"right of redemption of the Kelso lands, contained in the "deed 1790, inasmuch as the obligation therein contained, "is not imposed on the defenders by the deathbed deed under "which they take these lands." On further reclaiming petition, they adhered.

Against these interlocutors, the present appeal was brought to the House of Lords.

After hearing counsel,

LORD CHANCELLOR (ELDON) said:—*

"My Lords,

"Having looked carefully into this case of the Duke of Roxburghe and Wauchope, and others, I can see no sufficient reason for saying that this judgment should be at all altered. In consequence of which, the form of the House requires that I should move that the judgment be affirmed, it appearing to me, upon the best consideration I can give the case, that upon all the points controverted at the bar, the respondents are right."

It was therefore ordered and adjudged that the interlocutors complained of in this appeal be, and the same are hereby affirmed.

For the Appellant, *Mat. Ross, J. H. Mackenzie.*

For the Respondents, *Sir Saml. Romilly, John Clerk, J. Fullerton, Henry Cockburn.*

[Tinwald Entail.]

CHARLES, MARQUIS OF QUEENSBERRY, . *Appellant;*

SIR JAMES MONTGOMERY of Stanhope, Bart., WILLIAM MURRAY, Esq. of Henderland, and EDWARD BULLOCK DOUGLAS, Esq., Executors of the late Duke of Queensberry, } *Respondents.*

House of Lords, 26th May 1820.

ENTAIL—CONTRAVENTION—DAMAGES—LEASES.—The entail of Tinwald restricted the heirs of entail from granting "tacks or "rentals for any longer space than nineteen years, and without "any diminution of the rental; or for the setter's lifetime in case

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* From Mr Gurney's short-hand notes.

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" of any diminution of the rental; and that it should not be " lawful to any of the said heirs to take grassums, but to set " the said lands and estate at such reasonable rents as can be " got therefor." The late Duke, a few years before his death, and while former leases were current, made the tenants on the estate renounce their leases, for new leases, for nineteen years, at a small increase of rent; but with no grassum paid. In an action of damages raised by the appellant, held that such claim was not relevant. In the House of Lords partly affirmed; and *quoad ultra* remitted.

The late Duke of Queensberry succeeded in 1778 to the estate of Tinwald, under an entail executed in 1769, by his cousin Charles, Duke of Queensberry and Dover.

The entail contains the following clause, regulating the powers of the heirs called under it, in regard to granting of leases: " And with and under this restriction, that it shall " not be lawful to any of the said heirs to set tacks or rentals " of the said lands, or any part thereof, for any longer space " than nineteen years, and without any diminution of the " rental, or for the setter's lifetime, in case of any diminution " of the rental; and that it shall not be lawful to any of the " said heirs to take grassums for any tack or rental to be set " by them; but to set the said lands and estate at such rea- " sonable rents as can be got therefor, so that the succeeding " heirs may not be hurt or prejudged by the heir in posses- " sion setting the lands at an under value, or taking, by way " of grassum, what falls annually to be paid out of the pro- " duce of the lands."

In strict consistence with what he conceived to be his powers under the above clause, the late Duke continued, from the period of his succession, to let leases, from time to time, for nineteen years, at such rents as he understood to be equal to the fair value of the farms, without, in any instance, stipulating a grassum, or any consideration, but the rent payable by the tenants. In this way the rental of the estate, which, at the date of his succession in 1778, amounted to £4124, had, by 1802, been raised to £6980, and was further increased to £9686 at the time of his death, in 1810.

But this was not achieved, it was stated, without some effort; and it was stated, that it was well known about the beginning of the present century, from various causes, a great spirit of improvement began to manifest itself among the tenantry in Scotland, who were now very generally satisfied of the advantage of adopting the most approved modes of

cultivation, and of a liberal expenditure of capital in improving their farms. The lands in Dumfries, where the Tinwald estate was situated, were at this time also, in point of cultivation, very far behind the most improved districts of Scotland.

1804.

It was in order to encourage this improvement, the respondents stated, that the late Duke resorted to the plan of making the tenants renounce their current leases (which at the time had only a few years to run), and granted new leases for the period of nineteen years, in most instances with an increase of rent; in one or two others, without any increase of rent; and it was alleged that it was only in this way, that this improvement system could be carried out.

Accordingly, after a survey of the value of the farms, by a surveyor, he received the renunciation of their farms from 110 of his tenants, and granted new leases as above described, without any grassums being paid, and with only an increase of rent according to value, or fair rental put upon them by the surveyor.

1810.

The Duke died in 1810, and was succeeded in the Tinwald estate by the appellant; at which time, about three-fourths of the leases which had been renounced in consequence of the above transactions, would have naturally expired.

The appellant, in these circumstances, brought the present action of damages, founded on an alleged contravention of the entail, committed by granting the leases in question, setting forth, that the late Duke had taken grassums, by granting new leases for nineteen years, of different farms on the estate, to the tenants in possession, several years before the expiry of the then current leases, upon the tenants agreeing to pay an increased rent. That by thus letting new leases several years before the expiry of the old ones, all competition with the tenants in possession was prevented, so that the lands could not be let at the best rents which might have been got.

Vide Summons narrated in Lord Eldon's speech.

The respondents, in their defences, stated, that the Duke had in no respect exceeded his powers under the entail, as he had neither let any part of the estate for a longer period than nineteen years, nor taken grassums. That he had let the leases complained of, at rents which were reported to him by a person of approved skill to be fair and adequate; and that the claim of damages was, therefore, utterly groundless.

For Defences, *vide* Lord Eldon's speech, p. 575.

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June 25, 1812.

The Lord Ordinary (Gilles) pronounced this interlocutor upon the summons and defences: "Having heard parties "procurators upon the grounds of the libel and defences, "Finds, that in those cases where renunciations were ob- "tained by the late Duke of Queensberry of the former "leases, and new leases granted of the same lands for a "longer endurance, but without any increase of rent, there is "no room for an allegation that a grassum was received by "his Grace, or for a claim of damages on that account, but "finds, that in all cases where, upon obtaining renunciations "of current leases, the Duke let the lands of new to the same "tenants for increased rents, the renunciation, with the addi- "tional rent thus obtained under the new leases, is to be "considered as a grassum paid to his Grace. And finds, "that the nature of the transaction in such cases, affords real "evidence that the Duke did not, as enjoined by the entail, "set the lands and estate at such reasonable rents as could "be got therefor; and, therefore, finds damages due to the "pursuer, and decerns; superseding extract till the first box- "day in the vacation. Before answer as to the *quantum* of "damages, ordains the pursuer to give in a special conde- "scendence of the damages claimed by him, and for what "leases and lands." The appellant represented against this

May 19, 1813.

interlocutor. The Lord Ordinary before answer ordered a condescendence specifying the different leases granted by the Duke on account of which the appellant now claimed damages.*

The Lord Ordinary's interlocutor being again represented against, and the condescendence having been given in, his Lordship pronounced this interlocutor, allowing a proof to the pursuer of his condescendence, and to the defender of

June 7, 1814.

his answers.

Against this interlocutor a reclaiming petition having been brought to the Inner House, the Court pronounced this interlocutor: "Having resumed consideration of this petition, "and advised the same with the answers thereto, they alter

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For full Note, *vide* Lord Eldon's speech, p. 564.

* Note by the Lord Ordinary:—

"The Lord Ordinary still remains of the opinion expressed in his last interlocutor, viz.: That in the cases there mentioned, the renunciation with the additional rent must be held to be truly a grassum; and that these circumstances do at any rate, afford real evidence that the lands were not let by the renewed leases at such reasonable rents as could have been obtained therefor," &c.

" the Lord Ordinary's interlocutor reclaimed against, sustain " the defences, assoilzie the defenders from the conclusions of " the libel, and decern; but find the pursuer not liable in the " expense of process."

On second reclaiming petition, the Court adhered.

Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The leases executed by the late Duke of Queensberry, must subject his executors to the appellant in a claim of damages, as they were granted substantially for grassums contrary to the strict prohibitions of the entail under which he held. 2d, Even supposing, that the consideration received by the Duke could not be held to be a grassum, the leases having been deliberately and systematically let at an under-value, fall under the other prohibition of the entail by which the possessor is bound to let the lands at such reasonable rents as can be got therefor, so that the succeeding heirs may not be hurt or prejudiced by the same being let at under-value.

Pleaded for the Respondents.—1. The late Duke of Queensberry did not, by the leases in question, infringe that provision of the leasing clause by which the heirs are prohibited to take grassums. It is not alleged, that any consideration was stipulated by the leases, or received by the Duke at the time, or after they were granted, except the rent payable termly by the tenants; but the appellant contends that in those cases where there was an increase of rent, this increase, when coupled with the renunciation of the remainder of the former lease is of the nature of a grassum. The leases thus renounced were, it is said, of considerable value, and the tenants, in giving up, really paid to the Duke what was equivalent to the sum they would have brought in the market. But all this is fallacious. If the Duke, on obtaining the renunciation, let the farm on the same terms as before, he is no gainer by the change. If he lets at a lower rent, he is a loser. If at an increased rent, he reaps the advantage; but it never can follow that, if he lets at a rise of rent he commits a contravention of the entail, and is liable in damages. 2. Besides, the rents payable by the leases current at the time of the appellant's succession, are such as, on a fair construction of the leasing clause, the Duke was entitled to accept of, and the proof of their inadequacy offered by the appellant, is totally irrelevant. 3. Separately, the leases complained of are perfectly consistent with the provisions of the

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Act of Parliament, 10 Geo. III., c. 51, and are authorised and protected by that statute.*

After hearing counsel,

The LORD CHANCELLOR (ELDON) said,†

"My Lords,

"This is a most important case, and, therefore, I shall not express my full opinion upon it, until I have given to it further consideration. If the leases could be maintained, under the 10th Geo. III., there would be an end of the case, but I decline, for the present, giving any opinion upon that point. There are an hundred and ten leases, one in 1799, one in 1800, one in 1802, between fourscore or ninety more in 1804, two more in 1807, and three-and-twenty more in 1808; and there is one thing common to all these leases, that they were let upon the renunciation of former tacks. I think that circumstance pervades the whole of them. They were made by the late Duke of Queensberry; and with respect to some of them (seventeen of them) the old tacks which were renounced, if they had not been renounced, would have continued in force and effect for several years after his death.

"The summons is dated in the year 1812, and is to this effect; it states, that the deceased William, Duke of Queensberry, succeeded to the lands and estates in virtue of a deed of entail, which is set forth in the summons: That he made up his titles in the regular form, and possessed the lands and estates solely in the capacity of an heir of entail, and under all the limitations, fetters, and restrictions contained in the deed of entail above-mentioned. It then proceeds to state, what I would term the leasing clause—the clause regulating the powers of the heirs of entail in granting leases:—'And with, and under this restriction, that it shall not 'be lawful to any of the heirs to set tacks or rentals of the lands, 'or any part thereof, for any longer space than 19 years, and 'without any diminution of the rental, or for the setter's lifetime, 'in case of any diminution of the rental; and that it shall not be 'lawful to the heirs to take grassums for any tack or rental to be 'set by them, but to set the lands and estates, at such reasonable 'rents as can be got therefor, so that the succeeding heirs may 'not be hurt or prejudiced by the heir in possession setting the 'lands at an undervalue or taking by way of grassum what falls 'annually to be paid out of the produce of the lands.'

"Now, my Lords, I believe I may venture to state to your

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* These are merely the heads of the argument.

† From Mr Gurney's short-hand notes.

Lordships, that where, in an English settlement, a person is made tenant for life, and there is a power of leasing, the lease must be made strictly conformable to the power; but there is undoubtedly a very great difference between an English tenant for life, with a power of leasing, and a person claiming under a Scots entail, as to the construction of restrictive clauses. I take the liberty of stating *that*, that it may not be supposed I overlook that distinction, or that I am one of those who may be represented as an enemy to Scots entails. I may, perhaps, in my judgment have very much erred as to Scots entails. No man is more willing to profess an inclination of opinion that *that* may be the case; but I do assure your Lordships, I have never differed in judgment from those whom I so much respect, namely, the Judges of the Court of Session, without a conviction that it was my bounden duty to do so. If I have erred it is not, therefore, from an enmity to Scots entails, but from a persuasion that I was bound so to decide.

"My Lords, with this distinction, between the powers of an English tenant for life, with a power of leasing, and the powers of one in possession under a Scotch entail, it will certainly become necessary to consider, 1st, Whether the leases in the way in which they have been made, are leases granted on the taking of a grassum; and, 2dly, If the leases in the way in which they have been made, are leases granted on the taking of a grassum, whether the construction, which has been attempted to be put on this restrictive clause, is the construction, that ought to be given to the words, 'But to set the lands and estate at such reasonable rents 'as can be got therefor, so that the succeeding heirs may not be 'hurt or prejudged by the heir in possession setting the lands at 'an undervalue, or taking by way of grassum what falls annually 'to be paid out of the produce of the lands,' whether the construction which contends that they are not to be let at an undervalue, by taking a grassum, or the construction which contends, that they are not to be let at an undervalue, whether you take a grassum or not, if you let at a less rent than can be reasonably got therefor is the proper construction? My Lords, upon that I would state myself, no further at present, than only to shew I have taken a view of the questions in the way in which I apprehend they could be meant to be addressed to us from the bar; and I am anxious to discharge the duty that I am now attempting to discharge, with a view of learning when I shall come to the end of it, whether I have guarded, in my view of it, all the questions that are meant to be put to the House.

"My Lords, this summons goes to state 'that, notwithstanding 'the clause prohibiting the taking of grassums, and binding the 'heirs of entail to set the lands for such reasonable rents as could 'be got therefor, or, in other words, for the best rents that could 'be got therefor, so that the succeeding heirs might not be hurt

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'or prejudged by the heir in possession, setting the lands at an 'undervalue, the deceased William, Duke of Queensberry, in 'order to procure, during his own lifetime, the benefit of a present 'increase of rental, though at the expense and to the great hurt 'and prejudice of his succeeding heirs of entail, had been in use 'for a considerable number of years preceding his death, to grant 'new nineteen years' leases of the different farms of the entailed 'estates, to the tenants possessing the same at the time, several 'years before the expiry of the leases under which they were then 'possessing the lands, upon the said tenants' granting renuncia-'tions of the unexpired terms of their old leases, and paying an 'increased rent for the same. That, by thus letting new leases 'of the lands in question, several years before the expiry of the 'old ones, to the tenants then occupying the lands, all competi-'tion whatever, was completely excluded, and it was absolutely 'impossible, in such a case, that the lands could be let at the best 'rents that might have been got for the same.' To be sure, if that proposition can be maintained, that, in consequence of these circumstances, it was absolutely impossible that they could be let at the best rents that might have been got for the same, that would be conclusive. Then they give a reason: 'As no 'stranger could possibly compete with the tenant of the farm, 'who had, in many cases, six and eight years of his former lease 'yet to run, and in some cases even a longer period, the land-'lord, in acquiring his object, of an increase of rental, long before 'the expiry of the existing leases, was evidently acting at the 'mercy of the tenant possessing at the time, who would certainly 'take care that, in estimating the rent to be paid by him upon 'this new lease, he should be amply paid and compensated for 'the unexpired term of his former one.' Now, undoubtedly it is a perfectly fair thing, if we were agitating these things in a Scotch Court on the same principle as we should discuss a similar question, if it arose in this part of the island, namely, Whether a tenant for life with a power of leasing, had let for the most reasonable rent he could get for the same? you must of necessity inquire into that fact, by looking at the nature of the evidence which could be given, attending to the nature of the transaction; because, if a person deals with the tenants who are upon his estates for their renouncing their leases, and granting new leases to them, and if it is generally understood, as it could not but be generally understood, when you are dealing in ten instances in this mode, and dealing with no stranger at all; according to the case as it is stated to us, nothing can be more improbable than you should give in evidence any offer a stranger made. He is shut out by the nature of the transaction, and, therefore, where the person succeeding to the estate thought proper to insist that the lease had not been so let as to be according to the power, he

