SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

CASE OF THE QUEENSBERRY LEASES.

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CASE OF THE QUEENSBERRY LEASES.

POWER of an heir of tailzie in respect of leasing.

In what respects an heir of tailzie is absolute owner of the estate, and in what respects he is bound to administer for the benefit of his successors under the entail.

The word "dispone," in the prohibitory clause of a Scotch entail, has the same meaning and operation as the word "alienate."

Those words prohibit long leases, as alienations inconsistent with a due administration of the estate.

A lease for 57 years is a long lease within the meaning of the prohibition.

Words prohibiting alienation affect a lease by which the grantor of the lease, the heir of entail in possession, does not reserve to the succeeding heir of entail the same benefit as to himself, as, by reserving a given rent to the grantor during his life, or for the first years of the term, and a smaller rent after his decease, or for the remainder of the term.

Grassum (a fine taken upon granting a lease), is anticipated rent.

Therefore, a lease made upon a grassum paid to the grantor, is an alienation *pro tanto* of the rent.

A power in an entail to make leases "without diminu-"tion of the rental, at the least at the just avail for the "time," means, at the fair value at the time of leasing, not the last rent, which may have been paid a century before.

"Rental," in that clause of the entail, is the same in construction as "rent."

The heir in possession taking a grassum effects a diminution of the rental or rent, and does not take the just avail for the time.

It is a diminution of the rent if grassum was taken upon a preceding lease; and such lease being surrendered before its expiration, a new lease is granted at the old rent.

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Leases granted upon such terms are void, as between the heirs of the entail.

Whether leases granted for 31 years, or so many years as the Court of Session or House of Lords shall deem to be within the power of the heir of entail, are void as uncertain, and not according to a due administration of an entailed estate. *Quære.*

Leases made by the heir of entail in possession, for nineteen years, with covenant to renew annually during his life, are not void, as being a transgression of the power to lease for the setter's life, or nineteen years.

Numerous leases granted by the heir of entail for his own benefit, and to the prejudice of the succeeding heir of entail, operate as a fraud upon the entail.

THE LORD CHANCELLOR *.

MY LORDS,

2 July 1819. THIS is unquestionably the most weighty and important cause, which, in the course of my professional life, either at the bar or in a judicial situation, I have ever had occasion to consider: important in its

* These were appeals arising out of various actions of declaratur and reduction, in which the trustees of the late Duke of Queensberry, the present Duke of Buccleugh and Queensberry, the Earl of Wemyss and March, and certain lessees of the late Duke of Queensberry, were parties. The cases turned upon the construction of two entails; the one called the March and Neidpath, the other, the Queensberry entail: and the principal questions arising and discussed in the cause were,—1st. Whether, in the prohibitory clause of an entail, the word "dispone" was equivalent to the word alienate, and had the same effect to prevent alienation? 2d. Whether long leases, and of what endurance, were alienations? 3d. Whether taking grassum was a breach of the prohibition to alienate? 4th. What was the true construction of a power given to the heir of tailzie in possession to make leases "without diminution of the rental, at the least at the just avail for the time;" whether it meant the last preceding rent taken, or the fair value at the time of leasing; and

consequences as a question of great value to those who are directly interested in it; but in that whether taking a grassum was a breach of that condition annexed to the power of leasing? 5th. Whether leases for 31 years, or if the Court of Session or House of Lords should hold such leases to be void as too long, then for such period as those Courts should approve, were good leases, *i. e.* whether the Court would restrict the endurance, and define the ish for the parties? 6th. Whether leases for nineteen years, with obligations to renew for the same period annually during the life of the grantor, were prohibited, as being for the setter's lifetime *and* nineteen years? 7th. Whether leases at the same rent, substituted for and upon the surrender of former leases, which had been made with grassum, could be sustained? And finally, Whether leases of the several descriptions before stated, granted by the heir of entail in possession to the amount of many hundred, were to be considered as frauds upon the successors in the entail.

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The appeal was before the House of Lords in the year 1817, and on the 10th of July was remitted, with special directions, for the reconsideration of the Court of Session. After judgment upon the remit, the cause now came for the final decision of the House of Lords.

The nature of the several actions in the Court below, the parties to them, the terms of the respective entails, the several matters in issue, the arguments urged before the original and appellate jurisdictions, so far as they are material to understand the question, appear in the following observations made in moving the judgment on this appeal. More exact information (if desired) upon these points, may be found in the printed cases; and a general outline of the pleadings, and the facts and questions, may also be found in the observations of the Lord Chancellor in moving the remit upon the former appeal.—MS. 9 July 1817. Dow's Rep. vol 5. p. 297.

No part of the arguments are given in this report, because the principal topics of argument are noticed in the Chancellor's speech in moving judgment, and from their extreme length, it would not be possible, within moderate bounds, to do justice to the great ability of the advocates who pleaded the cause at the bar of the House.

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point of view, it sinks, as it seems to me, into absolute insignificance, when it is considered, with reference to the effect, which the judgment in this cause, whatever it may happen to be, must have upon the interest of landed proprietors of Scotland.

In order to render the question intelligible, it becomes necessary to enter into a statement of the law of Scotland as referrible to the facts and circumstances of this case,—the law of Scotland, not as it is understood in interpretation, but as it is to be found in acts of Parliament; for the question between these parties arises upon what is the true intent and meaning of an act passed in Scotland in 1685, which is their act respecting tailzies. Tailzies existed long before that period, but the present case is to be considered upon the true construction of that act of Parliament, as attaching uponthe tailzies of the March and Neidpath estates, and the Queensberry estate.

Before and since the passing of that act, it has been the subject of much controversy, what is the law of Scotland as to the interpretation of tailzies. They have been treated as matters *strictissimi juris*, as not to be construed by intention, but only on what you find embodied (to use their phrase) in expression; and those principles have certainly, before and since the act, been applied to tailzied instruments.

The several cases were argued at the bar of the House of Lords upon the original hearing by Mr. (now Vice Chancellor) Leach, Mr. Jeffrey, Sir S. Romilly, Mr. Cranstoun, and Mr. Moncrieff, on the 3d, 5th, 7th, 10th, 13th, 14th, 17th, and 18th of February 1817; and after the judgment of the Court of Session upon the remit, by the Lord Advocate (Machonochie), the Solicitor General (Gifford), Sir S. Romilly, Cranstoun, Moncrieff, and J. Murray, on the 13th, 15th, 17th, 20th, 22d, and 27th of April 1818.

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That act of Parliament is in these words:

" Our Sovereign Lord, with advice and consent of his " Estates of Parliament, statutes and declares, that it shall " be lawful to his Majesty's subjects to tailzie their lands " and estates, and to substitute heirs in their tailzies, " with such provisions and conditions as they shall think " fit, and to affect the said tailzies with irritant and re- " solutive clauses, whereby it shall not be lawful to the " heirs of tailzie to * *sell, annailzie or dispone* the said " lands, or any part thereof, or contract debt, or do any " other deed whereby the samen may be apprysed, ad- " judged or evicted from the others substitute in the " tailzie, or the succession frustrate or interrupted, de- " claring all such deeds to be in themselves null and void, " and that the next heir of tailzie may immediately, upon " contravention, pursue declarators thereof, and serve him- " self heir to him who died last infeft in the fee, and did " not contravene, without necessity anywise to represent " the contravener. It is always declared, that such tailzies " shall only be allowed in which the aforesaid irritant and " resolutive clauses are insert in the procuratories of re- " signation, charters, precepts and instruments of seisin, " and the original tailzie once produced before the Lords " of Session judicially, who are hereby ordained to inter- " pose their authority thereto, and that record be made " in a particular register-book, to be kept for that effect, " wherein shall be recorded the names of the maker of " the tailzie, and of the heirs of tailzie, and the general " designations of the lordships and baronies, and the pro- " visions and conditions contained in the tailzie, with the " foresaid irritant and resolutive clauses subjoined there- " to, to remain in the said register *ad perpetuam rei me-* " *moriam*; and for which record there shall be paid to " the clerk of register and his deputes, the same dues as " is paid for the registration of seisins; and which provi-

Scots Act, 1685.

* Here the Lord Chancellor noticed the arguments upon the construction of the words *sell, alienate and dispone,* which occur afterwards, p. 360.

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" sions and irritant clauses shall be repeated in all the " subsequent conveyances of the said tailzied estate to " any of the heirs of tailzie; and being so insert, his " Majesty, with advice and consent foresaid, declares the " samen to be real and effectual, not only against the con- " traveners and their heirs, but also against their credi- " tors, comprisers, adjudgers, and other singular succes- " sors whatsoever, whether by legal or conventional titles. " It is always hereby declared, that if the said provisions " and irritant clauses shall not be repeated in the rights " and conveyances, whereby any of the heirs of tailzie " shall brook or enjoy the tailzied estate, the said omis- " sion shall import a contravention of the irritant and " resolutive clauses against the person and his heirs who " shall omit to insert the same, whereby the said estate " shall *ipso facto* fall, accresce, and be devolved to the " next heir of tailzie, but shall not militate against cre- " ditors, and other singular successors who shall happen " to have contracted *bonâ fide* with the person who stood " infeft in the said estate, without the saids irritant and " resolutive clauses in the body of his right."

And then there is a saving of his Majesty's confiscations or fines.

Without entering at present into other considerations relative to this act, it appears that authorizing certain entails, it requires, in order to make them good, at least against claims of third persons, that they should have prohibitory, irritant and resolutive clauses; and it has always been held, that clauses of each of these kinds are necessary to give the effect to those tailzies which this act of Parliament intends should be given.

In construction this also seems to have been settled, that you cannot entail unless there is an express prohibition; you cannot entail by implication. That appears to have been intentionally prevented by some of the expressions used in the act of Parliament. If

there be no prohibition to sell, annailzie and dispone, a prohibition to make any deed by which persons might be evicted has been held insufficient. And so it has been decided in the case of other implications, that the *prohibitions from which they* appear to arise by necessary consequence would not deprive the heirs of tailzie of the power over the estate as to matters not expressly prohibited. Unless there is a prohibition of each sort, the heir of tailzie is free to take advantage of the omission. Where, for instance, the prohibition is not to alter the succession; nothing in the world could more clearly interrupt the succession than the sale of the estate; and yet a prohibition to interrupt the succession would not prevent a sale by the heir. I conceive also, that if the clause *de non alienando* fail, the acts prohibited not being stated again in the irritant clauses as acts that are prohibited, they are not effectually prohibited. If the clauses are not complete, the frame of the tailzie would not be sufficient to protect those who are to take under it; and indeed in some decisions, this sort of construction has been carried to a length, which I confess has surprised me very much; but a Judge must take care that the surprise which affects his mind, shall not affect the law as settled by decisions. Nothing surprised me more (to mention one among many) than the Duntreath case*, in which it was held by this House, contrary to the opinion of the Court below, that where there were prohibitions against the heirs of tailzie, yet, as the first taker under the disposition was known to the law of Scotland as the institute,

Duntreath case; an extraordinary decision.

* Edmonstone *v.* Edmonstone, Nov. 24, 1769. D. P. 15 April, 1771.

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and not as the heir, he was not affected by the prohibitory or other clauses, notwithstanding the person who had framed the tailzie, the donor of the gift, had called that very individual, in many many places in his tailzie, an heir of tailzie. In considering the two deeds of entail upon which this question arises, attention must be paid to what may be represented as the difference between the *prima facie* and obvious meaning of those instruments, and what may be contended to be their legal construction.

Entail of March and Neidpath estate, by deed of 12 Oct. 1693.

The entail of the March or Neidpath estate was effected by a deed bearing date the 12th of October 1693, but not recorded till the year 1781. It appears from the leases, that the late Duke of Queensberry had possessed the estate from the year 1731 to the year 1781, before this entail was recorded, as the statute requires it should be, yet the late Duke raised a very considerable sum of money upon the estate soon after he succeeded to the Queensberry estate in 1772.

This deed of entail was made upon the marriage of Lord William Douglas with Lady Jane Hay, stating that in contemplation of the marriage, " William " Duke of Queensberry, in virtue of the power and " faculty reserved to him by the infeftments of the " lordship of Neidpath, be thir presents binds and " obliges him, and his heirs and successors what- " soever, upon his own proper charges and expenses, " to duly and lawfully infeft and sease the said " Lord William Douglas, and his heirs male and " of tailzie after mentioned, in the lordship of Neid- " path, containing and comprehending the several " lands, baronies (and so forth), particularly and " generally after mentioned, to be holden from his

"Grace and his foresaids, of his immediate supe- "riors thereof, sicklike and as freely as he holds "the same himself, and that he is to do this *by* "*resignation* in favour of the said William Lord "Douglas his son, and the heirs-male to be procreat "betwixt him and "the said Lady Jane Hay his "promised spouse; which failing, to the heirs male "of his body to be procreat in any other lawful "marriage;"—(I call your attention to the words, that he is to do it by resignation, without stopping to state my reason at present;)—"which failing, to "the other heirs of tailzie after specified, according "to the order underwritten, under the express "provisions, reservations, limitations and conditions "hereafter rehearsed, and no otherwise; and for "making the aforesaid resignation, the said William "Duke of Queensberry and Lord William Douglas "make (certain persons) their very lawful and irre- "vocable procurators for them, and in their names "to resign, surrender, overgive and deliver, as they "be thir presents resign, surrender, overgive and "deliver, all and haill the lordship of Neidpath."

The tailzie then, at great length, mentions the particulars which form that lordship, among which are, "All and haill the tenandry of the Holy Cross "Kirk of Peebles; and moreover all and sundry the "lands and barony of Newlands, the lands and barony "of Linton respectively, with their pertinents called "Kirkwird and Lochwird; and further, *the lands*, "*baronies and others under written*." The parti- culars comprehended under those words, lordships, baronies and others underwritten, are distinguished in this tailzie as what are called warrandice lands.

Warrandice lands.

Then the entail goes on to state who are the heirs

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of entail, and the substitutes, and then there is a reservation in the following words: "Reserving "always to the said William Duke of Queensberry "his liferent of the haill lands, baronies, lordship "and others above rehearst, except as to those parts "thereof particularly after specified, which are hereby "allocate to the said Lord William Douglas for his "present maintenance, and to the said Lady Jane "Hay for her liferent, as the same shall happen to "fall out, and during the existence thereof *respec-*"*tive*:" then follows this clause, "notwithstanding Power of revocation. "the right of fee of the said haill lordship and "warrandice lands a-specified be hereby conveyed "and established in favours of the said William "Lord Douglas and his foresaids, and of the other "heirs of tailzie above mentioned, yet 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 the said Lord William Douglas "his son, and his heirs above mentioned, or of any "other of the heirs of tailzie a-specified, hereby "appointed to succeed in the lands, baronies, lord-"ship and others a-written, to sell, alienate and "*dispone* the lands of Newlands and Linton, and "also the tenantry of Holy Cross Kirk of Peebles, "comprehending all and sundry the particular lands, "annualrents, and so forth, that is, the lands of "Newlands, Linton, and Holy Cross Kirk of "Peebles, and all and haill the foresaid tenandry "of the said Holy Cross Kirk of Peebles, compre-"hending the lands, &c. in favour of any other "person or persons he shall think fit, and likewise "to burden the said lands and others immediately

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"above rehearst," (that is, those three parcels of land,) "with such debts or sums of money as his "Grace shall appoint, either by bonds of provision "or any other rights or obligements, albeit the same "be only personal rights containing no clause of "infeftment; and likewise reserving power and "liberty to the said William Duke of Queensberry "during his lifetime, to set tacks of the haill lands, "baronies and others immediately above rehearst, "for payment of such yearly duties, and for such "space and endurance as he shall think just, and to "set tacks of the remanent lands and others above "rehearst, except these which are allocated hereby "to the said Lord William for his present main-"tenance, and to the said Lady Jane for her liferent "from and during the time that her said liferent "shall exist, and that for such duties as he shall "think fit, and to continue during all the days of "his lifetime;"—(I read these words, because in the *prima facie*, or if I may so state it, the English meaning, we should infer from this sort of positive provision, that the general words of disposition which the author of this entail had made as against himself, would tie up his hands from doing those acts, unless he had reserved to himself permission to do those acts which I mention, because it will be necessary to go into a great deal of discussion on points of this nature;)—"and likewise to burden the "said lands, and set tacks thereof in manner above "written; all which rights to be granted by the "said William Duke of Queensberry, in the re-"spective cases above mentioned, are hereby declared "to be good, valid, legal and effectual; and with "the burden whereof the lands and estate a-men-

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" tioned, in the cases above rehearst, is *hereby dis-* " *poned to* the said Lord William Douglas"—(I lay a stress on the words " disponed," and " disponed to," and small variations of that kind, not from a sense of any intrinsic difference in the phrases " dispone," " dispone to," " dispone of," &c. but on account of the observations which I find in the printed cases,)—" to the said Lord William Douglas, " and his heirs-male foresaids in fee, and to the " other heirs of tailzie a-written, and that not only " against the said Lord William Douglas, and the " heirs of tailzie *respectivè* above specified, but also " against all singular successors, whether legal or " conventional, who shall have right to the lands, " baronies and others above *disponed* in all time " coming."

Then the heirs of tailzie are bound to confirm the deeds of William Duke of Queensberry; with respect to these excepted lands of Lintoun and Newlands; and then follows this clause, which appears to me not to be altogether immaterial with a view to observations which I shall have to make by and by; " and in like manner it is hereby ex- " pressly provided and declared, and to be provided " and contained in the resignations, charters and " infeftments, and all the subsequent rights to " follow thereupon, that all and sundry the forc- " saids lands and baronies of Newlands and Lin- " toun, and tenandries of the Holy Cross Kirk of " Peebles, comprehending as said is, with the " teinds, patronages, offices, jurisdictions and others " particularly and generally above mentioned, per- " taining thereto and comprehendit therein, shall " be redeemable, and under reversion by the said

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" William Duke of Queensberry himself, at any " time of his life, from the said Lord William " Douglas and his heirs-male, and the other heirs of " tailzie above mentioned, by payment making to " them, or consignation to their behoof, of ane twenty- " merk piece of gold, or 15*l.* Scots, as the value " thereof, and that upon any day the said Duke " should think fit during his said lifetime, upon the " premonition of six days of before to be made by " him to the said Lord William Douglas and his " foresaids, at the mercat-cross of Peebles, in pre- " of ane notar and two witnesses," and so on; " which provision and condition of reversion above " written, and for the using of the which order of " redemption, the extract hereof, or of the charter, " or instruments of resignation or seisin to follow " hereupon, is hereby declared to be as valid, effec- " tual and sufficient, to all intents and purposes " whatsomever, as if ane particular letter of rever- " sion were made, subscribed and delivered, be the " said Lord William Douglas and his foresaids, to " the said William Duke of Queensberry, apart for " that effect, with all solemnities requisite, where- " anent for him and his foresaids he has dispensed, " and hereby dispenses for ever: declaring always, " likeas it is hereby expressly provided and declared, " that in case the said William Duke of Queens- " berry shall not, during his lifetime, exerce the " foresaid faculty, by using ane order of re- " demption, otherwise *disposing of* the lands and " others contained in the foresaid provision of re- " version; that in that case, the said haill lands and " lordship shall entirely pertain and belong to the " said Lord William and the heirs of tailzie a-men-

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" tioned, upon the provisions, and with the burden of " the clauses irritant and resolutive under written."

Prohibitory clause.

Then follow the prohibitory, irritant and resolutive clauses upon which so much of difficulty has arisen in the present case; (those clauses are not the same in the entail of March and Neidpath, as they are in the entail of Queensberry.) " It shall " noways be leisome and lawful to the said Lord " William Douglas and the heirs male of his body, " nor to the other heirs of tailzie respectively above- " mentioned, nor any of them, to sell, *alienate*, " wadset or *dispone* any of the lands, &c. above " rehearsed, as well those to be resigned in favours " of the said Lord William, in fee, as these reserved " to be disponed by the said Duke of Queensberry, " in manner foresaid:"—(observe here, that speaking before of the lands which were to be disponed by the Duke of Queensberry, in the manner stated in former clause, he is to have the power of *disponing*; the word "dispone" being the self-same word as the word in the prohibitory clause, and mentioned in the statute as one of the words to be used in the prohibitory clause. The word " dispone," in the sense in which it is here used *primâ facie*, at least means the same as to " dispose of;" for the power of disponing, before rehearsed; is a power to dispose of:)—" or any part thereof; nor to " grant infeftments of liferents, nor annualrents, " forth of the same; nor to contract debts, nor do " any other fact or deed whatsoever, whereby the " said lands and estate, or any part thereof, may be " adjudged, apprized or otherwise evicted from them, " or any of them; nor by any other manner of way " whatsoever, to alter or infringe the order and course

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"of succession." So that this prohibitory clause certainly contained every thing that is required.

Then follow the irritant and resolutive clauses, and upon them no objection has been made which has given rise to any argument; but then there follows this permissive clause: "It is hereby pro- "vided and declared, that notwithstanding of the "irritant and resolutive clauses above mentioned, "it shall be lawful and competent to the heirs of "taillie a-specified, and their foresaids, after the de- "cease of the said William Duke of Queensberry, "to set tacks of the said lands and estate during "their own lifetimes, or the lifetimes of the receivers "thereof, the same being always *set without evident* "*diminution of the rental.*" Upon this clause, it is said on the one side, that it is a permissive clause; but that according to the construction of Scotch tailzies, the author permitting these tacks, has not prohibited other tacks to be made, unless in addition to what he permits, he states what he prohibits, and therefore they say that this clause cannot prevent the heirs of tailzie from making leases other than those which under this clause they are permitted to make, for they say there is nothing in this tailzie prohibiting their making leases other than they are here permitted to make. On the other hand it is argued, that the obvious meaning of this (I refer to the *prima facie*, or the English meaning), is, that giving this permission is a ground for saying that all other leases except those which you are here permitted to make, must be understood some how or other to be prohibited to be made, and that the general words which occur in the prohibitory clause, namely, "that he "shall neither sell, alienate, wadset or dispone,"

Permissive clause.

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must in all, or some of them, contain a prohibition against leasing, and that it was necessary, in order to make such leases as here permitted, to take them out of the prohibition which is included in these terms, some or one of them, by inserting in the tailzie this permissive clause. In answer to that it has been said, "to sell," means to make sale; "alienate" does not apply to leases, which are personal rights of possession for a time, and although they are made *quasi* real by the act 1449, it is not in that sense which means an alienation; and so again they said with respect to "wadset" and "dispone." In the Queensberry entail, we are delivered in some measure from the difficulty which arises from those opposite arguments which I have been just hinting at, by what has already been done in the Wakefield case; in which a lease was made for ninety-seven years of a part of this estate, and it was insisted, that that was a good lease under the instrument which I have now been stating. But it was found in that case by the House of Lords, and I believe indeed by the Court below, that making a ninety-nine years lease was prohibited by the word alienate; and though the word alienate has one peculiar strict sense, namely, the local transfer of dominion of property, it was insisted, it might be construed, by looking at the language of various acts of Parliament and of various instruments; and that whatever might become of a lease of ordinary endurance, that is such a lease as was necessary for the administration of the estate, yet that a tack of ninety-nine years was included under the word alienate.

The deed then goes on to state, "that liferent pro-
" visions shall be in full contentation and satisfaction
" to the wives of the heirs of tailzie in possession of

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" all right of terce." Then it proceeds to impose the obligation on the heirs of tailzie to place no debt upon the estate; and then follows the clause empowering them to lease, with the peculiar expression which occurs also in the Queensberry entail,—" without " evident diminution of the rental; and likewise, that " it shall be lawful and competent to the said heirs of " taillie to grant suitable and competent liferent pro- " visions in favour of their wives, not exceeding the " sum of five thousand 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." What is to be considered an evident diminution of the rental in the case of the Queensberry entail, has been a great subject of controversy. On the one side, " without evident diminution of the rental" has been represented to mean, that you shall increase the rental if you can, by taking what is the just avail at the time; on the other hand, it is said, it means this, you shall let without diminution of the rental; but as circumstances may arise, in which you cannot get the former rent, you shall then get the just avail at the time.

Powers to grant provisions for wives and children.

There is then a clause which occurs in many English entails, and which generally occurs in the entails of Scotland, " that in case the said estate " shall, be virtue of this present taillie, descend and " fall to ane heir female, the said eldest heir female " shall succeed thereto in haill, without division, and " so forth *successivè*, and that they shall be holden " to marry ane nobleman, or gentleman of quality " of the sirname of Douglas: *at the least*, who, and " the heirs above mentioned, shall be holden and

Provision in case of descent to heir female, to marry, &c. and take name and arms, &c.

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" obliged, as in like manner the haill heirs of taillie " and provision above specified shall be holden and " obliged, to assume, take on and use the said sir- " name, and carry the arms of the family of Queens- " berry, with the proper distinction; and that, in " case they shall either not assume the said sirname " or arms, or make any addition thereto, or at any " time desist to use the same, the person so contra- " vening shall *ipso facto* amit and lose their right, " and shall incur all the clauses irritant and reso- " lutive above mentioned." Then, " there is re- " served to the said William Duke of Queensberry " and Lord William Douglas, full power and liberty, " during their joint lifetimes allenarly, to alter and " innovate the taillie, both as to the substitute heirs, " after the heirs male of Lord William's body, and " other conditions and clauses above mentioned, as " they both shall think fit, but with this express " declaration, that if no alteration be made be them " during their joint lives, this reservation shall im- " port no power to Lord William to alter the same " after the Duke of Queensberry's decease."

Power of revocation.

Then follows this: " And in regard that the right " of the lands and lordship of Neidpath, hereby ap- " pointed to be resigned in favours of the said Lord " William Douglas, and his foresaids, (besides the " saids lands and baronies of Newlands and Lintoun, " and tenandry of the Holy Cross Kirk of Peebles, " which the said Lord Duke has reserved power to " redeem, burden or *dispose upon*, in manner above " written,) were, by the former infeftments of 1687, " redeemable by payment of a twenty-merk piece " of gold, conform to the provision of reversion

Clause of renunciation of the right of redemption, reversion, &c. in the Duke of Queensberry.

" therein specified; and the Duke of Queensberry " had otherways power *to dispose thereupon*, or " burden the same, or set tacks thereof, as he " thought fit; yet, being resolved now, that the " same shall be free to the said Lord William " Douglas his son, and his foresaid, from all debts " and burdens; therefore the said William Duke of " Queensberry has, in contemplation of the mar- " riage, consented to renounce, and by thir presents " renounces, quit claims, and *simpliciter* discharges " and overgives, the reservations and clauses con- " tained in the said former infeftment, in so far as " concerns the haill lands, baronies and others of " the lordship of Neidpath, except the said baronies " of Newlands and Lintoun, and tenandry of the " Holy Cross Kirk of Peebles, comprehending as " said is, and that in favours of the said Lord Wil- " liam Douglas, and the heirs male to be procreate " betwixt him and the said Lady Jane Hay; which " failing, to the said Lord William his heirs male " to be procreate be him in any other lawful mar- " riage." He also renounces the clauses, reservations and reversion contained in the foresaid infeftments, namely, that clause whereby the Duke of Queensberry had power to sell and wadset, or grant infeftments of annualrent, and all other rights irredeemable or under reversion, and to burden the lands with debts; as also that clause whereby his Grace had power to set tacks; and also that clause whereby is reserved to the said Lord Duke of Queensberry power to hold courts, and to use all jurisdictions, and to *dispose upon* the fines; and likewise " he re- " nounces and discharges in favour of Lord William

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" and the heirs of his body, in so far only as may be " extended to the lands particularly a-written, here- " by appointed to be resigned in favours of Lord " William, and which are not excepted nor reserved " to be *disposed upon* by the Lord Duke of Queens- " berry, the reversion or provision of redemption " contained in the foresaid infeftment or charter of " 1687, and all right of redemption competent to " him be virtue thereof; which renunciation and " discharge of reversion William Duke of Queens- " berry binds and obliges himself to warrant to Lord " William Douglas and his foresaids, at all hands,

Disposition for maintenance of Lord W. Douglas and Lady Jane Hay.

" and against all deadly.—And that the said Lord " William Douglas may have a present maintenance " for himself and the said Lady Jane Hay, his pro- " mised spouse, and their family, during their father's " lifetime; therefore the said William Duke of " Queensberry gives, grants and *dispones* to the said " Lord William Douglas and his foresaids, the castle, " tower," and so on, " and that for the term payable " at Martinmas 1693, for the half-year preceding,

Warranty against stipends, cess, and other public burdens.

" and in all time thereafter;" and then it gives him power of raising actions, and warrants him against all stipends payable to the ministers of the parish, and from payment of all cess and other public burdens. (I call your attention to the words, " cess, " stipends and public burdens," because you will find there is a great contest between the parties with respect to cess, stipends and public burdens, which, if chargeable on the rental, operate as a diminution of the rental.)

Then there is an obligation to infeft the Lady Hay during her lifetime, which is not material to

be stated; and a clause for provision for daughters, and another clause as to minister's stipends, which will deserve some consideration; but there then follows another clause, which it appears to me right to notice: "And further, that the said William Duke "of Queensberry gives, grants, assigns and *dis-* "*pones* to Lord William Douglas, *the rents* which "might be due from the lands at the time of the "death of the Duke of Queensberry, but which "had not been received by him." One of the words used in making this grant of the rents, and not of the lands out of which they arose, is the word "dis- "pone;" and describing the rents he had himself not collected, he says, he grants and *dispones* such rents, viz. "such as he should not otherways assign "or dispone thereupon," he gives them to Lord William, to be collected after his death.

"Dispone" applied to rents.

Such is the charter upon which the questions arise with respect to the entail of Neidpath or March.

The entail of Queensberry was made upon the 26th of December 1705, and registered in the Register of Tailzies on the 21st of February 1724, and in the books of Session on the 17th of June 1724. That tailzie is introduced by these words: "Be it "known to all men by these presents, Us, James "Duke of Queensberry, &c. heritable proprietor of "the lands, lordships, baronies, heritable offices "and others after specified, with the pertinents: "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 re- "present us in our dignities and in our said estate,

Queensberry entail, 26th Dec. 1705.

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" 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 decease, " for preventing all process or arbitrament on that " subject, or on the succession to our honours and " estate, 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, pro- " hibitory, irritant and resolutive underwritten, alle- " narly, and no otherways) to be bound and obliged

Word "sell" importing a gratuitous donation.

" to *sell*,"—(here the word sell is certainly used not in the common sense of the word, because this is a gratuitous donation,)—" annailzie and dispone,"

Words "annailzie" and "dispone" coupled in sense.

—(observe that the word annailzie is in this sentence coupled with dispone)—" heritably and irredeem- " ably,"—(that is one way of disponing)—" to and " in favours of ourself in liferent during all the days " of our lifetime, and to Lord Charles Douglas, our " second lawful son, and the heirs male lawfully to " be procreated of his body, in fie;"—(then it goes through the illustrious family by name, limiting estates to a great many persons, and the heirs of their bodies;)—" reserving always to us our liferent- " right of the said earldom, whole lands, baronies " and others above written; as also reserving the " liferent-right of such of the said lands and baronies " as Mary Duchess of Queensberry is provided to," —(viz. the said lands and barony of Sanquhar, com- prehending the lands and others contained in her

rights and infeftments thereof,)—" as also it is hereby " specially provided and declared, that the said Lord " Charles Douglas and his heirs male, and the other " heirs of tailzie above specified, shall be bound to " make payment of all the debts that shall happen " to be due by us, and perform all the deeds prest- " able by us the time of our decease ;" and then it is further stated, " that notwithstanding the right " of fee of the said whole earldom, lands, baronies " and others above specified, be devolved and se- " cured by this personal disposition and tailzie in " favours of the said Charles Lord Douglas and his " foresaids, and the other heirs of tailzie above men- " tioned ; yet it shall be lawful for us to contract " debts which shall affect the said Lord Charles " Douglas and the heirs of tailzie, and the foresaid " tailzied estate, in the same manner as if they were " consenting with us in the several bonds, contracts, " obligations, *dispositions* or other writs whatsoever, " to be granted by us, or as if they were served heirs " to us in our lands and estate ; as also to sell, an- " nailzie and *dispone*,"—(this is in the reserving clause ; and observe how the word annailzie again occurs)—" as also to *sell, annailzie and dispone* " the said lands and others above and after men- " tioned, in whole or in part, redeemably or irre- " deemably, for whatsoever cause, or in whatsoever " manner of way ; and to revoke, alter or innovate " this present disposition and tailzie, and order of " succession, in whole or in part, and generally to " do all other things ;" and so on.

