construction upon the words '*rent constantly paid*' as to tithes, they seem to have placed heirs of entail in circumstances very different from those in which they stood in point of interest in the entailed estate, before that new construction as to teinds was adopted.

My Lords, The courts have also differed as to the principles on which they have construed this entail.—One court says, that the heir of entail is to be considered, as I before stated it, as absolute fiar of the estate,—that he is the absolute monarch of the estate, with this exception, that he is such, so far as he is not fettered; and, when we inquire whether he is fettered or not, we are told that he is not to be fettered by implication, that he is not fettered unless where he is expressly, in clear terms and expression, fettered; that there are no fetters

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created by words, unless they are such words as that he who runs may read, and may understand them; that such were the terms used by a very great Judge. I ask in what way the Court of Session understands the terms so used by that great lawyer.

My Lords, That the heir of entail is a fiar,—that he is the proprietor,—that he is not to be considered as fettered, unless he is by express words fettered, and that he is not to be fettered by implication, is, generally speaking, doctrine not to be questioned. But that all decided cases sustain, without exception, these doctrines, I cannot agree, and I cannot admit that an heir of entail is not fettered in some way, in some cases, in some circumstances, otherwise than as he is expressly fettered. My Lords, I cannot find in all these papers, in any author I have had access to, in any book, nor have I heard from any mouth, that though a deed of entail contains not one single word, no provision whatever, against lowering the rent, the heir of entail can let below the last rent, unless in the case, in which it is impossible that he can get it. I should be glad to know how it happens that, if it be true, according to the printed opinions, that if a restriction is not expressed in the deed of tailzie, that is a restriction that no heir of entail is under, they all admit, every one of them, that the heir of entail, if he can let for ninety-nine years, if he can let for a grassum, because he is not prohibited so to do, yet cannot let below the old rent, though there is no such prohibition in the tailzie? upon what does that rest? There may be, for aught I know, a very satisfactory account of it,

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but I have not seen it. Again, with respect to the letting the mansion-house, and the grounds about the mansion-house, cannot an absolute fiar, an absolute proprietor of his estate, let his mansion-house, and the grounds about the mansion-house? and yet, although there be no such prohibition in the deed of entail, it is quite clear that an heir of entail cannot do it. That has been decided over and over again in the court below and here. Then, does not all show, that there may be implied obligations, some such obligation, as requires him to attend in some sort, or some manner, to the intent of the author of the deed, beyond that by which an absolute fiar is bound? It is said, that an heir of entail cannot let on an elusory consideration; in short, there are decisions which authorize one to say, that when the doctrine is laid down in the very strong terms in which it is, it must be taken to be a doctrine laid down with the exception, if I may so express it, of the excepted cases.

My Lords, I do know certainly that decision has gone a very great way in limiting construction, and that construction has been limited in cases, in which one can hardly understand the principles, on which it was limited; but I should be the last man in the world to deviate from rules, which have been laid down, for I look upon it, that certainty with respect to titles is a great deal better than even sensible rules of law, or sensible rules of construction. Speaking with all deference, I never could have consented to the decision in the Duntreath case. There is no more doubt that that case was decided against the meaning of the author of that deed,

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aye, and against the expression of that deed, than that I am standing at this table; but I will not break in upon what has been settled by that case, for the importance of abiding by what has been considered as settled law can never be represented too forcibly.

Next, my Lords, With respect to grassum, let us try what there is of reason and consistency in the law as we have heard of it, and as it is said to be extracted from the Westshiels, and other cases. If I say to a man, Sir, you shall have a lease for nineteen years, and you shall give me for that lease a couple of thousand pounds grassum, and I will make the rent so much less than it otherwise would be; it is contended, upon the authority of these cases, that this heir of entail may put the 2000*l.* in his pocket, and make a valid lease, as it respects the person to succeed him. But he cannot say to the proposed tenant, I will make you a lease at 100*l.* a-year, and you, instead of paying me the money now, shall give me a bill or a bond for the payment of so much annually, not as *rent*, we will not call it *rent* for the world, but, instead of paying me a grassum of 2000*l.* at this time in my hand, you shall give me a bill or a bond to pay it me at twenty different payments, to be made at the periods when the reserved rent is payable; this is not grassum, however much like it, but rent. Pay me now, the thing is safe against the next heir of entail;—pay me in future,—accept the benefit of credit which I give you (the thing in effect the same as if you had paid me now, and I had lent you the money so paid, upon the same credit), that is not safe against the next heir of entail;—but he, when he comes into