must proceed to show that it was not so let according to the power, by such evidence as the nature of the case would admit of, and the one head of evidence would undoubtedly be the true value of the estate, though, probably, no person can be ignorant that, in a great number of cases, it is impossible to expect that you can get at a reasonable rent for the estate, but by getting the utmost worth and value of it, to be let (got?) for the time, and, according to our proceedings here, I believe it will be found, as I had occasion formerly to express, in other cases, that ninety-nine times out of a hundred, where a man reserves to those who are to come after him, what he reserves to himself, inasmuch as human prudence will always in some measure be regulated by a regard to its own interests, he is doing that (if one may venture to use such a phrase, though I would wish to abstain from it), which a prudent administrator of an estate would do, if only himself were interested; a very possible criterion of knowing whether the tenant for life has got the most reasonable rent that can be got for an estate, being supplied by looking at what an individual would say was the rent at the moment. I believe I speak in the hearing of some who know—I am sure I know an individual myself who knows—that estimating what it was reasonable to have done in the year 1806, with a view to purchase lands in 1806, may be, long before 1820, thought to be a most extravagantly, unreasonable, and foolish proceeding. In this case, however, my Lords, it seems impossible to have given in evidence, offers made by other persons. Then they state, 'that in all cases there was 'absolutely a grassum paid by the tenant.' Now, if there was a grassum paid by the tenant, then also there is an end of it, and your Lordships will have to consider it, in order to determine whether a grassum was paid by the tenant or not,—1st, Whether the landlord was at liberty to take a renunciation of the lease? Because, if the landlord was at liberty to take a renunciation of the lease, and if the lease could not be renounced but by the tenant considering in some degree the value that he was, in some way or other, to have for the renunciation, unless the tenant would do what, in his disinterestedness, perhaps, a Scotch tenant might do, but what an English tenant, I am sure, would not do, namely, renounce—the value of the renunciation in the bargain he made with his landlord. If you are driven to admit, on the one hand, that he would look for a return for his renunciation, but are obliged to admit, on the other, that the landlord had a right to take the renunciation, it appears to me difficult to say that it is not the price of that renunciation; but when that is paid to the landlord, you must consider what is meant by the words, 'the landlord.' The price of that renunciation is spread all over the new lease. It is not the price paid to the individual who happens to be the landlord at the time the new lease is made,

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but it is paid to that person or those persons who, from time to time, during the currency of the new lease, sustain the character of landlord—the landlord for the time being.

"My Lords, there is another point which has been raised at the bar, which appears to me to require also attention, and that is what has been stated in the course of the argument to-day, which, I dare say, there may be a very solid foundation for stating; but I cannot help saying that I was a good deal surprised at hearing that was the law; I mean that the proprietor of the estate for the time, should have let at such a rent as could reasonably have been got for the same, if he took a renunciation of the former tack, but with an allowance and reduction for so many years as the tack had to run. Now, I have no doubt at all—not the least doubt—in saying, that if this could be looked at with analogy to what might happen in this country on a power, that that could not be good, and for many reasons. In the *first* place, it is not a lease in possession. In the *next* place, it is impossible that you can fix a criterion of rent property, because the rent which is to be fixed, is the most reasonable rent that can be got at the time of letting the lease; for instance, supposing the Duke of Queensberry had lived twelve years instead of six, after these leases were taken, the fair question as between those, to take the estate, and the executors of the Duke of Queensberry, would not be, Whether there was a fair rent taken at the time the lease was made? but, Whether it would have been a proper rent for the heirs of entail at the time the former lease was to cease, which was the time when the new rent was to be paid? therefore, upon that part of the case, it appears to me fit only to say, that I think it deserves more consideration, before I can be satisfied to accede to it.

"My Lords, they then go on to state, 'That in this manner 'the deceased William, Duke of Queensberry, in contravention 'of the said deed of entail, and to the manifest defraud, hurt, and 'prejudice of the pursuer, and the heirs of entail succeeding to him 'in the tailzied lands and estates, let leases of the lands.' Then they proceed to state the various leases which he did let. 'That 'by this mode adopted by the late Duke, for the sake of present 'profit to himself, of letting the lands anew to the tenant then 'possessing the same, for the full term of years authorized by 'the entail, several, and in a number of cases, many years before 'the expiry of then existing leases, upon the tenant's renouncing 'the unexpired period of these leases, in consequence of which, 'the leases were let at most inadequate rents, and a virtual 'grassum actually given by the tenant.' My Lords, what a virtual grassum is, perhaps, I may a little better understand now, than I did some years ago, for I have seen, in cases which have been brought on your table, or, rather, cases referred to here,

very nice distinctions between rents and grassums. 'That the 'heirs of entail, therefore, have been grossly hurt and prejudiced, 'for had the leases been allowed to expire in common course, the 'very great bulk of the above-mentioned valuable and extensive 'estates, indeed the whole of them, with the exception only of 'twenty farms out of the farms above-mentioned, which are up-'wards of 120 in number, would have, ere this time, expired, and, 'in consequence of the free competitions which would, in that 'case, have taken place, the rents even at a very moderate estimate 'would have considerably more than trebled the present amount.' They then proceed to state a circumstance, the effect of which, in the consideration of an action for damages, may not be immaterial:—'That, although, from the circumstance of the deed 'of entail not being recorded in the register of entails, in terms 'of the Act of Parliament, it might be doubted how far the 'pursuer was entitled to reduce the leases in question, *quoad* the 'tenants; it cannot be doubted that he is legally and justly entitled to full compensation and redress from the separate means 'and estate of the deceased William, Duke of Queensberry, for the 'immense loss and damage he has sustained by and through the 'above-recited contravention of the entail.' It then proceeds to state the applications made to the executors; and then it prays compensation in damages in the manner which I shall mention to your Lordships; and I confess, I was greatly relieved by Mr Clerk's stating that we were to consider this only as a random statement of damages, and that we were to apply our rule of damages to the case as we might think it expedient and just, to apply to the case. But here there are, as I stated to your Lordships before, 110 leases, and the damage is sought with respect to the whole in this prayer, in the summons, namely,—'That the executors do 'make payment to the Marquis of Queensberry, pursuer, of the 'sum of £150,000 sterling, in the name of damages sustained by 'him in consequence of the contraventions of the entail on the 'part of the Duke, or else to make payment to the pursuer and 'the heirs of entail succeeding to him in the tailzied lands and 'estates, of a free yearly annuity of £15,600 sterling, or such 'other annuity, more or less, as shall be modified and ascertained 'by our Lords, to be the difference between the amount of the 'rents presently payable under the leases above-mentioned, and 'the present true yearly worth and avail of the lands, and continuing the payment of the same, during the whole terms and 'years of the currency of the presently existing leases of the lands, 'and progressively, as the leases shall expire and determine, 'making such rateable deduction from the amount of the said 'annuity as may be equivalent to the present yearly worth and 'value of the lands, whereof the leases shall so expire and determine, so that the said annuity shall always and only continue

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'proportionate to the value of the lands and farms, whereof the 'leases are still current and in existence at the time, and shall 'finally cease and determine, when all the leases above-mentioned 'of the lands and farms shall have expired.'