Then follows the prohibitory clause, " that it shall " not be lawful to the said Lord CharlesDouglas, and

Prohibitory clause omitting word " alienate,"

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" the heirs male of his body, nor to the other heirs of " tailzie above mentioned, or any of them, to sell, " wadset or *dispone*" (*omitting the word "alienate"*)

but containing the word " dispone."

" any of the foresaid earldom, lands, baronies, offices, " jurisdictions, patronages and others foresaid, nor " any part of the same, nor to grant infeftments of " liferent or annual rent out of the same, nor to " contract debts, nor do any other fact or deed " whereby the same, or any part thereof, may be " adjudged, apprised or anyways evicted from them, " or any of them."

Judgment of Court of Session, that the word " dispone" has not the same prohibitory virtue as the word " alienate."

I pause here to observe, that even some of the judicial opinions, the soundness of which you have now the difficult duty of examining, turn upon the circumstance, that the word " alienate" is omitted in this prohibitory clause; and although in the Wakefield case, by force of that generic term, a lease of ninety-seven years was prohibited, it is held that the word " dispone" will not have the same effect. Some of the learned Judges were of opinion, that they would have the same effect; but they differed very much upon that point. I therefore call your attention to the circumstance, that the word " alienate" is not in the prohibitory clause in the Queensberry entail.

Then follow these words, " except in so far as " they are empowered, in manner after mentioned, " nor to violate or alter the order of succession fore- " said, any manner of way whatsoever;" that is, they are not to " wadset, sell or dispone, nor to " contract debts, nor do any other fact or deed, " except so far as they are empowered in manner " after mentioned, nor to violate or alter the order

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"of succession in any manner whatsoever." Upon these words again arises much argument about permission and about exception. In an English instrument, we should say that a power to make leases being found in the clause of exception, was a ground for arguing, that unless it had been included in the clause of exception, it would be taken to be included by implication in the general words of the prohibition or restriction; but they say, that is a principle not applicable to the law of Scotland. The prohibitory clause farther provides, "that the 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, and the title, designation and arms "of the family of Queensberry, as their own proper "sirname, title, designation and arms." Then follows another clause, which is material; "and the "said heirs female shall also be obliged to marry a "nobleman or gentleman of the name of Douglas, "*at least*, who shall assume, use and bear the said "name and arms of the said family of Queensberry; "and if married, the said heirs female and the heirs "of their bodies succeeding in manner foresaid, "shall assume, use and bear the said name and "arms of the said family of Queensberry;" and they are to take the sirname of Douglas, with the arms, &c. of the family.

Exception and permission, in an English instrument, implies a previous prohibition of what is not excepted and permitted.

Then follows this: "and that the said Lord "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 "lifetime, or for nineteen years."—(One great point

Prohibition to set tacks for more than life or nineteen years.

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of dispute between the parties here is, whether certain leases, the particulars of which I shall mention hereafter, are leases for longer than the setter's life or nineteen years, and if they are, whether they are prohibited under the word "dispone," and the other words here used;)—"and that without dimi-"nution of the rental, at the least, at the just avail "for the time." In the course of this cause, much discussion and most able reasons for the opinions on both sides have been stated, with respect to what these words, "without diminution of rental," mean. Those who take one side say, that it means no more than this, that if the land was let at the time of granting the new lease, for 3*l.* and it is let again for 3*l.* that is no diminution of the rental; others say, that if you let it for 3*l.* when you might let it for 300*l.* there is a diminution of the rental within the meaning of these Scotch entails; that if instead of letting it for more than 3*l.* you take a sum of money equal to the difference of value between 3*l.* and 300*l.* true it is, in one sense, you do not let it with diminution of rental, because the rent is still 3*l.*; yet that the operation of the law of Scotland upon the fact of your commuting the difference in rental between 3*l.* and 300*l.* for a sum of money put into your own pocket, is such, that though you have reserved to the persons to take after you a rent of 3*l.* it is demonstrable, that by the operation of such a law, 3*l.* is a diminished rental. How justly either of those propositions are stated, it is not for me to enter into now, when I am merely stating the facts of the case.

Arguments on construction of the words "diminution of rental."

Then follow the words, "nor doe no other fact

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" or deed, civil or criminal, directly or indirectly, " by treason or otherwise, in any sort, whereby " the said tailzied lands and estate, or any part " thereof, may be affected,"—(it is further contended, that what has been done by the late Duke of Queensberry was prohibited by these words,)—" 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."

Then follow these words, (which are important words for our consideration, if the law of Scotland operates upon the rent of 3*l.* in such manner as it has been argued:) " neither shall the said Lord " Charles Douglas, nor any of the said heirs of " tailzie, suffer the duties of ward, marriage, and " relief, either simple or taxed, nor the feu, blanch " and teind duties, nor any other public burdens or " duties whatsoever, payable forth of the said tailzied lands and estate, to run on unsatisfied, so as " therefor the lands and others foresaids may be " evicted, apprised or adjudged from them, for any " of the said casualties of superiority, and public " burdens*."

Clause for payment of casualties of superiority and public burdens.

Then, after making the irritant and resolutive clauses, and also directing that the heirs and parties succeeding should denude on existence of a nearer

* Here the Lord Chancellor entered into a discussion as to the effect of taking grassum upon the rent, the operation of law upon the transaction, and the consequence of the principle established in the Scotch courts by their final decision as to teind-duties, and the mode in which grassum is to be taken into calculation in the estimate of rent for the payment of those duties. The discussion is omitted here, because it is afterwards resumed to the same effect. See *post*.

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heir, there follow provisions to spouses of male or female heirs, and provisions for daughters and younger children, and reserving the question, how far we are at liberty to look into such circumstances with regard to such entail; and not forgetting the principles of interpretation, as applied to entails, it has always struck me, that those clauses would be very material clauses to be considered: "And notwithstanding "of the premisses, it is hereby provided and de- "clared, and shall be provided and declared by the "infeftment to follow hereupon, and whole subse- "quent conveyances of the said tailzied land and "estate, that it shall be lawful to, and in the power "of the said Lord Charles Douglas, and of the "other heirs of tailzie above specified, whether male "or female, to provide and infeft their lawful "spouses in competent liferent provisions, of a part "of the said lands and estates, not exceeding the "sum of 1,000 *l.* sterling of yearly rent; and if there "shall happen to be two liferent provisions upon "the said estate, then and in that case the second "liferent provision, during the existence of the "first, shall not exceed 800 *l.* sterling;"—(so that if there were two, there might be provisions for spouses, to the amount of 1,800 *l.* a year, affecting the estate at the same time;)—"and if there shall happen to "be a third liferent provision upon the said estate, "then the same shall not exceed 500 *l.* sterling, "during the existence of the other two liferent pro- "visions;" (so that there might be 2,300 *l.* required for these jointures.)

Power to provide for spouses to the amount of 2,300 *l.*

Then there is this clause: "And also it is hereby "further provided and declared, and shall be de- "clared by the infeftments to follow hereupon, and

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"all the subsequent conveyances of the said estate, "that it shall be lawful to, and in the power of "the said Lord Charles Douglas, or any of the "said heirs of tailzie, to burden the said estate "with any sum not exceeding the sum of four-"score thousand pounds Scots, for providing of "their daughters or younger children." So that there might be three-and-twenty hundred pounds a year charged upon and issuing out of the rent of this estate by way of jointure, and likewise this sum of money for children, amounting to between six and seven thousand pounds. These are consider-

Powers to charge 80,000 *l.* Scots, for portions of younger children.

able burdens upon an estate, if it can be dealt with in the manner in which it is contended it can be by such tacks as have been made; but still we must take into our consideration, that whatever may be the effect of reasoning of that kind, the question at last results to this, what according to the general rule of interpretation as fixed by decision on Scots tailzies, you are at liberty to reason from such circumstances as those to which I have been alluding.

Grassums upon leases taken by Judges who were tutors and curators.

During some part of the time which has elapsed since these tailzies were made, these estates of March and Neidpath undoubtedly (and the estate of Queensberry too) have been let on leases for such terms and upon such grassums as I shall have occasion to mention; and it is a circumstance unquestionably of considerable weight, that leases of that nature were made by persons who stood connected with the heirs of tailzie, and holding judicial situations, from which it is fairly enough inferred, that they must have been acting upon their notions of what was the law of Scotland at the time.

When the late Duke of Queensberry came into

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possession, he seems to have done acts of which I shall say no more, than that his Grace appears to me to have intended to make as much of the estate as the powers he had would enable him to make, and no court of justice has a right to say that there was any thing wrong in that intention. The leases of Easter Harestanes and of Whiteside, the set of leases which have been called "alternate leases," and the leases sought to be affected at the suit of the Duke of Buccleuch, particularly the lease of a farm called Hallscar, are the most material to be considered. There are some other leases of minor note, which I shall not trouble you with in the detail of the facts and circumstances. They may be very easily disposed of, when you have determined what is your judicial opinion as to the others.

Enumeration of leases made by the Duke of Queensberry; Harestanes, Whiteside, Alternate leases, Hallscar, &c.

Case of Harestanes.

The lease of Easter Harestanes was granted under the Neidpath entail, in which it is declared, that the heirs of tailzie are not to *sell*, *alienate*, *wadset* or *dispone*, nor to grant infeftments of liferent, nor annualrent. There is no prohibition of any sort against granting leases; but the deed contains a permissive clause, by which "It is expressly "provided and declared, that notwithstanding "of the irritant and resolutive clauses above "mentioned, it shall be lawful and competent for "the heirs of tailzie above specified, and their "foresaids, after the decease of the said William "Duke of Queensberry, to set tacks or rentals of "the said lands and estate during their own life-"times, or the lifetimes of the receivers thereof, "the same being always set without evident dimi-"nution of the rental." The late Duke had granted a lease to Alexander Welsh of the lands of Easter

In Neidpath entail no express prohibition to grant leases.

Harestanes for fifty-seven years. The entry of the tenant was at the term of Whitsunday 1791; the rent payable was 74*l.* 1*s.* sterling; and it was further stipulated, that the tenant should pay the sum of 300*l.* of grassum, or entry money. In consequence of proceedings * which had taken place before the Court with respect to a lease for ninety-seven years, under the same entail, Welsh brought an action of declarator against the late Duke of Queensberry, the late Francis Earl of Wemyss, and the late Francis Charteris Lord Elcho, his eldest son, as the next heirs of entail, setting forth, that as some doubts had arisen with regard to the validity of the lease, he had brought the action, to have it found and declared, that it was a valid and sufficient title in his person for all the years of its endurance then to run. The action having come before Lord Woodhouselee, the defenders were assoilzied by an interlocutor of the 25th of June 1808; this lease for fifty-seven years, as the lease for ninety-seven years, being, in the judgment of the Court, prohibited by the prohibitory, irritant and resolutive clauses contained in the entail of the Neidpath estate.

Statement of proceedings in Court below, in the case of Harestanes.

Fifty-seven years lease prohibited.

Lord Wemyss and Lord Elcho having both died, an action of tranference was raised, and the suit was, to use our expression, revived. On the 6th of December 1809, 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; that is, again stating his opinion that the lease was bad; "but he reserved to the pursuer, (that is the tenant,)

* In the Wakefield case.

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" his recourse upon the warrandice in his tack " against the Duke of Queensberry and his repre- " sentatives, in the event that the said tack should " be set aside, as *ultra vires* of the granter, in a " regular process brought for that effect." The Lord Ordinary was of opinion that the lease was good for nothing; regard being had to the nature of the entail; but that the late Duke of Queensberry having entered into a warranty, his assets were answerable to the tenant for such damages as would compensate him for the loss of his tack: and as those assets will be equally affected by his warrandice as to all the tacks, it becomes a question of very great value as between the parties in the cause; but the value is trifling, compared with the extreme importance of the case, as establishing a rule for the administration of property.

Assets of the grantor liable on the warranty.

Statement of proceedings in Court below, in the case of the Earl of Wemyss *v.* the Duke of Queensberry.

After this decision the late Earl of Wemyss brought an action of declarator against the late Duke of Queensberry; in which he stated, that William Duke of Queensberry, in the year 1731, made up his titles under this entail, but notwithstanding the limitation therein contained of the powers of the heir of entail in setting tacks, he had set or granted tacks or leases of different parts or parcels of the said lands and estates, to endure for a longer term or period than his own lifetime, or the lifetime of the receivers thereof; and that the said tacks or leases had been granted, upon payment by the tenants of fines or grassums, and with diminution of the rental: he then alleged that he was the heir of entail, and entitled to succeed to the lands and estates on failure of the Duke of Queensberry, and the heirs-male of his body; that the tacks or leases had been granted

to the manifest prejudice of his eventual right and interest as heir of entail, and therefore he prayed that the Duke, and all those tenants whom he names, should be convened before the Lords of Council, and that it should be found and declared by their decree, 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 entailed estates to endure for a longer period than his own lifetime, or the lifetime of the tenants receivers thereof, except in terms of, and under the provisions of the act for encouraging the improvement of lands in Scotland held under settlements of strict entail, nor to grant any tack of the lands and estate in consideration of fines or grassums, and thereby diminish the rental; and that all such tacks and leases so granted, either for a longer period than prescribed by the entail, (unless they are in the terms of the act of Parliament,) or upon the payment of grassums by the tenants, are void and null, and should be of no effect as against the heir of entail.

Joinder of processes.

This action was remitted to the previous process of declarator at the instance of Welsh, depending before Lord Woodhouselee. A representation having been given in for Welsh against Lord Woodhouselee's interlocutor, there was another interlocutor pronounced: "Having heard parties procu-
"rators upon what is stated in the representation,
"the Lord Ordinary recalls the interlocutor com-
"plained of; and in respect the action of decla-
"rator at the instance of the Earl of Wemyss
"against the Duke of Queensberry and others his
"tenants is now remitted to the present process,

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"conjoins the processes;" then there is the usual direction in that respect.

The Duke of Queensberry died soon afterwards. There was an action of transference against his representatives; and on the 12th of November 1812, the case having been then reported, the following interlocutor was pronounced by the First Division of the Court. "Upon the report of the "Lord President in place of Lord Woodhouselee, "and having advised the informations for the parties, "the Lords sustain 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 assoilzie the de-"fenders from the conclusions of the libel, and "decern;" that is, the whole Court then concur with the Lord Ordinary, and hold that this lease for such a rent and such a grassum, and such a term, was not a good lease. Then they "remit to Lord "Hermand to hear parties on the conclusions of "the libel for damages, and to do therein as he "shall see just." And with respect to the process of declarator 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, they also remit the said process to Lord Hermand as Ordinary, in place of Lord Woodhouselee, to hear parties on the conclusions of the same as applicable to the cases of the several defenders, and to do therein as he shall see just. The interlocutor of the First Division of the Court of Session pronounces, that Welsh cannot sustain his lease against the persons who are

Interlocutor, 12 Nov. 1812.

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the heirs of entail; but the interlocutor on the declarator of the Earl of Wemyss against the subtenants, leaves the heirs of entail to proceed, in order to determine whether they can substantiate their declarator, against each and every of those tenants mentioned in that declarator; those tenants having leases which were of the same nature as those sought to be affected by that action of declarator.

Questions in case of Harestanes lease. 1. Duration 57 years. 2. Grassum.

The case of Easter Harestanes includes two questions, the first, Whether a fifty-seven years lease is an alienation? you have decided that a ninety-seven years lease is an alienation;—and there are some decisions that leases between fifty-seven and ninety-seven are alienations:—another question is, What is the effect of the grassum which was taken in this case of Easter Harestanes?—that is a question common to that and the other cases: with respect to the duration of the lease—the fifty-seven years furnishes a question peculiar to that case.

Case of Whiteside.

The next case which was before the Judges of the First Division, was the case of the lease of Whiteside, and with respect to that lease, it was a lease for the life of the tenant. The rent was not less than the rent which was payable under the former lease, but it was insisted that this was a lease made for a grassum, and that therefore it ought to be reduced. The fact that it was made for a grassum, is a finding clear in the case. This farm had been let, together with two other farms; they were afterwards divided in the manner stated in these cases. There is no doubt that Whiteside, which is mentioned as having been let for the same rent, was let upon a grassum; and that the rent in this lease was affected by the

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amount of the cess, and rogue and bridge money, with which it was not let by the former lease.

There was a special interlocutor, first of Lord Hermand, then of the Lords of Session, with respect to this lease; and in order that the case may be fully comprehended and properly decided, it is necessary that the interlocutors should be read:

Proceedings in Court below, in the case of Whiteside.

14 June 1814. "Having advised 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 burden 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 hold-"ing 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 pay-*"*ing any grassums for their new leases*; and that "soon afterwards, the tenants of all the farms 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 accepted

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" 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 en- " durance, 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 consideration 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 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 notwithstanding 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 " lifetimes, or the lifetimes of the receivers thereof, " the same being always set without evident dimi- " nution of the rental: Finds, that the rent pay- " able under the renounced leases, diminished as it

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" was by the payment of grassums, cannot be con-
" sidered as constituting a fair rental, such as is
" implied in the above clause: Finds, that the
" lease under reduction, though it might be sup-
" ported 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 dimi-
" nution of the rental." Then he repels the defences.

Proceedings in Court below in case of Whiteside. 3 Feb. 1815.

When this came before the Court, they pronounced this interlocutor: " 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 lifetimes of the receivers thereof,
" the same being always set without evident dimi-
" nution of the rental: Find, that in the year 1769,
" the petitioner's father obtained a tack of White-
" side for nineteen years, at a rent of 109 *l.* for
" which he paid a fine or grassum of 132 *l.* 18 *s.* 10 *d.*:
" 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 rate of 50 *l.* 10 *s.* for which he paid a gras-
" sum 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 260 *l.* 16 *s.* 4 *d.* being the amount of the
" old rents payable under the former tacks, 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.* which was declared to be for
" Whiteside and Fingland only: Find, that in the
" year 1807, the petitioner's father renounced the
" said tacks and took new tacks to himself and sons
" for their lifetimes, at the rents payable under the
" tacks renounced: 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 tacks re-
" nounced: 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: Further 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; there-
" fore, 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 alienation, as well as by the
" condition in the said permissive clause against evi-
" dent diminution of the rent; therefore, in the
" process of declarator, repel the defences; and in

Decision as to Whiteside and Fingland, on the principle that the lease operates against the prohibition to alienate, and also is in diminution of rental.

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" the process of reduction, repel the defences, sus-
" tain the reasons of reduction, and reduce, decern
" and declare accordingly." And there was an additional interlocutor with respect to the lease of Flemington, which it is not necessary I should state to your Lordships. The principle therefore laid down in the declaration is, that this lease operates against the prohibition of alienation, and also amounts to an evident diminution of rental.

Case of alternative leases.

With respect to Neidpath, there was a third case as to the alternative leases. I will state enough to show what is meant by that term. There was a farm called Edstoun. In the year 1731, when the Duke of Queensberry succeeded to the estate, it was rented at the sum of 83*l.* 10*s.* In 1756, the rent was raised to 85*l.* 12*s.* In 1769, it was let for nineteen years to Alexander Horsburgh and John Saltoun, at a rent of 149*l.* with a grassum of 193*l.* 7*s.* 4*d.* When that lease expired, a gentleman of the name of Symington obtained a lease for fifty-seven years from Whitsunday 1792; the rent stipulated upon that occasion was 155*l.* 7*s.* and the grassum 300*l.* In 1807, Robert Symington renounced his lease, and obtained a new one,—which is the lease sought to be set aside,—" for the space of thirty-one years,
" and from and after the term of Whitsunday 1807,
" which is hereby declared to have been the term of
" the said Robert Symington's entry, notwith-
" standing the date hereof; declaring always, as it
" is hereby expressly provided and declared, that in
" case it shall be found that the said William Duke
" of Queensberry is prevented by the entail of his

" Grace's estate of March, from granting a lease of " the aforesaid subjects for the above mentioned term " of thirty-one years, then, and in that case, this " lease is granted for, and shall subsist, and be un- " derstood to have been granted for, the term of " twenty-nine years, twenty-seven years, twenty- " five years, twenty-one years, or nineteen years, " from the said term of Whitsunday 1807, which- " ever of the said several terms of years, from the " said term of Whitsunday 1807, (short of the " aforesaid period of thirty-one years), the Court of " Session or House of Lords shall find to be the " longest period of those above specified, for which " the said Duke had power to grant a valid lease of " the aforesaid subjects."

In the narrative of this lease, it appears to be a lease the duration of which is to depend upon the decision, when it is obtained, of the Court of Session or the House of Lords, whether it is to be a lease for twenty-nine years, twenty-seven years, twenty-five years, twenty-one years, or nineteen years. Now, according to the law of Scotland, there must be what they call an ish (that is a determination) to a lease: But no man living can tell what it is to be in this lease, until the Court of Session or the House of Lords have said in that or some other case what it may be. This is a lease, which one party says cannot be exposed to challenge, on account of a grassum being taken; the other party says it can, and ought to be affected upon that ground. The Court of Session held at first, that the limit of the Duke's power was nineteen years; but they say the whole transaction is affected by that general fraud which affects the in-

Judgment of Court of Session.

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strument; and that therefore, though the lease might be a good lease, notwithstanding the determination of it is uncertain, for some period stated in it, yet it is affected by the general fraud.

These are the cases which appear to me necessary to be stated. I pass over the minor cases.

Points and arguments in the three cases.

The *points* with respect to these three sets of leases, may be thus shortly stated.

1. Harestanes.

First with respect to Easter Harestanes; the lessees and the representatives of the late Duke of Queensberry contend, that the Duke had power to grant such a lease; that the decided cases prove the power of granting such leases; that the entail, according to its legal construction, does not prohibit granting leases for fifty-seven years, and that, whatever may be the case with respect to a lease for ninety-seven years, a lease for fifty-seven years cannot be objected to; they say, that the rent being equal to the last rent reserved, is equal to that which the law requires; and being equal to that which the law requires, that grassum is not prohibited by the entail, or by any implication, or by any fair understanding of the words in the entail. It was further insisted, that the lease was within the meaning of the statute of 1449, and that the act is in complete force at the present day; though leases are not in the law of Scotland conveyances, but mere incumbrances on the fee or property, and only so made by the statute, inasmuch as the lessees cannot be ejected during their terms while they pay their rents. The words of the act are, "It is or-

Scots Stat. 1449.

"dained for the safety and favour of the poor people "that labour the ground, that they, and all others "that have taken, or shall take lands in time to come

"from lords, and have terms and years thereof, "that suppose the lords sell or annailzie the lands, "the takers shall remain with the tack until the "issue of their terms, whose hands soever the lands "come to, for sicklike mail (that is the same rent) "they took them for." And they say, that by virtue of this statute, the tenant of Harestanes paying a grassum, is entitled to his lease.

Effect of word annailzie in the prohibition, as operating on the Stat. 1449.

Upon this statute, the effect of the word annailzie must be considered. We have decided, that a lease for ninety-seven years is void as an alienation. The present question is, how far that may apply as an authority to a lease for fifty-seven years.

The successor in the tailzie contended, that a lease of this endurance is prohibited by the entail; that any leases of extraordinary endurance are prohibited; that with respect to the statute of 1449, it authorizes only such leases as may be lawfully made, not such as contravene the prohibitions of an entail; that the lease is bad on various grounds, all of which they proceed to state, if made for a grassum. They contend, that the practice did not sanction such leases; and that practice, if proved to exist, could not sanction such leases.

2. Whiteside.

With respect to Whiteside lease, the argument on one side was, that such a lease does not fall under the prohibition to alienate, because deeds of entail are by the settled rules of interpretation in the Scotch law *strictissimi juris*, and a prohibition to alienate, according to such rules of interpretation, does not extend to leasing, and when the entail is so interpreted, does not extend to a lease of ordinary endurance, though granted in consideration of

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grassum; that the lease being granted for a term, and at the rent permitted by the entail, the grassum worked no injury. They further contended, that a man who is permitted to let without diminution of the rental, if he lets without diminution of rental, does no injury to the person who is to take after him, because, if he takes no grassum, the person to take after him cannot complain; and if he takes a grassum, he still takes that which he may take, and that there cannot be a complaint if the lease is granted for that length with a grassum; that the rentals of Whiteside and Fingland were not, in the sense of the deed, diminished by the grassum being taken, and that therefore the lease cannot be said to be set with a diminution of the rental; and further, they insisted that neither the Duke nor the tenants were guilty of any fraud in this matter; that in his own particular dealing, the Duke was not, by the general and comprehensive deed he entered into with all his tenants, guilty of fraud upon the entail, if what fraud upon the entail is can be defined. Then they rely upon the practice; they say all landed proprietors do, and for a very long period have let with grassum. As to the words, "without diminution of rental," they must be construed, they say, with reference to former leases, or leases immediately preceding; that it was so with respect to church and crown lands; that it has been so to a vast extent with respect to a vast number of estates; that it appears by a long series of decisions, that such a prohibition to let with a diminution of the rental, did not prohibit the letting with grassums. They further insist, that if there was any irritancy, that irritancy might be purged.

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The heir of entail, on the other hand, says, that the lease is comprehended under the prohibitions of the entail; that the construction which is put upon the word rental on the other side, is not the proper construction; that grassum is anticipated rent, within the meaning of the deed of entail, and that it is so when taken upon surrender of former leases; that such dealing with the estate is within the meaning of the words diminution of rental; that upon a lease, twelve years of which were unexpired, if the tenant renounces the lease, and takes another lease, extending the term twelve years, that the grassum taken for the first lease must have some operation.

The tenant contends, that whatever may be the case as between the Duke of Queensberry's representatives as stand ing in his place, according to all the principles of law which ought to affect his case, he is the tenant, and ought to be considered as a third party; that he is a purchaser, that he is contracting onerously, that he is entitled by virtue of the statute of 1449, and he prays that, whether his lease is a good lease or not, the Court will not consider what the case of any other persons may be, because he happens to have a good recourse against the assets of the late Duke of Queensberry. Then he insists, that all the prohibitions must be embodied in expression, that there is no prohibition embodied in expression, and that the irritancy (if any) may be purged.

3. Alternative leases.

With respect to the alternative leases, as far as the points made on each side arise out of the facts of the case, they insist that those leases are bad, on the same grounds as all the other leases that are to be affected by a grassum; and they say it is impos-

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sible that the law can be such, that when a lease is executed, neither the heir nor any body else who is to succeed him, can tell whether the lease is for thirty years, twenty-nine years, twenty-seven years, twenty-five years, twenty-one years, or nineteen years.

These include all the points with respect to the Neidpath estate.

Queensberry leases.

With respect to the Duke of Buccleuch's case: That came before the other Division of the Court of Session, and the two Courts differ altogether in their views of thelaw on this most important question.

The Duke of Buccleuch's leases relate to the entail of the estate of Queensberry; and without going through all the particulars of the leases which have been granted upon that estate, they may be represented generally as being *leases granted for long periods, grassums being taken upon those leases,* and first leases granted to tenants in those tacks which were current, or to strangers under the burden of the current tacks, and with obligations in both cases, to grant a new lease annually for nineteen years during the Duke's life. With respect to that species of lease, they say, that it is not only affected by the circumstance of grassums having been taken, but that it is to be considered as a lease for more than the Duke's life *or* nineteen years: they say it is a lease for the Duke's life *and* nineteen years; to which it is answered, that is not a lease for more than the lifetime of the setter or for nineteen years, because, in order to make the lease good, there must be possession, and that the possession is a possession which at the death of the Duke of Queensberry must

Leases for nineteen years, with obligation to renew annually.

be referred to the lease then actually existing; and in truth and in fact they say, whatever it may be, in semblance and appearance, it is nothing but a lease for the life of the person or for nineteen years.

There is a second class of leases, where *the current leases had* actually expired.

There is a third class of leases granted without an obligation of renewal, but where the leases renounced were not near their natural expiry; and there were other leases which were not granted till the previous leases had expired, but on which grassums were taken. The validity of those leases was not only discussed in the general case of the Duke of Buccleuch, but also in the case of one of the tenants. With respect to the tenant's right, he insisted likewise upon the circumstance, that he was an onerous purchaser.

Judgment of Court of Session, Second Division, and remit.

'In this case, the Second Division of the Court of Session declared the particular lease before them was good, and that the leases in general were good; and in this state of things, the cause came before this House, when you were pleased to make a remit, which has brought before you the collective opinion of both Divisions of the Court of Session, by which it appears that there is great diversity of opinion among the Judges.

Defences and argument for Duke of Buccleuch.

One of the defences of the Duke of Buccleuch, in one of those actions, stated that "the deceased Duke "of Queensberry succeeded to the estate of Queens-"berry in the year 1778, as an heir of entail under "the foresaid deed of tailzie, and made up titles ac-"cordingly under the conditions therein contained; "but after entering on the possession of the estate, he

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" did not, as the leases gradually expired, let the lands " at the just avail for the time, in terms of the entail, " 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 " view of defeating the prohibitions contained in " the said deed of tailzie, thought fit, about the " year 1796, when the whole estate was under " current leases, which had been granted by him- " self, to form a device, without waiting for the " expiry of these leases, of letting anew the whole " estate, both for his own lifetime and for nineteen " years after his decease, and also in diminution of " the rental, contrary to the conditions of the " entail;" and then it proceeds to state what the Duke of Queensberry had done in pursuance of that device, contending that it was a fraudulent use of his power, and that there might be a fraudulent use of the power of the heir of entail, although what he did in the execution of this power might be within the letter of the power under which he professed to act. Then they say, " that these were 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, because they were granted for

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" a space longer than the setter's lifetime or nine-
" teen years; the obligation of renewal being part
" of the contract, and elongating the term of pos-
" session for which the lands were let; and because
" the leases were not let for the just avail, but for a
" rent known and intended to be inadequate, and for
" less than that avail; and because they were let
" with diminution of the rental actually existing pre-
" vious to letting them, the Duke having previously,
" by grassums, received an additional rent for the
" lands beyond that stipulated in these leases."

Upon the remit, two orders were made by this House, one with respect to the tenant, and the other with respect to the general cause; which latter was, " that the cause be remitted back to the Court " of Session in Scotland, to review generally the in-
" terlocutor complained of in the said appeal; and
" in reviewing the same, the Court is to have espe-
" cial regard to the fact, that this action of decla-
" rator 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 plead-
" ings, and is not instituted by any of the persons
" to whom such tacks are granted, nor are any such
" persons parties thereto: that the Court do re-
" consider the defences of the appellant, and espe-
" cially 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,

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" 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 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 pur- " suers, as representing the Duke; and in reviewing " the interlocutor complained of, the Court do par- " ticularly 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 consider what is the effect, with re- " ference to such tacks, of all other parts of the said " deeds which relate to tacks, having regard to the " endurance of such tacks, and to the fact of gras- " sums being or not being paid upon the granting " thereof, or paid upon the granting of former leases; " and 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 then this was addressed to the Second Division,—" 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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There are in print the opinions of all the Judges which have been taken in consequence of this remit. Upon these opinions I will make only this observation: I am either bound to suppose, that the question about the Duke of Queensberry's declarator, as contradistinguished from the proceedings of declarators in general, by the circumstances which are stated in this case, was not a question understood, or that it was a question thought of so little importance, as certainly not to produce information enough from those opinions, to enable those who thought that question of any weight, to look at them, to resolve any doubts they might feel.

Observations on the remit and misunderstanding of the Court of Session.