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possession, shall have the future payments. If I, an heir of entail in possession, let black acre for 100*l.* a-year, and 1000*l.* paid into my pocket that morning, the lease is good, and he who succeeds to me is to have only the 100*l.* a-year; but if, on the same day, I let white acre at 100*l.* a-year, and desire the tenant not to trouble himself, but to suit his own convenience, by paying the sum of 1000*l.* by certain instalments, these shall be deemed rent; and in the one case the lessor is to have the whole 1000*l.*, in the other he is not. So as to wood; the heir in possession, it is said, may sell it for present payment, or for payment at present in part, and for payments by instalments afterwards. If the wood is cut down in his life-time it is well; but the purchaser cannot cut a stick after the death of the heir, whatever he may be said to be as fiar or proprietor. As to wood, the heir in possession cannot, for present profit to himself, dispose of future produce not accruing in his own time; but future produce of a different kind, in a sense, they say he may dispose of for rent payable in future, and grassum paid down. My Lords, I do not mean to say, that if the law has decidedly settled these things, we are, because of such observations, to disturb that, which is so settled; but the question is, whether the law has so settled it, and whether it has gone so far as to establish that a whole estate can be dealt with in the manner, in which the Duke of Queensberry has dealt with this, provided such a large question is open upon the pleadings: and at least we should have the collective opinions of those, who best understand the law of Scotland, the case being brought

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before them in all the views of the case; and we should not decide without the best information we can receive from those, who can give that information, after we have ourselves stated in some degree the difficulties we feel upon the subject.

My Lords, It is said that there has been a practice in the case of the King and Church as to taking grassums, and I agree there has been, when the practice can hardly be said to have been according to law. There has been a constant struggle between the persons holding crown lands and church lands, and the Legislature both in England and Scotland, the Legislature interposing from time to time against the non-observance of law as to such property. It must be admitted, however, that grassums, in cases of such property, have received much countenance in the administration of law. How far that fact shall weigh in decision upon the powers of an heir of entail, or fix his obligations, is matter much to be considered.

About the year 1685, it will be found, I think, that the leasing in Scotland extended only to very short periods; with respect to grassums, when they were first taken by heirs of entail, we have not much information.—Under this entail, I apprehend, not for some years after it was made,—not before, I think, 1720;—and that the practice should grow into use in this and other entails, is not very marvellous, when you consider, that an heir of tailzie in possession lets the lands perhaps only for eight or nine years; when you again consider that, if any body thought proper, being lucky enough to know the terms, on which the lease was made,

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during the currency of it, to interpose, in that case the person who made the lease and the tenant together might purge the irritancy; when you know that it very frequently happens that the persons succeeding as heirs of tailzie stand in a connection of affinity or obligation, which prevents their disturbing the acts of those in possession; and when you see how this thing has crept on from time to time. But you must ask, on the other hand, if this be the law, how comes it it has not been acted upon in so many settled estates as there are in Scotland, with reference to which it has not been attempted? Men have an inducement to take the last penny out of their estates, and how has it happened that this has not been universally done, or almost universally done? Can you doubt after decision in favour of the leases in question, that it will be universally done, unless the Legislature interfere, if by law it can be universally done? Nevertheless, we must take the law as we find it, be the consequences what they may.

My Lords, I will mention also the word "*dispone*" to your Lordships here. It is very true, that in the entail of the Queensberry estate, the word "*alienate*" does not occur; and the word "alienate" not occurring, it is urged, that the Wakefield case cannot be said in terms to be an authority, unless the word "dispone" has the same effect as the word "alienate."

It must be recollected, that in the case of *Macdowall*, the Second Division of the Court held, that the word "dispone" had not the same effect as the word "alienate," which shows again what may be the consequence of our immediate decision in this case.