"Your Lordships will perceive, in the list of leases mentioned in the condescendence, that this summons, having been dated in February 1812, several of the old leases, and many of them of considerable value, had not then expired, so that this question would arise, Whether, if the pursuer could claim, in respect of finding leases that could or could not be disturbed, finding upon the estate leases, not according to the restrictive clause, as he would allege, he could insist upon the damages in respect of these leases having been made, not as he would urge, according to that restrictive clause? But, on the other hand, if the old leases, which had been surrendered had been still in existence, as several of them would have been still in existence, and would not have expired, if in existence, till long after this summons was preferred to the Court of Session, then a question would arise, How the pursuer was to make out that he was damnified before the time he came into the Court of Session, and between the time that he came into the Court of Session, and the period at which those old leases would have expired, when *de facto* he would have been entitled, the moment he began to sue, to larger rents upon those leases, and would have continued entitled to larger rents upon them till the time that the old leases had expired. That difficulty, however, I thought, might have been got over, in these cases, on principles on which we cannot contend with it in our Courts. It is enough, therefore, to say, that it deserves consideration.

"My Lords, there is, besides in this prayer, ground for observing how extremely difficult it is to know how to deal with such a case as this, because if you will read the prayer of this summons, as I understand it—I am not sure that I do understand it—but it shews the extreme difficulty, I would add, the extreme injustice of being too nice with reference to the question, Whether the most reasonable rent has been got for the thing which has been let with ordinary and common caution and prudence—for, if I understand the prayer of this summons, when it seeks to have, as the measure of damages, an annuity constituted by the difference between the rent that has been reserved, and the yearly value of the lands, it goes on, not only to desire that the damages may be estimated on that *ratio*, and that principle on which the summons is preferred, but that *de anno in annum*, during the currency of these leases, there may be that computation made to shew the damage, and that shews, in the nature of the thing, that the quantum of reasonable rent that may be got to-day, is very different from the quantum of reasonable rent that might have been got this day twelvemonth, or the quantum of reasonable rent that

may be got a twelvemonth hence. It is not, therefore, to be weighed in golden scales, or in very nice scales. My Lords, it appears, however, that the summons having prayed for damages, in respect of those leases which had come in, they state the leases which would not have been expired at the time. That is open to this observation at the bar, to which your Lordships will give due attention.

" My Lords, the proceedings which have taken place in this case have been the interlocutors of a very eminent person, Lord Gillies, and the interlocutor of the Court of Session. My Lords, the first interlocutor is in these words: 'It finds, that in those cases, 'where renunciations were obtained by the late Duke of Queens-'berry, of the former leases, and new leases granted of the same 'lands, for a longer endurance, but without any increase of rent, 'there is no room for an allegation, that a grassum was received 'by his Grace, or for a claim of damages on that account,' that is, upon account of receiving the grassum, 'But finds, that in all 'cases where, upon obtaining renunciations of current leases, the 'Duke let the lands of new to the same tenants for increased 'rents, the renunciation, with the additional rent thus obtained 'under the new leases, is to be considered as a grassum paid to 'his Grace.' And if, in point of law, it is to be considered as a grassum, and is to be considered as a grassum paid to his Grace, there is an end of the case. Then there is another finding, 'Finds, 'that the nature of the transaction in such cases affords real evi-'dence that the Duke did not, as enjoined by the entail, let the 'said lands and estate at such reasonable rents as could be got 'therefor.' Now, supposing the former part of the interlocutor to be unfounded, and that the renunciation is not to be considered as a grassum, your Lordships would have to consider, whether the construction that has been put upon the restrictive clause to which I referred before, is a construction which connects it with grassum, or whether the true construction leaves it unconnected with grassum, and makes it a substantive injunction, that you shall not let for a rent less than could be reasonably got for the same; because, if that be a substantive prohibition, and if Lord Gillies was right in saying, that the nature of the transaction afforded real evidence that the Duke did not, as enjoined by the entail, let the lands and estate at such reasonable rents as could be got, it would be a question why we should go into proof of that; but I am prepared myself to say that the real value and worth of the land at such a time being more than the rent reserved by the lease at the time, is, in my judgment, no evidence to prove that the lease was not let at the best rent that could be reasonably got at the time. That may be made out one way or the other, from other circumstances.

" My Lords, Lord Gillies proceeds, as persons with minds such

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as his usually do, by endeavouring to set the matter right as soon as may be. In another interlocutor, he says: 'He still remains 'of the opinion expressed in this last interlocutor, namely, that 'in the cases there mentioned, the renunciation, with the addi-'tional rent, must be held to be truly a grassum, and that these 'circumstances do, at any rate, afford real evidence that the lands

Note to interlocutor.

'were not let by the renewed leases, at such reasonable rents as 'could have been obtained therefor; but by the above interlo-'cutor, all this is, in the meantime, left open, in order that, be-'fore the case is carried into the Inner House, the facts relative 'to it, may be fully ascertained, and particularly, an opportunity 'afforded to the pursuer, on the one hand, of proving his allega-'tion, that by the renewed leases, the lands were let greatly below 'their value, and to the defenders, on the other hand, of proving 'what is so strongly insisted on in their representation—that all 'the lands were, by the renewed leases, let at reasonable and 'adequate rents.'

My Lords, a condescendence was given in, and that condescendence your Lordships have heard read. I have it now before me: 'In obedience to the above interlocutors, the pursuer con-'descends upon and offers to prove the following facts and cir-'cumstances, which he shall endeavour to state as succinctly as 'possible, observing the same order in which the different farms 'are specified in the summons upon which the action is founded.' And then they state, item by item, these hundred and ten leases, and, with very few exceptions, I think the effect of the statement is—let in such a year, at so much—the lease renounced in such a year, so many years of it being then unexpired, and a new lease granted at so much—real value at that period £147, 10s. Now, I state again, as I have before taken the liberty of stating to your Lordships, if this had been an averment made in Westminster Hall, it would have followed from the words of the clause, Why have they not made an averment, that £147 was the best rent that could be reasonably got therefor at the time? and, Why have they not given the real value in evidence, which would have had more or less effect according to the greater or less difference there was between the rent actually reserved, and that real value, which might be so inadequate, that, as Lord Thurlow says, when a man heard the difference stated, it would startle him, and likewise any other circumstances in evidence that might account for the difference being more or being less between the real value and the rent at which it is let. There are some particular cases, however, that might deserve particular attention; and as it has now been stated, that the proof must be applied to each of these leases severally and respectively, instead of being applied to all together, as seemed at first intended, I would mention again item 87, which is the 'Townfoot of Mousewald,' let in 1791 at £47, valued in 1801 at

£58, lease renounced in 1807. Now, there can be no doubt, I presume, that it would be a fair observation to a jury, that the value of the evidence which is called the valuation of Alexander in 1801, would be very different if a lease was made in 1801 than it would be considered as being with reference to a lease not made till 1807; and if in 1801, that valuation was a right one at £58. Still, when it is here stated, that 'during the subsistence of the 'previous lease at £47 rent, a part of this farm (being in point of 'value, greatly less than a half), was subset by the tenant at '£45, which sub-rent was, in 1804, increased to £52, 10s.' So, that, according to this, the valuation of Alexander in 1801 was £58, and the lease granted was £60, that is, £2 more than the valuation, and one-half of it had, between 1801 and 1807, been let for no less than £52, 10s., which is more than double—*that* would be a strong case.