There was no ground to attribute to me, that I felt a notion that an action of declarator was not the form in which the representatives of the late Duke of Queensberry could proceed in the Court of Session, in order to have it declared that these leases were good. I knew that was the species of action which would be brought in the Court of Session; but the remit was made in the Duke of Buccleuch's case; and the reason of making the remit in that form was, that in the proceedings of the trustees of the Duke of Queensberry against the Duke of Buccleuch, they not only sought to have these leases substantiated, but to be protected from all claims of damages, on the ground that they were good. Much of the contest in this case went on this ground, that whatever might be the effect of granting one such lease on the payment of a grassum, yet there might be such a conduct on the part of the heir of entail in possession, such a comprehensive and vast dealing, buying up the leases of tenants, making them renounce their leases, and letting all the lands

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Question as to fraud upon the entail.

upon such a general system, as to amount to fraud, and although it might be the most difficult thing in the world with respect to tenant *A.* or tenant *B.* or tenant *C.* to say it was a fraud on the entail, yet that there might be such a thing as a fraud upon the entail nobody in the course of that matter disputed. The question under these circumstances was, whether those who were the representatives of the late Duke of Queensberry had a right to interpose to have all those leases declared good instruments, although it might be very fit to know how far the lease of *A.* or *B.* or *C.* or *D.* was or was not connected with that system of fraudulent management, and whether, notwithstanding that system of fraudulent management, you could prevent a particular tenant having a declarator, if he was entitled to it in an action of declarator, that his lease was a good lease.

Distinction between cases of heir and tenant.

Analogous case of Roxburghe feus.

In the case of the Roxburghe feus*, where the heir of entail having a power to feu such part of the lands as he should think fit, provided his grants were not made in diminution of the rental, &c. and the heir feued all the lands, taxing the casualties, the House of Lords decided, that this was making such a use of the power of entail, as a court of justice would not permit. As between the Duke and his tenant, if there were no other parties in the cause, you might decide in favour of the leases; but here there might be one principle, it was argued throughout, on which to contend against the Duke of Queensberry, yet a principle that would not enable you to contend against all his tenants, or most of his tenants.

* Ker *v.* Roxburghe, Dom. Proc. 18 Dec. 1813. MSS. and 2 Dow. 149.

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When the Court of Session was asked, by the terms of the remit, whether the action was an action which he could have maintained, if it was made out that there was in the leases that device, and that fraud upon the entail which the Duke of Buccleuch insisted made part of the system of the Duke of Queensberry, I had not the least idea that it would be considered as a remit, desiring to be informed, whether a man could in the ordinary case proceed by action of declarator. The particular circumstances that led to that particular remit, were of some such sort as I have been alluding to; and I must say, that the remit in its nature has not been well understood, and that it has not received the answer which was expected.

Reflections on the understanding of the Court of Session.

The majority of the Judges seem to have been of opinion, that these leases were good; that grassums could not affect them. And with respect to the word "dispone," the majority of them were of opinion, that the word "dispone" would have the same effect as the word "alienate."

Second Division of the Court of Session, 10th Feb. 1818.

After these proceedings, from this interlocutor, (this case embracing the general consideration, and the additional circumstance that there is an onerous purchaser,) the appeal now comes back to this House. The several points which seem to have been stated in the Courts below, and discussed, involving the merits of the question upon this remit, were, with very little alteration, the same points on both sides as before submitted to the Court.

L. C. 6 July 1819.

In the March and Neidpath entail, the clause about setting tacks is a permissive clause, that is, "notwithstanding the irritant and resolutive clauses

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" above mentioned, it shall be lawful and competent " for the heirs of tailzie above specified, and their " foresaids, after the decease of the said William " Duke of Queensberry, to set tacks or rentals of the " said lands and estate during their own lifetimes, " or the lifetimes of the receivers thereof, the same " being always set without evident diminution of the " rental."

In the Buccleuch entail, the question arises upon the prohibitory clause, that is to say, the clause against *disponing* in any manner of way whatsoever, " except so far as they are empowered in " manner after mentioned." The clause then which relates to tacks and rentals, is a clause that they shall not do so and so, it is therefore a prohibitory clause in the terms of it, but still seems to be in some degree permissive also, by the words " except so far as they " are empowered in manner after mentioned."

Rental of the lands, teinds, &c.

To the March and Neidpath entail, there is subjoined a paper which has this denomination: " Rental of the lands, teinds and others, lying " within the sheriffdom of Peebles and Selkirk *re-* " *spectivè*, which did pertain to John Earl of Tweed- " dale, and John Lord Yester his son, and were " sold and disponed by them to William Duke of " Queensberry in liferent, and to Lord William " Douglas, his second lawful son, and their heirs " of tailzie therein mentioned, in fee, conform to " the disposition thereof of the date the 19th day " of October last," and which has particular relation to this present rental. Then they state what the lands are let at. There is, first in the parish of Lyne, I think they call it, the sum or rent of 5,840 *l.* Scots; then follows this, " Paid out of this in sti-

"pend to the minister of Lyne, 466*l.* 13*s.* 4*d.* "Item, deduced for the teinds of Scroggs, "66*l.* 13*s.* 4*d.*" the sum of the deduction so much; and then follow the words, "remains of neat rent, "5,306*l.*" They then proceed to state the rent in Peebles parish, where the sum of rent is 2,428*l.* 6*s.* 8*d.*; "paid out of this of tack-duty to the parson, "66*l.* 13*s.* 4*d.*; to the vicar, so much;" there then rests of neat rent 2,348*l.* 6*s.* 8*d.* It is not necessary to particularize the whole; but it goes through the several items of property which yield rent, stating the sum of rent, and stating what remains of neat rent, and then it concludes summing up the whole foregoing rental contained in the preceding four pages, which extends to the sum of 17,002*l.* 13*s.* 10 pennies Scots, which I take to be the amount, not of what is called the rack-rents, but of the rents, making the deductions which give the quantum of the revenues.

Alteration in the law of Scotland as to the valuation of rent in respect of teinds.

According to the law of Scotland at the time when this tailzie was executed, in calculating the teinds, the estimate was made by looking only at the rent reserved, and no benefit was given in that valuation to those who were entitled to the teinds with respect to any grassums that had been taken; but at a period long subsequent to this, the Court of Session having reconsidered the statutes, with reference to this matter of teinds, put a construction upon the words* "the rents of lands constantly paying;"

* Originally by decreets arbitral of Chas. I. dated 2 Sept. 1629, upon submission by titulars, proprietors and other parties interested; ratified in Parliament by act 1633, c. 17. See the decreets, subjoined to the acts of the reign.

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and held, that under these words they were entitled to say that a grassum was worth so much with reference to the calculation of rent, and that, instead of estimating the teinds by the rent reserved, they would take a proportion of the grassum, though the land did not constantly pay that grassum, and consider as the rent not the rent which the land constantly paid, but the rent which they thought in justice they ought to consider it as paying as between the persons entitled to th tei nds and the land-holder.

Doubt as to the authority of the Court to give a new construction to the words of the Scots statutes 1633.

This was a very just alteration as to any question between the parties entitled to these different species of property; but how the Court of Session, after their predecessors, for nearly a century together, had said that the statute afforded the rule, and the words were what they were to go by, could give a construction which the words do not bear, in order to reach the justice of the case, is a difficult question, which ought to have been discussed upon the remit, but has been altogether neglected. I am not saying, that because this has been done in a question between the person entitled to the teinds and the owner, that therefore it is applicable to heirs of tailzie and onerous purchasers; that is another question; but the question is material for this reason, that this alteration of the law, by necessary consequence reduces the clear rents of the March and Neidpath and Queensberry estates in a very serious degree.

Effect of Scots statutes 1685 and 1449 as to long tacks.

As to the question, what is the effect of the statutes of 1449 and 1685 taken together, with respect to a tack for fifty seven years; supposing, for argument's sake, that the March and Neidpath entail must be considered as prohibiting a tack of fifty-seven years

as an alienation, does the statute of 1449 * afford any objection to the conclusion of law? My clear opinion is, that it does not. Whether entails before that are to be considered as odious or not, or whether the statute of 1685 is or is not to be considered as purging them of all odious qualities, it is extremely clear, that if the statute of 1685 authorizes the entail, and if the entail, by force of that statute, prohibits a tack of fifty-seven years as an alienation, it is impossible to say the statute of 1449 can prevent the effect of the statute of 1685.

The statute 1449, does not support a lease prohibited by a tailzie, framed according to the statute 1685.

We have been told again and again, that we are to proceed on the matter upon that system of interpretation that he who runs and can read may fix instantly the interpretation; yet, notwithstanding all these dicta, and the representations of the great character of the heir of tailzie, most assuredly I may say, as to these decisions about estate tail, that those who have run and read, have felt very different convictions, and entertained very different feelings with respect to the interpretation to be put on what they have so read. Looking at the opinions of the Court of Session, it is very difficult to reconcile their opinions in a matter in which no two men who run and read it is said can differ.

It was stated at the bar, on the hearing of this case, that the present proceeding was not to be looked upon as a claim for damages against an heir of entail, or his representatives, on account of his having contravened the prohibition; that it was not

Observations on the pleadings and the necessity and purpose of the remit.

* By this statute for the encouragement of agriculture, leases, which before had been mere personal contracts, were established as *quasi* real rights against general heirs and purchasers of the inheritance.

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to be looked upon as a claim for sums of money, or rather as a repetition of rents unduly anticipated; but that it was to be considered as a case of a right granted to a third party, for valuable consideration, if effectual; and which could only be made effectual by the combined operation of the different clauses which the statute of 1685 requires in entails—that it was a claim founded in contravention, (which is important to be observed) and where therefore the operation with respect to the smallest part of the estate, if it could not afterwards be purged on account of circumstances, would extend to the whole estate: In such a case, where it was insisted that the generality or universality of the acts of the late Duke, constituted a species of dealing with the entail which (whatever name he might give to that dealing, or however he might characterize it) might with respect to him be looked at in a point of view in which it might not be capable of being represented to the mind in a question between tenant *A.* and tenant *B.* and others, and where the

Pleadings against the leases on the ground of fraud.

defences of the Duke of Buccleuch were defences founded on the allegation of devices which the law would not sustain, and where the summons demands (as it does in this case) not merely to have a judgment that these leases were good, but to have it declared by the Court, that, free of all molestation or interruption whatever on the part of the heirs of tailzie, the executors might take the personal estate of the late Duke of Queensberry, and dispose of it as they thought proper; and where the distinctions were drawn between tenants claiming as purchasers, and all this device, as it was called, on the part of the Duke: Before we proceeded to decide

on a Scotch case of such a nature, it was surely expedient to know what the Scotch Courts thought of the case so represented; and for this purpose the case was remitted.

Conjecture as to the opinions of the Scotch Judges upon the question of fraud on the entail.

If I am to look at the opinions of the Judges, in consequence of this remit, as amounting to this, that a court of justice is not to change the law, (and God forbid they should change it!): if I am to look at what I read in those opinions, as pointing out, that although the Duke of Queensberry has made deeds to the amount of three or four hundred, although he has made tacks, and taken large grassums, and procuring the tacks to be renounced, has let the lands again, and so covered the whole estate with these tacks, if I am to look at those opinions as declaring that he has not thereby exceeded his power, that he has only done what it was lawful for him to do, it is very difficult to imagine in what cases those who make claims against him can say, that what it was lawful for him to do he has fraudulently done.

Cases in English law of illusory appointments.

We have, in our own law, cases, where men acting according to their powers, may abuse them as to the objects of the powers. These are difficult cases to decide, and the Judges should take care they are not misled by the idea, that because powers may be abused, there has been in the cases put abuses of the powers. A noble Lord*, in one of the cases of this kind, had a power of appointing a certain sum of money among his younger children under a settlement. He made an appointment to one of those children, who was at that time at death's door in a consumption. What was the object of this appointment? It was, that if the child died, the

* Case of Lord Sandwich. See 11 Ves. 479.

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father should take out administration to that child, and claim the estate himself. That was according to the letter of the power; but the Court said that should not be, because it was substantially an appointment to himself, and not to that child.

Difference of opinion on the question of fraud.

The Judges differ very much upon the point. Some of them are quite clear this was a device, and that it cannot be sustained; others being of opinion that this was nothing more, in a great variety of instances, than a legal exercise of that power which the Duke had a right to exercise.

This remit has been treated as if those who had the honour of advising this House had really doubted whether the law of Scotland would permit such a thing in general cases, as bringing an action of declarator by the representatives of the deceased, to have the acts of the deceased cleared from all doubt, and difficulty, and controversy. Certainly your Lordships did not mean to express any such doubt.

Observations on the memorials.

In looking at the memorials which were presented when this judgment was to be applied in the Court of Session, I find what passed in this House treated in those memorials in a manner of which I know no example, and of which I trust I shall never see another instance. Your Lordships are in the habit, for the sake of assisting persons in doing justice to the suitors in the Court of Session, of endeavouring to put into the possession of those who are the agents of the parties all the doubts and difficulties which have occurred to your minds upon the subject. It is accorded as an assistance to those who are afterwards to discuss the points below; but it never was intended, that when such notes are handed out to those who are to deal with the case below, they are to use them as

if they were printed pamphlets, and to make observations upon them in the style, and tone, and temper, in which some of these memorials treat (and I think not very accurately either) what was stated in this House. No man entertains a higher respect than I do for the learning, talents and character of the persons whose names are subjoined to those memorials; but that is not a mode in which I can see a member of this House dealt with, without saying, I hope I shall see no other instance of it. The President of the Court of Session, upon this subject, says, " I shall first consider the chief arguments on " which this proposition is disputed by the executors, " and that in such a lofty tone of scorn, and such " a cry of danger to established principles, as almost " to frighten one from daring to think otherwise."

It is supposed, that those who advise your Lordships, have very little notion of the difference between an English entail and a Scotch tailzie, because I observed there seemed to be this difference between persons claiming under a Scotch entail, and persons claiming under an English entail; that leases of short duration, under a Scotch entail, have been sustained against prohibitions, and that that possibly might arise from the circumstance, that a person making an entail might be presumed not to mean to prevent ordinary leases being granted of the estate; although if the term "alienation" applies to leases at all, it is difficult to say why it is not to apply to those of short as well as those of long duration. A lease of short duration was by the Scotch Judges held good; whereas our Judges have held leases made by a tenant in tail as voidable, not as void. Upon reconsidering that question, I am at

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a loss to know on what else the difference depends, in the law of Scotland, between long and short leases. We have been told we are overturning the law of Scotland,—that we are beating down established principles and rules which have been established for ages. I shall consider it an injustice done to the country, if in any decisions of mine an attempt to change the law of that country can be found; but it may happen that persons may have very different opinions as to what is the law of a country.

Long leases alienations by the law of Scotland at all times.

In applying the word "alienation" in the Neidpath case, in construction, I am perfectly satisfied that whatever distinction there may be, (if there be a distinction) as to the effect of the word "alienation," that word in all time has prohibited a long lease in Scotland. I formed that opinion upon the ground that the term was not now to be applied for the first time as prohibiting such a lease. If the law of Scotland be thoroughly investigated, it will be found there was no period when it was not an alienation. Holding that a long lease was an alienation, the

Doubt as to the principle of distinction between long and short leases, on the question of alienation.

next question is, Upon what principle,—for this is what I want to have sifted and examined—upon what principle is it to be said a short lease is not an alienation? The text books, and the authorities which decided the Wakefield case*, show that a long lease is an alienation; and it is now supposed, because they have said a long lease is an alienation, and have not said a short lease is an alienation, that it is to be concluded that a short lease is not an alienation; but I must find some principle on which the distinction has been made.—Now those who

* Montgomery *v.* E, Wemyss, D. P. Dec. 1813. MSS. and 2 Dow. 90.

contended for what is called strict interpretation in the law of Scotland with respect to entails, (and rightly, for I do not venture to trench on that principle of construction), say that alienation means something quite different from allocation; that alienation is the actual conveyance of a real right; that allocation is a personal contract for the use of the property, which by the statute of 1449, with respect to Scotland, is made a species of real right. But alienation, whether long or short, in essence, nature and quality, is exactly the same. A lease of nineteen years, and a lease of thirty-one years, do not differ as to their essential qualities and attributes. The one is no more an alienation, nor less, *primâ facie*, than the other. The one is no more and no less, *primâ facie*, an allocation. How long is too long for a lease, or how short is right, is quite a different question. If a short tack be sustainable according to the law of Scotland, which I take it to be unquestionably, and which (whether I can account for the principle on which it is so or not) I never will disturb (I think I can account for it upon a principle satisfactory to my mind) I wish to see what is the principle upon which other persons have seen the difference between a short tack and a long one.

All tacks alienations *pro tanto*.

It is said, and I agree it has great weight—what sort of a situation will you put all persons into, if you give a general sense to such words as "alienation" or "disponing?"—Perhaps it is a little too late to discuss that, after the general sense has been given, as far as leases are concerned. But it has been often asked, (and the papers in this cause go a great way to controvert the Wakefield case, but being settled we shall be bound by it,) How are we

Length of lease allowable must be ascertained upon entail, as in case of inhibition, death-bed, &c.

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to know what this lease is to be?---How are we to know which is a long, and which is a short lease?—I never could bring myself to have any difficulty about that; and for this reason: If a lease was prohibited in any of these terms, you must travel with all the difficulties till you find the description of the tack.—How is it with respect to death-bed?*—How is it with respect to inhibition, † and other cases in which a distinction has been taken between leases of one character and the other, with regard to which the assertion occurs, that such and such leases are not to be endured?—It is quite obvious, that whenever a question arises, where, notwithstanding inhibition —notwithstanding death-bed—notwithstanding prohibition, leases have been made which *A.* says are prohibitory, and *B.* says are not, a Court of Justice must deal with them, and say whether they are so or not.

We have had these arguments at our bar, as if they were the most unfortunate people as to landlords; and yet, if you look at their tacks, they seem so to deal with their landlords, as we have been told, if we were to insist on landlords dealing with their property, we should place them in the situation of not knowing what they should do, or forbear to do. You are not to place persons under the harrow of those difficulties, if the instrument has not placed them there; nor are you to be astute to find, that the instrument has a meaning to subject them to such difficulties; but if, in the true legal construction, they are exposed to them, they must submit. The instrument under which they claim is

* See post p. 416, and notes.

† Gordon *v.* Milne, id. 7008; and Wedgewood *v.* Catto, Fac. Dec. 13 Nov. 1817.

the law by which they must abide. It comes, therefore, round again to the same question, if long leases be alienation, what is the principle on which short leases are allowed? That principle must be ascertained, with a view to see whether the same principle does or does not in any manner, and to what extent, apply to that which is certainly the great question in this cause, and which perhaps may be stated fairly to be the only question in this cause. What is the effect of leasing, and in that sense alienating, provided the lease be long, and falls under the term alienation? What is the effect of that principle, or any other you can discover out of the fact of taking grassums on leases too short to be alienations; but nevertheless where, though in one sense there is no diminution of the rental, it must be admitted, on the other hand, there is a diminution of what might have been the profit?

Questions in the cause.

There are some points upon which I agree with some of the Judges—in some cases with a majority of the Judges—and I have the mortification to differ from a majority of the Judges in others. There is one very important part of this case, which is pronounced, I think, as the judgment of them all, in the interlocutor of the First Division of the Court—that is, with respect to those leases (I lay grassum out of the question for the present) in which the late Duke of Queensberry, having power to set for lifetime or nineteen years, set for nineteen years with a covenant to renew. It is contended that was a lease he could not make within the meaning of the charter, as it amounts to a lease for the life of the receiver, and eighteen years after. If so, it appears to me to be a

Leases for nineteen years, with covenant for renewal.

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lease prohibited;—but I go so far with those who lay down the principles of strict interpretation of entails as to say, I have no doubt the Duke might, without covenant, from time to time take a renunciation, the effect of which would have been the same. Then the question is, does the obligation to do so, make any difference in a question between him and the heir of tailzie?—I think not; for this reason, that whenever the Duke happened to die, the possession of the tenant must have been under the lease that actually existed. With respect to the covenant for another lease, it is a mere personal contract, upon which it appears to me there could be no possession. According to the manner in which these tailzies are constructed, that is not to be denominated a lease or a tack for the whole of that period; entering into an obligation which does not fix itself by way of lease on the heirs of tailzie, would not affect the legal or equitable right *ultra* that of the person who grants the lease, and his power to grant. So it was decided in this House, in that case of *Leslie* v. *Orme*, where upon the main question a lease for four nineteen years was sustained; yet with respect to a reversionary lease, where there could be no possession during the life of the heir of tailzie, the House held it to be bad.

Leases for nineteen years, with covenants for annual renewal, good.

Whether taking the teinds affects the transaction, is a distinct point; taking a grassum cannot affect it in any other way than in a higher degree. There can be no doubt, that, generally speaking, a man would give more of grassum, if grassum can be legally taken for a lease of this sort, with such a covenant, than for a lease without; but in that point of view the question by which the lease is to be affected, is not upon the duration of the lease, for as a lease it has

a duration for nineteen years only—it is not upon the effect of the covenant, for the covenant does not bind the heir of tailzie; but it is upon the effect of receiving that sum of money, which they contend, on the other hand, ought to be considered as rent, and not as grassum. Upon that part of the case, therefore, (omitting now the question of grassum) notwithstanding the effect which this sort of covenant has, and an effect which I should strongly conjecture was intended throughout these transactions; yet I am not at liberty to act upon any thing beyond the legal effects of its character; and if it is not prohibited by the charter, I trust this House never will make law, where they are acting in that department of their functions which belongs to interpreting law, and not making it.

The tailzie of the March and Neidpath estates has been adjudged * to prohibit long leases. The word "alienate" occurs in the Buccleuch case in different parts of it, but here also I take it to be clear law which never must be departed from—I mean, unless it is authorized by decisions—that when the statute of 1685 has required prohibitory clauses, irritant clauses, and resolutive clauses, those who state there is an effectual prohibition against onerous purchasers, must find the terms in which the prohibition is conveyed in all those clauses. Now it is quite clear that the word "alienate" is not in some of the clauses in the Buccleuch case; and that introduces another question in this case, likewise of considerable importance. Those who have had this charter to inter-

Sense of the word dispone.

* In the *Wakefield* case, D. P. 1813. MS. and 2 Dow, 90 and 206, et seq.

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pret, may have given a sense to the word "dispone," which I cannot give to it; and if that sense of the word "dispone," which in my conscience I think belongs to it according to its meaning in the law of Scotland, is adopted by the House, it will affect not only this case of the Duke of Buccleuch, but some others which have reached judgment in the Courts below, and some of which are now before the House on appeal. But whatever may be the effect, it is our duty to give it the sense which belongs to it.

"Dispone" equivalent to "alienate."

Upon the question as to the word "dispone," according to its sense in the law of Scotland, whether it is equivalent to the word "alienate,"—I have again and again read this case and all the former cases—I have again and again taxed myself to the duty of considering what is the meaning of this word "dispone," as it has been understood in text writers, in charters, in writs, in statutes; and in many of them, I am of opinion, that the word "dispone" is as effectual to prevent a lease of a hundred years, as the word "alienate" is.—That is my opinion. It would be pedantry in me to read all the doctrines which led me to express that opinion which I, for one, entertained on the word "dispone;" and I have the satisfaction to see, that the Judges below were not so much disturbed by that opinion, as they were by our notions of alienation in other cases.

The word "dispone" does not apply to leases as to duration, it only applies to leases in respect of grassums; and therefore it clears the way to the consideration, what is the effect of a grassum? because, if you held that the word "dispone" would not authorize such a decision as the word "alienate"

would authorize, it would have been difficult to get at the interpretation. 1819.

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When this case was argued here before the remit, there was no argument at the bar, nor any thing in the papers, which induced the raising, much less the discussion, of a question, whether an heir of tailzie, where there was no prohibition, could diminish the rent? Whether he could let below the last coming rent? I now see (and that makes this case of infinitely greater importance than I understood it to be then) that it is introduced as a question by no means determined, although the notion that an heir of tailzie had no such power, was founded upon the opinions of great and eminent lawyers, and those who now quarrel with that doctrine were the persons who brought those opinions here for the assistance of this House. I think there is *one judgment** at least, in which some Judges of great eminence in Scotland have gone the length of saying, that if the rent was lessened, particularly, if much below what it was, (and see what a state of law you are getting into, *much and little, long and short*), that they should hold that to be fraudulent. From this it appears, how very dangerous it is to determine any thing not before us for judgment; and it becomes necessary to consider, if it be the law, that a tenant in tailzie cannot let below the rent, independent of actual terms of prohibition, on what principle that is said to be law. It cannot be the law on strict construction, because there is nothing on which to put it; and therefore it must arise out of some principle, of which we ought to satisfy ourselves.

Question whether heir of tailzie, where there is no prohibition, can diminish the rent.

If heir of tailzie so restricted, *query* on what principle.

* The Wakefield case, see *post*. 417.

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Implied prohibitions. Mansion, Policies, &c.

In these papers, much is also said about what are supposed to have been treated as implied prohibitions. I cannot charge myself as the first to denominate the cases of the Mansion-house, of Policies of illusory rent, and other cases, as implied prohibitions. I expressed a doubt as to the proposition which was so broadly stated in argument, that a tenant of tailzie was "absolute monarch*" of his estate in every particular where he was not bound by express prohibition. I now venture to observe as to the law respecting the Mansion-house and the Policies, that if they are not implied prohibitions, I may take the liberty of stating them to be something like limitations of the powers of an absolute monarch. What is the principle here which binds a tenant in tailzie, although restricted by no words in the charter. When the act of 1685 gives a man power to comprehend in tailzie all he chooses to comprehend in that tailzie, and where he does comprehend the Mansion and the Policies, and where the prohibition does not strike at the Mansion-house and the Policies—what is the principle, I say, on which it has been held, both below and in this House, (particularly in the Roxburghe case—a case which may not form any precedent to decide this, but in that case in effect, if those feus had been held good, it was reducing the mansion-house of Roxburghe to the state of a stone quarry) that such a dealing as to the Mansion-house and policies was illegal, though not expressly prohibited. Such is the effect of the decisions, though I am not able to

* An expression frequently used in the argument for the appellant, as to the powers of an heir of tailzie, so far as he is not expressly restricted by the prohibitory, &c. clauses of the entail.

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satisfy myself on principle, why tacks of these Mansion-houses and Policies ought not, by the statute of 1449, to be made good, as against the future heirs of tailzie. I wish those who put it upon that ground, would tell us, why the act of 1685, if it authorizes an entail in terms which comprehend them, being subsequent to 1449, will not, upon the face of what is embodied in the expression, just as much affect the Mansion-house and Policies as other subjects. We must endeavour to ascertain what is the principle of the exception before the present appeal is decided.

Illusory rent.

So as to the cases of illusory rent, if I am to look at the statute of 1449, and what some of the Judges have said on that statute, I find it extremely difficult to say what is an illusory rent. There has been an attempt to determine what is illusory, but our decisions do not supply the principle upon which we can determine that to be illusory, provided we read the statute of 1449, as giving the power by which the effective lease is granted. When, therefore, this is stated to be an implied prohibition, and to be an implied prohibition destroying all the effect of strict interpretation, I ask those who say that nothing is out of the power of an heir of tailzie, except what is put out of his power by the intention and meaning of the entail, embodied in actual expression, to show how they account satisfactorily for the cases to which I have alluded. They may account for them very satisfactorily, for aught I know, upon the doctrine which lays this down as a general rule, without any exception whatever; and yet, on the other hand, I have been quite unable to discover what is the prin-

Prohibitions implied on principle of presumed intention.

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ciple which takes it out of that rule, unless it be some important principle arising out of the presumed intention of the author of the tailzie, that this shall not be done, whatever may be the apparent import of the expressions which he has used in his tailzie.

The great and important question remains, and undoubtedly it is a great and important question in every view that can be taken of it, if the doctrine with respect to grassums is allowed. If taking grassums is not to be considered as "*evident diminution* "*of rental,*" which are the words to be construed, we see what may be done with respect to estates tail in Scotland. We may indeed be surprised at what has not been done with such estates. On the other hand, if you do hold that taking grassums is, in the sense in which I speak of it, prohibited, you deny legal effect to acts which have been sanctioned by practice, and defeat the provision and the means of providing for wives and children; but, much as such consequences might be deplored, we cannot, with a view of avoiding them, venture, in judicial decision, to declare that to be the law which is not so. Those evils must be remedied, if necessary, by the Legislature. The question, therefore, comes round to this, What is the effect of grassums with respect to such leases as have been granted under these entails, having due regard to the principles of interpretation, as affecting the construction of these deeds; having due regard also to what has hitherto been done in practice, and to what has hitherto been established by decision?

9 July 1819. It has been intimated to me, that the teinds in one of these estates were valued about the year 1720;

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it does not appear to me in the view I take of this case, to be a circumstance that varies the principle on which we are to decide this case: because, one of those entails being made in 1705, and the other considerably before 1700, the circumstance of an after valuation of the teinds, would not shut out the consideration of any construction the Court of Session put upon that entail, either upon the interpretation of these deeds of entail, or any other deeds of entail. I have not forgotten that there may be, as contended, a very great difference between the rules of construction, as they may be applied to lands generally, and proprietors of teinds, and as they may be applied to heirs of entail; the rules have come very often under consideration, and I should be very sorry indeed if, in the result, we should not duly consider them.

Valuation of teinds.

With respect to the meaning of the word *dispone*, I found my opinion, not only on what I conceive to be the legal sense of the word, as contradistinguished from that strict and peculiar sense which belongs to an instrument known to the Scotch law by the name of disposition, but on looking at the meaning of the words *dispone*, and *dispose of*, in the two deeds of entail under our consideration, and all the parts and clauses of both the deeds, containing the words "dispone," and "dispose of," and "dispone upon," and "dispone thereupon," and so on.

Dispone and dispose of.

I understand there has been a decision * of the Court of Session subsequent to this, by which a different construction has been put upon the word. There was a great difference of opinion upon it, and that with respect to setting tacks. In the case of The Earl of

Dispone.

* Elliot *v.* Pott, March 10, 1814.

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Elgin *v.* Wellwood.

Elgin v. *Wellwood*, now pending, on appeal *, the same point came under discussion. In that case, upon the 9th of October 1807, a proposition was made in a letter, the terms of which are as follow:—"On the "part of the Earl of Elgin, I hereby offer to enter "into a lease with you for 999 years from Martinmas "next, of the farms of Wankirclu and Greenhill, "possessed by Thomas Purves, excepting that part "thereof lying on the north side of the road from "North Queensferry to Torryburn of Craigs;"—the rent is a peculiar sort of rent, three bolls of oatmeal per acre, besides "a grassum of 12,000 *l.* sterling, "bearing interest from Martinmas next, but the gras- "sum not to be payable during your lifetime."—The grassum, therefore, was to be paid at a subsequent period.—"It is understood, that Lord Elgin is "in the mean time to find security for that sum to "the satisfaction of Mr. Thomas Adair, writer to "the signet;"—and then there is a provision with respect to the quantity of acres;—"and it is further "understood, that by your acceptance of this offer, "you agree to enter into a lease with Lord Elgin "for the same period of years, at the same rent, "and for a grassum in proportion to the extent to be "fixed, according to the grassum now offered, of all "the land lying to the west of Pitliver House, "and belonging to you, which you are at liberty to "let for that period of years, in terms of the entail "of your estate, but this only in case his Lordship "should incline to enter into such a lease."

The power of leasing under the tailzie, in that case is expressed in these words: "and with this "power and faculty, as it is hereby expressly pro-

* Since decided against the appellant. D. P. cases of 1820, *post*.

" vided and declared, notwithstanding of the restric-
" tions before written, with regard to the setting
" tacks, that the said Robert Wellwood, my son,
" and each of the heirs succeeding to the said lands
" and estate, shall have full power to set tacks of
" the same, excepting the house, offices, houses and
" gardens of Pitliver, and one hundred acres of
" ground next adjacent, and contiguous to the said
" manor-place, for such space of time as they shall
" *think fit*, provided that the same shall never be set
" at a smaller yearly rent than three bolls of oat-
" meal, at eight stone weight per boll, for each acre
" so to be set, and proportionably for any smaller
" quantity; and which rent or tack-duty shall
" always be payable in kind, and never be converted
" into money: Declaring, that in case the said
" Robert Wellwood, my son, or any of the said heirs
" of tailzie, shall set tacks of the said estate for any
" longer space than nineteen years, or in terms of
" the act of Parliament before mentioned, except in
" the terms of the clause immediately before written,
" then such tacks shall be in themselves null and
" void;" and there were the usual resolutive and irritant clauses. The general power was, " to set
" tacks or rentals of any part of the estate, except
" that they were not to do that (except in the terms
" after mentioned) for a longer space than nineteen
" years certain, or for the life of the setters, or in
" the terms of the power given to the proprietors
" of entailed estates in Scotland; and that none of
" the tacks or rentals shall be set *with diminution of*
" *the rental*, except the same be done without col-
" lusion, and by way of public roup, to the highest
" bidder;" a material passage in this case, as having

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some application to the entails now under your Lordships consideration.