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They have lately held in that case of Macdowall, that, because the prohibition was only against disponing, although this House might have said that, if the prohibition was against alienation, you could not let a lease for ninety-seven years, that does not extend to disponing; and, therefore, they there confirmed a lease for 300 years. I know, my Lords, that that was a decision made, when there was a very considerable division of opinion in the Court. It also appears, that in this case a distinction has been taken between the words "*dispone*" and "*alienate*;" whether the word "dispone" means the same as if the word was "alienate." It would be of the last importance that we should know what is the understanding of all the Scotch Judges as to the word "dispone;" because if these objections about grassums, and so on, should fail, it will be then to be considered, whether the positive clause as to leases affects the generic meaning, if I may so express it, of that word "dispone," and whether, because particular leases are prohibited, or particular leases permitted in a deed, in which there is a generic term, a generic prohibitory term, it shall or shall not have the effect of prohibiting leases, which would be bad *vi legis*, if not within the prohibitory clause; for instance, whether if this word "*dispone*" strikes at leases, as *alienate* does, it can be contended that, because certain leases are not permitted or prohibited by this entail, therefore this heir of entail is let loose from the ordinary prohibition, *vi legis*, of letting the mansion-house and the grounds around, the prohibition as to elusory rents, as to extravagant endurance, and so on.

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My Lords, If I were obliged to state to your Lordships, what, in my judgment, is the meaning of the word dispone, I could not express at present a doubt, that that word dispone does as effectually prevent leasing as the word alienate. I know dispone may refer to the particular thing called disposition, but when it is said you are not to dispone *in any manner of way*, does not that mean expressly to state, that the author of that deed conceives that there may be dispositions of different sorts?

When I look into the language of statutes passed before and at the time of the date of this entail; when I look into the language of writs and of writers, it appears to me to be clearly proved by the citations from statutes, and from writers, and from instruments, that an assignation or a tack is a disposition, in the language of the law of Scotland; this seems to me almost as clear as that I have the honour now to address your Lordships; at the same time knowing, as I do, and have had experience of the talents and abilities of the Judges of Scotland, I am not only bound, but disposed to believe, that I may be in some error upon this subject, which I should be glad to have corrected. If this is to depend upon the meaning of the word dispone, and the interpretation to be put upon that word, at present certainly I think the word "dispone" would as effectually bar long leases as the word "alienate."

My Lords, The result of the whole is, that I feel it due to myself, if I may take the liberty so to say, when called upon to discharge so important and so anxious a duty as my duty in this case is; I

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think it due to your Lordships, recollecting the immense consequence which must attach upon your judicial act, whatever may be the nature of it; I think it due to the Judges of Scotland, whose decision we are called upon in this place to review, to the lieges of Scotland, whose laws we are to settle; not with all the advantages, which I wish we could have when called upon to decide on great interests in property; above all, having regard to what has been the habit of your Lordships in cases of great value as to Scotch estates and titles, I mean to call upon the Judges to consider and re-consider what they have stated. Upon all these considerations, I think it fit to advise your Lordships to remit the two Buccleuch cases to the Second Division of the Court of Session, calling upon that Court, in your remit, to attend to the fact, that the action of declarator at the instance of the Executors and Disponees in trust, is an action brought by them in their character *as such*; to consider what is the effect of the action being brought by them in their character as such, in the absence of so many tenants, regard being had to all the circumstances that are alleged in the defences, as circumstances of concert, and alleged as acts of fraud upon this entail; and calling upon them to settle what is the meaning of this word *dispone* in that entail; and generally, calling upon them to attend to all the circumstances which belong to that entail, as influencing their opinion upon that action. I have looked with great anxiety to the pleadings, in order to see how, in their decision upon that action of declarator, or in their proceedings with respect to two or three tenants, the Court

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can affect all the other tenants, unless they have agreed to be bound by the result of these proceedings; but upon that I am not able to form any satisfactory opinion. It will be necessary, however, to remit the action of Hyslop for further consideration; and, when we have the opinion of the Second Division of the Court of Session upon these remits, taking care to have the best consideration we can have, by calling upon the Court of the Second Division, in obedience to the statute, to call to their assistance the Judges of the First Division, that the Judges of the First and Second Division may together consider all the points, we shall then, I trust, have obtained such further information from the Court of Session, as will enable us, not only to dispose of the Buccleuch declarator and the case of Hyslop, but would enable us, if the other causes stood over, to determine them; and, if the pleadings are such as enable us to do so, to determine, with that information, the rights of *all persons,* whether parties before the Court or not.