My Lords, there was another interlocutor pronounced by the Lord Ordinary, which 'allows the pursuer a proof of the facts 'stated in the condescendence, and the defenders a proof of the 'facts stated in the answers, and to both parties a conjunct proba-'tion thereanent.' The respondents reclaimed to the whole Court against the above interlocutor, and their Lordships 'having re-'sumed consideration of this petition, and advised the same, with 'the answers thereto—Alter the Lord Ordinary's interlocutors 'reclaimed against; sustain the defences; assoilzie the defenders 'from the conclusions of the libel, and decern; but find the pur-'suer not liable in the expenses of process.' A petition and additional petition having been presented by the appellant, their Lordships 'having resumed consideration of this petition, and of 'the original petition, and advised the same with answers thereto—'They refuse the desire of both petitions, and adhere to the inter-'locutor reclaimed against.' And it has been correctly stated to your Lordships from the bar, that in both hearings, the Court were perfectly unanimous; and not only perfectly unanimous, but, as it appears to me, expressed no doubt at all that the judgment, which they did so unanimously pronounce, was right. Now, whether that judgment does or does not amount to this assertion, namely, that if all the allegations of the pursuer are true, still they would not support the pursuer's claim, is a matter, I think, for consideration; for if they would support the pursuer's claim, then, it appears to me difficult to say why he was not allowed to make proof of them—they being all taken for granted to be true, that they would not sustain the pursuer's claim. Then, in the first way of putting the case, your Lordships will have to decide, whether they would or would not, if true, sustain the pursuer's claim. If you are of opinion they would sustain the pursuer's claim, then it will be extremely difficult to say why they are not to be allowed to go to proof of them. And it appears remark-

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able, as Mr Clerk has strongly put it, that we can in judgment take the allegations of the defender to be true, and yet not allow a proof of the pursuer's allegations. For instance, there is no doubt that Alexander made a valuation; but as to the prudence and skill of Alexander, they may depend on circumstances. We cannot, however, come to this view of the case until we have disposed of other questions. I mean those I referred to in the first of my observations, and which undoubtedly, as they affect the doctrine of entails in general, are of much more importance to be well determined than any points which arise in this cause, and apply to this cause only. These are the general questions which have been raised. If I am wrong in my statement of them, I shall be extremely glad to be set right; and I would not be understood to have given any opinion whatever on any one of the points I have stated, meaning to reserve that for more mature and quiet consideration."

LORD REDESDALE said,*

"My Lords,

"I shall not go into this case at present, because it does appear to me to be of great importance in respect of entailed property in Scotland. I understand the final decision of the Court of Session to be a complete determination of the question upon the allegations contained in the proceedings, independent of the question respecting the propriety of giving evidence upon the subject; because the Court has entirely disposed of the cause, it is out of Court, as I may say; and, therefore, they have not certainly decided upon the question, whether the evidence should be given on the matters contained in the condescendence, but they have held, as I apprehend, that the case, as stated, does not give the present appellant a right to proceed in the action. That is the effect of the decision.

"My Lords, I apprehend that may have been decided upon grounds that have not been particularly adverted to in the argument before your Lordships. In the *first* place, at the time the action was commenced, all the leases that had been renounced, would have been in continuance, if they had not been renounced. I believe all of them, if they were in continuance at the time that the action was brought, then at the time that the action was brought, the Marquis of Queensberry had sustained no damage. If he died before the expiration of any of these terms, he never would have sustained any damage. Whether that was a matter considered or not, has not been stated to us; but, my Lords, in the additional petition, the Marquis of Queensberry does allege that these leases were granted by the Duke of Queensberry, *mala*

* From Mr Gurney's short-hand notes, revised by his Lordship.

fide, and to the prejudice of the succeeding heir. In the summons it is not so alleged, but it is alleged that the Duke had granted those leases to the manifest fraud, hurt, and prejudice of the pursuer, that is, the Marquis of Queensberry. Now, my Lords, I confess I have great doubt in this case, whether it is possible to maintain an action but upon the allegation that the Duke, in granting the leases, had acted *mala fide;* and in the summons *that* is not expressed. It is expressed that he had granted the leases to the manifest fraud, hurt, and prejudice of the pursuer, but not that the leases were granted by him with intent to defraud the pursuer, and that appears to me a very material consideration in this case.

"I conceive one can scarcely put the situation of an heir of entail in a Scotch entail, with a power of granting leases in a higher situation than a trustee. If you consider him a trustee in executing that power, he should so execute it as to have regard to the interest of his successor, that is considering him, I think, in the highest situation that he can be possibly considered. You cannot possibly consider him in a higher situation. Now, my Lords, if a trustee, in such a situation, had granted leases of this description, though they were really to the prejudice of the succeeding heir of entail, does it follow that damages can be recovered against the estate, and against the trustee who has acted without an intent to injure the succeeding heir of entail, acting honestly, in the transaction, and dealing with the property, as possibly he would have dealt with the property, if it had been his own? That is a great difficulty that impresses itself upon my mind. I do not find that the summons proceeds to that extent. The additional petition has an allegation to that extent, though not very distinctly; but that additional petition having that allegation, it seems to me it must have been considered that that was necessary to support the action. Under the circumstances of this case, therefore, the question that presses itself upon my mind is, whether to support this action, it is necessary to show, that the Duke of Queensberry, in what he did, intended to injure the heir of entail?

"My Lords, a decision has been cited to your Lordships, with respect to leases granted in this country, under a power for a tenant for life to grant leases for a certain term of years, at the best rent. My Lords, in that case it was proved that a lease was granted, I think, at £43; that there had been offered by another tenant a rent of £50 and above; by another, I think £60; but that the tenant for life, who was in possession of the estate, preferred the tenant at £43, and granted him the lease. This lease was impeached, and on its being impeached, the Court determined that that lease could not be set aside. The Court said, that unless it appeared that that lease, at an under rent, was granted under an undue partiality, or taking some advantage to the lessor, they

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could not impeach that lease. Now, my Lords, here, if the Duke of Queensberry had let these leases from undue partiality to the tenants, or from a personal dislike to his succeeding heir of entail, and for the purpose of injuring that heir, that might be a ground, perhaps, for taking damages, in respect of his having acted *mala fide* in the administration of the property. My Lords, that is a part of this case which strikes the most strongly upon my mind, and, I think it would be extremely important to have the ground upon which your Lordships are to decide this case, fully and well understood, because it must be of the utmost importance to all entailed estates in Scotland, where there are restrictive clauses, in respect of granting leases, that the persons in possession should know on what principles they are to act. My Lords, it is really a very serious consideration, whether a person, who, in that situation, is to be liable (supposing the entail be properly recorded, which it was not in this case), to a forfeiture of the estate, if he grants a lease to a tenant for less money than he might receive of another tenant. In the *first* place, if he is to forfeit the estate, unless he can procure a surrender of that lease, so as to purge the forfeiture, the loss of the whole property would follow. Your Lordships will, therefore, find that a person in that situation granting leases, would be in a situation of extreme danger; and even, in the prudent management of property, every person must know it is not always prudent to grant a lease to the person who offers the greatest rent. On the contrary, I know, in my own case, that a very intelligent man, and a very honest agent, has frequently advised me to accept the lowest offer, because, he says, the lowest offer always comes from the best tenant, and, therefore, it would be extremely unreasonable to forfeit the estate of an heir of entail in possession in Scotland, because he had acted as I should think fit to act, in possession of a fee simple estate. My Lords, it is also extremely material in another point of view. A person in that situation would not only be liable to forfeit the estate, for he could not purge the forfeiture, but if the lease could be sustained against the heir of entail, and the heir of entail could maintain a suit for damages for the granting of that lease, the consequence would be that he might be made to suffer to the very extent, supposing the lease to be valid. He might be made to suffer to a very great extent, without the possibility of any advantage to himself; and, on the contrary, supposing the lease to be avoided, he would then be responsible to the tenant for the injury that the tenant would sustain by that very transaction. If a long lease were granted for a term of years at a moderate rent, the tenant may have expended a very large sum of money, which might be his object in taking that long lease, and the tenant for life would be in a situation of extreme difficulty in respect of any leases so granted, though really in the prudent administration

of the property. My Lords, this induces me to think this a case for most serious consideration, and that your Lordships cannot sustain an action of this description against the representatives of the deceased heir-of-entail under such circumstances, without being perfectly assured, that, in what you are doing, you are proceeding of necessity in the administration of justice, and in such manner as not to injure all the persons in possession of similar estates administering those estates, as they would administer their own unfettered estates."