999 years, whether a tack.

The Court below were of opinion that this tack for 999 years is a good tack; and the question to be discussed, whenever that cause comes for decision, will be of two kinds; first, with respect to grassum, upon which I observe, in the note I have taken, the counsel at the bar stated, not one word was said in the Court below; the next question will be, Whether a 999 years estate is really a tack? whether it is in Scotch law a tack? The Court were of opinion, it was a tack, under this power to set such tacks as the heir of tailzie thought proper, that this 999 years could be sustained. It was argued at the bar, that it was no such thing as a tack; and you will have to decide whether 999 years is to be considered as a tack under this power and faculty; and if it is, what is the effect of the grassum? I have thought it my duty to mention that case. Though it is a case subsequently decided, it contains the opinion of the Court of Session. It has so much of authority, (though subsequent to the case before your Lordships), as belongs to a case that is under appeal.

Harestanes lease.

The Harestanes lease has been reduced and declared to be null, by the First Division of the Court of Session, upon two grounds, *first*, upon the ground of its duration; *secondly*, upon the ground of the grassum. If it is a bad lease on the ground of duration, it would not be necessary, in that case, to show whether it was a good or a bad lease on the ground of grassum; but if you hold it to be a good lease, notwithstanding it was for a duration of fifty-seven years, then it will become material to consider what

is the effect of the grassums. That consideration may be as well blended with the consideration of what belongs to the *Whiteside* case, as taken separately. With respect to a fifty-seven years lease being an alienation, in the *Wakefield* case it was decided in this House that a long lease was an alienation, confirming the opinion of the Court of Session, notwithstanding the practice in Scotland of granting such leases to a very great extent.

Long leases an alienation.

On looking at the grounds of the opinion, that a ninety-seven years lease was an alienation, and was not a tack, it appears the Court held, that according to the law of Scotland, except so far as the effect of the statute of 1449 is to be considered, a lease, though quite different from an infeftment, a disposition, and so on, and quite different from an alienation understood in the special sense of alienation, that is, a transfer of property, that a lease, although it is in truth nothing more, either in the law of England or in the law of Scotland, than a personal contract for the possession of land not transferred to another, and converted only into a real right, so far as the statute of 1449 does convert it into a real right; yet they were of opinion, not on any speculations of theirs, but on doctrine as it was to be found in their books, in their statutes and instruments, that a long lease was an alienation; and, when you look at what is to be found with regard to particular heads of law in the law of Scotland, (though I am not now stating this to afford a direct inference with respect to what should be the construction of a tailzie,) you will find that, with respect to forfeiture*, for instance, a long

Leases only personal contracts for the possession of land.

How far converted into real rights by Scots Act 1449, *quære*.

In respect to forfeiture, long lease, or grassum, an alienation.

* See Home *v.* Oldhamstocks, Dict. of Dec. 4684.

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lease is stated to be an alienation,—that with respect to forfeiture, if there is a grassum *, it is stated to be an alienation. So again with respect to deathbed †,—so in respect to crown lands ‡, and church lands §, they have laid down in the language of their law, that a long lease is an alienation; and they give a reason for that, upon which many of the Judges proceed in their opinion in the Wakefield case. The reason which they give in the case of forfeiture that a long lease is an alienation, is because it is not of ordinary endurance, and because it is not a necessary and proper administration of the estate. Whether you are to apply this principle to deeds of entail or not is another matter. Great stress is laid on the difficulties which persons would be placed under, if you were to construe powers of leasing with reference to what is a necessary and fit and proper administration, I find the law has distinctly pointed out a variety of cases in which you cannot escape from that principle of construction. So it is in the cases which I have mentioned. In other cases also, they have held leases void, unless they were adapted to the necessary and proper administration of the estate, as, if they were too long, for that is the instance which they particularly point out, and therefore wherever a question arises whether the lease is too long, or in other respects such as to fall within the reach of that principle which would aim at its destruction, it must

So as to church lands and crown lands.

Long lease an alienation, because not of ordinary endurance, nor in proper administration of the estate.

Whether the lease is too long, the same in the cases of forfeiture, &c. as in the case of tailzies, yet those have been and must be made the subject of judicial investigation.

* Dalziel *v.* Caldwell, Dict. of Dec. 4685.

† Chrystisons *v* Ker, Id. 3226; Bogle *v.* Bogle, Id. 3235.

‡ Upon the question of alienation see Stair's Inst. l. 2, tit. 2, s. 25, and l. 3, tit. 3, s. 30; Craig, l. 2; Dieg. 10, e. See also a case as to tacks of Crown property, with diminution of rent, *A.* v. *B.* Dict. of Dec. 7854.

§ *A.* v. *B.* Dict. of Dec. 7938.

necessarily become matter of judicial investigation, whether it is a lease of that description or not.

Sir Ilay Campbell's opinion.

Sir Ilay Campbell, upon the first advising and decision of the Wakefield case, says, "Long leases are "alienations, and leases of ordinary endurance are "not alienations. My opinion is just that of all your "Lordships. All of us know, *first*, that a lease "may be granted by an heir, which is not an alien- "ation; and, *secondly*, that a lease may be "granted which is really, substantially and truly an "alienation. Now it is unnecessary for me to "bring under your Lordships view, examples of the "two extremes, because they must be obvious; for "leases for one year or two years, or in Craig's time "for ten years, or in the present day for nineteen "years, are not alienations. But, on the other "hand, will any man say with candour, or is it pos- "sible for a lawyer to maintain, that a lease for a "thousand years or ten thousand years, for *some- "thing much below the present rent*, is not an "alienation?" The difficulty commences when we come to inquire what is *long* and what is *short*, and what is *too* long and what is *too* short; and we find on this grave authority (for undoubtedly that of Sir Ilay Campbell must be taken to be a grave authority, he being Lord President of the Court at that time, and having great occasion to consider these subjects), a judicial opinion, that nineteen years is not too long to be a lease, and not an alienation. This doctrine of Sir Ilay Campbell led me on a former occasion to say, "upon what particular "ground they found that he (the tenant) was to "have a lease for nineteen years, I am not able to "learn from the papers before us. I take for

Nineteen years a lease, and not alienation.

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" granted, they must have gone in some measure " upon a notion, that as upon a species of *præ-* " *sumpta voluntas* a tenant in tail may make a lease " for nineteen years, (whether with grassum is " another question), the Duke of Queensberry could " 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 endu- " rance can or cannot be said so to be) to be an act " of necessary and ordinary administration, necessary " for the cultivation of the land, that such a lease is " good. The Court seems to hold that doctrine " somewhat upon the principle which the courts of " law in England have applied to leases granted by " tenants in tail before the statute * about their leases, " but with this difference, the Courts in Scotland I " understand held the nineteen years lease to be " good, as of the ordinary endurance; upon the " grounds of policy and husbandlike management of " the estate, the Judges in England would not hold " a lease made by a tenant in tail for a term that " endured beyond his life to be *ipso facto* void, but " they would hold it voidable, if the heir of entail " chose to have it voided;" and upon this sort of expression falling from me, it has been supposed that I had totally forgotten the difference between the heir of tailzie in Scotland and the heir of entail in England.

Difference between heir of entail and heir of tailzie.

That an heir of tailzie in Scotland differs from an heir of entail in England in some respects, could not be unknown to me. An heir of entail in England has an estate that may endure for ever; an heir of

* 32 Hen. 8, c. 28, s. 1, 2.

tailzie in Scotland is the absolute fiar of the estate. Undoubtedly the whole fee is in him for the time. Those who may take after the heir of entail in England are considered as being remainder-men, having part of that fee which is vested only between the English heir of entail and the remainder-man. But since the whole fee, after the heir of tailzie is served heir of tailzie, is in that heir of tailzie for the time being, I ask, how it is that a lease beyond nineteen years is bad, and a lease of nineteen years good? It appeared to me impossible to decide, with any sort of justice, that there was any thing in the word *nineteen* that would make that lease rational, or that there was any thing in the words *fifty-seven*, or in the words *twenty-seven*, that would make the lease irrational. In every text writer, and in all the decisions in which it is stated that a *long* lease is an *alienation*, it is put on the ground that it is a dealing with the estate which is not for the proper and necessary management of the estate; but when they repudiate the longer leases as not being necessary for the proper management of the estate, and when they do that in the case of estates tail as well as other estates, to be sure I was led to think, that when they gave that reason for the destruction of long leases, they meant to say, that the short leases they sustained were to be sustained, because that reason which destroyed *long* leases did not apply to *short* leases. That is the only rule which I can find; and I was perhaps misled by the manner in which our own books treated this matter about the leases of tenants in tail, where they seem to have gone upon very much the same principle.

Long lease void, because not for necessary management.

This principle not applicable to short leases

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In a Treatise upon Leases, which I believe was written by Lord Chief Baron Gilbert, and certainly is one of the best compositions on leases we have in our law, he says, "If a tenant in tail, after the "statute *de donis*, had made a lease for years, and "died, this lease was not absolutely determined by "his death; but the issue in tail was at liberty "either to affirm or avoid it, as he thought fit; and "the reason why such leases for years were not "holden to be absolutely determined by the death "of the tenant in tail who made them, was either"—(see now how near this comes to a Scotch tailzie)—"because they were drawn out of an estate "of inheritance, which by possibility might continue "for ever; and this was but a reasonable liberty "given to the issue in tail, because it might well be "supposed that his ancestor was not qualified to "keep all his possessions in his own manurance and "occupation, but must necessarily let them out to "farmers and husbandmen, who, by their skill and "understanding in the arts of agriculture and hus-"bandry, would be best able to preserve and im-"prove the soil, and by their yielding an annualrent "or income to the lessor or tenant in tail himself, "would enable him equally to provide for the neces-"sities and exigencies of himself and his family."

Rule of English law as to leases granted by tenant in tail, after the statute *de donis*. *Bacon's Abridg.* tit. Leases.

Our Judges, who have not the power which belongs to the Judges of the Court of Session, upon this principle of policy would not hold the leases absolutely void, but voidable. The estate tail, being an inheritance which might endure for ever, was an estate out of which a nineteen years lease might be drawn. If the issue in tail, or those to take after

them, chose to complain of the lease, the Judges held it void; if they did not complain, upon that sort of policy which is, it seems, more open to the Court of Session to act upon than our Judges, they held them voidable. It was in this way I was led into this view of the case, whether it was a proper or an improper one.

Opinion of Sir Ilay Campbell as to leases under tailzies and the stat. 1449.

A paper was handed up to us, stating a great deal both with respect to leases and with respect to grassums, from the same learned person, Sir Ilay Campbell. You will see his authority both for and against any opinions that may be expressed to you to-day; and I consider it a document which sustains again the doctrine that long leases are bad, and that short leases are good. That imposes upon us the task of finding out what are long and what are short, and impels us to find the principle upon which the one is held *good*, and the other is held *bad*. In that paper it is stated, that "a lease with-
"out an ish at all is not good against singular suc-
"cessors, because it is truly not a lease, but an
"alienation of the subject, in an incomplete per-
"sonal form, which cannot be sustained against an
"infeftment. Suppose then that it is for a limited
"term of ten millions of years, can this be sus-
"tained?—It is impossible. This may be said to
"be an extreme case on the one side, and a lease
"for two or three years is an extreme case on the
"other side. The thing desiderated is to fix a
"precise line. This is a hard task to be imposed
"upon Judges, and is much fitter for the Legislature;
"but till a new law is made, they must necessarily
"exercise their powers of discrimination according

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" to the best lights they can obtain upon the sub-
" ject. The act of the 10 George III. certainly
" does not decide the question, because it relates
" only to cases of entailed property where the taillie
" contains special clauses limiting the power of
" granting leases to a small number of years ;"—(I doubt whether that is correct ; because if it was intended that that act should apply only to such cases, there should have been a provision limiting its operation to such cases ;)—" but it contains a
" principle which deserves to be attended to, viz.
" ' We are willing to extend your power of leasing
" under certain conditions beneficial to the entailed
" estate ;'—(Now what the meaning of this act was, I think Sir Ilay Campbell must know as well as any man in the kingdom ;)—" but not beyond a certain
" moderate and reasonable endurance ; because if
" you go farther, this might be held as bordering
" too nearly upon alienation, and exceeding the
" ordinary power of rational administration. Thirty-
" one years or two lives are generally reckoned very
" moderate terms, yet the Legislature seems to have
" been afraid to go farther, even when the interest
" of the entailed estate was to be forwarded, unless
" in the case of building leases, which were to be
" allowed for ninety-nine years. It was upon this
" ground that I could not venture, in giving my
" opinion as a Judge in the first of these Queens-
" berry cases, to go farther than thirty-one years as
" a moderate endurance. I shall be better pleased
" with thirty-eight ; neither should I object to fifty-
" seven years, in cases under the act 1449 ; but to
" go "—(Now see the notions of this great and

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experienced Judge, with respect to entailed property, the absolute dominion over which is supposed to belong to those in possession of it)—" but to go " that length in cases of entailed property, would " in almost every such instance be over-reaching " the life of the succeeding heir, which does not " seem very consonant to the rational object and " proper meaning of an entail;"—and then he proceeds upon the act of 1449, saying, (and this is matter of authority), " see the 19th of February " 1771, reported in the late volume of the Faculty " Decisions, where there is a good deal of discus- " sion upon the subject*. The case of *Jordanhill* † " is too shortly stated by Lord Elchies. The weight " of his authority is great. He lays it down as the " opinion of all the Judges in his time, that a lease " must not exceed ordinary duration, to be pro- " tected against singular successors by the act 1449; " but he still leaves it unexplained what *is ordinary* " *duration.*"

In another part he states, that he can find no resting-place until he comes to thirty-one years, or two lives in being at the time of making the lease; and that none of the old lawyers framed out a tack of thirty-two years, because there it seems you get beyond the power of an heir of entail.

Opinion of Sir Ilay Campbell, as to grassum.

He then proceeds to the consideration of the grassums. His authority is undoubtedly of great importance in this matter; and it is quite decisive as to his opinion. He says, " As to the question now " raised about grassums, it is entirely new to me.

* Dict. of Dec. 15200.

† Decisions, tit. Tack, No. 18.

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" I had always considered it as indisputable, that so " long as a tack was a tack," (and whether a 999 years tack is a tack, is a question which must be decided in the cause of *Elgin* v. *Wellwood*; but you see that this learned person has thought it might be a question, whether a tack was a tack), " the pro- " prietor, whether entailed or not entailed, might " let his farm as he pleased, and under any con- " ditions he chose to annex, taking care always not " to lower the current rent, to the prejudice of the " heir of entail." I remark again upon this passage as I pass along, that in the course of the former argument at your bar, neither authority, text-writer, case, nor dictum was heard, to assert that the heir of entail could let down the rent. I speak of cases where there is not authority under the entail to do it. It seems now, that is become matter of question. It is grave matter of question, for as there are a great many entails, I apprehend, (I think it right to use a word which shows that I do not mean to assert it, but only to state my apprehension,) in which *long* leasing would be held to be prohibited by the word " alien- " ation," if under such a word short leases, which would not be alienations under the distinction which has been pointed out, may be made for any rent just higher than that which might be considered as an illusory rent, what would be the condition of persons having estates tail. It becomes material therefore to consider whether this can or cannot be done; for whether you call it implied prohibition, or whether you call it want of power, or whatever you call it, the incapacity to do it must be founded in some principle connected with the administration of the estate, if

Where there is no authority under the entail, the heir cannot lower the rents, except in case of necessity. *Semb.*

an heir of entail has not this power, except in cases where it is necessary. No person entertains a doubt, that if an heir of entail could show, that when he let down the rent he did it of *necessity*, that would not be a case in which it would be said to be wrongly done; but supposing he cannot let down the rent in a case in which it is not necessary he should let down the rent, then the next question is, What is the principle upon which he is prohibited from letting down the rent? It must result from this principle, that those who are to enjoy the estate which he is bound to take care of, shall not enjoy it in a state less beneficial than they would if the rent was not let down; and that proves the principle, that the heir of entail is bound at least to pay some attention to what is called the *rational* and *due administration* of the estate.

If the heir of entail granting a short lease cannot lower the rent to one degree above an illusory rent, that is on the principle that he must administer the estate fairly.

The paper then proceeds to state another principle, which likewise deserves attention on account of the authority from which it proceeds: "By the current "rent I mean that which has hitherto been ob- "tained, not a future possible rent which might be "got by varying the stipulations, and rejecting all "entry-money, or other advantage to the heir in "possession. The maker of an entail might no doubt "prohibit grassums;" (and there are unquestionably several entails in which grassums are prohibited; I take those to be of very modern date, when compared with the entails under our consideration, and stated in the cases before the House); "but even "this would not always benefit the future heirs; for "still the heir in possession might decline to raise "the rent, and it would be extremely difficult to

Opinion of Sir I. Campbell as to current rent and grassum.

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" force him, or even to prove the fact of grassum " after his death." Then he takes notice of the decisions which have been made in the Court of Session upon the subject of grassums, and says " he " is at a loss to see the ground of a question ; for if " the tack be too long it will cease to be a tack, and " even without a grassum, it could not be sustained; " if within the bounds of a tack, it must be sustained " whether grassum or not."

He afterwards states, that this is the result of his experience upon the subject : " The question, What " is a long lease participating of the character of " alienation, and what is moderate, amounting to " *administration* only, is no doubt attended with " difficulty, because the limits have never yet been " precisely drawn ; but the question of grassum is of " a very different nature, and it is astonishing to me " how it should ever have been made a question at " all. I have been now upwards of sixty years em- " ployed in studying, reading, practising, hearing " and determining upon all sorts of questions in the " laws of Scotland, and I declare I never heard from " the mouth of any lawyer, old or young, or any " Judge, nor ever read in any book, nor figured in " my own mind till now, that an heir possessed of " an entailed property, was or could be under the " smallest restraint as to taking grassums upon " the renewal of his leases, the entail itself saying " nothing to the contrary, and the former current " rent under a lease, which perhaps had been granted " by the tailzier himself, *not being diminished* ;" (so that his opinion certainly is, that where there was nothing said about it, the rent could not be

diminished.) "Tailzies very often say the rent "shall not be diminished; and this is clearly proper, "because otherwise it might be unfairly done, and "the tailzie rendered illusory. One instance oc- "curred where an entail prohibited raising the rent, "5th February 1794, *Moir* *. This was a mere "whim, and laughed at by the Court, and it was "got quit of upon a specialty." Then "the utmost "length that any tailzie case has yet gone, is to "prohibit taking grassums; and even this has not "been done in many instances, and the effect of it "is merely to serve as an inducement to let the "farms, not by public auction to the highest offerer, "but in a rational way, and for such an advance of "rent as may with ease be obtained by a prudent "landlord acting discreetly in his own affairs. In "this way alone it is practicable, without involving "the management of an estate in the greatest pos- "sible confusion."

This difficulty has been raised very high in argument. It has been said, no heir of tailzie can know, and no other person can know, when he lets for the best and most improved rent. That the difficulty of *knowing* that, is such that you cannot adopt it as a principle. An English lawyer may think there is no great difficulty in matters, in which those who are experienced in the Scots law think there can be nothing but difficulty. There is not a single marriage-settlement in England, that has been drawn for some centuries, where the tenant for life has not a power of leasing, and that power is given to him to lease for the best and most improved rent, and the lease is void if not so made; and yet I believe I

Power of leasing in English marriage settlements at best and most improved rents.

* Dict. of Dec. 15537.

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may challenge the experience of the oldest persons in Westminster Hall, to point out three or four instances of leases being held void upon that restriction. Our Courts have said, the best evidence that a man has let for the best and most improved rent is, that he has taken no more himself than he has taken care those who come after him shall have. We may trust to the inclination of mankind in general, to get as much as they can get, and if the tenant for life provides for those who are to take after him, as he has provided for himself, (to be sure he may be under mistake as to them and as to himself, and he may take too little, but it is not very likely he should expose himself to that mistake, or willingly take too little,) this throws a burthen on those who mean to quarrel with such a lease, to prove that there was in the transaction that want of ordinary prudence which shows an inattention to the prescribed terms under which he was to let the lease. *Primâ facie* a lease has been always held to be good against remainder-men, which made for them the same provision as for the tenant for life; and I believe, in ninety-nine cases in a hundred, that is the safe principle of decision. If the principle of leasing, either under powers of leasing in English deeds, or under the declared right of leasing in Scotch tailzies, does in law depend upon the lease being made with a due and rational attention to the administration of the estate, whatever difficulties there may be in applying that principle, you must come to the question, whether the lease, or whatever it is, is made upon the principle on which the law of Scotland will decide for its validity?

Donee of power taking same rent for himself as for those in remainder, there is a presumption that it is the best; the burden of proof that it is not so, is thrown upon those who impeach the lease.

If due administration is the principle of decision, it must be applied notwithstanding the difficulty of the rule.

I will go no farther in the statement of this paper

there appears in it to be great authority in favour of grassum; and it helps to show what is the opinion of the Judges and lawyers of Scotland upon alienation, as being or not being the result of tacks of longer or shorter duration; and, as far as it goes, to show the principle upon which a prohibition of alienation has been held to prohibit tacks of a long duration, but not of a short duration.

The act of the 10th of Geo. III. is intituled, "An act to encourage the improvement of lands, tenements and hereditaments, in that part of Great Britain called Scotland, held under settlements of strict entail."

10 Geo. 3. Title.

The recital is in these words: "Whereas, by an act of Parliament of Scotland, made in the year 1685, intituled, 'An act concerning taillies,' all his Majesty's subjects are empowered to taillie 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; and which taillies, 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; and whereas many taillies 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," (the printing is, *or* for a small number of years only, and the policy of the act is to encourage the improvement of lands, &c.) "whereby the cultivation of land in

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" that part of this kingdom is greatly obstructed, " and much mischief arises to the public."

Upon this recital the act incapacitating those whom it prohibits by general words, or if not by general words, by the fact that they were either permitted to make particular leases, or prohibited from making other leases, goes on to provide, " that it shall and

10 Geo. 3, enactment.

" 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 person, 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."

Here the Legislature seems to consider a lease for fourteen years, and the life of one person, or a lease not for any certain number of years, but for the lives of two persons, or a lease not for any life or lives, but for thirty-one years, as being in some respect equivalent to each other in the ordinary and proper management of a Scotch estate. Then if they are made for two lives, there is to be a special clause about inclosing, &c. and if for nineteen years, the lessees are to fence and inclose the lands; and every lease of above nineteen years is to contain certain clauses for the proper administration of the estate, which it is not necessary for me here to mention: " And

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10 Geo. 3, conditions of lease.

" all leases made or to be granted under the autho-
" rity of this act, 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 re-
" served 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 determi-
" nation 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."

Here it must be admitted, that the Legislature had in contemplation the practice of letting, under the rent last received; that they had in contemplation a species of letting with grassum, fine or foregift; that they had in contemplation that species of tack which occurs in this case, a letting in fact before the determination of a former lease; and that they likewise had in contemplation, that if a man let a lease under this act before the former lease was expired, and more than one year before the expiration of that former lease, it was an addition to that former lease, which under the authority of this act would be void.

Then follows this clause, which I apprehend must be supposed to take out of the authority of this act of Parliament the cases referred to in this clause: "That
" if any taillie shall, either expressly or by implica-
" tion, 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."

This clause, in judicial construction, can mean no

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more than this, as it seems to me, namely, that persons who had larger powers of leasing than are here given, shall not be prejudiced by the enactment of this act.

Proviso as to improvements.

The act then proceeds to that part of it which relates to the encouragement to lay out money. In one of *the cases of Elliots* *, where a tenant of entail had laid out money on improvements, and where by letting leases he had by grassum got into his pocket that sum of money which he had expended in improvements, and afterwards his estate tailzie ceased, and another person under the effect of the entail came to the enjoyment of the estate; the Court of Session held, that under the true construction of the clause which followed, though that person had received in the shape of grassum so much for the improvements which he had made upon the estate, yet that he had a title under this act, as against the person who succeeded him, for three-fourths of those improvements, to be paid out of the rent reserved to the persons who were to succeed. Taking it for the present to be a right decision, consider what the effect of this act of Parliament is, if grassums are to be taken. The result would be, if a tenant under the tailzie should lay out a large sum of money in improvements, (not exceeding such a sum, thē act puts a limit to the amount of the improvements, but supposing that sum of money to be considerable, as in many estates it will be), if he afterwards lets the estate, getting a considerable sum as a grassum, in a case where he cannot let with a diminution of the rent, that a person succeeding to the estate is to pay such proportion

The decision that three fourths of expenditure for improvements to be paid by the succeeding heir out of the rent reserved, over and above grassum, questioned.

* Trustees of Sir F. Elliott *v.* Sir W. Elliott, 1793, Jan. 22. Dict. of Dec. 15622.

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of those improvements out of the small rent reserved by a man who takes a large grassum. It is difficult to say that such can be the right construction of this act of Parliament.

Harestanes, whether 57 years a good lease.

With respect to the lease of Harestanes, which is for fifty-seven years, the question is, whether it can be supported, considering the principles on which this House has held a ninety-seven years lease bad, or upon the principle upon which, as it appears to me, they have always acted; (I mean in judgment—practice is a different matter)—can such a lease be sustained upon the principle of distinction between long leases and short leases? The Court of Session is of opinion that it is a term which amounts to an alienation, and cannot be supported. If your Lordships are of that opinion, which I humbly state to be mine, that would dispose of the lease of Easter Harestanes. By the list of leases which has been laid upon your table, with a view to show what grassums have been taken upon the Queensberry estate, it appears that it was at a very late period indeed before any body dealing with that estate got, even in a very few solitary instances, to a lease of nineteen years. They were of very short duration; and so were almost all the leases contained in the list laid before your Lordships with respect to grassums, leases of very short duration. They show, that the persons dealing with that estate thought they were justified in taking grassums, but not for leases of sixty, seventy, ninety, or a hundred years; and although there are to be found in Scotland very long leases; I find that with very few exceptions in judgment, such leases have not been sustained.

Held void as an alienation.

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It has been asked, if you do not sustain a lease for fifty-seven years, will you sustain a lease for fifty years? will you sustain a lease for thirty years? will you sustain a lease for twenty-seven years? Or, to put the question as the case upon your table requires us, as to what we call the alternative leases, what will you sustain, if you do not sustain fifty-seven? Sir Ilay Campbell answers that question; but if I am to answer, I resort to the principle which cuts down one of those leases, because it is inconsistent with the fair and rational administration of the estate. I should be disposed to say, that with reference to ninety years, or such leases as are mentioned in the act of Parliament, it would be a lease of too long duration. If you ask me, why I say so, I can give you no more satisfactory answer, than that I think it is a rational application of the principle upon which they have held leases too long not to be good. But I do not know, with respect to this, and every other part of the case, any thing which appears to me to deserve so much and so strong recommendation to have these matters all settled by Parliament, as the state in which the power of leasing in Scotland exists.

Whether 57, 30, 27 years, or what number of years, is too long for a lease, is to be decided on the principles of fair administration.

The uncertainty shows the necessity of legislative interference.

In respect of other leases, it becomes extremely important that some such measure should be adopted: it would leave the law of Scotland in a cruel state, if on the one hand grassums cannot be taken in which the families of heirs of entail may be interested; I mean their widows and their children; for it is impossible, looking into the matter historically, to deny that this method of taking grassums has been frequently resorted to, to enable the heirs of

entail to make provision for wives and younger children, for whom, as in the Buccleuch cases, it would be found extremely difficult, on the construction that shuts out grassum, to make provision. On the other hand, it appears to me equally clear, that if grassums can be taken in the way in which they have been taken, the result may be, (and more especially where there is no prohibition that requires keeping up the old rent, and any rent may therefore be taken,) the consequence must be, unless there be some reasonable provision made about grassums, that the heirs of entail may be disappointed of their whole provision, supposing every one can so act with respect to his own posterity under a charter made by his ancestors for his and for their provision. Whether that is a desirable consequence—whether entails ought to be thus defeated—is a distinct question.

Opposite inconveniences of prohibiting and permitting the taking of grassums.

The power of judges, in this respect, may be doubted. Upon that subject, as it applies to English law, I have formed an opinion, which leads me to think, that the judges of this age, in England, would not have been permitted to get rid of the statute of English entails, as judges of that age did soon after the passing of the statute *de donis*.

Power of Judges to affect statutory entails, on grounds of policy, questioned.

The next subject is the alternative leases. The Division of the Court of Session, which has decided upon the alternative leases, seems to have been of opinion, that those leases, in the first instance, might be good for twenty-one years, or that they might be good for nineteen years; or in the first instance, for nineteen, and then for twenty-one years, (I do not recollect which) were it not that they were

Alternative leases void for uncertainty.

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affected by fraud. I cannot bring myself to think that such alternative leases can be good. The action of declarator has been stated in the papers before us, and most justly and truly stated, to be an extremely useful proceeding in the Court of Scotland. It enables a person to have it declared, whether there is or is not such a lease, as he contends there is, and as other persons contend there is not. Upon such a proceeding, it seems to have been thought, if the late Duke of Queensberry grants a lease for thirty-one years; if that will not do, for twenty-nine years; if that will not do, for twenty-seven years; if that will not do, for twenty-five years; if that will not do, for twenty-three years; if that will not do, for twenty-one years; and if that will not do, for nineteen years, agreeing also, that if the House of Lords shall decide in the Wakefield case, or in any other case, that a ninety-seven years lease is good, they shall not have a lease for nineteen, or thirty-one, or any other fixed period of duration, but for ninety-seven, or for fifty-seven, or the longest which the Court of Session or the House of Lords may approve, that such a lease could be good, if it was not affected by a general fraud—a general device, founded in fraud; which that Division of the Court of Session imputes to all those cases. Now, putting that general fraud out of the question, it appears to me to be a most extraordinary thing, that a lease of such a nature as this, with such an indefinite ish, as a contract of this kind provides for, can be a good lease. If it can be a good lease, I have no conception how persons are to deal with each other, in respect of a lease of this sort, supposing no other person in-

Action of declarator as to right, a useful proceeding in Courts of Scotland.

terested but the landlord and his tenant; for the rent of the lease frequently varies, according to the extent of the term which the party grants; the rent is set with express reference to the term. We have á rule in Westminster Hall *, that if a man has a power to grant for ten years, and he grants for twenty-one, the lease, although bad for the twenty-one, will be good for the ten; because, there both parties have before them a written instrument, which gives the power; and they both know what is the utmost extent for which it can be good. But how are we to deal with a contract of this sort, made liable to such alterations, where the contract itself is founded upon the necessity of limitation?—What is to be the state of law and property in Scotland, if the contract itself does not furnish the means to determine what lease is either to bind the lessor, or those to come after him, as personal representatives, or as real representatives, or the heirs of tailzie, in the case of a lease rental?—if no person is to know what burden there is upon that estate, in the shape of a tack, or rental, until the question has been pursued, (as this lease provides it shall be,) through the Court of Session and the House of Lords. According to English law, there may be a good lease for ten years, if *A. B.* shall not come from Rome in ten years, or for twenty years if *A. B.* shall not come from Rome in twenty years; but then there is a certain ish or determination in these cases; for you know it

English leases under a power void for the excess only.

Leases for a certain duration subject to be defeated upon a contingency.

* In the Courts of Equity. Campbell *v.* Leach, Ambler, 740; Shannon *v.* Bradstreet, 1 Schoales & Lef. 52. Excessive leases are held void at law. Hardres, 398.—As to the authority of Leach *v.* Campbell, see the observations of the Lord Chancellor in his judgment upon the case *Ex parte* Smith, 1 Swanst. 336.

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must be at an end, on that certain fact taking place; but I cannot find out the principle of law upon which such leases can be held to be good.

Question as to grassum.