My Lords, I feel, and I am sure I state my regret that it should be so with the utmost sincerity, that this tends in some measure to delay, in a case in which it is due to the feelings of all persons interested that there should be no delay; but I should hope and trust, that in a case of this nature, in which the Second Division of the Court of Session, I observe, have interposed, in order to avoid delay, to give their opinion in the manner they have, that the Court of Session, in both Divisions, would be pleased to take this matter into their consideration immediately in their next session. My Lords, if

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they do that, I speak for myself, and I speak most sincerely for myself, I believe I should be able to give my opinion upon this great and complicated case, as soon as I could now satisfactorily do it; for, although I have, I can venture to assure your Lordships, spent every hour which I could devote to this purpose to the consideration of this case, there are difficulties belonging to the decision of it, which as yet, and I am not ashamed to confess it, I have not been able to overcome. If I were pressed at this moment to give my decision, I should give it according to my present judgment. But even if it were satisfactory, in that state of things, to others, it would not be satisfactory to myself, and I avow it; and therefore I follow the example of my predecessors, and advise your Lordships to remit these Buccleuch cases, that they may be considered by both Divisions, and that we may have all the information that can possibly be procured before we come to a final conclusion on questions of such vast importance.

Lord Redesdale,—My Lords, attending to the circumstances which the Noble and Learned Lord has referred to, and to what he has said upon the subject of these causes, I will not at this late hour detain your Lordships long; nor should I have troubled you at all, if I had not understood that it was his wish, that, having attended the hearing of the appeals, I should generally state my sentiments upon them. I agree with the Noble and Learned Lord in the manner in which he proposes to dispose of these cases. I conceive it to be in conformity to the manner in which your Lordships would dispose

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of a case of the same description, if it arose in the courts in this country. For if a case had arisen in one of the courts in Westminster Hall, and had passed through the Court of King's Bench and the Exchequer Chamber, and had come here in the form of a writ of error, your Lordships would have had the judgment of all the courts upon the subject, and might also have had here the assistance of all the Judges to guide you in your decision; but as you cannot have the same assistance in a case from Scotland, and there are in the decisions of the two Divisions of the Court of Session points in which they appear to have differed in opinion, the only way which your Lordships have of obtaining that assistance which you would have in the case of an English cause, is that which the Noble Lord has proposed.

It would be improper for me to enter much at length into the cases at this moment; but it strikes my mind as most extraordinary, that those of the Judges of the Second Division of the Court of Session who have considered the terms in which the entail of the Queensberry estate is expressed, containing an express prohibition, "that the heirs of "tailzie should not set tacks or rentals of the land "for any longer space than the setter's life-time, or "for nineteen years, and that without diminution of "the rental, at least at the just avail for the time," should have put the construction which they have put upon these words; and that upon that construction they should have proceeded in the interlocutor which they have pronounced. The interlocutor indeed has the effect of declaring, that the late Duke of Queensberry had the power of granting all

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the tacks in question, some of these tacks in question being certainly within the terms of the words of the express prohibition, and therefore not capable of being sustained, if that express prohibition does operate to prohibit tacks of any description; and, therefore, I must presume, that in the extent of the judgment, the Court has determined, that the word "dispone" has not the effect of the word "alienate:" and although the very words of the clause prohibiting tacks have been distinctly argued upon, considered and interpreted by the Court, and their decision seems to have been in a certain degree founded upon the construction which they have given to those words; yet in the extent of their decision, they must have put that clause wholly out of their consideration, and considered that the word "dispone" not being equal to the word "alienate," therefore the long leases contained in the action of declarator are leases which may be sustained, because there is no prohibition to alienate.

My Lords, With respect to the construction of the word "dispone," I must confess, as far as I can judge from the authorities stated in the printed cases, and in the argument at your Lordships' Bar, I cannot have the least doubt, that the word "dispone" used in this entail, is not used in the limited sense which has been supposed to be attributable to it, but has been used in a general sense, superadded to the other words; and that, according to all that I have found of authority in the law of Scotland, disponing is a word of extended effect, including alienation in a variety of ways in which property may be disposed of, and particularly in different acts of Par-

liament clearly applying to leases of estate. I therefore think a prohibition to dispone must be at least equivalent to a prohibition to alienate, and strictly applicable to a lease.

My Lords, There are also particular parts of the deed of entail in question, which seem to me to require a consideration which has not perhaps been given (as far as we can judge from the accounts we have had of what passed in the courts below), by those who have made the decisions which are the subject of appeal. If the words "*without diminution of the rental*" are to be so restricted, as to mean without diminution of the nominal rental at the time of the lease granted, which appears to have been the construction put upon those words in the Court below, the consequence as to the Queensberry estate will be this: That if the first person who succeeded to the entail, and those who followed, had let constantly at the rent which was the reserved rent at the time of the entail, and which is stated to have amounted to between 5 and 6000*l.* a-year at the time of the entail, granting leases continually from time to time at that rent, and taking grassums, the effect at this time would be, that this estate not only would produce nothing to the heir of entail now in possession, but would not produce any thing to answer either the charges in point of jointure which might have been made upon it, or the charges which, as provisions for younger children, might also have been made.