LORD CHANCELLOR.—"I move your Lordships that this case be further taken into consideration on Friday next.

Ordered.

Friday, 19*th May* 1820.

"LORD CHANCELLOR,*

"My Lords,

"In this case, in which the most noble Charles, Marquis and Earl of Queensberry, is the appellant, and Sir James Montgomery, Bart.; William Murray, Esq., and Edward Bullock Douglas, Esq., executors of the late William, Duke of Queensberry, are respondents, this was an action of damages brought by the Marquis and Earl of Queensberry, against the respondents as the executors of the late Duke of Queensberry, for damages incurred by the late Duke of Queensberry, in having let certain leases, which leases have been represented from the bar to be leases good as between the late heir of tailzie and the tenants in possession, but which leases have been represented as having been granted in wrong of the heirs who were to take after him, and, therefore, the representatives of the late Duke, are answerable to the present heir, the Marquis of Queensberry, who is now entitled to the possession of the estate, as heir of tailzie, and this is, undoubtedly, if the case is to be considered as a case in which the power of leasing required that the heir letting a lease should obtain the most reasonable rent that could be got therefor. If that be a substantive part of the restrictions and conditions or terms in the deed of tailzie, this is, certainly, one of the most important cases we have had ever to deal with, because, as far as the inquiry I have been able to make on the subject, has enabled me to judge, I believe it is the first case of the kind which has come from Scotland, and it is quite obvious that it must of necessity form a case that, in all probability, now this species of case has, for the first time, come before the House, that will establish principles, in the decision of it, which would lead to settling all questions of this nature, which it may be in the consideration of

* From Mr Gurney's short-hand notes.

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parties to bring before courts of justice, or, at least, it will settle those principles upon which Courts ought to govern themselves in like cases. My Lords, its importance is extremely obvious in every way of putting it. If an heir possessing an entailed estate in Scotland, lets leases, taking no more in rent to himself, and taking nothing by way of fine, premium or foregift, or any other benefit,—taking nothing for himself except what he reserves to those who are to follow him, still the question is open, whether he did, in so taking to himself, reserve, in the true sense of those words, the most reasonable rent that could be got? and, therefore, it is an extremely important situation in which he is placed, unless the principle on which it is to be decided, is a principle of perfect fairness, and which will protect him, if he means to act fairly. This would be the case where the tailzie had not been duly recorded, but where the tailzie is duly recorded, then the question certainly would not be a question for damages, as between the representatives of the late heir and the present heir, but the present heir would have a right to come into Court against the tenants, as in the late Queensberry cases, and to insist they had taken leases, not giving the best and most reasonable rent that could be obtained, and seeking, according to the Scotch forms, not for damages from the representatives of the late heir, but seeking to destroy the leases themselves, and thereby to create, on the part of the tenants, a demand against the assets of the late tenant in tail.

This case, therefore, is not a case which must, whenever it is finally decided, govern merely cases in which the action is for damages, but it may affect the whole tenantry, as well as all the landlords of the country; and considering what the law of Scotland is with respect to the powers of tenants in tail, who are, in truth, proprietors of the fee for the time being, and where they are not strictly prohibited, they are understood to be at liberty to lease, it is a case where the favourable principle to them should be carried as far as it can. It is the more important to consider this case, and weigh the principles on which to decide it; because, though I am not aware that any case in Scotland (taking this to be a substantive prohibition), has yet been decided, we know, in England, for a long series of years, there have been in constant use and habit, settlements by which persons are made tenants for life, with powers of leasing, which, almost always, in the terms of them (except as to leases in the west of England, where fines are allowed), require that the tenant for life should reserve the most reasonable rent that can be got. And this is not only the case as to tenants for life; but where there are tenants in fee, or in releases to uses, generally, during the minority, or where there is a forfeiture of the life estate, the trustees are to enter and enjoy for the life of the tenant for life, permitting him to receive the rents; there is a power to make such leases at the best rent that

can be got; and looking at our marriage settlements, which are in daily and hourly use, where powers of this kind are reserved to the tenant for life; and what is, perhaps, more to be considered reserved to mere trustees, both of them bound, from time to time, to get the most reasonable rent. Such has been the favourable interpretation pursued with respect to the tenant for life, and the lessee; and with respect to the trustee and the tenant under him, that, *unless there is fraud or gross partiality to the tenant, or unless there is negligence in inquiry, which amounts to evidence of fraud*, I believe our Courts have never thought themselves at liberty to disturb those leases, and speaking now as one of the oldest in the profession, of instances in which such leases have been disturbed, so great is the difficulty to be encountered, that the instances of disturbing them are very rare.

" Having stated the importance of the case, as a case in which leases are sought to be disturbed, we must not, altogether, lay out of our consideration the importance of establishing the principle, such as will enable persons to recover damages, where damages can be recovered according to the law of Scotland, and such as will enable persons to set aside leases in cases in which, according to the true intent and meaning of this power, damages in the one case should be recoverable, and the leases in the other considered void.

" With these general observations, your Lordships will permit me to state, that the action in this case was raised in the year 1812. Previous to 1812, it appears from the condescendence, that the leases which are stated in the condescendence, and which amount to no less than 110; for the perplexity in the mind of an English lawyer, in such a case as this, is considerable, when he recollects the number of questions in this part of the country, it would have been a separate action on each lease; but in this case, it is a general action upon 110, all lumped together. It appears that these 110 leases were granted prior to the time when the action was brought into Court, but upon renunciations of former leases, many of which would have been in existence at the time this summons was brought, if they had not been renounced when these new leases were taken. There is the first set of leases; and, without going through them particularly, I think from 95 to 110 inclusive, are all of them leases which were granted upon renunciation of former tacks, which former tacks would have been in existence, if they had not been surrendered and renounced when this action was brought into Court; and it will be pretty obvious, I think, to your Lordships, that it is rather difficult to say what cause of action the Marquis, in 1812, could have when, if he had happened to die before the term at which the old leases would have expired, he would have been, in fact, instead of receiving the increased rent upon the new leases, only receiving the smaller rent upon the old leases, if the leases could have been set aside.

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If the heir had insisted on a recal of the tailzie, the thing might be different, but if he had died before these old leases had expired, it is quite obvious, instead of being a loser by the grant of these new leases, he would have been a gainer by it.

"My Lords, the summons states, first, generally, the entail, and then follows this power: 'With and under this restriction, 'that it shall not be lawful to any of the said heirs to set tacks, 'or rentals of the said lands, or any part thereof, for any longer 'space than nineteen years, and without any diminution of the 'rental, or for the setter's lifetime, in case of any diminution of 'the rental.' Now, it is not necessary, in this case, to consider with any degree of particularity what is meant by these words, 'without any diminution of the rental, or for the setter's lifetime, 'in case of any diminution of the rental,'—a question which has arisen in other places, in which great attention has been given to determine what the meaning of it was, but it goes on to state, 'And it shall not be lawful to any of the said heirs to take gras-'sums for any tack or rental to be set by them, but to set the 'lands and estate at such reasonable rents as can be got therefor, 'so that the succeeding heirs may not be hurt or prejudiced by 'the heir in possession setting the lands at an undervalue, or 'taking, by way of grassum, what falls annually to be paid out of 'the produce of the lands.'

"My Lords, your Lordships will see, by and bye, that the very learned judge who executes the duty of Lord Ordinary, was of opinion that, where the Duke of Queensberry took renunciations of existing leases, and made other leases, though he reserved to himself no more than he reserved to the heirs of tailzie who were to take after him, or who should take after him, during the existence of these leases, yet, if he raised the rent, he took a grassum; and your Lordships have heard the argument to maintain that proposition. It was argued, on the other side, that this was no grassum; that an increase of rent in such cases was no grassum; but, then, in reply to that again, it was said, Be it so, still, if this is not to be considered as a grassum, the lands and estate have not been let at such reasonable rent as could be got therefor. Upon which it was rejoined, that this is no substantive restriction or prohibition in the power, but that it is merely exegetical, and explanatory of what the author of the deed meant by not taking grassums; that it is not a substantive prohibition in itself that you are to get the most reasonable rent. My Lords, with respect to that, without detaining your Lordships long in considering that question, I confess it does appear to me, taking the whole together, that it is a substantive requisition in the power, and therefore a substantive prohibition, that you are not to let but at such reasonable rents as could be got therefor; and with respect to the question of grassum or no grassum, my humble

Opinion as to reasonable rent.