Supposing these leases to be good in other respects, the next, and the most important question is, whether the taking a grassum is that which leads to the conclusions, which are to be found embodied in the interlocutors of the First Division of the Court of Session, with respect to the March and Neidpath estates; or to those which are to be found embodied in the interlocutors of the Court of the Second Division, with respect to the Buccleuch estate. What the principle is, upon which the First Division of the Court proceed, we know; for they, in their interlocutors, state expressly the grounds and principles upon which they proceed. What was the principle upon which the Court of the Second Division proceeded, is to be collected, as well as we can collect it, not from the terms of the interlocutor, but from such conclusion as may be found to arise out of the opinions delivered upon the subject. That interlocutor does not enter into a detail of the grounds of the opinion, in the same way as the interlocutor does with respect to the March and Neidpath estates.

Conclusions and reasons of the first and second division of the Court of Session.

Different expressions in the different deeds of entail.

The Buccleuch entail wanting the word "alienate," whether lease with grassum prohibited.

Supposing the doctrine to be against grassum, you cannot apply that doctrine to the Buccleuch property, unless leases with grassum are prohibited in the true construction of that deed of entail, although the word "alienate" is not in the deed. If you are of opinion, that the operation of that deed of entail would be the same without that word as with it, then the question as to grassum arises with

respect to the leases made under those deeds respectively. The question must be considered, having regard to the different expressions, and the import of the different expressions which are to be found in those deeds, and as far, and no farther, than legal implication in construction will authorize you to attend to the several provisions, as manifesting the general meaning of the authors of these deeds of entail.

Question as affected by expressions and provisions manifesting the intent of the authors of the entail.

The Neidpath entail provides, "that it shall be "noways lawful to the heirs of taillie, nor any of "them, *to sell, alienate, wadset, or dispone* any of "the said haill lands," and so on, "or any part there-"of, nor to grant infeftments of liferents, nor an-"nualrents furth of the same, nor to contract debts, "nor do any other fact or deed whatsoever, whereby "the said lands and estate, or any part thereof, may "be adjudged, apprised, or otherways evicted from "them, or any of them, nor by any other manner of "way whatsoever, to alter or infringe the order and "course of succession above-mentioned." And after the irritant and resolutive clauses, by a subsequent clause "it is provided, that notwithstanding of the "irritant and resolutive clauses above-mentioned, it "shall be lawful and competent to the heirs of taillie "a-specified, and their foresaids, after the decease of "the said William Duke of Queensberry, to set tacks "of the said lands and estates during their own "lifetimes, or the lifetimes of the receivors thereof; "the same being always set without *evident dimi-*"*nution of the rental.*" There is then a power of providing for their wives, and for their younger children.

Provisions of Neidpath entail.

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In the other entail, after stating what it shall be lawful for the entailer himself to do, it proceeds to state, "That it shall not be lawful to the said Lord

Queensberry entail.

"Charles Douglas, and the heirs-male of his body,
"nor to the other heirs of tailzie above mentioned,
"nor any of them, to sell, wadset or *dispone* any of
"the foresaid earldom, lands," and so on, "nor any
"part of the same, nor to grant infeftments of
"liferent or annualrent out of the same, nor to con-
"tract debts, nor do any other fact or deed whereby
"the same, or any part thereof, may be adjudged,
"apprised, or anyways 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." These words, "any manner of way
"whatsoever," appear to me to have relation to every thing tha tis before prohibited; and when in an antecedent part of this entail, it is stated, that the author of this tailzie may *dispone* in any manner of way whatsoever, and the others are here prohibited to *dispone* in any manner of way whatsoever, it appears difficult to say, under such expression, that the word "dispone," meant only to prevent what is technically called disposition; and these words, "except so far as they are empowered in manner "after mentioned," apply to a special prohibition, among other things, of granting leases, which special prohibition is in these words: "That the said Lord "Charles Douglas, nor the other heirs of tailzie "above specified, shall not set tacks nor rentals of "the said lands for any longer spaces than the setter's "lifetime, or for nineteen years, and that without

Meaning of word "dispone" ascertained by the context.

" diminution of the rental, at the least, at the just " avail for the time; nor to do any other fact or " deed, civil or criminal, directly or indirectly, by " treason or otherwise;" and so on.

The provision to be made for spouses by this deed went to the extent of a thousand pounds for one—to a larger sum for two—and if three, it might amount to about two thousand three hundred pounds; and there was likewise a provision for daughters and younger children, amounting to the sum of fourscore thousand pounds Scots, which would be between six and seven thousand pounds sterling.

Such was the nature of the instruments; and the question arises, (regard being had to the provisions contained in them,) whether, according to the law of Scotland, grassums could or could not be taken upon such leases as the Duke of Queensberry has thought proper to grant?

Practice as to leases of private property.

With respect to the practice as to leases of private property in Scotland, the counsel for the respondents have laid before you a list of leases which have been made with grassums. Those leases, I think, with respect to their duration, you will find to be generally very short; some of them certainly of considerable length; and with respect to the periods at which those leases have been made not going so far back by any means as the year 1685, when the statute of tailzies was made.

Arguments as to the alleged practice.

Those who encounter the argument drawn from this practice, say, that the list is not confined to leases of entailed estates, but that, on the contrary, by far the greater part of the lands mentioned seem to be unentailed; and it may be worth attention to look into

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the list, with a view to see how far this observation is founded in fact. They say further, that a considerable number of the instances in the list are quoted without any statement except that the defenders are not informed concerning them. They further state, that in almost the whole, no more is taken by way of grassum than one year's value. In answer to which, this observation arises, and has been made, that the question, whether a grassum is to be taken or not, does not depend upon the quantity of the grassum—that if a large grassum is not lawful, a small grassum is not lawful; and that again is met with this observation, that the fact that no attempt has been made to set aside deeds which have been made partly in consideration of grassum, may be accounted for by the circumstance that the grassum was small.

Practice of taking grassum in the Queensberry estate by tutors in high judicial situations.

With respect to the leases of the Queensberry estate, it certainly does appear that, although this estate was entailed in 1705, grassums were taken within a very few years of that date; and that the grassums continued to be taken upon it, (the leases being short, and the grassums in general not being large, except in some instances), down to much later times; and it is to be observed, that this practice with respect to the estate of Queensberry, carries with it the authority which belongs to the circumstance, that two of the tutors or curators, or whatever they may be, of the Duke of Queensberry for the time being, letting these leases with grassums, were persons in the highest situation of the law in Scotland.

To answer the observation that these practices

passed without question, the appellants state, that it does not appear that the substitutes of entail, or any but the immediate successor, had an interest during the life of the actual tenant to question the lease, and that if questioned, the irritancy might be purged, with the consent of the tenant, so that the next heir would gain nothing during the life of the heir in possession. On the other hand, it is said, that if the taking grassums is unlawful, they may still be purged, notwithstanding the death of the Duke of Queensberry—a proposition which may call for your judgment. The appellants further represent circumstances which might induce the next heir not to question the lease—first, during the granter's life, it might be doubtful whether any declaratur of irritancy could be maintained, although grassum were taken, if the lease were short; for the tenant's life might endure beyond it, and that he might plead in defence; secondly, he might be a near relation of the tenant, and perhaps answerable in his own person to indemnify the person who might have suffered by the supposed violation of the entail; thirdly, he might have a wish to take grassums himself;—and when I come to state the facts, you will see that the weight which belongs to such a suggestion is, that his predecessor may have left his disposable property to near connections, and the succeeding heir of entail could not therefore prosecute the irritancy without affecting such relations, if he were not himself, out of assets descended to him, answerable to repair the loss suffered by the effect of the irritancy. This thing happens perhaps nineteen times out of twenty in such successions; and they point out in this list,

Arguments as to the practice appearing by the lists.

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instances in which it has happened, and in which they therefore insist, that the person who could have challenged on account of grassum; had been prudent in not challenging on account of grassum, for that he would only have taken the burden of the grassum off the entailed to the unentailed estate, which would have been liable to it. Upon the whole, they say, therefore, that the list is by no means a formidable list on the head of the practice.

Practice of appellant and his family.

To this I think must be added, that the persons who now complain, Lord Wemyss himself, or that family at least, granted leases with grassums. On the other hand, it must be admitted, that great part of the entailed estates in Scotland do not appear, by any evidence we have before us, to have been in the hands of persons who have let leases for grassums. This circumstance, however, again, is to be taken into consideration with regard to the defenders, that there may have been very great difficulty on the part of those who were to endeavour to find out what had been the practice as to those entailed estates. It is quite obvious, undoubtedly, that the very importance of this point would lead persons to take a great deal of care, how they afforded the means of information to those prosecuting this cause, as to the circumstances in which their own estate stood.

Difficulty of access to cases upon entailed estates.

Practice as to church and crown lands.

On the head of practice, the respondents again refer to the practice with respect to Crown lands, and the practice with respect to Church lands. It is not my intention to go through all the reasoning upon that subject. I think it may be stated as to Crown lands, and also as to Church lands, in

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in that period the statutes* had not pointed out that the possessor was to reserve the rent subsisting at the time of his entry—if he did reserve that rent, he was not prohibited; unless you can argue from the case about teinds, as the Court of Session has done †; and with respect to Crown and Church lands, there has been a degree of irregularity in the management of them, which does not make the practice with respect to them of much importance. It is a consideration of some importance, however, because, particularly with respect to the Church lands, a practice did obtain in Scotland of taking grassums, which now obtains in England, and I believe in Wales, under the name of fines, not very much to the benefit, or with the approbation of those who have the good or bad luck to succeed receivers of those grassums or fines.

Irregularity in practice as to church lands.

They have also stated many decisions of the Court of Session in Scotland, in which they represent that the right to take grassums has been established, and they cite a great many instances in which, as far as they go, there has been a general impression in the Courts of Scotland, in favour of the practice, as far as it is established by what the Judges have said, and what they have done, and what they have forborne to do or to say. In the case of *Sir Archibald Denham* v. *William Wilson*, ‡ writer in Edinburgh as that case is stated in the papers on your table, and taken, as I understand, from the papers in the cause, "Sir William Denham of Westshiell, of the

Decisions in favour of grassum.

Case of Denham *v.* Wilson, 15 Jan. 1761.

* As to the beneficed clergy under prelacies, by the Scots Stat. 1581, No. 101; and as to all ecclesiastical persons, including by name bishops, abbots and priors, by the Scots Stat. 1585, No. 11.

† See *ante*, p. 393–4. ‡ Dict. of Decis.

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" date of August 11th 1711, executed a deed of " entail of his lands of Westshiell, and burthened " the same with an annuity of 4,000 *l.* to Dame " Katherine Erskine, spouse, afterwards Lady " Schawfield. The pursuer, upon the decease of the " late Sir Robert Denham, succeeded as heir of en- " tail to the said estate, and soon found it absolutely " necessary to bring a process against the defender, " who for some time had been Sir Robert's factor upon " that estate,"—(your Lordships will observe that), " —and likewise his agent and trustee, and had ob- " tained an assignation to the rents that fell due " during Sir Robert's life, to whom he had also " confirmed himself executor-creditor.—The pur- " suer was advised, that it was the duty of the heirs " of entail, out of the proceeds of the estate, to pay " the lady's annuity, and keep down the annual- " rents of the heritable debts of the tailzier with " which the estate was chargeable."

Implied prohibition on succeeding heir to keep down the annuities charged on the estate out of the proceeds, although there is no clause in the entail directing such payment. This is required on the principle that the interest of successors is to be regarded.

Whether you are to call it an implied prohibition, or whatever else you may call it, it appears to me to be admitted in the papers before us, that the succeeding heir of tailzie was to keep down annuities out of the proceeds of the estate, and that he was likewise to keep down the annual rents of the heritable debts of the tailzier, with which the estate was chargeable, although in the tailzie there was no clause which ordered him to do so; and those duties of keeping down the annuity and the annual-rents by the persons representing the estate, are duties which one may venture to represent, as founded in an obligation which has some relation to the interest of those to come after him.

The case continues thus: "It seems that Sir Robert's "plan was to render the estate of as little value as "possible to the next heir; for when the defender was "factor, whatever payments of these burdens was "made out of the rents of the estate, he, instead of "taking discharges, took assignations in his own "name; so that, had Sir Robert lived any number "of years longer, by this scheme, the succeeding "heirs of entail would have been quite cut off, and "the tailzier's intention totally defeated."

But the matter did not rest here; Sir Robert Denham also fell upon a new, and what, with submission, appears a most unwarrantable device, to disappoint the heir of entail of a considerable part of the proceeds of the estate for many years after his decease, by letting leases for which he not only took considerable grassums,—(your Lordships will be pleased now to advert to the specialty of this case,)—but also took bonds or bills from the tenants for part of their rents, payable by partial payments annually, for the same endurance with the tacks; to which bonds and bills it seems the defender had got assignation, and intimated the same some time after Sir Robert's decease.

When the process against the defender came before the Lord Bankton Ordinary, the pursuer insisted that the annual sums payable on these bonds and bills were part of the future rents of the estate of Westshiell, to which the pursuer, as heir of entail, had right, and therefore that his Lordship should, *ante omnia*, decern the defender to repay what he had uplifted since Sir Robert's death, by virtue of his assignation to these bonds and bills, and transfer

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the same to the pursuer in so far as not uplifted. His Lordship, of the date of July 14th 1758, was pleased to make *avisandum* to the Lords with the above point, and to order informations to be given in for both parties; and then on the part of the pursuer, "*Primo*, It is contended, that these bonds "and bills assigned by Sir Robert to the defender, "could by no means be effectually conveyed to him "for a longer endurance than Sir Robert's life; it "might as well be pleaded, that Sir Robert could "assign the whole rents of the estate for nineteen "years, the term of the endurance of the tacks, as "that part of the rents which is constitute by bonds "and bills, than which nothing could be more absurd.

Argued that these bonds, &c. not grassums.

"*Secundo*, That there was no room to allege that the "sums contained in these bonds or bills ought to be "considered as grassums, which heirs of entail are "frequently in use to take without challenge,— "seeing at letting the present tacks considerable "grassums were paid to Sir Robert, quite distinct "from these obligations, to the extent of about 300*l.* "sterling, and the amount of the sums in these same "bonds and bills comes to no less than 637*l.* 1*s.* 4*d.* "Scots per annum of rent, which at the expiry of the "tack makes a total of 11,524*l.* 8*s.* Scots, which "by this device the heir of entail would be dis- "appointed of, should this new invented plan meet "with success." Then they state, "that this is a "most illegal machination; for at that rate, sup- "posing an entailed estate should improve from "500*l.* to 1,000*l.* sterling per annum, nineteen "years rent of 500*l.* a year might be conveyed to "a stranger, in direct violation of the intention of

"the maker of the entail; a scheme which, at first "sight, appears fraudulent, and inconsistent with the "law, so long as entails are permitted to take "place in this country." Then they insisted, that these were to be considered as annualrents in the nature of discharges; and they proceeded to state upon the whole, and under the circumstances of the case, that whatever might be said about that which was paid at the commencement of the lease as grassum, it was, as with respect to these bonds and bills, to be considered as rent

On the other hand, it was insisted, that there was not the least pretence for this,—both sides agreed that grassum might be taken,—there was no point, therefore, brought before the Court as to that, but it must be admitted, that both sides agreed that grassum might be taken; and your Lordships will hear what the Judges said on that point; but Mr. Wilson said this in effect—This is a very strange claim you make, —for the result of it is neither more nor less than this—here are (I forget what number, but I think twenty-one) tenants, who upon the renewal of their leases, a dozen of them being in good circumstances, say, here is a grassum,—(this was an entail, where it was to be without a diminution of rental,)—here is a grassum, let us have our lease at the rent last paid;—the heir in possession takes the grassum from them.—With respect to other persons, not in quite so good circumstances as the former, they say we cannot pay down the grassum, but our grassum shall be so much, and we will pay you that, *de anno in annum*, till we have satisfied you the whole of it. The grassum, if it be legal, must be paid, it is said, at the commence-

In the Westshiells case, agreed that grassum might be taken.

Grassum *de anno in annum* upon credit by different payments in successive years.

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ment of the lease; but, argues Mr. Wilson, if it can be taken at the commencement of the lease, how can it be illegal for the parties to agree that the landlord shall give credit to the tenant for the grassum, till such time as it shall be convenient for the tenant to pay it; or that, instead of receiving that grassum in one payment, he will take it in different payments, in succeeding years; supposing, for instance, a person who could not part with his money, had been able to find some person to make up the money, and that other person had paid the money, and that the landlord had then given him back his bond to pay the grassum at a particular period, or at particular periods. This, it was contended, was in substance and effect precisely the same thing.

Opinions of Judges.

The Judges, as far as we have notes of their judgment, express themselves in the following terms:—My Lord Kames says, "A bond payable for sums "at the terms the rent is paid, is presumed a part of "the rent." Here it must be remarked, that the sums were not payable at the time the rent was paid; that is a mistake. "But in this case, we should not go upon "presumptions; a proof ought to be allowed, that "these bonds were granted for rents—these bonds "must be paid to Sir Archibald."

Lord Coalston says, "There is no fraud in this "case—a lawful act to take bonds for grassums, "as the heir of entail is not restricted in setting "tacks:" so that he considers all this as grassum. The bonds were taken for what he thought a grassum, just as much as any payments could in the consideration of the Judges be considered as having the character of grassum.

Lord Minto says, "The question depends upon "this fact, Whether this is a grassum or a rent." Mr. Justice-Clerk says nothing.

Then follows Lord Alemore, and what he states, will be well worthy your Lordships attention:—"A "deception of this kind is not unlawful, but if not "cleverly done, it cannot be sustained. Every "bungling operator is not fit to execute such nice "operations. This deception is not properly ex-"ecuted—this appears to be rent, not a grassum."

Lord Nisbet says, "This a grassum, not a rent; "it has not the qualities of rents—no hypothec."

Lord Auchinleck says, "These bonds rent, not "grassums."

Lockhart, the defender's counsel, observed, that the heir of entail could have discharged these bonds; he could not discharge rents.

Upon the report of the Lord Ordinary, "The "Lords sustain the defences of William Wilson; "defender, against that part of the pursuer's libel "which concerns the bonds and bills granted by the "tenants of Westshiell to the deceased Sir Robert "Denham, to which the said defender has right; "partly by assignation, and partly as executor decern-"ed and confirmed to the said Sir Robert Denham, "and remit to the Lord Ordinary in the cause to "proceed accordingly."

So that, in the first instance, the parties and the Court proceed upon the notion of grassum not being subject to objection. There was a very good reason for that: the Judges, one and all, were taking grassums themselves: even my Lord Alemore, who thinks the deception was not unlawful, so that it was cleverly

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done; but that here the operator was a bungler, and the payment therefore appeared to be rent, instead of grassum. Upon the whole, however, they were of opinion it was to be considered as a grassum, and they sustained the defences, as far as concerned the bonds and bills.

This was brought before the Court again; and it was argued, that this was an attempt to evade; that it signified nothing, whether the bonds and bills could be sustained or not; that it must be considered as a rent; and the Judges were finally of opinion, and came to this decision in substance—

Final judgment that grassum taken at the beginning of the lease is lawful, but if taken in sums annually paid in discharge of grassum, it is rent.

That if you contract for grassum at the commencement, you may take it, and keep it; and that the lease is a good lease, provided it be made without a diminution of the rental; but that, on the other hand, if you deal with a tenant, who cannot immediately pay you a grassum, and you agree with that tenant to take annually from him sums, which are in discharge of the grassum; in fact, those annual sums are not to be considered as grassums, but to be considered as rent; in other words, that the grassum must be presently paid, and you cannot give time, in the manner in which it is here stated, to pay the grassum *de anno in annum*. I understand that this case did not come before the House of Lords; but it is a case which deserves a great deal of consideration. It seems to decide, that if a sum of money, before or at the time of granting the lease, is taken as grassum, the heir of tailzie has no right to complain; but, if you can see from the whole transaction that the sum taken was reserved as rent, although expressly in discharge or satisfaction of grassum, then it must be taken as rent. But why, because to be paid in

Denham *v.* Wilson an authority requiring consideration.

—

If present payments are allowable as grassum, it is difficult to deduce from principle, how future payments in respect of grassum can be forbidden as rent.

future, it was to be taken as rent, appears to me a proposition extremely difficult to be deduced from the principles which must be supposed to have governed this case *.

There are several other questions, which we shall be obliged, I think, to put to ourselves, before we come to a determination of this case; and they may be put some of them in this way. It is said, that by the law of Scotland the heir of tailzie cannot make a lease, which is to reserve to himself, during the first five years of lease, 800 *l.* a year, and then to reserve, during the remainder of the lease, 500 *l.* a year; that the lease must not be more beneficial to the person holding at the commencement of the lease, than to those who are to take after him. Now, if that can be sustained as law, which is hardly denied, then this question presents itself: If a man cannot for the first five years of a nineteen years lease, take 1,000 *l.* or 1,500 *l.* a year for himself, reserving to himself, and those who come after him, 250 *l.* a year, for the remaining fourteen years of the lease—

Law of Scotland that heir of tailzie in possession cannot grant a tack reserving more rent to himself than to his successors;

but this is effected indirectly by taking grassum, which infringes the principle of the rule.

I may be wrong, but there does not appear to be a great deal of good sense in saying, he may do that *per indirectum*, which he cannot do *per directum*; that is to say, that instead of reserving the 1,000 *l.* a year, or 1,500 *l.* a year, for the first five years, he may reserve throughout the whole of the lease only 500 *l.* or 250 *l.* a year; and, instead of the 1,500 *l.* a year, or the additional rent for the first five years, he may take *in præsenti* from his lessee as much as that 1,500 *l.* a year, or the additional rent for the first five years, would amount to.

* *Vide post*, 465, the further discussion of this case.

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Supposing the meaning of the words, "without "diminution of rental," to be, that you might let at the last rent; I conceive it would be the same in point of law, even if we had no authorities so to inform us, that if there were no such words to be found in the Buccleuch entail, as "*the just avail at* "*the time*," you might lower the rent, stating the reason. Then, suppose the rent having been lowered, there is a third lease to be granted; what is the rent at which that third lease is to be granted? Is it the rent which was the last rent which had been so lowered; or are you to refer back again to that which was the rent before it was so lowered? I find, there is one case *—(it was not a case where the last rent had been diminished on a subsequent lease, but) where the tenant who held, had ceased to hold, and the land was taken into the possession of the landlord himself, and he held it for a considerable time.—If the value of land, in the last year in which he so held it, had been asked, and it turned out that the value of the land to be let was 1,000 *l.* a year; and, on the other hand, that the actual rent reserved, before that landlord took it into his natural possession, was only 500 *l.* a year—I understand there is one case, in which it has been held, that if the landlord chooses to let it again, he is allowed to let it, not at such a rent as the value at the period of his natural possession would justify, but at the low rent which the land was let for at the time when his holding commenced. If you consider what may be the effect of such a rule, I think you will see no small reason to doubt the principle upon which it stands.

Suppose the words "without diminution of the rental," to mean that the last rent may be taken, what is to be done where the rent has varied? as where the rent has been lowered of necessity upon a former lease, and afterwards the land is to be let, when the former value is restored, what is the rent to be taken?

Elliott *v.* Curries. Doubt as to the principle of decision.

* Elliott *v.* Curries, Fac. Coll. Jan. 16, 1798.

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L. C. 10 July 1819.

*In this case, the great and important question is, What is the effect of that thing, which in this case is called grassum, but which I apprehend must be called rent. With respect to the tacks made under this entail, sometimes inconsiderable sums were taken—one year's or two years rent, reserving sometimes the old rent, understanding the words, the old rent, to be rent recently paid before the lease is made. Upon this transaction, we are to decide what is the Scotch law applicable to the subject—we are to look at the practice—we are to look at the understanding of the Courts—we are to look at decision—and if an opinion should be ever so clearly entertained, that if the matter were *res integra*, it would be impossible to introduce the doctrine, that the heirs of tailzie may thus deal with estates; yet, if you find that doctrine at this day part of the law of Scotland; to any notion of the inexpedience of such law you ought to pay no attention, but to pronounce the law simply as you now find it to be.

The rules of law, although originally inexpedient, ought not to be varied.

On the other hand, as a lawyer, I do not shrink from stating, that there may be a great deal of practice in transactions of a particular nature; there may be a great deal of understanding, as to the legality or illegality of that practice; and there may be a great deal of decision, where the point decided is not the point in controversy; which understanding, it must be admitted, is important;

Practice, understanding, and extra-judicial decision, may be contrary to law.

* At this part of his address to the House, the Lord Chancellor observed, that in the March and Neidpath case, there were one or two of the leases expressly granted for the lifetime of the receiver, and the lifetime of the grantor; and that the question upon them would be, how far grassum affects them?

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which practice is strong; and it must be admitted, that that general understanding is important testimony as to what the law is, and that the *dicta* of Judges, and what they have taken for granted in decisions not upon the point, are of great weight also, as testimony of what the law is; but nevertheless, the law may not be as that practice, or that understanding, or those *dicta* would *primâ facie* import it to be.

Course and principle of decision as to teinds.

The present case affords a very strong and cogent illustration of the doctrine which I have been stating. You see in this case, that from a particular period, long before the year 1600, and down to the year 1732, it was the constant doctrine, and the uniform decision of the Courts of Scotland with respect to teinds, that they were to be valued upon the rent constantly paid, and without reference to grassums taken by the person to whom that rent was constantly paid. If any person had asked prior to the year 1732, what was the law with respect to teinds, he would have been answered, Who can doubt it? Here are the doctrines and the decisions of the Courts; and yet in the year 1732 the Court of Session itself decided, that all this practice, and all this understanding, and all these decisions, were not accordiug to the law of Scotland. I do not say, that the same principle as between the land-owner and the person who is entitled to the teinds, is to be applied in considering the effect of a deed of tailzie, as between the heir of tailzie in possession and the person to succeed; but I am only attempting to illustrate the observation, that both in England and in Scotland it has frequently occurred, that there is a great deal of practice, a

Practice, understanding and dicta, upon investigation, ascertained not to be founded in law.

great deal of understanding, and many *dicta*, and yet when the thing came to be investigated, that practice, that understanding, and those *dicta*, were found to be without foundation.

In the Wakefield case, former decisions founded on practice, &c. overruled.

With respect to long leases, what has been the practice in Scotland—what has been the understanding with respect to them—what have been the decisions sustaining them? It is but a few years since the Wakefield case was brought into the Court of Session, when they decided, that their practice, that their understanding, that their decisions were wrong; and when this House decided upon the question, whether long leases were or were not prohibited as "alienation," under that word "alien," although it was represented that the whole law of the country would be overturned; yet the Court of Session in the first instance, and this House on appeal, were of opinion, that notwithstanding all that practice, all that understanding, all those *dicta* and decisions, the law of the land was, that the word "alien" in a tailzie which had prohibitory, irritant, and resolutive clauses, did prohibit long leases as alienations.

Decision that under prohibition to "alien," long leases are prohibited as alienations.

It is now stated in the papers upon the table, that "it is impossible not to admit, that there are grounds, "both in principle and authority, for holding a long "lease to be an alienation:" But they go on to state, "that the determination does not clash with the "fundamental rules on which entails depend." They further add, and in their words I had rather point out the distinction than in any of my own— "but the question with regard to the endurance of "leases has no connection whatever with the question

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"of grassum, and it is impossible to deduce any "analogy from the one, which can bear even remotely "on the other." If this be so, the powers of my mind are not equal to discover what is the principle upon which long leasing is alienation, and short leasing is not alienation. If we are to take it upon the strict rules of the interpretation of tailzies, then we must say, that alienation means transference of property; and a lease is neither in the law of England nor the law of Scotland, a transference of property. By the law of Scotland, until the statute of 1449, leasing, which in other words is called location, was a sort of right, (and so in the law of England), which the tenant had to enjoy the premises demised, or tacked, not by virtue of any transference of the property itself, but having a mere possessory right, or a mere personal right under the contract. In the year 1449, in Scotland, an act made it a species of real right; but though a species of real right, it is not a species of real right deduced from alienation in the technical and strict sense of the word, because alienation in the technical and strict sense of the word is transference of property.

Rule of strict interpretation as applicable to leases.

Alienation is a transference of property, which a lease is not, either in Scotch or English law.

A lease is a location of the land, a personal right under a contract.

A tack becomes a quasi real right under the Scots Act, 1449.

If it be the law of Scotland, as it has now been *finally determined to be* *, that under a prohibition to alienate, a long lease is prohibited, and if it be the law of Scotland, that a lease is not a transference of the property; yet, that in the construction put by the law of Scotland upon these deeds of tailzie, it applies strict construction to prohibit long leases; and yet it permits, upon grounds not of construction, but upon other grounds,

* Wakefield case, *ante*.

what are called short leases, or leases which are necessary for the manurance and profitable management of the land, however difficult it may be to declare that one lease is too long and another lease too short; yet we have at least got into this state, that every body seems to be agreed, that a lease of a certain duration is neither too long nor too short. I should say, if I were to lay down what I conceive is a duration of which that might be predicated, that a lease of nineteen years was neither too long nor too short; but whether I am right or not in saying, that a lease of nineteen years is neither too long nor too short, I know I am expressing myself according to the law of Scotland, when I say, that a lease of ninety years is too long; that it is an alienation, not because it is a transfer of property, but *because it operates as mischievously as a transference of property.*

Nineteen years not too long as a tack.

Ninety years too long, because as injurious as alienation.

If I am asked why short leases are not prohibited, I cannot answer.—I have read these papers, till I can hardly tell what is in them,—and I have not been able to find expressly, and in terms, why a short lease is allowed. I am obliged, therefore, to see why a long lease is not allowed, and when I find why a long lease is not allowed, I find why a short lease is allowed. The *dicta* and decisions with respect to forfeiture, with respect to deathbed leases, and so on, have this expression when they strike at long leases, "they cannot be considered as tacks, "because they are not leases of necessary and ordi-"nary administration;" some of them go so far as to say, because they have grassums. If this can be maintained that such is the principle upon which short leases are allowed, how can I be doing that

The reason why a long lease is prohibited, furnishes the principle on which a short lease is allowed, viz. ordinary and necessary administration.

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which is charged upon me, altering the law of Scotland, introducing a change into the law of Scotland, or striking at principles upon which deeds of tailzie have hitherto been construed.

Tailzies not odious under the stat. 1685.

With respect to those deeds of tailzie, it is impossible to overlook that which I find scattered in every author, that they are *strictissimi juris*, that they are considered odious. Yet it is difficult to deal with that proposition as applicable in the year 1685, or to affirm that the tailzies established by that statute are odious. I agree in this principle, that as, on the one hand, it would have been wrong in any Court of Justice to have added to that act of Parliament, so on the other hand, I think it would have been equally wrong in any Court of Justice to have taken away from the fair effect of it; and as to the effect of these tailzies, I do not, as a Judge, enter into the consideration of its placing the property extra commercium, if they happen to make an estate tail into what may be represented as a perpetuity.—I think it incumbent upon the Court to say, that what is complained of as an act which amounts to a breach of a tailzie, is a breach of the tailzie within that act of Parliament which sanctions the tailzie; and if the question is, whether a long lease is or is not an alienation within the meaning of the author expressed in the deed, it must also be considered whether it is an alienation within the intent and meaning of the act of 1685. Now that act has not one word about leases; it speaks of such provisos and conditions as you might think proper to insert in tailzies, but it has not one word about leases; and when they get the length of saying, that a long lease is an alienation, I cannot concur in the opinion

which I see expressed elsewhere, that it does not follow, that because a long lease is an alienation, a short lease is an alienation. It seems to me that every lease must be an alienation; but that it has been so long settled, and it is so necessary for the purposes of production and enjoyment that short leases should be endured, that it is impossible to disturb short leases, though you disturb long leases.

Short leases alienations as much as long leases; but endured for the purposes of production and enjoyment.