So, my Lords, with respect to the other estate, the Neidpath estate, the consequence would have been exactly the same; and the consequence is very

striking with respect to one part of the powers given, that to make provisions for younger children; because the power in the entail of the Neidpath estate as to younger children, is to settle upon the younger children two years' net rent; whereas, according to the construction put upon the words "without diminution of the rental," in that entail, there might have been no net rent; and consequently the power of settling on younger children would amount to nothing; and the intent of the author of the entail, in this respect, might have been wholly defeated.

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To the deed of entail of the Neidpath estate, there is annexed a rental of the lands as they stood at the time; and to show what was the view which the persons who settled this estate had, the net rental is expressly noticed in the deed, and contrasted with the reserved rents; with an obligation, as your Lordships will recollect, that all the public burdens, of course including the teinds, shall be discharged by the person in possession from time to time; and he is bound to make that discharge, though, according to the construction put upon the words "without diminution of the rental," there might be no income whatsoever to be received by the person in possession equal to the payment of those public burdens.

The rental, speaking of the different estates, says, —*the sum of the whole*, that is, of the rents reserved in the leases of the particular estates, is so much. Then there is deducted for *teinds, and so on*, so much; then the net rent is stated at so much. The consequence is, that in that rental reserved

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rents, amounting to a considerable sum, are reduced to a net rent, very much below the reserved rent, and so throughout, to the end of the rental; and it concludes, "the sum of the whole foregoing rental, "contained in the preceding four pages, extends to "the sum of 17,002*l.* 13*s.* 10*d.* Scots;" and if your Lordships recollect what 17,002*l.* 13*s.* 10*d.* Scots is, your Lordships will perceive, that at this moment, if the estate had been constantly let at the same rent from time to time, there could not possibly have been any thing coming out of the estate to the heir of entail in possession. It appears to me, therefore, that it must certainly have been considered by those who created this entail, as well as by those who created the entail of the other estate, that "diminution of the *rental*" must, in their view, have meant, at least, diminution of "*net rental.*" It cannot have meant simply the diminution of the nominal rental, because many clauses in the deed are founded upon the substance of the net rental; and therefore a diminution of the net rental must have been meant to be prohibited by the deed of entail.

The effect of what has been done with respect to the Queensberry estate, is unquestionably, as it *now* stands, to reduce the net rental to be received by the present possessor very considerably below the net rental received by the late Duke of Queensberry when he succeeded to the estate.

The coustruction put upon the words prohibiting leases in the Queensberry entail, appears to me very extraordinary. The qualifying words are, "without diminution of the rental, at the least at "the just avail for the time;" and those words have

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been interpreted as if they were disjoined by the word "*or*," as if the words "without diminution "of the rental" were one complete sentence; and the words, "at the least at the just avail for the "time," were another complete sentence, the one not connected with the other, and disjoined by the introduction of the word "or." There is nothing in the deed itself which imports that these words should be so disjoined, or the word "*or*," introduced; and I apprehend you must take all the words together; you must construe the words "*at "the just avail for the time*," as words interpreting the words "*without diminution of the rental*," and as parts of the same sentence. And if you do so, it is impossible that the construction which has been put upon the whole by the Court of Session can be the just and true construction of the instrument. The clause must be considered either as of no avail, or it must be deemed to have prohibited some of the leases in question.

I do not think it necessary to detain your Lordships with any further observations upon either of these cases, after the Noble and Learned Lord has made so full and accurate a statement of them. It appears to my mind, that it is highly important that the law upon the subject should be completely settled; not only with reference to the particular cases which are in question in these two entails, but that all persons who are in possession of entailed estates in Scotland, and those who may claim after them, should know what the law is upon the subject; and I believe it will be found, that, generally, the effect of a decision in a particular case is much

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more important, with a view to prevent future litigation and future questions between other parties, than with a view to the interests of the parties concerned in the particular case; that in all cases it is of more importance that the law upon the subject should be settled, known, and well understood, than what may be the effect of the decision as between the particular parties interested. I conceive the course proposed is highly proper, in order to enable your Lordships to come to a decision, which must, when you do come to it, operate in a certain degree as a legislative enactment, which cannot be altered without legislative enactment, as it may affect other cases. I entirely concur, therefore, in what has fallen from the Noble and Learned Lord. I do conceive, that what he has proposed is the only way in which your Lordships can with satisfaction come to that decision which it becomes your Lordships, in your character of Judges in the last resort, to come to upon so important a subject, —so important in the future administration of the law, and upon which there has been in the two Divisions of the Court of Session so much difference of opinion.