On subject of grassum.

opinion is, and I speak it, with all deference to the great judge who looks on it in another view, that where the Duke of Queensberry took renunciations, and took renunciations granting to the tenants leases at an increased rent, within the intent and meaning of this power, he certainly did not take a grassum, because I think it obvious, upon the whole of these words taken together, what it was that the author of this deed meant should be considered as a grassum. But I go farther than that, because, if the Duke of Queensberry could take a renunciation of an existing lease, and could have set the lands, not to the old tenant, but to a new tenant at the very same rent at which he has set to the new tenant, it appears to me that it is impossible to say that, within the meaning of this clause, that lease would not be a good lease, whether it was to the new tenant or to the old tenant, provided it was let for the most reasonable rent that could be got therefor. If you once admit that the Duke could take a renunciation, and could let to a person who was before not in the situation of a tenant to him, for the rent of £100, it appears to me there was nothing to prevent his letting to the old tenant at the rent of £100, and the question would be, Whether that was the best rent that could be got therefor?

Opinion on the statute.

" My Lords, there is another question, which has arisen in this case, upon which I shall not trouble your Lordships by saying more than simply to state my opinion upon it, namely, it is said if all these objections could be sustained, still these are leases within the statute of the 10th George III. Now, my humble opinion upon that is, that these are not leases protected by that statute.

" Having stated that I do not think the objection of grassum arises here, or that the statute will protect the leases if they are contrary to the power, and having stated that, in my judgment, this is a positive restriction or prohibition, the question, therefore, that is now to be decided, I apprehend to be, Whether this case has been properly decided in the Court below? Whether, upon the grounds on which it acted, they ought to have altogether assoilzied the defenders? And that, I apprehend, may be put in another shape, namely, Whether the pursuer has stated such a case upon his summons, and whether the circumstances and facts upon which the Court have proceeded are such, in their nature, that, without farther inquiry or investigation, they ought to have assoilzied the defendants altogether?

My Lords, having intimated that, I think your Lordships will perceive that, in my judgment, the pursuer has a very difficult case to establish, I cannot go the length of saying, that, as far as I have been able, with a diligent attention to the case, I have convinced myself that it has hitherto been before the Court with all the information which may be necessary in order to determine, and, particularly, to determine for the first time, a cause of such

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infinite importance to the landed interest of Scotland, as I conceive this to be. I shall, therefore, proceed to state to your Lordships the effect of the summons again.

The summons then proceeds to state the manner in which the Duke of Queensberry let; that is, it asserts that, 'by thus letting 'new leases of the lands in question, several years before the ex- 'piry of the old ones, to the tenants then occupying the lands, 'all competition whatever was completely excluded, and it was 'absolutely impossible, in such a case, that the lands could be let 'at the best rents that might have been got for the same, as no 'stranger could possibly compete with the tenant of the farm, who 'had, in many cases, six or eight years of his former lease yet to 'run, and in some cases, even a longer period. The landlord, in 'acquiring his object of an increase of rental long before the ex- 'piry of the existing leases, was evidently acting at the mercy of 'the tenant possessing at the time, who would certainly take care 'that, in estimating the rent to be paid by him, upon his new 'lease, he should be amply paid and compensated for the unex- 'pired term of his former one.' Now, this general reasoning may be extremely good, but it is by no means conclusive, because, if the landlord was at liberty to take a renunciation of the lease,—and the landlord being at liberty to take a renunciation of the lease if he could have let to a stranger, provided he has let to the old tenant at the same rent at which he could have let to a stranger, all this would fall to the ground; but, I am by no means prepared to say that it would follow of course, if he took a less rent from the old tenant than from a stranger, therefore the lease ought to be avoided, because there may be a great many considerations which ought to induce a tenant in tail, even if you clothe him with the character with which it has been supposed this House has clothed him, rather more than they ever have, I mean that of the administrator of a trust estate, there may be many cases, in which it would be a better execution of the trust to prefer old tenants, connected with the family and estate, at some abatement of rent, than to take an increase from a stranger. It is therefore a circumstance, and but a circumstance, to be attended to. Then it states, 'that in all these cases there was absolutely a 'grassum paid by the tenant.'

"I have before stated to your Lordships, and I do not mean to go into it again, that in my judgment this is not a grassum; for it cannot be disputed that the unexpired terms of these highly valuable leases were in every case worth a specific sum of money. That specific sum of money, is a sum of money which is paid as rent; and, I think, the late Duke of Queensberry cannot be said to have taken grassums while these leases were in existence, and the Marquis of Queensberry will have the benefit of the increased rent. 'That, in this manner, the deceased William, Duke of

'Queensberry, in contravention of the said deed of entail, and to 'the manifest defraud, hurt, and prejudice of the pursuer, and 'the heirs of entail succeeding to him in the said tailzied lands 'and estates, let leases of the lands and farms under written, for 'periods of nineteen years, each commencing at the different 'terms underwritten, upon renunciations of the unexpired terms 'or periods of the former leases.'

"My Lords, in a subsequent part of this summons, after enumerating various leases, it is stated, 'That by this mode adopted by 'the late Duke, for the sake of present profit to himself, of letting 'the lands anew to the tenants then possessing the same, for the 'full term of years authorised by the entail, several, and, in a 'number of cases, many years before the expiry of the then 'existing leases, upon the tenants renouncing the unexpired period 'of these leases, in consequence of which, the leases were let at 'most inadequate rents.' Now, here is an allegation in this summons, that the leases were let at most inadequate rents, and an allegation that they were let at most inadequate rents for the purpose of his making a profit to himself; and this allegation appears to me to be very material.

It then proceeds to state the law of Scotland as to the right to recover damages, in consequence of having let such leases as these, and then, my Lords, it seeks the payment of those damages on a ratio of calculation, which, I understand by Mr Clerk, is not to bind him to have the damages in that form; but it is a mode of calculation which the Court might, if they thought it not the right mode, alter and vary, or reject, if damages were due.

I beg now to call your Lordships' attention to the strict *intention*, whatever may be the meaning of the words, strictly speaking.

Opinion on respondents' defences.

The first defence is, 'That many of the leases of which the pursuer 'complains, that the renunciations were taken, would not naturally 'have expired until some years hence; and had they not been 'renounced, the Marquis would have been receiving lower rents 'than he does at present. If it were to be held that the late 'Duke of Queensberry was not entitled to put an end to the former 'leases, by accepting of renunciations, and if the executors of the 'late Duke could be found, upon that account, liable in damages, 'these damages would not be due until the periods shall arrive 'when the former leases would have expired, and could only be 'claimed by the heir in possession. The pursuer, the present 'Marquis of Queensberry, may then be dead, and a different heir 'of entail possessed of the estate; and as it would only be the 'heir of entail in possession at the time, who would be entitled to 'claim the damages, if any could be due; therefore, in all those 'cases where the natural expiration of the former leases has not 'yet arrived, it is incompetent for the present Marquis to proceed 'in the action.' Now, that defence your Lordships see, is founded

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in matter of law. If the Marquis could not bring his action till the former leases had expired, then the defence is perfectly relevant. There is no fact to be tried in that case on that part of the defences. The defence would be perfectly relevant, and it would be a bar in that way of putting it, if, by the Scotch law, he could not maintain his action at this time; it would be of no consequence whatever, and would be irrelevant to prove that these leases had been let at an undervalue.