When we get to this point, there are many ways of considering the question with respect to those leases which were made by the Duke of Queensberry, and which are said to have been made for grassums. In this case there has been a considerable abuse in the application of that word "grassum." We have it said here, if you take a small grassum, you may take a large grassum, and it is very difficult to say why, if you take a small grassum, you should not take a large one; yet, I do not think it absolutely follows, that a sum may not be so very large as to be too large even to be a large grassum, so that that term grassum cannot be properly applied; and when I see the heir of entail on an old rent of 3*s.* a year, taking 300*l.* by way of grassum, I should be glad to ask any lawyer in Scotland, of the century before the last, whether he had the least notion that the sum of 300*l.* taken for a lease where the rental was only 3*s.* was in the law of Scotland *bonâ fide* a grassum?

Improper use of the word "grassum."

This must be taken in two or three points of view. We must inquire first, what *is* the law—not what *should be* the law, if this were *res integra*. If the case is not touched by decision, we are next to ask what is the conclusion we are to come to, regard being had to the contents of these deeds of tailzie, and the

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nature of that which has been done under these specific deeds of tailzie?

Practice, dicta and decisions in favour of grassum.

Now, inverting the order a little as to these considerations: first of all, I call your attention again shortly to what has been the practice; and although I think, that upon the analysis of the several cases in this list of leases which are here printed, the practice will prove to be infinitely less than it appears upon first sight to be, if you take for granted that all the leases stated in this list of leases were let for grassums; yet it is impossible for me to deny (and I ought to admit every fact which bears upon the question that will enable your Lordships to try the opinion I may give) that, even upon an analysis of these cases, looking at each and every of them, there is enough to form a considerable body of practice. I might also admit as probable, that no research can have been so effectually made, as to bring before you the full amount of this practice. There are many heirs of tailzie who are not inclined and will not be advised to assist such inquiries. I might also admit, that you have cases, in which parties have come into Court, not questioning grassum at all, in which Judges have stated certain *dicta* with respect to grassum, which must also be taken as evidence of the law; and where you have decisions, except those very lately indeed, in favour of grassum. To this I must add, that it is stated in these papers, and not denied, that the former possessor of this estate let many leases for grassums. The practice is also extremely weighty. Sir Ilay Campbell, who states the result of his experience during a long professional life, in the course of which he has been in every respectable situation of

the profession, where he has had occasion to advise and to give judgments upon leases, states his idea of grassum in such a way as to amount, I must admit, to very strong proof of what has been the practice, and to afford strong proof of what he considered to be the law; and there can be no doubt that his conceptions of what is law, are very much to be regarded by those who are called upon to pronounce the law judicially, although he merely gives an opinion, and was never called upon to pronounce judicially upon the very point in question; but if he had been called upon to pronounce it, there can be no doubt what his opinion and judgment would have been.

On the other hand, there are an infinite number of estates tail, in which, as it is represented, and without contradiction in these papers, leases have not been granted on grassums. But as to this tailzie of the Duke of Buccleuch having been made in 1705, it does appear that grassums, in the fair sense of the word grassum, on short leases, were taken by those who had the care of the Queensberry estates while the Dukes were minors, or while some Duke was minor, and that the persons who in succession had the care of the estate, were persons who, from their situation,—the judicial situations they held in the country,—were likely to know what they could and what they could not legally do in the administration of the estate of an heir of tailzie.

Practice in deeds evidence of the law.

There is another circumstance, which is evidence of practice, and of the law; namely, that in many cases, heirs of tailzie are prohibited from letting for grassums. I believe that those prohibitions are not of very ancient date; but, whatever may be their

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date, whether it is more remote or more proximate, the fact that there are such prohibitions in deeds of tailzie restraining heirs of tailzie from letting with grassums, is some evidence at least that at the period at which such tailzies were made, and such prohibitions inserted, it was thought necessary there should be such prohibitions, and therefore it was thought you might let with grassums, provided there was no such prohibition in the tailzie.

Decisions.

With respect to the decisions upon the subject, I pass over the Church cases and the Crown cases, with the observations which I have made upon them, as bearing or not bearing upon this question. You will find them all stated at large, in the cases upon the table, and I cannot add to them; but there is nothing which bears as decision upon the point which I am now putting. I pass over the case of *Leslie* v. *Orme*.

Leslie *v.* Orme.

In that case, there was a grassum, but the case was not decided upon the effect of grassum; and it must be admitted, that the fact that it was not decided upon the effect of grassum is a fact of some weight. In that case, the lease for four nineteen years was sustained by this House. I can do no more than refer you to the observations which were made upon it, in the cases formerly in discussion in this House*.

Denham *v.* Wilson, 15 Jan. 1761.

With respect to the Westshiells case, so far from being an authority in favour of grassums, it is in principle an authority against them. In that case the pursuer did not complain of grassums, and the defender had no complaint about grassum to answer. It was an action which did not strike at a lease on which grassum had been paid. It was an action by

* As to this case, see the observations of Lord Redesdale, *post*.

a succeeding heir of tailzie asserting that he was entitled to consider as rent certain payments, which were secured by bonds and bills; and that the person to whom those bonds and bills had been assigned, was not entitled to take the money secured by the bonds and bills, because the heir said that whatever their apparent nature was, they were really securities for rent, and the rent of course belonged to the heir of tailzie who had succeeded to the estate. In that case several tenants took leases from the heir of tailzie in possession. With respect to many of them, they were made according to what they considered good practice. They took leases, and paid grassums down. With respect to others, the lessees did not pay grassums down, but they said in effect, we have not money to advance, but inasmuch as the heir of tailzie, according to our notions (I am now putting language into their mouths which I think their acts spoke, if their mouths did not utter it,) is not prevented from letting without diminution of the rental, (for that was a case, as appears by the papers on your table, in which the heir of tailzie could let, provided he let without diminution of the rental,) therefore, though we cannot now advance the grassum required, we will do what comes to exactly the same thing—we will take the lease at the old rent; that is, we will take it without diminution of the rental, and you have a clear right to grant it, (as we say, and as you say,) without diminution of the rental, and instead of paying you a grassum, which is defined in some of these papers to be a sum of money paid at the commencement of the lease, we will not pay at the commencement of the lease, but we will give you

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something payable not on the land leased, we will give you bonds and bills for so much money, (those, to be sure, were for annual payments,) and, (as they contended), it makes no difference either with respect to the validity of those leases, or the claims of the heirs of tailzie to come afterwards, whether we stand simply in the relation of tenant to you the landlord or not. The transaction creates between us the relation of debtor and creditor; the heir of tailzie has nothing to do with that transaction. If you look at the opinions of the Judges given upon the hearing of that case, some say this is grassum, others say this is rent, others say that it is a deception, and that it must not be performed by a bungling operator, and so on. Sir Ilay Campbell's note of what passed, is a very curious testimony to show how clear the law was in that year 1761, with respect to the powers of heirs of entail.

In the first instance, they all decided, (and certainly there again it is authority to be regarded, both with respect to the practice and with respect to the law itself)—they all decided that it was not grassum, and deciding that it was not grassum, whether the lease was good or not good, being granted for grassum, was a question they had not in that case to determine—it was not before them. They found, that as the succeeding heir of entail had not sought to affect this lease on the head of grassum, the Judges had nothing to do with it; that if they could not bring the sums granted under these bonds and bills into the account as rent, they could do nothing. And they could do nothing;—why? because the parties had not upon that subject submitted any

thing to them; and therefore, all that is said about grassum in that case, appears to me to be *obiter dictum*. The argument, which was repelled upon the second hearing, was an argument submitting to the Judges in that action, that the sums due upon the bonds and bills were not sums demanded in the action. It is impossible for the mind of man to say, that there is any sound distinction between a grassum that is paid, and a grassum that is agreed to be paid, and secured.—If it be rent, that is another matter.—There are two most able papers on the subject; but notwithstanding the ability with which it was argued that this was rent, and notwithstanding the decision that it was rent, I must take the liberty of saying, that after looking at that case again, and again, and again—after paying all the deference I can pay to the judgment—and after admitting all the weight that appears to me to be due to the great authority of the counsel of that day who signed the memorial before the Court of Session, I never can agree to that decision.

No sound distinction between grassum paid and grassum payable on security.

Decision in the Westshiell's case disapproved.

I say further, that when I see in these papers that grassum is treated as a thing impossible to be rent, because you cannot apply the remedies to grassum which by law and by acts of sederunt may be applied for the recovery of rent, I should be glad, if any body would tell me how then it was possible to apply those remedies to the payments secured under those bonds and bills. I am very far from saying that is a reason why it should not be considered as rent. Mr. Cranstoun has satisfied me, there may be such a thing as a fraud upon an entail. He has given instances in the memorial addressed to the Court of Session, where

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Examination of the decision in the Westshiell's case.

one thing appears, and another thing is that which is designed. There is therefore no doubt on my mind that there may be fraud upon an entail; and I agree, that if this was meant to be a fraud upon the entail, by taking these bonds and bills not *eo nomine* as rent, but really and truly as rent, the trustees using this device to prevent the heir of tailzie or the Court of Session from saying what was the real transaction, the fraud might be overreached by the Court. But then the difficulty I have upon my mind is this, if the heir of tailzie could take the grassum which he did from tenant *A. B.* and could take the grassum, which he did not instantly take from tenant *C. D.* but *bona fide* agreed with *C. D.* that grassum should be thereafter paid, and paid by certain instalments; if the parties make a lease, which upon the hypothesis of what the law was then, was a good lease independently of that collateral transaction, by reserving rent without diminution of the rental, it appears to me, that to say because they have thought proper to constitute the relation of debtor and creditor, therefore the fruits of that relation were to be considered as rent, and to he ascribed to the relation of landlord and tenant, is a consequence that does not follow at all. The Westshiells case goes no farther than this, that the Judges of that day took it for granted that grassum was allowable where there was no diminution of the rent of the day, a proposition admitted by the pursuer, and not contended against by the defender; and they decided, that what was secured by these bonds and bills was rent, and was not grassum.

If that case had come before me as a Judge, I must have said I could make no distinction between

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a grassum paid directly, and a grassum secured by way of future payment, that they are both of the same nature, and that unless both could be recalled (recalled is perhaps too strong a word to use, for there may be equities with respect to those grassums) but that unless they can both be objected to, he who admitted the right to take grassums upon that deed, ought in that case to have been held to have no right to call for the payment to him of the sums secured by those bonds and bills.

Principle of decision in the Westshiells case disapproved.

This brings to my mind the case now pending on appeal to this House, the case of the *Earl of Elgin* v. *Wellwood*. If nothing is grassum but what is paid at the commencement of the lease, how are your Lordships to deal with the case of the Earl of Elgin *v.* Wellwood*: there the grassum was no less than 12,000 *l.* which is not to be paid at the commencement of the lease, it is to be paid at the death of the landlord or the tenant; and that is a case which includes the other question, namely, whether, where there is a power or faculty to set tacks for such time as the party thinks proper, making such reservations as are thereby prescribed, letting for the term of 999 years is to be considered as setting a tack, or whether that was not to be considered as an alienation, notwithstanding the permission contained in the lease to which I am now alluding?

D. P. July 1820, *post*.

Late decisions as to grassum and long leases

With respect to grassum, as with respect to long leasing, much difficulty has been introduced by some

* Since decided in favour of the respondent, principally on the nature of the rent to be reserved and the permissive clause by which the heir of entail was permitted to make such tacks as he *should think fit*, reserving ten bolls *of corn* per acre by way of rent.

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late cases.—It is not my intention to go through them all; but I will call your attention particularly to the case of *Mc Gill** ; in the printed opinion of one of the learned Judges the following account is given of that case. He says, "the property was very consid-
"erable. As I was counsel in the cause, I can speak
"with some certainty. It was an action by the guar-
"dians of a minor heir of entail, whose father, on
"account of the very slender provisions allowed by
"the entail to his widow and younger children, had
"granted a lease of a part of the lands to a trustee
"for their benefit, with an expectation of its being
"afterwards let at a higher rent. The question was
"not very anxiously contested; the guardians,
"who were desirous that the additional provisions
"should be made good, having acquiesced in the
"first interlocutor that was pronounced, although
"some of the Judges expressed doubts as to the va-
"lidity of the transaction. For this reason, I presume
"the decision is not mentioned in the reports,
"although a question of smaller pecuniary import-
"ance between the same parties is there noticed;
"and of this I am confident, that it was not con-
"sidered by the Bar as a precedent upon which the
"country might rely. One case I remember, where
"an heir of entail in an estate yielding between five
"and six thousand pounds a year, was prevented
"from providing his widow in a jointure of more
"than 200 *l.* a year"—(I hope, that whatever may be the decision upon this case, something may be done by Parliament by way of regulation upon this subject, and without delay, for the purpose of giving security to what perhaps this decision might other-

Mc Gill's case.

* Not reported.

wise tend to shake, and prevent having effect)— "upon the authority of the decision in the case of "Mc Gill, he proposed to grant a trust lease of cer- "tain farms, which it was supposed might yield in- "creased rents when the current leases were at an "end. The answer by the counsel was, that there "could be no objection to the granting of a trust "lease; but that, as no certain reliance could be "placed upon it in a question with the succeeding "heirs of entail, the trustee should have it in view, "out of the surplus funds, while the heir of entail "lived, to accumulate such a sum as might be ne- "cessary." I cannot conceive that this case can be considered, after what I have read, as a case of grave authority.

Mc Gill's case not a grave authority.

Your Lordships will obtain a very correct idea, which will enable you to be more precise in your views of this subject of grassum, from a paper printed in a case which I have now in my hand, and which has the name of "Blair, Solicitor-General, as to the "mode of making a lease subject to provisions for "younger children," undoubtedly with a view of avoiding what my Lord Alemore calls a bungling operation. He puts it thus: "What occurs to me "as the most unexceptionable mode of conducting "a transaction of this kind, if the execution of it "shall be found practicable, is this, that the new "lease should be granted for a real grassum to be "drawn by the memorialist at the time, not from the "occupier of the land, but from some third party, "or any other person who shall agree, in consider- "ation of getting the new lease in his name, to "advance a sum of money equal, or nearly equal, to

Blair's opinion as to the best contrivance for obtaining grassum.

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" the value thereof, to be drawn back by him from " a sub-tenant yearly, during the currency of the " lease. For this purpose, it will be necessary, in " the *first* place, to fix with certainty the value of " the new lease, which can be done by previously " making an agreement with a person who is to oc- " cupy the land in character of sub-tenant, at such " rent as the land may be worth. The surplus " rent, therefore, which is to be drawn by the " principal tenant, being thus known, it becomes " an easy matter of calculation to ascertain what " is the present value of such surplus rent for the " space of nineteen years, or whatever may be the " endurance of the lease. If any person can be " prevailed upon to advance a sum in the name of " grassum equal to the present value of the lease so " calculated, making however a reasonable allowance " for the trouble and inconvenience of being reim- " bursed by yearly payments from the sub-tenant, " the transaction I think would answer every purpose " which the memorialist has in view. The person " advancing the money would be the principal tenant, " paying a grassum for a real lease granted in his " favour at the old rent, and drawing an annual sur- " plus rent from the sub-tenant, who would just be " liable to pay the rent which he agreed for, without " having any connection with the grassum, and the " memorialist would draw a sum of money which " would be entirely at his disposal. Upon the sup- " position that the heir of entail has the power of " setting farms at the old rent and taking grassums, " (which is understood to be a settled point), I do " not see upon what grounds such a transaction could

" be challenged.—There may be a difficulty in get-
" ting a person to advance money upon the security
" of a lease, and on the prospect of being reimbursed
" out of a surplus rent."

This is a mode in which a transaction of this sort is thought to be most advisably carried into execution; but when this mode is stated to have had the opinion of so learned a man as Mr. Blair, it must be admitted that it is " upon the supposition
" that the heir of entail has the power of setting farms
" at the old rent, and taking grassums; which is
" understood (as he says) to be a settled point." But upon such a transaction, if you are to look at the real nature of it, what in the world is it but anticipation of rent? The lease is to be let at the value of the land; there is to be a previous agreement for a lease at the value of the land; an estimate is then to be set upon such a lease, that is, in other words, having agreed for a lease upon the full value of the land, another lease is made to somebody else at the old rent with a grassum, and the heir of entail in possession is to have the disposal of this grassum if he has got it; or if he did not take the grassum, somebody else is to have the benefit of the lease, with regard to which a calculation is to be made of the grassum. If that is not anticipation of rent, there surely is nothing prohibited.

Blair's opinion founded upon assumption of the point in question.

Grassum is anticipated rent.

I have called your attention to what has been considered to be grassum, and contrasted that with what passed in the case of Westshiells, where bonds and bills were taken, it not being thought necessary that the rent should be increased, and those bonds and bills were held to be rent, because they said they

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were connected with the transaction. But how it can be held that grassum is not anticipation of rent, consistently with the opinion given in the Westshiells case, is a difficulty I cannot get over.

Great as the name of Mr. Blair is—and there never did exist in the judicial state a man entitled to a higher character,—it is impossible to look into these papers without seeing how unsettled his notions were as to the question whether long leases might be granted of entailed estates.

The question, if not concluded by authority of precedents, to be decided by principle.

The result of the whole in reference to *dicta* and decision, coupled with practice, will be, whether there is or is not so much of decision upon this point as to have become settled doctrine, hallowed and sanctified by time; so that if this case had been agitated some thirty or forty years years ago, we must have come to the same decision. No one can state more strongly than I should be disposed to represent to you, that the current of authorities in the Court below, standing on grounds that could not be shaken, must be considered to have been established on sound principles, in order that the law may be settled. But here the question at last would be, whether you have so much of decision upon this point as precludes you from examining what is the principle upon which you have acted in other cases, and particularly with respect to long leases, to which I have before alluded.

Diminution of rent, except in cases of necessity, prohibited under a tailzie by quasi implication, on the principle that it is not an

It has never been suggested that rent could be diminished under a tailzie. I must be understood to be speaking, not of tailzies containing express prohibitions, or under circumstances where it is of necessity that the rent is diminished; but of tailzies where there is nothing about diminution of rent in the tailzies

—of tailzies where the necessity of reducing it does not occur from the state of the times, and where you are therefore to look at the charter of tailzie, which prohibits alienation and long leasing, and that upon a principle which has been stated in all the cases in which that prohibition has been mentioned. Can it be said, notwithstanding long leases are prohibited by the prohibition to alienate, yet if there is nothing in the charter that prohibits diminution of rent, and if there is nothing in the circumstances of the times which warrants diminution of rent, the heir of tailzie, who cannot grant a long lease, because that is not for necessary and ordinary administration, may, nevertheless, sink the last rent to the lowest sum, which is a farthing above illusory rent. I beg to ask what a system of law must that be which says, you shall not let a lease for thirty years, (I take this duration for the purpose of illustrating what I mean, though we have got no lower than fifty-seven; your Lordships have said fifty-seven years is prohibited, because that is in its nature an alienation; and that it is in its nature an alienation, because it is placing on the tailzie an incumbrance, not of necessity and for ordinary administration), and yet, if there be no prohibition of that kind, that word "alienation" will permit you to sink the value of the estate for nineteen years, if that is the longest term which the word alienation will permit, whether grassum is paid or not, to such a sum as is just one single farthing above that sum, which will constitute an illusory rent. It is not immaterial that the question should be considered in this point of view, because I admit that if the law be so, if you can do that, it bears strongly upon your power with respect to the present question; but if

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the law be so that you cannot do that, I will not call it an implied prohibition, but I do say that it is a non-capacity, imposed upon the heir of tailzie, represent him as much as you please as the absolute fiar or manager of his estate—imposed upon him, not by the terms of the tailzie, but by the same principle which imposes upon him the restraint, not to let leases for ninety-seven or fifty-seven years, or any number of years not of necessary and ordinary administration.

Opinion of Scotch Judges as to implied prohibition or incapacity of heir of tailzie to diminish the rent.

There is certain evidence of what is the law upon that subject. In the first place, something is to be found upon the subject in these papers. Lord Meadowbank in one case states, that diminishing the rent much, he would call even fraud. There is one of the Judges who says, he would not permit a diminution of the rent. Sir Ilay Campbell, according to the paper which I read to you, certainly supposes there could not be a diminution of rent; he conceives from the nature of a tailzie that a diminution of rent could not take place, unless there is a necessity for such diminution. Upon what grounds do these opinions rest, unless it be that such incapacity is imposed upon the heir, not for his own sake, but to preserve a just dealing with the tailzied estate.

I can never come to the decision of a Scotch cause, which involves an important question, without fear and trembling. It would be folly for any man in my situation, to suppose he is to deal with questions of Scotch law, as he would with questions of English law. I always recollect, that with respect to the judgments of the Courts of Scotland, it is our first duty to employ ourselves industriously in investigating those subjects which come before us,

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and I know it would be ridiculous to suppose that the nature of our jurisdiction is not open to error, from the circumstance, that those who have to advise your Lordships can only occasionally inform themselves. But with much diffidence in myself, and great respect to others, I am bound to preserve my independence as a Judge, and weighing every circumstance, to enable me to form a solid and a right opinion, I advance to that point in which conscience will not permit me to speak other than the language of the law.

With these observations, I apply myself again to what is the law of Scotland with respect to mansion-houses and policies. It is admitted since the *Greenock case* *, the *Roxburghe case* †, and others which might be mentioned, that the heir of tailzie cannot disappoint his successor of the mansion-house and policies; yet the author of the tailzie has not prohibited him by a single word, for this doctrine applies to those cases, where the author of the tailzie has not prohibited him from doing what he pleases with those mansion-houses, and those policies; but yet the law has said they are the residences of the heirs of tailzie in succession, and we will imply the prohibition. But leases, they say, of mansion-houses and policies are not protected by the act of 1449. Why are they not protected by the act of 1449? You find words by which lands and tenements are protected by the act of 1449, yet you find the cases mentioned in which as to lands and tenements that act is not applied to protect them.

Cases of Greenock and Roxburghe. Implied prohibition against leasing the mansion and policies.

The Scots Act 1449, by its general terms extends to mansion-houses and policies.

* *Cathcart* v. *Shaw*, Jan. 31, 1755; D. P. March 19, 1756.

† *Ker* v. *Roxburghe*, D. P. 1813, MSS. cases, and 2 Dow. 149.

See *Ante*, p. 408.

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Tenants in fee simple, those who in the largest sense are absolute fiars, have an unlimited discretion as to mansion-houses and policies. This was strongly impressed upon the minds of Scotch lawyers in the Roxburghe cases, by the great professional talent of Mr. Clerk. When the feus were made, it was thought necessary to except and reserve for the succeeding heirs of entail, the principal mansions and many acres of land adjoining. Upon what principle was this?—it was thought to be contrary to the intention of the author of the tailzie, who had not said one word about his mansion-house, to permit it to be given out of the possession of those who he hoped would there maintain hospitality among their Scotch neighbours, and continue to receive the respect so justly due to the Scotch nobility.

Power of selling wood to be cut after death of, &c.

As to the power of selling woods (to be cut down after the decease of the heir of tailzie), I never considered that as an implied prohibition; I said only that in such respect he was not the same monarch, having the same unlimited estate and power over his lands as an English tenant in fee simple, or the absolute fiar in Scotland. The tenant in pure fee can sell his wood to be cut, and this shows that the principle is not generally applied. There is no doubt, that the Scotch heir of tailzie may denude (to use the word) the estate of every stick upon it, timber, and saplings, and every thing else that should be permitted to grow; in short, he may do all the waste he can do in the course of his life. That is what our tenant in fee can do, but what our tenant in tail cannot do.

As to the objections arising from the difficulty and

uncertainty of the proposed rule of law in its application, the same occur in the Courts of this country when they are required to decide what is an illusory share of a sum of money which a man has a right to appoint. Mr. Selden was certainly wrong in saying, that the decision of the Court of Chancery depended on the length of the Chancellor's foot. But I may admit as an exception or qualification, that when the Court comes to decide what is an illusory share, that does very much depend upon what is the length of the Chancellor's understanding. Sir W. Grant was so sensible of the difficulty, that he came to the decision, that he never would hold any share to be illusory, which no former Chancellor had done*. The question comes to this, What is the principle which you are to apply to this case, and what does that principle require of you? Unfortunately that is open to what arises by way of observation, I mean according to legal opinions and criticism, upon the words of the charters themselves.

Difficulty and uncertainty in application of law.

Case in law of England—illusory appointment.

I endeavoured, when I read in one of those charters, in the March and Neidpath entail the words, "without diminution of the rental," to see how I could deal, upon any construction which I could put upon those words, with a great variety of questions which may possibly arise. What does this word diminution of the rental mean with respect to time? Does it mean, that you are to look at the date of the charter, and that you are to preserve always the rent as it is stated in the charter? If that is the case, would it be called a diminution of the rental, supposing the rental of this estate

Construction of the words diminution of rental.

1st Case. Lowering the rent of one farm and raising another in proportion.

* See *Butcher* v. *Butcher*, 9 Ves. 399.

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to be 10,000 *l.* a-year, if the tenant in tailzie in possession lets farm *A.* at 100 *l.* a-year more than it before let for, and farm *B.* at 100 *l.* less? In one sense, that is no diminution of rental. Suppose he lets farm *A.* for 100 *l.* a-year more, and lets farm *B.* for 50 *l.* a-year less than it was before let for, there being upon the whole a gain of 50 *l.* in the rental, Is that a diminution of the rental or not in the law of Scotland? I have no means of answering that question but by stating that a great authority * says, he thinks the heir of entail is not entitled so to deal with the estate, but that he is bound to raise the rents in proportion. So that you have to determine, if you take this limited sense of the word, "without diminution of "rental," whether that means a diminution of the total quantity of rent upon the whole of the farms, admitting of a diminution of rental for parcel of the estate, but still preserving the whole quantum of rent upon the whole taken together. According to the opinion to which I have adverted, if you diminish the rent of farm *A.* though you still preserve the quantum of rent upon the whole, by raising farm *B.* in proportion, you do not answer the Scotch idea of the meaning of these words.

2d Case. Where the author of the tailzie dies in possession of part of the lands entailed, which have never been let at a rent.

There is another case we must look to, in order to know what this means. Suppose, that when the author makes his tailzie, he is in the natural possession of a part of the estate, that other part of the estate is in possession of tenants:—he dies:—the next heir of tailzie makes a lease, and he is to make a lease without diminution of the rental; what is

* Mr. Blair.

the sense of the words "without diminution of "the rental," with respect to those lands of which his predecessor was in the natural possession, and which perhaps never were let at any rent at all? or they may have been let at some rent, before the time of the author of the tailzie, who, during his time, was in the natural possession? If they never were let at any rent previous to that time, then the words "without diminution of rental," with respect to that estate, cannot, in the technical sense of the words, mean without diminution of rental; because, according to that construction, he would be empowered to let the whole estate, including all that part in the natural possession of the entailer, for the rent of that part not in the natural possession of the entailer. To get rid of that difficulty, you must take the true value of that which was never let before, and so the words "without diminution "of rental," do not necessarily bear the technical sense of those words; but in order to give a rational construction to those words, you must take into your consideration the value of that on which there can be no diminution of the rental.

3d Case. Land in possession of entailer let 50 years before at a low rent and since doubled in value.

Suppose again, that the land in the natural possession of the entailer had fifty years before been let at a rent, Could it be said, (something like it has been said lately, but I cannot assent to it,)—could the next heir of tailzie, being bound to let without diminution of the rental, say the author of the entail was in the natural possession of this part, which was worth 5,000 *l.* a-year during his possession; but the last time this was let, which was fifty years ago, it was let at 2,000 *l.* a-year; I will let farms *A. B.*

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C. and *D.* which were not in the natural possession of my author, at the rent which they yielded when the entail was made; but with respect to that which was in the natural possession of my author, and which, if it had not been in the natural possession of my author, would, before his death, have increased from 2,000*l.* to 5,000*l.* it is no diminution of the rental to pass over the period of his enjoyment, in which the value of it had so much increased—I will take the 2,000*l.* a-year, as a ratio of the rent. I say that is impossible. I have therefore, when I read these words, asked myself what they can mean. Here is annexed in the papers, the rental to the tailzie—Is it then to be contended, that the manner in which it is to be discovered whether there is an evident diminution of the rental or not, is to put upon the heir of tailzie the obligation to see whether there is sixpence abated from the former rental. I cannot conceive that to be the meaning of the author of the entail. I am of opinion, that the words "without evident diminution of the rental," mean without diminution of such fair rent as may be obtained.

"Without evident diminution," &c. means of such fair rent as may be obtained.

Difficulty to ascertain fair rent imaginary.

We are told no person can deal with this decision; that you put such a difficulty upon the heirs of tailzie, that they must go to what in this country we call auction, and what in that country they call roup; that it will not be safe for them to act at all. To that I answer, I feel no difficulty in the world upon that subject. And when we are told, as we are told over and over again in the papers before us, that he who is not to diminish rent, is not bound to increase it. I apply the principle which appears to me

to be a very fair principle to apply. You are not bound to increase it, I admit; but you are not bound to increase it, for this reason, that it may be taken, if you do not, to be the just rent. In this country, (and do not let it be supposed I am confounding the powers of tenants in tail in this country, with those of tenants of tailzie in Scotland), in a similar case, the author of the power always imposes it as a condition, that the lease shall be made for the best rent which can be obtained. Then what is the evidence, upon the execution of the power? Show me that he takes no more for himself than he leaves for his successor, and that is evidence * that it is the best rent which can be obtained. Show me that he does for himself only that which he does for others, and no difficulty can arise.

Where tenant in possession takes the same rent for himself and those in remainder, there is presumptive evidence that it is the best rent which can be obtained.

Suppose a man of the age of eighty, (and the Duke of Queensberry was about the age of eighty when he made some of these leases,) calculates his own life, and says, I may live for five years—Now, I will let for nineteen years; at 1,500 *l.* a-year for five years, and 500 *l.* a-year for the rest of the nineteen. It was positively asserted, but I really cannot give my assent to the proposition, that such a lease as that could not be set aside by the succeeding heir of tailzie. I will not say that it can be, but there has been no instance produced of such lease. What is the state of the law of Scotland if grassum can be so taken: such a contrivance would not be endured by the law of Scotland—What does it amount to? The heir in possession says, I will take a grassum of

A lease for 19 years, reserving a large rent for the first part of the term, and a smaller rent for the remainder, is a contrivance to take grassum, which would not be endured by the law of Scotland. There is no instance of such a lease.

* Presumptive. *Vide ante*, p. 428.

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5,000 *l.*; my way of taking that grassum of 5,000 *l.* is not to take it in one sum, but to divide it into payments for the first five years, and then, at the expiration of the first five years, those who come after me, instead of having 1,500 *l.* a-year, shall have 500 *l.* a-year. No, says the law of Scotland, you shall not have it so; if you mean to take it at all, you shall have it once for all—you may not take such an advantage by instalments, but you may take it at once in the name of grassum. I should be very glad if those who are more conversant with this subject, would tell me upon what principle such a doctrine can stand. The case may be thus illustrated: Here is a farm called *A.* and another farm called *B.* each of them was let: the last rent was 100 *l.* I am obliged to keep up the old rent, at least it is contended that that is so, as far as I can judge, I think it is so, and upon my opinion that it is so, I must decide with respect to farm *A.* and I take 500 *l.* and let it for the old rent; but with respect to farm *B.* unless I can get that 500 *l.* paid down to me *in præsenti*, I cannot apportion it on the first four or five years of the lease; for what I receive *de anno in annum* must continue. Now that this is the state and principle of the doctrine there can be no doubt.

Construction of the words in the Queensberry entail.

If this view of the case be right, on the words "*evident diminution of the rental*," I think there is no difference with respect to the words contained in the prohibitory and irritant and resolutive clauses of the Buccleuch case, "without diminution of the rental *at the least at the just avail for the time.*"

Opinions of the Scotch Judges.