DUKE OF BUCCLEUCH *v* MONTGOMERY.

JUDGMENT, July 10, 1817.

It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the said cause be remitted back to the Court of Session in Scotland, to review generally the interlocutor complained of in the said appeal; and in reviewing the same, the

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said Court is to have especial regard to the fact, that this action of declarator is brought by the Executors and Trust-Disponees of the late Duke of Queensberry, as such, against the heir of tailzie, seeking thereby to establish unconditionally all and each of the numerous tacks mentioned in the summons, and granted by the said Duke, in the manner and under the circumstances mentioned in the pleadings, and is not instituted by any of the persons to whom such tacks are granted, nor are any of such persons parties thereto: And it is further ordered, That the said Court do reconsider the defences of the said appellant, and especially, Whether, in a question between such parties, the leases so granted, ought or ought not to be considered as granted in execution of such device, as is alleged in the said defences; and if so granted, Whether the same ought to be considered as granted in fraud of the entail, and are or are not such as ought on that account, or any other account appearing in the pleadings, to be held invalid, or not to be sustained at the instance of the pursuers, as representing the Duke: And in reviewing the interlocutor complained of, the said Court do particularly also reconsider what is the legal effect of the word "dispone," contained in the deed of tailzie of the 26th December, 1705, with reference to tacks of lands comprised in the said deed; and further do reconsider what is the effect, with reference to such tacks, of all other parts of the said deed, which relate to tacks, having regard to the endurance of such tacks, and to the fact of grassums being or not being paid upon the granting thereof, or paid upon the granting of former leases,

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and to all other the terms and conditions upon which such tacks were made, and to the effect of such grassums, terms, and conditions, in reducing the amount of the clear rent receivable by the heir of tailzie, and to all the circumstances under which the appellant has alleged, and it shall appear, that the late Duke of Queensberry granted all such tacks: And it is further ordered, That the Court to which this remit is made, do require the opinion of the Judges of the other Division, in the matters and questions of law in this case, in writing; which Judges of the other Division are so to give and communicate the same: And after so reviewing the said interlocutor complained of, the said Court do and decern in this cause as may be just.

DUKE OF BUCCLEUCH *v.* HYSLOP.

It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the said cause be remitted back to the Court of Session in Scotland, to review generally the interlocutor complained of in the said appeal, with reference to all and each of the grounds upon which the appellant has alleged that the tack, to which this cause relates, ought to be reduced, in a question between the appellant and the lessee, as such, after the Court shall have first reviewed the interlocutor complained of in the cause between the Duke of Buccleuch and Sir James Montgomery and others, Executors and Trust-Disponees of the late Duke of Queensberry, deceased, in pursuance of a remit to the said Court, in the

said cause, of even date herewith: And it is further ordered, That the Court to which this remit is made, do require the opinion of the Judges of the other Division, in the matters and questions of law in this case, in writing; which Judges of the other Division are so to give and communicate the same: And after so reviewing the said interlocutor complained of, the said Court do and decern in this cause as may be just.

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IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

KNATCHBULL and others—*Appellants*.
KISSANE and others—*Respondents*.

Feb. 25, March 2, 1818.

FRAUD.—CONSIDERATION, &c.

K. HOLDING certain premises under a lease made in 1769, for three lives at 300*l.* rent in 1802, obtains from G. tenant for life of the premises, with power of leasing at the best rent, then under age, and in embarrassed circumstances, by the offer of immediate payment of a year's rent then due, but by the custom of the country not payable till half a year after, and by a promise to plant on the premises 10,000 trees for the benefit of the landlord, and to make over to him those already planted, a new lease of the lands at the old rent, substituting instead of the two of the old lives, two young lives:—the lease, however, containing nothing about the trees planted, and no covenant to plant the 10,000 trees, but only an agreement endorsed on the lease to plant them. The old lease still retained by K. and no trees planted by him; but immediately after execution of the new lease of 1802, he assigns that lease upon trust to secure a provision for a wife whom he then marries; and soon