Looking at the opinions which have been deli-

vered, it is curious to observe the different views which the human mind takes of the meaning of words. Some of the learned Judges are clear of any doubt whatever, that these words mean, at all events at the just avail at the time: others of them are clear, without any doubt whatever, that it means no such thing, and that it means, that if you cannot get the last rent, you must not let the estate at all: others are of opinion, that you might let it at the last rent; and if you do let it for less than the last rent, you shall let it at least for the just avail at the time. These opinions are supported by many very curious and ingenious cases.—They say, if you hire a workman for twelve hours, or from sunrise to sunset, you must pay him, if he has employed the interval between those periods, if there are not twelve hours from sunrise to sunset. I say that is all very well; but you are dealing with other subjects. Another learned Lord says, if I order my servant to go with my corn and sell it at its value, that is, at the market price, at least at the market price the preceding day; what should I say to my servant if he came back again, and said, I did not sell it at the market price of this day, but I did sell it at the market price of the last day; but, Sir, I have to inform you, that when I went to market, I was bid three times as much for it as the price paid on such day. The master immediately says, the servant cannot possibly have understood my meaning—My meaning was this; get the market price of the day if you can, at least get the market price of the former day; but do not conclude from my saying, you are to get the market price of this, or the market price of the last day, that

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I mean to authorize you to sell my corn at half its price, if you can get double the market price of either day.

Meaning of the provision in favour of the heirs of tailzie in succession.

The question then is reduced to this: What is the meaning of the provision which is made in favour of the succeeding heirs of tailzie? I think the meaning of it is this; by way of direction to the heir in possession—"get what you can—recollect what is the "rent—do not let it be diminished, unless it is "necessary it should be diminished; take the just "avail at the time in all cases, not in that case only "when the just avail at the time is less than was the "rent before actually paid." The person making the entail could not have meant to say, "I have "not the slightest wish or intention that my heir of "tailzie should get the value of the estate; I mean "to let him take less than the present rent, if he "cannot get the present rent; but although I guard "against his taking less than the just avail at the "time, I do not mean that he should take the just "avail at the time, when that is higher than the "present rent."

If grassum by the Scotch law is anticipated rent, the leases made under the entails in this case are void.

If notwithstanding what has been the practice, and notwithstanding any thing that may be called decision, there is a principle upon which you are entitled to say that grassum is anticipated rent; if that is now the Scotch law, these leases cannot be maintained. God forbid you should say it is the Scotch law, if it is not so! I would not say it, if I were not convinced it is the Scotch law; but all law ought to stand upon principle, and unless decision has removed out of the way all argument and all principle; so as to make it impossible to apply them to the case before

All law must stand on principle, unless principle and argument precluded by continued decision.

you, you must find out what is the principle upon which it must be decided. After all the consideration I have been able to give to the case, my opinion is, that grassum is anticipated rent; what constitutes it so, and what may be the effect of such a decision, may require a good deal of consideration, with a view to apportioning that anticipated rent; or if the tack is such a tack as the heir in possession ought not to have made, to decide to what extent you will place in situations of inconvenience, persons exposed to all the inconvenience which may arise in consequence of such a decision.

Grassum is anticipated rent.

I do not advert now to the alternative leases. With reference to the question whether they are good or not, I am not sure whether it would not be my wish to remit so much to the Court of Session, if the alternative leases steer clear of the objection which applies to the others; but I do not find that any of those leases are clear of the valid objection on the ground of grassums, if it be a valid objection, not even the cases of Crook and Flemington Mill.

Entreating your Lordships to believe that I have given to this subject a degree of painful attention, which I hope I shall be relieved from ever giving to any other, if I am in an error, I cannot extricate myself by the operations of my own mind; and the view my mind takes of the subject, that view my conscience obliges me in my judgment to express. With these observations, I conclude this matter today, and on a future day will propose to your Lordships some findings which may be, in my opinion, agreeable to the principles which I have stated.

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L. C. 12th July.

WITH respect to the leases of Flemington and Crook, and likewise a farm called Edstoun, it is insisted there were no grassums; it is likewise insisted, that if there was any diminution of the rent in point of fact, it was a diminution rendered absolutely necessary by the circumstances under which the heir of tailzie was placed—he not having the power of letting at the same rent. These are cases also in which the summons has the alternative conclusion, that if these very long leases are not good, certain leases of certain durations there mentioned may be permitted; and the Court seems to intimate an opinion, that the alternative leases might be good, provided there was no fault on the part of the tenant. With respect to the leases depending upon that question, both on account of the manner in which the title on the part of the tenants has been created, which seems to me not to have been sufficiently investigated; and likewise on account of the extreme importance of the question, Whether leases with alternative durations can or cannot be sustained as tacks? on reconsidering which question, I have not been able from the papers laid on your table, or on the search I have been able to make into books, to find sufficient reason to offer to your Lordships a decided opinion upon the point. With respect to the Flemington and Crook case, I shall propose to your Lordships to remit these cases to the Court of Session, generally to review the interlocutors complained of, and to do therein what may be just.

As to the supposed matter of equitable consideration, which is proposed for the consideration of the

House, whether you can look at these grassums as taken generally for the benefit partly of the heir in possession and partly for the successor, and apportion them, there certainly is a passage which has been pointed to my attention since I last addressed your Lordships, which somewhat indirectly brings that forward for consideration.—On looking into the papers, it appears to me to be quite impossible that it should be disconnected with the question of purging the irritancy; and as this question has not yet been discussed and decided in the inferior Court, we cannot entertain it as a matter of original jurisdiction; and whatever, therefore, may be the decision with respect to that case, I am not aware that if your Lordships adopted an opinion as to the power to make tacks, and as to the validity of the tacks, that they should be shut out from proposing it to the Court of Session. With respect to my own opinion, I shall say no more than I intimated the other day, that I think it will be found extremely difficult indeed to sustain the leases.

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I will now state, in a few words, the view which I have taken of the other cases, and the propositions which I shall have the honour of making with respect to them. With respect to the lease of Harestanes, in which case the Trustees of the late Duke of Queensberry, and Alexander Welsh, the tenant, were appellants, and the Earl of Wemyss respondent; that is a case which brings into question the validity of grassums, and is also to be determined upon other circumstances; and among others, the circumstance that the tack is for fifty-seven years. Conceiving that that tack of fifty-seven years is an

Lease of Harestanes for 57 years void as alienation.

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alienation within the meaning of the entail, it will not be necessary for me, in my view of the case, to say more as to this case, than to propose to affirm the interlocutors complained of.

With respect to the case of Symington, who is the tenant of the farm of Edstoun, it is a case which had an alternative ish, and it might have been necessary to reconsider that case, because it is case affected by that circumstance. But it may be disposed of upon other grounds *.

In the case of the appeal of the Duke of Buccleuch against the Executors of the deceased William Duke of Queensberry, I propose to reverse the interlocutor of the 7th March 1816, and to find, that the late Duke of Queensberry had not power, by the entail under which he held the land, to grant tacks for terms of years, partly for yearly rent and partly for a price or sum paid to the Duke himself; and that tacks granted by him, upon surrender of former tacks which had been granted partly for yearly rent and partly for prices or sums paid to the Duke himself, ought to be considered as partly granted for prices or sums paid to the Duke, and that such tacks ought not to be considered as let without diminution of the rental, or at the just avail, and are therefore to be considered, as between the parties claiming under the entail, as tacks which he had not power to grant by such entail; and with that finding, to remit the cause back to the Court of Session in Scotland, to do therein as shall be just and consistent with this finding.

Tenant of tailzie in possession.

* See the minutes of the judgment. *Vide post*, p. 533.

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In the case of the Duke of Buccleuch against the Executors of the late Duke of Queensberry, and Hyslop, the tenant of Halscar, I propose, to reverse the interlocutor complained of in the appeal, and to find that the late Duke of Queensberry had not power by the deed of entail to grant the tack in question, the same having been granted upon the surrender or renunciation of a former tack then unexpired, and which former tack had been granted by the Duke at the same rent, and also for a sum or price received by him; and that the said tack having been granted, partly in consideration of the rent reserved thereby, and partly in consideration of a price or sum before paid to the Duke himself, and of the renunciation of the said former tack, therefore to find that the tack in question ought to be considered, in this question with Hyslop the tenant, as let with an evident diminution of rental, and not for the just avail; and with this finding, that the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

With respect to the Whiteside case, I propose to find, that William late Duke of Queensberry had not power, under the entail, to let tacks, partly for annualrent and partly for sums and prices paid to himself; and that tacks granted upon the resignation of former tacks, which were granted partly for rent reserved and partly for sums and prices paid to the Duke himself, are to be considered as tacks made partly for rent reserved and partly for sums and prices paid to the

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Duke himself; and that the tacks in question having been granted partly for rent reserved and partly for a sum or price paid to the Duke for a former tack renounced, for which a sum or price had been paid besides the rent reserved—the same is to be considered, as between the persons claiming under the entail, as a tack, partly for rent and partly for a sum or price paid to himself, and ought not to be considered, in a question with the tenants claiming under the said tack, as let without evident diminution of the rental; and with this finding, to remit the cause to the Court of Session, to do as it should deem just, consistent with this finding.

With respect to Edstoun, to adjudge precisely in the same terms as I have just proposed as to the Whiteside case.

The only other cases are those which relate to Crook and Flemington. I propose to your Lordships to remit to the Court of Session the interlocutors in both those cases to be reconsidered.

See the minutes, *post*.

THE orders and judgments of the House in the several cases were according to the opinions and proposals of the Lord Chancellor *.

* The Lord Chancellor concluded by saying, that he had never been able to look at these cases without being satisfied, that in whatever way they were determined, it would be absolutely necessary for the stability and security of titles to property in Scotland, that some Act of Parliament should be passed.

The *Earl of Lauderdale* observed, that after this judgment, a declarator would lie against any heir of tailzie who took a grassum; and that being the case, this judgment would give rise to

LORD REDESDALE *.

MY LORDS,

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CASE OF THE QUEENSBERRY LEASES.

9th July, 1819. Statement of facts, pleadings and questions.

THERE are two entails now under consideration, applying to different estates, and with different limitations: One of them applicable to the MARCH and NEIDPATH estate, with respect to which the Earl of Wemyss is the person contesting, with the Trustees of the late Duke of Queensberry and the tenants, the validity of leases granted by the Duke; the other, applicable to what is called the QUEENSBERRY estate, in which the question is between the Trustees of the late Duke of Queensberry and the Duke of Buccleuch, upon a proceeding somewhat of a different description from that in the former case, for the purpose of obtaining a declaration, that all the leases expressed in the proceedings to have been granted by the late Duke of Queensberry, of the Queensberry estate, have been granted according to the power vested in him by the entail of that estate. There is also this distinction betwixt the two cases. With such a scene of litigation as absolutely to require an Act of Parliament to be brought in to declare what is the law.

The *Lord Chancellor* replied, that the proposition which he intended to make, would bring before the House that consideration; and he hoped, whenever that matter should be brought before the House, the peers would express more fully their opinions upon that subject.

* This speech was delivered before the conclusion of that of the Lord Chancellor, but it has been thought preferable to preserve the connexion of the Lord Chancellor's judicial opinion by postponing these observations of Lord Redesdale.

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respect to the March and Neidpath estate, it is not contended that the leases which are now in question, were authorized by any power contained in the deed of entail; for the leases which have been granted are not either for the granter's life, or the life of the receiver, which is the only species of lease expressly referred to in the settlement of the March and Neidpath estate. With respect to the Queensberry estate, the leases are of a different description; because, supposing the word "*dispone*," in the entail of the Queensberry estate, to have the same effect as the word "*alien*," the leases impeached are sought to be supported under a power of leasing, which is contained in the settlement of that estate.

The *form* of the action which has been brought by the Trustees of the late Duke of Queensberry against the Duke of Buccleuch, to have this great number of leases declared to be good, was a subject of consideration of your Lordships when this case

Remit.

was before your Lordships upon a former occasion; and your Lordships directed the cause to be remitted* back to the Court of Session in Scotland, to review generally the interlocutor complained of in the appeal then depending; and special directions were given as to the points to be reconsidered upon such review.

Interlocutor consequent upon the remit.

Upon this remit the Court to whom it was made have pronounced an interlocutor repelling the defences, and finding, decerning, and declaring, *in*

* Lord Redesdale here recited the words of the remit, which are given before, p. 387.

terms of the original libel. The *terms of the original libel* required an unqualified declaration in favour of all the leases in question. It would have been to me somewhat satisfactory, if the Lords of Session had thought fit to express that they had considered the several subjects respectively to which their attention was particularly called by the remit, and had expressed that they had so done, in the decision which they have made upon the subject. At present, we are only enabled to form a judgment how far they took the particular subjects into their consideration, in consequence of the notes with which we have been furnished, importing to be notes of what fell from the Lords of Session respectively.

Observations on the opinions expressed by the Lords of Session.

Upon those notes I feel myself compelled to state, that, as far as I can form any judgment, the Lords of Session have totally mistaken the object of the remit in one point—that object not being to obtain the opinions of the Lords of Session, whether, generally, an action of declarator respecting the validity of the leases could be entertained; but whether by the persons, and under the particular circumstances which are mentioned in the remit, such action could be entertained? Upon that subject the Lords of Session have given to your Lordships no satisfaction whatever. It appears to me strange, that these learned Lords should have so mistaken the terms of the remit; but, perhaps, it was much easier to mistake the terms of the remit, than to grapple with all the difficulties which the terms of the remit, not mistaken, might have imposed. We must, however, now deal with the decision such as it is. I cannot forbear

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observing also upon the language used in some of the memorials upon the subject, with respect to what may have fallen from Noble Lords in this House. There is a style and a manner which are becoming upon such a subject; and I will only say at present, that I cannot apply *that* word to all that is to be found in some of these memorials.—I trust, my Lords, that the practice will not be continued.

Questions upon the leases.

With respect to the leases themselves.—In the Neidpath case, the first question which occurs, arises upon the length of the term which has been granted. It seems to be a very serious question, To what extent that can be carried? There is another case* upon your Lordships table, in which the question is, Whether a lease of 999 years may be granted of an entailed estate. I leave your Lordships to consider what may be the effect of leases for 999 years of an entailed estate. Your Lordships will recollect, that during that term of 999 years, the estate will nominally belong to one person, and really to another; that the consequence will be, that the power and influence of such property will be divided—divided, in a greater or less extent, according to the possible improvement of the property, or the difference in the value of money, from time to time; and at length, the lessee for 999 years may have an infinitely better property than the tenant who succeeds to the entailed estate, and the power and influence arising from the estate will be wholly in the lessee, and the tenant of the

* The Elgin case, since decided in favour of the lease, on the words of the permissive clause of the entail. *Vide ante*, p. 412.

tailzie will be a mere annuitant. One of the greatest evils affecting another part of the united kingdom, arises out of the leases renewable for ever, which have been granted in that country, where leases for 999 years have also been granted, to a great extent. Knowing all the political evils which have resulted from that practice, I take it upon me to say, that if a lease for 999 years can be granted of an entailed estate in Scotland, the consequences to the country would be infinitely worse than any which can result from the strictness of any Scotch entail. When, however, Judges in a Court of Justice take upon themselves to act upon what they conceive political evils, or political benefits; and when they hold that entails are odious, from political considerations, which is the only ground I know of upon which it can be contended that entails are odious; they should consider, whether, in endeavouring to defeat entails in this manner, they are not producing a greater political evil than that which they are attempting to avoid. But I do not understand what right a Court of Justice has to entertain an opinion of a positive law, upon any ground of political expediency. I have always been at a loss to conceive upon what ground a Court of Justice was entitled so to act. The *Legislature* is to decide upon political expediency; and if it has made a law which is not politically expedient, the proper way of disposing of that law is by an act of the Legislature, and not by the decision of a Court of Justice. It is true, my Lords, that in this part of the country, in very ancient times, contrivances have been resorted to to avoid the effect of a statute, also a very ancient statute, by which entails were counte-

Impolicy of long leases, and leases renewable for ever.

Expedience an improper ground of decision.

Entails in England destroyed by judicial contrivance.

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nanced—I mean the statute *DE DONIS*. This has been done gradually, and by various contrivances, and with some assistance too from the Legislature. The prejudices of those who conceived themselves interested to preserve entails, not admitting of a complete repeal of the statute *de donis*, it has been, in effect, partially repealed by such contrivances, and these contrivances have been in some degree countenanced by the Legislature. The effect of these contrivances has now been so long considered as established law, that it cannot now be questioned. We might almost as well question the constitution of the Legislature itself. Lately, it has been my duty particularly to consider that subject also, and I fear, your Lordships will be unable to find by what law a considerable part of the constitution of the Legislature of this country has been formed. It has been the work of time, and has been sanctioned by length of time; and length of time has given sanctity to the practice of barring entails in England.

An anomaly countenanced by the legislature and sanctioned by time.

Distinction between English and Scotch entails.

The learned Judges of the Court of Session in Scotland seem to have supposed that those who attend the decision of appeals in this House, are disposed to judge of entails in Scotland according to the law affecting estates-tail in England; and that they consider estates-tail in Scotland as similar to estates-tail in England. On the contrary, it seems to me impossible to assimilate the laws of the two countries on this subject. In contemplation of the law of England, as it now stands, a tenant in tail has a *quasi* perpetual inheritance; he has powers, which certainly do not belong to a tenant of a tailzied estate in Scotland—I mean a

tailzied property, protected with all the clauses necessary for that purpose. The tenant in tail in England, if adult, is capable of rendering himself complete master of the land, and making himself tenant in fee-simple, unless it is an estate held under grants of the Crown of a particular description, where the reversion is in the Crown, and estates-tail, generally, where the reversion is in the Crown. In the latter case, a tenant in tail may bar all but the Crown, though he cannot bar the right of the Crown. A tenant in tail in England, who is an adult, being capable of barring the entail, is not bound to keep down the interest of a mortgage affecting the estate out of the rents of the estate; but with respect to an infant tenant in tail, the rule is otherwise, for an obvious reason, that in consequence of his infancy, he is not capable of making an absolute disposition of the estate, and therefore it is considered that those who receive the rents for him, are bound to keep down the interest during his infancy. A tenant in tail in England grants a lease, and does not bar the entail. The lease is not void, but it is voidable. If he grants a lease with warranty, and there are assets descending to the heir of entail, the lease is good; because the warranty will bind the heir of entail, if there are assets to answer that warranty;—if he grants a lease with a covenant binding the heir of entail, and there are assets descending to the heir to answer that covenant, the heir of entail is so far bound, as to be compellable to make recompence for the breach of covenant out of those assets. Therefore it is, as I conceive, that a lease by a tenant in tail in England

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is not absolutely void, but voidable at the election of the heir, and that it will probably be avoided or not by the heir, according to circumstances. The difference, therefore, between the condition of a tenant in tail in England and an heir of entail in Scotland, is such, that I do not apprehend that any person who has been conversant with the law of England is likely to fall into any of that confusion, as to the nature of estates-tail in England, and the nature of tailzies in Scotland, which the learned Judges of the Court of Session in Scotland seem to have supposed.

It is a very difficult task, unquestionably, for persons who are not familiar with the administration of the law of any country, to apply their minds so fully and effectually to the subject, as those who are familiar with it. No person can feel that more strongly than myself. Having been for twelve months only in the situation of Speaker of the other House of Parliament, and therefore absent from Courts of Justice, I certainly did not find myself, when I returned again to a judicial situation, so capable of applying my mind to the subject as I should have been, if there had been no interval between my following the profession at the Bar, and my holding the situation of Chancellor of Ireland. I have heard that one of the most able men who ever sat in the Court of Chancery in this country, (Lord Cowper,) having ceased for four years to be Chancellor, in consequence of a change in the Administration, when he afterwards came back to the office of Chancellor, often declared that he did not feel himself so ready in the discharge of his duty in that office as he had been before. Whenever, there-

fore, I judge of a case of Scotch law, (being bound, nevertheless, by the situation in which I stand, to form a judgment upon it as well as I can, and as every one of your Lordships is bound), I always have a jealousy of myself upon the subject, and always endeavour most particularly to divest myself of any thing that can be called English prejudice. I hold that to be a most imperious duty, because I must admit that it is likely such prejudices should exist in my mind. But if I am to discharge my duty as a Lord of Parliament, in giving my opinion upon cases of appeal which come before this House, as long as the Court of Appeal shall remain in this House, (and most of your Lordships must be in some degree at least in the same situation), I must endeavour to make up my mind upon the subject in question as well as I can, and to give the best judgment I can form upon it.

The principle of former decisions to be regarded.

In judging of any question of law, it has always appeared to me highly important to discover, in the *first* place, what are the principles upon which persons who have had to decide upon the same question of law have proceeded; because I donot apprehend that a Court of Judicature is to decide capriciously, or is to decide because it will have it so, or as has been said with respect to the Court of Chancery, facetiously, by a very learned person, Mr. Selden, that a judgment in the Court of Chancery was like taking measure of the Chancellor's foot, one Chancellor having a *long* foot, and another a *short* one. The object of every person in a judicial situation, and particularly of a person in the office of the noble Lord on the Woolsack, should be, and I conceive always has been, to establish certain principles,

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by which, not only he shall guide his own decisions but by which others may decide similar cases, and by which those who have to give advice on similar cases may be able to give proper advice. For if principles of decision are not established, it is impossible to say what will be the decision upon any case, or what advice ought to be given by those who are consulted on the subject. I have therefore been most anxious to discover what are the principles of decision which the Courts in Scotland have adopted in deciding upon the powers of tenants of tailzied estates in Scotland under strict entails. With respect particularly to their power of granting leases, (for that is the subject which is immediately under your Lordships consideration), I find, that it has been generally considered that a lease of a long duration is a species of alienation; and your Lordships have accordingly decided, in the Wakefield case, that a lease of ninety-seven years was a species of alienation, not permitted to a person who held an estate under strict entail; and that a prohibition of alienating prohibited such leases. It immediately occurred to me, to endeavour to discover upon what principle this was so determined. The principle, and the *only* principle which I have been able to discover, is this,---that the prohibition to alienate extends, generally, to any lease, the lease being, in itself, an alienation *pro tanto*, during the continuance of that lease, except so far as a rent is reserved upon that lease, payable during its continuance. I then proceeded to consider upon what ground any lease by a person holding under a strict entail, could be good against the successors in that

Long leases held to be alienations.

entail; and according to what has fallen, from time to time, from Judges in Scotland, and what is to be found in text-writers on the subject, the rule is this, —that a lease of a proper duration, and under certain circumstances, is to be considered as a fair administration of the estate, which it is necessary to allow to a person holding a tailzied estate, for the purpose of giving to him the fair benefit of the estate during his right to the enjoyment of it; because if he were utterly incapable of letting any lease whatsoever, the consequence would be, that he must either hold the property, however large it might be, entirely in his own possession, (a thing, in many cases, almost impossible), or he must dispose of the possession of it to persons whose interest would terminate with his life. That inconvenience, therefore, seems to have been considered as a sufficient ground for allowing some, but it may be difficult to say what power of disposition by leasing, to a tenant of a tailzied estate in Scotland. The language of all the persons who have spoken, and of all the persons who have written upon the subject, has been, that they considered the granting of leases by a person under the restriction of a tailzie, as a due administration of the estate, and a species of administration which was necessary for the enjoyment of the estate. It seems to me, that a power thus yielded to necessity, and yielded *only* to necessity, ought to be bounded by the necessity which compels it to be yielded; — that is, by that which, generally speaking, is compatible with the future as well as with the present enjoyment of the estate. The future possession of the estate might be injured,

Leases of proper duration allowed, for the necessary administration of the estate.

The power of the tenant of tailzie in possession ought to be bounded by this necessity.

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if the land were let without the means of insuring the proper management of it, in consequence of the lessee not having a certain term and interest, and particularly in a country in the state in which the greatest part of Scotland was a hundred years ago. Where a country was capable of great improvement, it would have been highly injurious to have prevented persons, holding estates under strict entail, from granting any leases whatever, that should endure beyond their own interest in those estates. The limitation which I have stated seems to me to be one which necessarily arises from the principle on which, as I conceive, an indulgence in making leases to bind the successor has been allowed to tenants in tail; and that the grant of a lease, for what may be deemed a long term, (whatever may be the length of term that may be allowed), is not permitted to a person holding an estate strictly entailed, being prohibited by the prohibition of alienation; the alienation by lease being prohibited where the extent of the term granted is beyond that which was necessary for the proper administration of the estate. When I am asked, what is to be the limitation of a lease under such circumstances, I confess there is a great difficulty in drawing any line precisely; but if there is to be no limitation, it is perfectly clear that the property may be, in effect, alienated; and when it has been decided that a long lease may be an alienation, as in the Wakefield case, it appears to me perfectly clear, that you must consider the question upon every lease to be, whether that which has been done is alienation or administration, according to circumstances.

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In judging, therefore, of the Neidpath case, the first question to be considered is the length of duration of the lease of Harestanes, which is a fifty-seven years lease, not qualified by any circumstances; not for instance, a building lease. Was it, or was it not necessary to the administration of the estate, that a fifty-seven years lease should be granted? What line is to drawn between fifty-seven years and ninety-seven years? A ninety-seven years lease your Lordships have determined to be not sustainable, on account of the length of time; a fifty-seven years lease is a lease that may, probably, endure much beyond the life of the granter. It may be made by a person at a very advanced period of life: his immediate successor, (his son perhaps) may also be at an advanced period of life; and a fifty-seven years lease in such case likely to endure during the whole time of the successor's holding. If it should so endure, what is the consequence? The administration of the estate during the time of the succeeding tenant in tail, is not in the hands of that tenant in tail; it has been preoccupied by the person who preceded him in the enjoyment of the estate. The consequence necessarily is, that the person who so succeeds under the tailzie, has not the same power of administration as the person who preceded him had; and, generally speaking, has no chance of having the same power, considering the ordinary term of human life. We are told, that threescore years and ten is the ordinary term of human life; and if threescore years and ten *be* the ordinary term, consider how large a portion of that ordinary term a lease of fifty-seven years will occupy; and what is the probable state of a succeeding heir of

Lease of Harestanes: question as to duration.

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entail coming to the possession of the estate under a lease of fifty-seven years, granted in the latter years of his predecessor. That consideration also called to my attention the leases with covenants to renew; for, if a man may grant leases for fifty-seven years, and may covenant to renew those leases for fifty-seven years, yearly, as long as he lives, what is likely to be the situation of the succeeding heir of tailzie, if that covenant should be acted upon? Has the successor, generally speaking, any chance whatever of having the administration of the estate in any degree? It appears to me, that, considering the case upon no other ground but the length of time, the lease of Harestanes is one that cannot be supported upon any principle upon which I have heard it asserted, that an heir of tailzie, who is prohibited from alienating, and who has not a power to grant leases expressly given to him, can grant a lease; and upon that ground alone, I should be of opinion that that lease is capable of impeachment. But there is upon that case another consideration, which is, the question of grassum. I cannot understand what the Lords of Session in Scotland conceive grassum to be. In my mind, grassum, as taken on the leases in question, is nothing more nor less than anticipation of rent—it is taking rent beforehand. A noble Lord, whom I see in his place, will recollect the common expression in Ireland, of *fining down the rent.* What is a grassum but fining down the rent? Is there any distinction? I can find none. Then, if grassum is fining down the rent, what is grassum but rent? rent paid beforehand to the granter of the lease, instead of being paid annually to whoever should be

Lease of Harestanes bad in length of time alone.

Question of grassum.

Grassum is rent paid in advance to the granter of the lease, instead of being paid annually to the owner of the estate for the time being.

owner of the estate. But the objection which I state does not depend upon this reasoning alone: the Courts in Scotland have determined that grassum is rent; they have determined that it is rent with respect to teinds, and with respect to superiors; and in all cases, except in the case of tailzied estates, grassum is admitted to be rent. Such have been the decisions of the Courts in Scotland. Now, what can be the distinction between the same thing with respect to an heir of tailzie, and with respect to other persons? When an heir of tailzie in possession receives a sum of money on granting a lease, for what does he receive it? He receives it, because the rent reserved upon the lease which he grants, is so much less than the value of the land. Grassum would not be given to him, unless the land was let by the lease at an under rate. It is therefore neither more nor less than rent received by anticipation, and received by one heir, instead of being received by a succession of heirs. In the Westshiells case, a very extraordinary distinction was attempted to be made. The Court of Session held, that though what was granted by the name of grassum was not rent, yet what was given, not by the name of grassum, but in the shape of bonds for the payment of money at future periods, was rent. It appears to me that both were the same thing. What difference is there betwixt my receiving, upon my granting a lease, 100*l.* or my receiving 100*l.* in ten years, at the rate of 10*l.* a year, with interest? Therefore, in the Westshiells case it appears to me, that the bonds which it was determined should go to the succeeding heir of entail as rent, were just the same thing as the grassum taken in the

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The Courts of Scotland have decided that grassum is to be considered as rent in questions of teinds and superiorities, and in all cases except of tailzied estates; but there is no ground for the exception.

Decision in Westshiells case.

Groundless distinction between premium paid and premium secured by bond.

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same lease. I cannot distinguish between the two. In that case no question was made with repect to the grassum; and I believe there were reasons why the person who claimed the benefit of the bonds did not think fit, either to resort to his father's assets, for the purpose of demanding a proportion of the grassum, or to attempt to set aside the leases which had been granted, provided he received the bonds remaining due in lieu of rent. The effect of grassum is also to be considered in another point of view, which more particularly relates to the case of the Queensberry estate than to that of the Neidpath estate; and yet, to a certain degree, it respects the Neidpath estate also, if the opinion that the rent to be reserved upon a lease to be granted by a person in possession of a tailzied estate in Scotland must be the last reserved rent, is well founded. Upon what principle that opinion is founded, I am utterly unable to discover; for, if nothing is said in the deed of entail upon the subject of rent, I cannot see why the person who is in possession of an entailed estate cannot grant a lease for half the last rent, as well as for the last rent. I can see no just ground of distinction: I see nothing upon which I can found a principle of decision, to make a distinction between these two cases; and therefore I so far agree with those Lords of Session who held that the tenant of an entailed estate may let down the rent. They must so hold, if they mean to be consistent, where there is no express prohibition to the contrary; for if the tenant of a tailzied estate has power to grant a lease for any term, where there are no express words in the deed of entail to prohibit it, if there is nothing in the deed

Where there is no prohibition, the tenant of a tailzied estate may lower the rent.

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of entail to prohibit granting for less than the old rent, there is nothing to limit the terms on which the lease may be granted; and consequently to be consistent, those who hold that, where there is no express prohibition, a lease may be granted for any term, must also hold that the rent may be let down, and that the lease may be granted at any rent. Most of the Lords of Session, however, are of opinion, that the old rent must be reserved; and a very distinguished person, whose sentiments upon that subject have been read by the noble and learned Lord, seems to have conceived that there can be no question but that the old rent must be reserved. But upon what principle? I can see none. If a person who is in possession of an entailed estate can defeat his successor, by granting a lease upon a grassum, I can see no ground for holding that the rent reserved must be the *old* rent, or that it may not be any rent however small. But, if the lease is granted upon a grassum, and the old rent is nominally reserved, is the rent so reserved in effect really and truly the old rent? Does it produce the same thing? Certainly not. Your Lordships know, from what has been stated in the case of the Queensberry estate, the effect of the grassums taken, and the consequent burdens brought upon the estate, if with respect to to others, grassum is to be considered as rent; but, between the Duke of Buccleuch and the late Duke of Queensberry, is it not to be considered as rent, and that, consequently, the net rent now to be received is not the same net rent which was received previous to the leases in question.

Looking at the cases which have been decided, it

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strikes me, that the case of *Leslie* v. *Orme*, which came before this House during the time Lord Thurlow held the office of Chancellor, has established certain principles upon which I should wish to decide the present case. The case of *Leslie* v. *Orme* was this: An entail had been created in the year 1692, by a person of the name of Patrick Leslie, by which he disposed of lands in entail, (with the usual words prohibiting alienation,) to his second son George Leslie. The words of prohibition contained in the deed of entail were, "that it should not be lawful "to the said George Leslie, and the said heirs of "tailzie, to sell, annailzie, or dispone the lands and "others, or any part thereof, provided to them, "heritably or irredeemably, or under reversion, nor "to grant infeftments of annualrent, or yearly feu-"duties thereof." There followed in the deed of entail these words: "Nor to let tacks in diminution "of the true worth and rental they paid before the "said tack." This deed of entail therefore generally prohibited alienation, and expressly prohibited, not the setting tacks for any duration of time, but the setting tacks "in diminution of the true worth "and rental they paid before the said tacks." A subsequent deed was executed according to the power vested in the party for that purpose, taking notice of the former deed of the 8th November 1692, and reciting, that by that deed it was prohibited, conditioned, and declared, "that it should be nowise "leisome and lawful, nor in the power of the heirs "of tailzie therein named, to set tacks of the lands "therein specified, in diminution of the true worth "and rental they paid before the said tacks;" and that

Principles established in Leslie *v.* Orme decide this case.

The entail in that case did not prohibit setting tacks for any duration of time.

for the reason stated, he was disposed to change this clause, and that he had power to do so; and therefore he did, with consent and advice of his son George Leslie, "dispense with, and annul the "clause above specified, as freely in all respects as "if the same had never been conceived or insert in "the bond of tailzie above deduced:" the effect of which was, to strike out of the former deed of entail the words prohibiting leases: But these words were added: "So that, in all time hereafter, it shall be "leisome and lawful to any of my said heirs of "tailzie, to grant tacks and assedations on any part "of the lands contained in the said tailzie, and that "under the present rental, if they shall think fit "and expedient, without incurring any hazard or "danger in and through the foresaid irritant clause, "which is hereby abrogate and taken away," Now, my Lords, taking these two instruments together, it seems to me that there is a general prohibition of alienation; and that there is an express power of granting leases, and of granting those leases without limitation of term, and at any rent, under the present rental. Unless the prohibition of alienation extended to prohibit long leases, there was in these instruments nothing that prohibited long leases; but it is perfectly clear, that not only the granter of the entail, but the Court of Session, did conceive that there was something prohibiting long leases; for, when they came to decide upon the leases granted, they declared themselves to be deciding upon the supposition that the person in possession under the deed of tailzie acted in the execution of the power of leasing so granted; and they expressed

It contained a general prohibition of alienation, and a power to grant leases without limitation of term, and for any rent under the existing rental.

Yet the Court of Session thought in that entail there was something prohibiting long leases.

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this to be their construction of the settlement, in the words of their decision.

The first person who came into possession of the estate under this entail, was a person of the name of Peter Grant, who took the name of Leslie; and he having had a litigation with respect to his title, was involved in considerable expense; and a person of the name of Orme, who had been employed by him to direct that business, had considerable demands upon him for money on that account. Part of the property consisted of a house called Fetternear, which had been *a mansion-house*, but at that time was in great decay, and not capable of being inhabited. Mr. Orme obtained a lease, dated the 29th March 1769, of *that part* of the estate for the term of four nineteen years, at the rent which had been before reserved upon a former lease. The consideration for this lease was part of the debt due to Orme; and the remainder of that debt was to be satisfied by means of another instrument, enabling Orme to withhold a part of the rent reserved by the lease till the whole of that debt should be discharged. Orme also obtained other instruments after mentioned from Mr. Leslie Grant. At length, the property comprised in the entail came into the hands of the person who disputed the lease, and sought to reduce all the instruments obtained by Orme from Leslie Grant, as contrary to the powers which were vested in Leslie Grant by the deed of entail; and he likewise endeavoured to reduce them, upon the ground of frauds practised upon Leslie Grant by Orme. The question of fraud was a distinct question, and it was determined that it was not compe-

tent to the person who then sought to investigate the transactions, to impeach them on this ground; and the question which finally came before the Court was upon the effect of the instruments executed by Mr. Leslie Grant. The Lord Ordinary, in his interlocutor, found, with respect to the tack dated 29th March 1769, whereby Leslie Grant, in consideration of the sum of 992 *l.* 15 *s.* 6½ *d.* sterling of premium or entry-money, discounted and allowed to him out of a larger sum due by him to Orme, conform to accounts settled between them, set in lease the lands and baronies of Balquhain and Fetternear to Orme, for the space of four nineteen years, from and after the term of Whitsunday 1769, for a rent or tack-duty of 9,062 *l.* 8 *s.* 3 *d.* Scots: That as by the two deeds of entail, the heirs of entail were put under no restriction as to the number of years for which leases might be granted, they were at liberty to graut leases for any term of years they thought proper, and therefore sustained the defence, and assoilzied the defender from the reduction of his tack, in so far as challenged on account of its being granted for such an unusual term of years, "seventy-six years;" and in so far as this tack was challenged on account of its being granted for a rent or tack-duty *below what the lands and estate were worth, and did or might have paid.* The Lord Ordinary found, that though, by the tailzie of said estate, in 1692, the heirs of entail were restrained from setting tacks in diminution of the true worth and rental they paid before the said tacks, as the entailer by another deed in 1707 did dispense with and annul that clause, sicklike and as freely as if the

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same had never been conceived nor insert in the bond of tailzie; declaring the same to be void and null in all time coming, so that in all time thereafter it should be leisome and lawful to any of the said heirs of tailzie to grant tacks of any of the lands, and that under the present rental, if they should think fit and expedient, without incurring any hazard or danger in and through the aforesaid irritant clause, which was thereby abrogate and taken away. The Lord Ordinary then "found that the tack in "1769 was not liable to challenge by the pursuer as "granted for an under rent or tack-duty; and "*separatim* found, that the said tack-duty of "9,062 *l.* 8 *s.* 3 *d.* with the discount given of "992 *l.* 15 *s.* 6½ *d.* sterling, in name of premium or "grassum, was superior to any rent these lands did "then pay or had formerly paid, and therefore upon "that ground also sustained the defence, and assoil-"zied the defender from the reduction of that tack."

Construction of the words "true worth and rental."

The latter part of this finding shows, that at the time of that decision, there was not so perfectly clear an opinion of what was the construction of the words "the true worth or rental," contained in the first deed of entail, as is now alleged; and the pursuer had attempted to impeach the lease, as granted for a rent or tack-duty below what the estate and lands were worth, and did or might have paid. The third deed under challenge, was an obligation and assignation of even date with the tack thus granted by Leslie Grant to Orme, whereby, for the causes therein expressed, Leslie Grant assigned to Orme, his heirs, &c. for his own behoof and that of the other creditors of Leslie Grant, therein mentioned, the

sum of 4,470 *l.* 1 *s.* 9 *d.* Scots, being the balance of the above tack-duty over and above 3,600 *l.* reserved to Leslie Grant; this instrument containing a discharge of the said 4,470 *l.* 1 *s.* 9 *d.* of the said tack-duty, until such time as the debts above mentioned should be satisfied; and with this proviso, that in case any of the heirs of tailzie should refuse to ratify these his deeds, the aforesaid tack-duty of 9,062 *l.* 8 *s.* 3 *d.* Scots should be restricted to 3,600 *l.* until the aforesaid debts should be paid. Upon this the Lord Ordinary found, that the assignment and restriction of the tack-duty, for the purposes therein mentioned, viz. for payment of the debts contracted by Leslie Grant, who held the estate under the foresaid entail prohibiting the contracting of debts, the restriction of the tack-duty, and the assignment of the surplus of the tack-duties to Orme in payment and satisfaction of the debts due to him and the other creditors mentioned in the deed, could not be effectual beyond the life of Leslie Grant, and such of the other heirs of entail as should ratify and confirm the same; and as it was accordingly ratified and confirmed by the pursuer's father, the Lord Ordinary sustained the defence, and assoilzied the defender from the reduction of the said deed, so far as respected the restriction of the tack-duty and assignment of the surplus over and above the 3,600 *l.* during the lifetime of Leslie Grant and of the pursuer's father; but reduced the same, so far as regarded the restriction and assignment of the tack-duty from and after the death of the pursuer's father, and reduced the same accordingly. The reducing the rent for the purpose of paying

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debts was not within the power of leasing which had been granted, and was a mode of charging the estate with those debts, which was expressly restrained by the deed of entail; and yet Leslie Grant might have done the very same thing in another way, if he might have granted a lease at a less rent, instead of granting it for the larger rent, and thus might have given the benefit of the depression of the rent, to the extent in which a benefit was intended to be given by this deed, which was found not to be according to the powers which he had. I mention this, particularly with this view, that it is perfectly clear that the Court of Session, at that time, did not consider that what a man might have done in one way, he therefore could do in another. The interlocutor farther noticed, that the tack of the 29th of March 1769, reserved to Leslie Grant, his heirs and assigns, a faculty or privilege to resume the possession of *the mansion-house, offices, and gardens,* and mains of Fetternear, upon twelve months premonition, upon an abatement from the tack-duty of 430*l.* 4*s.* 10*d.* Scots, but that that reservation had by deed in August 1769 been discharged and annulled, so far as respected assigns, and was, by deed of the 7th September 1773, again restricted and limited to Leslie Grant himself, and the heirs male of his body. Upon this the Lord Ordinary found, that as the said Leslie Grant was under no restraint or limitation from granting tacks of all or any parts of the said estate, and for such rent or tack-duty as he thought proper, there laid no challenge at the pursuer's instance, either of the tacks themselves, as comprehending what was denominated the mansion-

house, offices, &c. of Fetternear, or restriction of the aforesaid reserved faculty to the exclusion of the heirs and assignees of Leslie Grant, other than the heirs male of his body, and therefore assoilzied the defender from the reduction of the several restrictions of the said faculty. The Lord Ordinary then, after noticing that the pursuer insisted that the unlimited power of granting tacks, for any number of years, without limitation, ought not to comprehend the mansion-house, offices, &c. of Fetternear, as being the principal mansion-house of the family, found that there was *no evidence that it was the mansion-house of the family*, or had been occupied and possessed as such, for many years before, but was, in a great measure, ruinous and waste, and as the tailzie itself made no such exception, repelled that reason of reduction. The last deed under challenge, was a tack or contract 11th September 1773, whereby Leslie Grant did, for the causes and considerations therein mentioned, not only ratify the aforesaid tacks, but prorogated the same for the further term of nineteen years, upon receiving payment of a premium or grassum of 25 *l.* sterling, and the Lord Ordinary sustained the defence against the reduction of this tack, and assoilzied the defender. The case afterwards came before the Lords of Session, and the Court so far differed from the Lord Ordinary, that they sustained the reasons of reduction of the deed of restriction granted by Peter Leslie Grant to Orme, dated the 5th day of August 1769, and of the deed of restriction and tack granted by Peter Leslie Grant to Orme, dated 7th of September 1773, and also of the tack granted by the said Peter Leslie

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Grant to Orme, dated the 11th of September 1773; and remitted to the Lord Ordinary to proceed accordingly. The Lords of Session, therefore, agreed with the Lord Ordinary with respect to the power of granting leases at any rent, and without any restriction as to the term, under the words contained in the second deed of entail, but held that, notwithstanding the terms of that power, and although that power was granted in general words, extending to all the estate, without any exception of the mansion-house, the mansion-house and lands could not properly be considered within the terms of that power, because they were the mansion-house and residence of the family, the Lords finding that Fetternear was a mansion-house, against the finding of the Lord Ordinary. They also considered the subsequent lease, by which an additional term of years was added to the first term of four nineteen years, as not within the power; and the decision of the Court of Session was affirmed, on appeal, by this House.

Decision of the Court of Session affirmed on appeal in D. P.

Leases in Leslie *v.* Orme held good by virtue of the power, though otherwise prohibited.

I conceive, therefore, that in this case of *Leslie* v. *Orme*, the Court of Session, and this House affirming what was done by the Court of Session, have established by their decision, as far as that decision has any authority, that the lease in question, in the case of *Leslie* v. *Orme*, was to be sustained under the express power given by the deeds of entail; and that, therefore, it was to be in all respects in conformity with that power; that it was the express power under that settlement which enabled Leslie Grant to grant a lease of that long endurance, and at the rent reserved, and to take the grassum which he did take. I cannot conceive how there could

otherwise be a question with respect to the lease which was sustained. If Leslie Grant could have made that lease, though every thing had been thrown out of the entail which expressly gave that power, would first the Lord Ordinary, and then the Court of Session, have expressly sustained the lease as good by force of the power, the Court of Session, in construing that power, holding by implication, contrary to the express words, that the mansion-house, and the lands adjoining it, were not within that power. Under these circumstances, therefore, I conceive that the case of *Leslie* v. *Orme* tends to show that that which is now said to have been the old law of Scotland, was not considered as the law at that time. It seems also clear, that the power which an heir of tailzie has to grant leases, so far as he has that power, is subject to the exception with respect to the mansion-house, and the lands which belong to it; an exception which indeed is pretty generally admitted. That exception was understood both by the Lord Ordinary and the Court of Session; for though the Lord Ordinary did not determine, as the Court afterwards did, with respect to the house and land, it appears that he considered the house as not the mansion-house, but waste, though he also relied on the general words in the power, including all the estate without exception. The Court, on the contrary, considered that Fetternear was properly the mansion-house of the estate, and therefore not properly comprised within the leasing power, notwithstanding the words of that power, which extended to the whole property. The result appears to be, that it was then understood that an heir of tailzie cannot grant a lease of the entailed

The mansion and lands adjoining held not to be within the power, though general.

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mansion-house and lands occupied with it, but that they shall be reserved for the use of the next heir of tailzie, when he comes to the enjoyment of the estate. Upon what principle can that have been determined? It can only have have been determined upon *this* principle, that the heir of tailzie who is in possession has generally no right to grant a lease but for the purposes of his own enjoyment of the property; and therefore he has no right to grant the mansion-house, because that is not necessary for his enjoyment of the property, according to the view of the creator of the entail, who is supposed to have intended that the person in possession, as heir of tailzie, should have the mansion-house, and the lands belonging to it, for his own occupation. This appears to me to show decisively what is the principle upon which any lease by the heir of entail must stand, unless granted under an express power; for I cannot imagine on what ground the mansion-house and the lands adjoining it are excepted from the general power of leasing attributed to the tenant in possession of an entailed estate, without any express words for the purpose, unless the power of leasing is to be considered as arising from the necessity of leasing for the purpose of enjoyment, and therefore not extending beyond that necessity. For what reason was it determined in *Leslie* v. *Orme*, that the lease for four nineteen years was not a lease struck at by the prohibition of alienation? because the power of leasing given to the tenant in tail, gave him a right to grant a lease at any rent he pleased; and if the lease was *good* at any rent he pleased, the reason for avoiding the lease, on the ground of alienation, did not apply.

Lease of a mansion excepted because not necessary for the enjoyment of the property.

With respect to the case of the Queensberry estate,

in which the Duke of Buccleuch is the person complaining to your Lordships, the word "alien" is not contained in the deed of entail, but the prohibition uses only the word "dispone;" and the question is, Whether the word "dispone" is equally effectual for the purpose as the word "alien?" I will not trouble your Lordships by going through all that is to be found in Acts of Parliament, and in text-writers, upon the effect of the word "dispone." It appears to me, that it is fully equivalent to the word "alien," and that, in this very settlement of the Queensberry estate, it is unquestionably used, as already stated by the noble and learned Lord, as equivalent to the word "alien." Upon that subject, I am relieved from difficulty by the opinions of the Lords of Session, because a great majority are of opinion, that the word "dispone" has in this deed of entail the same effect.

Case of Queensberry estate.

Word "*dispone*" the same in use and effect as the word "*alien*."

The next consideration respects the alternative leases;—the leases which are to endure for so many years, if such be the power, and so on, till reduced to nineteen years. It appears to me, that such a letting of an estate cannot be deemed a proper administration; for how is the person who succeeds to the estate tail to ascertain for what term the lease is to endure? By the terms of the lease, the endurance is to be, *first*, decided by the Court of Session, and, *lastly*, by this House. In the mean time, what is to become of the rent? How is the property to be managed? How is the rent to be paid? Upon a lease which is to bind the succeeding heir of entail, that succeeding heir of entail ought to know immediately to what extent he is bound;

Alternative leases not a proper administration of the estate, and void because term not certain.

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he ought to have the power to go immediately to the person who is the tenant, and say,—"Give me "the rent reserved by that lease." But the succeeding heir of entail under these leases must wait until the decision by the Court of Session, or by this House, shall have ascertained their validity and extent, or he must receive under some convention between the parties, or under a protest, to avoid affirming the leases; and until such decision, he cannot know to what extent he is bound by the leases. Is *that* the state in which the succeeding heir of entail is to be placed? And can *that* be deemed a *legal* disposition of the estate, which has such an effect? It appears to me, therefore, that these alternative leases cannot be good, because the term is not certain. What is a lease for a term? A lease must have a certain *ish*, according to the law of Scotland. What is the *certain ish* of these alternative leases? Will any of your Lordships be able to tell me, until this House has decided the case?—Can any of your Lordships say what is the ish? Is it a good lease according to the law of Scotland, independent of any other consideration, not having a certain ish?

Covenants to renew.

There is another question which arises upon the covenants to renew, from time to time, by annually granting leases for nineteen years. These covenants to renew have no operation beyond this,—they obliged the person who entered into these covenants, to renew, at the rent agreed upon between the parties, from time to time, during his life, however long the duration of that life might be. Supposing a lease upon a grassum with a covenant of that description by a person of two or three and twenty, who

might live fifty or sixty years afterwards. The grassum to be paid upon such a lease ought to be calculated according to the value of the life of that person, as the lease would be, in effect, a lease for nineteen years, and for as many additional years as the life of that person would probably endure, which, upon the contingencies of lives, is an operation of calculation.

Question of grassum; effect of prohibition to alienate.

The question of *grassum* is in some respects a distinct question, though it operates both with respect to the alternative leases and the covenant to renew. The question with respect to grassum applying to the Neidpath estate, is a question not depending upon any particular words in the deed of tailzie, but simply upon the right which a tenant in tail has to make leases of the estate tailzied; for although there is a particular power contained in that entail, that power does not apply to any of the leases which have been granted; and consequently the question in the Neidpath case is, What is the effect of the grassum upon a lease granted by the tenant of an entailed estate, with respect to whom there is no particular prohibition of granting the lease in question, but where the lease in question can only be affected by the prohibition of alienation? What is the effect of grassum? As a lease is a disposition of the property for a certain period, the effect of taking a grassum is, to give to the person who grants the lease a rent for the estate *different* from the rent which the person who succeeds him in the estate will receive during the continuance of that lease. What is "*rental?*" What is "*rent?*" What is "*grassum?*" Grassum is taking, beforehand, that which otherwise would be taken half yearly, or annually, according to the terms

Effect of grassum to give to granter of the lease a larger rent than to his successor.

Grassum, rental, and rent, the same thing.

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of a lease: It appears to me that "grassum," "rental," "rent," or whatever word may be used, are, in reality, one and the same thing.

The disposition which is contained in such a lease made by a tenant of tailzie, restrained only by words prohibiting alienation, is a disposition of property during the period for which that lease is granted, in which there is a reservation of annual rent, for the benefit of the person who succeeds him; but that reservation does not convey the same benefit as that which he stipulated for himself. If a lease were granted for nineteen years, or any other term, reserving, for ten years, or so long as the granter should live, 100 *l.* a year; for the remainder of the term, 10 *l.* a year, I have not heard it asserted that that would be a good lease against a succeeding heir of entail. If a lease is granted at 10 *l.* a year for the whole term, and a grassum is taken equivalent to 90 *l.* a year during the first ten years, what is the difference? This would be, what was called in the Westshiells case, a contrivance, which, it was said, if dexterously executed, was to be sustained, but if not dexterously executed, was not to be sustained. If therefore the words prohibiting alienation affect any lease granted by the person in possession of the tailzied estate, they must affect a lease which does not reserve to the person who may succeed, the same benefit which the person who granted the lease derived from it, according to the term of his enjoyment of the estate; because, whatever benefit was so derived from the lease by the person granting it, would be exactly the same thing as the benefit derived from reserving a large rent for the life of the

Words prohibiting alienation, affect a lease which does not reserve to the successor the same benefit as to the granter of the lease.

granter, and reducing it, at the period of his death, for the remainder of the term; which no person has contended would be a good lease.

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With respect to the Queensberry estate, the words of the entail as to the power of leasing are these: "That the said Lord 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, or for nineteen years, and "*that without diminution of the rental, at the least,* "*at the just avail for the time.*" It has been said, that this gives a power to let leases at the old rent. Under these words, it is not contended that leases might be let under the old rent, or that there are no words prohibiting the letting under the old rent; it is admitted that the letting must be without diminution of the old rent. The first question to be asked upon that is, What is the meaning of the word "rent?" It is said that it means, the rent reserved upon the prior lease of the same lands. I do not know upon what ground that stands; for it might just as well be asserted, that it meant the rental at the time the deed of entail was executed; and this must be general; so that if at the time of the execution of that deed, and long after, the lands had been in the hands of the creator of the entail, and the several tenants of tailzie in possession, and the value had been increased, so as to be quadrupled, or increased in any greater proportion, you must resort to the old lease prior to the entail. The words are "without diminution of rental,—at the least, at the "just avail for the time." It is said that the meaning of the words is this, "without diminution of

Leasing power in the Queensberry estate.

Meaning of the word rent.

Rental.

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"rental," meaning by "rental," the rent last reserved before the granting of the lease in question; but that, if it should so happen that *that* rent could not be obtained, then that the lease might be made at such rent as could be obtained. This appears to me to be a very arbitrary interpretation of the words.

The fair construction of the words of the clause, taken altogether, is that the heir is to obtain the fair value at the time of leasing.

The fair construction of the words, taking the whole together, and using the latter words as explanatory of the former, appear to me to be this,—that the creator of the entail shall be taken to have said, "I "mean by the words 'without diminution of the "rental,' that you shall let, at least, for the fair "avail at the time; that is, I do not desire you to "get the utmost you can possibly obtain for the "estate, but that you shall get the just avail for the "time." This strikes me as the fair interpretation of the words, taking the whole together.

But it is said, that in this entail there is another clause, which interprets the meaning of this,—a direction that when any lady of the family should succeed to the estate, she should marry a person of the name of "Douglas," or at least a person who would take the name of Douglas. But what is the meaning of these words? That he wished the lady to marry a person of the name of "Douglas?" That was, in his mind, the preferable measure; but that, if she should *not* marry a person of the name of Douglas, she should marry a person who should take that name. Does not that, if it operates at all, rather show the meaning in which the words respecting leases are used as I have interpreted them? That the entailer did not mean, by the words "the "just avail at the time," a worse thing than that

Clause requiring heir female to marry a Douglas, or at least a person who would take the name, if applicable, shows, that by rental the author of the entail meant the best rent.

which he had proposed to require under the former words?—If, therefore, the clause respecting marriage, is to be used as interpreting the other clause respecting leases, it appears to me to have directly the contrary effect to that which has been contended for. It shows, that by "rental," he meant the *best rent*, but that he then added,—"I do not desire you to reserve the best rent that can possibly be obtained, but take the just avail at the time; and *it* shall be sufficient." If a construction is to be put upon the words "at the least," in the leasing clause, by a reference to the same words used in the other clause, it seems to me that, instead of having the effect which is contended for, they have directly the contrary effect; that by the words "at "the least, at the just avail for the time," the entailer meant something less, and not something greater than he intended to express by the words "without "diminution of the rental." But taking the leasing clause by itself, when the entailer says, that the tenant of tailzie shall not set tacks nor rentals of the lands for any longer space than the setter's lifetime, or for nineteen years, "and that without diminution "of the rental," adding, "at the least, at the just "avail for the time;" can it be said, in an honest interpretation of the deed, that he meant that *less* than the just avail at the time should be taken? And do not those words, "at the least, at the just avail for "the time," interpret what he meant by the word "rental?" Do they not show, that by "rental," he meant the best rent that could be obtained? and that he then meant to qualify the expression he had used, by adding, "but I do not insist upon your

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" getting the extremity of the rent that might be " obtained ; take the just avail at the time, and I " shall be satisfied." That seems to be a much more fair and reasonable interpretation of the clause, than that attempted on the part of the representatives of the late Duke of Queensberry. But construe this clause even in the way in which the representatives of the late Duke of Queensberry contend it ought to be construed ;—is there no diminution of the rental by means of the leases in question? is it not clear the payment of grassum is in effect a diminution of rental, taking the rental to mean the former rent? What is the meaning of " rental?" Is it *nominal* or *real* rent? Is it that which a man is to receive for his own benefit, or that which is nominally held out to him as rent, but a part of which only can be beneficial to him? The nominal rent may be 10 *l.* ; but if the consequence of the grassum taken by the granter of the lease is, that the deduction from that rent, instead of 2 *l.* becomes 5 *l.* is there not, by the operation of the grassum, a diminution of the former rental, in any reasonable sense of the word? Is there not a diminution of the rental, in the view that this entailer seems to have had upon the subject? Why did he insert this clause? Did he not insert it, that there might be fair dealing between the tenant in tail in possession, and the succeeding heir ; that both might have equal benefit from the lease? And is *this* fair dealing? Have both an equal benefit? It seems to me that, considering the effect of grassum, with respect to the clear sum to be received upon the rent reserved, it is impossible to say that a lease so granted, is not a lease granted with diminution of

Taking grassum is in effect a diminution of the rental or former rent, if that was upon grassum.

The clause inserted by the entailer, that there might be fair dealing and equal benefit between the heir in possession and the succeeding heir.

the rental. See the effect the grassum has upon the rent before reserved. As to all the world except the heir of entail, the grassum is considered as part of the rent; and all the charges upon the estate are assessed accordingly. It is admitted that the grassum is to be considered as part of the rent, with respect to all but the succeeding heir of entail. What is there in the law of entails that makes the condition of the heir of entail different from that of other persons with respect to the meaning of the word "rental?" I am not able to comprehend how it is possible to say that the grassum is *not* a part of the rent with respect to the heir of tailzie, when, with respect to every other person, it *is* a part of the rent. If it is part of the rent—if the grassums previously received are to be considered as part of the rent, when the land is let again (whether with another grassum or without a grassum) at the same nominal rent, the land is let at *less* than the rent that was before actually received, though the same rent is nominally reserved. The rent before taken by the granter of the lease, was compounded of the grassum and the reserved rent. When the lease which was so granted was either surrendered, or expired, if the grassum was not taken into consideration in fixing the reserved rent on a second lease, then the land is set with diminution of rent, in the strictest sense of the words, independent of the additional charge brought upon the actually reserved rent, by means of the grassum.

All charges on the estate are assessed with a calculation of grassum as rent.

Upon these grounds, therefore, I do conceive that the effect of taking grassums is, to make all leases which have been granted at the old rent upon gras-

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sums, or upon the surrender of leases granted upon grassums, not within the power of leasing given by the deed of entail; and that the lands comprised in such leases have been set with diminution of the rental, even if the word "rental" in the deed of entail is not to be construed, as I insist it ought to be construed, as meaning the rent which might be obtained for the estate at the time, and not the rent which was before reserved.—There are no words in the deed of entail expressing that the word "rental" meant the rent before reserved.

In the act prohibiting the alienation of lands of the Crown, except under particular circumstances, and except by way of exchange, by which the last rental should not be diminished, if a question had been raised upon an exchange, what was the meaning of the word "rental," it must, unquestionably, have been construed to mean, that the value of the lands given and received in exchange should be the same; that the value of the land which the King should exchange with another person, should be no greater than the value of the land which he should receive in exchange. That act was intended as a restriction upon the power of the Crown to alien lands; and therefore, if the King exchanged lands with another, the act required that the lands which he should receive in exchange should be of equal value; that is, that the exchange should be without diminution of the rental of the Crown— the word "rental" there clearly meaning real annual value. The words of the statute must clearly and unquestionably mean the real value, and not the rent actually reserved.

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Taking the whole of the circumstances of these cases together, (upon which I should not have addressed your Lordships so long, in all probability, had the noble and learned Lord been able to have proceeded to-day, as he would most probably have anticipated much that has fallen from me upon the subject,) I can only add, that it appears to me that a fifty-seven years lease cannot be good, under the entail of the Neidpath estate;—that under the entail of the Queensberry estate, the word "dispone" is a word operating a restriction upon the granter of leases, as much as the word "alien;"—and that in respect to the leases in question in that case, they cannot be sustained under the power of leasing which is contained in the deed of entail, because they have been granted upon grassums, and at rents reserved on leases before granted on grassums, and therefore with diminution of the rental, and certainly not at the just avail at the time.

JUDGMENTS BY THE HOUSE OF LORDS

IN THE PRECEDING CASES.

DUKE OF BUCCLEUCH *v.* SIR JAMES MONTGOMERY, &c.

In action of Declarator.

Die Lunæ, 12 Julii 1819.

IT is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, That the said interlocutor complained of in the said appeal, be, and the same is hereby reversed: And the Lords find, That William late Duke of Queensberry, had not power by the entail founded on by the parties in this cause, to grant tacks for terms of years, partly for yearly rent,

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and partly for a price or sum paid to the Duke himself; and that tacks granted by him upon surrender of former tacks which had been granted partly for yearly rent, and partly for prices or sums paid to the Duke himself, ought to be considered as partly granted for prices or sums paid to the Duke, and that such tacks ought not to be considered as let without diminution of the rental, or at the just avail, and are therefore to be considered, as between the persons claiming under the entail, as tacks which he had not power to grant by such entail: And it is further ordered, That with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this finding. (signed) *Henry Cowper*,
Dep. Cler. Parliamentor.

DUKE OF BUCCLEUCH *v.* HYSLOP.

In the Reduction.

Die Lunæ, 12 Julii 1819.

IT is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That the said interlocutor complained of in the said appeal be, and the same is hereby reversed: And the Lords find, That the late Duke of Queensberry had not power, by the deed of entail founded upon by the parties in this cause, to grant the tack in question, in this cause, the same having been granted upon the surrender or renunciation of a former tack then unexpired, and which former tack had been granted by the Duke at the same rent, and also for a sum or price received by him; and the said tack in question, therefore, having been granted partly in consideration of the rent reserved thereby, and partly in consideration of a price or sum as before paid to the said Duke himself, and of the renunciation of the said former tack: And find, therefore, That this tack of the 30th of December 1803, ought to be considered *in this question with Hyslop*, as let with diminution of rental, and not for the just avail: And it is farther ordered, that with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

(signed) *Henry Cowper*,
Dep. Cler. Parliamentor.

SIR J. MONTGOMERY *et al. v.* EARL OF WEMYSS.

Lease of Harestanes.

Die Lunæ, 12 Julii 1819.

IT is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of be, and the same are hereby affirmed.

(signed) *Henry Cowper,*
Dep. Cler. Parliamentor.

SIR J. MONTGOMERY *et al. v.* EARL OF WEMYSS.

Whiteside—Liferent Leases.

Die Lunæ, 12 Julii 1819.

THE Lords Spiritual and Temporal in Parliament assembled, find, That the said William late Duke of Queensberry had not power, by the entail founded upon by the parties in this cause, to grant tacks, partly for yearly rent and partly for prices or sums of money paid to himself, and that tacks granted by him upon the surrender of former tacks which had been granted partly for yearly rent, and partly for prices or sums of money paid to himself, as between the persons claiming under the entail, ought to be considered as set with evident diminution of the rental: And it is ordered, That with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as may be just and consistent herewith.

(signed) *Henry Cowper,*
Dep. Cler. Parliamentor.

SIR J. MONTGOMERY *et al. v.* EARL OF WEMYSS.

Edstoun.

Die Lunæ, 12 Julii 1819.

THE Lords Spiritual and Temporal in Parliament assembled, find, That the said Duke of Queensberry had not power, under the entail founded upon between the parties in this cause, to let tacks partly for rents reserved and partly for sums and prices paid to himself, and that

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tacks granted upon the renunciation of former tacks, and were made partly for rent reserved, and partly for sums and prices paid to the Duke himself, are to be considered as tacks made partly for rent reserved, and partly for sums and prices paid to himself, and that such tacks are not to be considered, in questions between the parties claiming under the entail, as let without evident diminution of the rental: And it is ordered, That with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

(signed) *Henry Cowper,*
Dep. Cler. Parliamentor.

EARL OF WEMYSS *v.* HUTCHISON *et al. et e con.*

Crook.

Die Lunæ, 12 Julii 1819.

IT is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the said causes be remitted back to the Court of Session in Scotland, generally to review the interlocutors therein complained of.

(signed) *Henry Cowper,*
Dep. Cler. Parliamentor.

EARL OF WEMYSS *v.* MURRAY *et al. et e con.*

Flemington Mill.

Die Lunæ, 12 Julii 1819.

IT is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the said causes be remitted back to the Court of Session in Scotland, generally to review the interlocutors therein complained of.

(signed) *Henry Cowper,*
Dep. Cler. Parliamentor.