The next article in the defence is, 'But, independently of this 'objection, the defenders plead that the claim of damages, in all 'the cases, and, in any event, is totally groundless. The late 'Duke of Queensberry never contravened the entail of the Tin-'wald estate, referred to in the summons, as he neither let any 'part of this estate for a longer period than permitted by the 'entail, nor took grassums.' Now, my Lords, admitting this to be so—admitting for the moment that he did not let any part of this estate for a longer period than permitted by the entail, and admitting that he did not take grassums, is this, therefore, a complete defence to this action? This action proceeds, not merely upon the circumstance that he took grassums; but, supposing them to fail in proving that he took grassums, it does not proceed on the circumstance that he let no part of the estate for a longer period than permitted by the entail, because that only goes to show that the period of duration of the leases was according to the entail; but the question raised by this summons is,—Supposing he took no grassums, and that he did not let for a longer period than permitted by the entail, has he, in other respects, let according to the entail? Has he, or has he not, let for this permitted period, at such a rent as was not the reasonable and best rent that could be got for the same? It seems to me, therefore, that this defence cannot possibly be sustained.

Then follows the third defence: 'The whole estate was let by the 'valuation of a person of approved skill, at what was deemed an 'adequate rent, and the rental, so far from being diminished, was, 'at the death of the late Duke, increased to more than double 'of its amount at the time of his succession. Therefore, the 'defenders, his executors, ought to be assoilzied from the present 'action, and found entitled to expenses.' Now, this is a defence not founded in law, but in fact. That it was let by valuation, seems to be admitted on all hands. That it was let by the valuation of a person of approved skill, is a circumstance of fact which will amount to considerable evidence, that it was let for the best rent that could be got therefor; but whether the person who made the valuation was such a person, is matter of fact to be proved, unless it is admitted; and it is matter of fact to be proved, that it was let at an adequate rent. Possibly, one might venture to add, that if it was let by the valuation of a person of approved

skill, at what he deemed an adequate rent, the Court would take for granted, that there had been inquiry made to enable him to exercise that skill, unless it was shown there was gross and culpable neglect in the manner of estimating it. 'The rental, so 'far from being diminished, was, at the death of the late Duke, 'increased to more than double its amount at the time of his suc-'cession;' which appears certainly to be admitted in the papers; but the manner of recovering that amount, may leave open a question to be decided on sound principles, when you look at all these leases, which form a constituent part of the whole lettings, whether the doubling the rent was not reserving on each lease the best rent that could be got therefor? That question, therefore, is left open.

"My Lords, the first interlocutor, I observe, is that of my Lord Gillies, who stated himself thus:—'Having heard parties' 'procurators upon the grounds of the libel and defences: Finds 'that in those cases where renunciations were obtained by the 'late Duke of Queensberry, of the former leases, and new leases 'granted of the same lands for a longer endurance, but without 'any increase of rent, there is no room for an allegation, that a 'grassum was received by his Grace, or for a claim of damages 'upon that account.' Now, your Lordships will perceive that the humble individual now addressing you, does not agree with my Lord Gillies in this declaration in his first interlocutor, because, though I think there is not room for an allegation that a grassum was received, yet I do not agree that there is no room for a claim of damages, provided, that in a case where there was not an increase of rent, there might have been reasonably obtained a reasonable increase of rent, because, if there be a prohibition to let, except for the best rent that could be got therefor, letting at the old rent may be of itself a circumstance of evidence. It would be so in our Courts, to show that it was not letting at the best rent you could get at the time, and, therefore, that taking no increase of rent, though it will not negative the fact that you did let for the best rent, will not conclusively prove and establish that fact.

Then the judge goes on to say:—'But finds that, in all cases 'where, upon obtaining renunciations of current leases, the Duke 'let the lands of new, to the same tenants, for increased rents, 'the renunciation with the additional rent thus obtained under 'the new leases, is to be considered as a grassum paid to his 'Grace.' And your Lordships will recollect Mr Clerk, who argued this case very ably at the bar, stated, you are not to consider merely the renunciations and the letting to a tenant, but to look at this (and most truly and justly he so stated it), as a complicated case. That is, a renunciation by the old tenant letting to a new one; and, in the nature of the thing, there must have been something in the nature of an agreement by the old tenant

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giving up the remainder of a term at a less rent, and beginning with a new one, with an increased rent; and in that way of putting it, he argued, that the heir of entail in possession has an advantage by reserving a benefit to himself, which the other heirs of entail would not enjoy. Some of them might not; but still, that all comes round to this—be it, if you please, a complicated question, I think if he was entitled to take a renunciation of a lease from A. and let it to B. at £100 a year, and if you could not insist that the rent that B. was to pay, was not within the words of this power, 'the best rent that could be got for the same,' it would be impossible, for these reasons, to say it was not the best when paid by A. If that was the best rent that could be got therefor, it is impossible to say, it was not the best when paid by A, because very often, Who is the tenant? is a question of as great importance as to what is the best rent.

"Then his Lordship went on to state, 'That the nature of the 'transaction, in such cases, affords real evidence that the Duke 'did not, as enjoined by the entail, set the said lands and estate 'at such reasonable rents as could be got therefor, and, therefore, 'finds damages due to the pursuer, and decerns.' Now, if by that had been meant that the nature of the transaction, in such case, affords evidence to be considered, I agree with him, but if it is to be said that the nature of the transaction in such case affords conclusive evidence, then I cannot agree with him. 'And, 'before answer, as to the quantum of damages, ordains the pur- 'suer to give in a special condescendence of the damages claimed 'by him, and for what leases and lands.' My Lords, both parties were dissatisfied with this interlocutor, and gave in representations against it, and then my Lord Gillies, 'Having considered this re- 'presentation, with the answers thereto, before answer, ordains 'the pursuer to give in a special condescendence, in terms of the 'Act of Sederunt, specifying the different leases granted by the 'late Duke of Queensberry, on account of which he now claims 'damages, and the facts and circumstances relative to each, which 'he avers and undertakes to prove;' and then he subjoins a note, which bears upon the language of his first interlocutor, and which is expressed in these terms:—'The Lord Ordinary still remains 'of the opinion expressed in his last interlocutor, viz., that in the 'cases there mentioned, the renunciation with the additional rent 'must be held to be truly a grassum, and that these circumstances 'do at any rate afford real evidence that the lands were not let, 'by the renewed leases, at such reasonable rents as could have 'been obtained therefor. But, by the above interlocutor, all this, 'in the meantime, is left open, in order that, before the cause is 'carried into the Inner House, the facts relative to it may be 'fully ascertained, and particularly, an opportunity afforded to 'the pursuer, on the one hand, of proving his allegation, that by

'the renewed leases, the lands were let greatly below their value; 'and to the defenders, on the other hand, of proving what is so 'strongly insisted on in their representation, that all the lands 'were, by the renewed leases, let at reasonable and adequate 'rents.' So that your Lordships observe, that the determination with respect to the finding, that the nature of the transaction afforded real evidence that the Duke did not, as enjoined by the entail, let the lands at reasonable rents, is now followed by a direction to the pursuer, 'to prove his allegation, that by the renewed 'leases, the lands were let greatly below their value;' so that the Court might have before it, not only the effect of what is called real evidence, but the evidence which should arise from the proof of that allegation; and to the defenders, on the other hand, of proving what is so strongly insisted on in their representation, that all the lands were, by the renewed leases, let at reasonable and adequate rents. My Lords, that condescendence was then given in, and it appears material now to call your Lordships' attention to this sentence. It is in these words—as much of it, at least, as it is necessary to state, is in these words,—'In obedience to 'the Lord Ordinary's interlocutor, the pursuer condescends upon, 'and offers to prove the following facts and circumstances, in 'relation to the undermentioned farms and possessions, which he 'shall endeavour to state as succinctly as possible, observing the 'same order in which the different farms are specified in the 'summons, upon which the action is founded.' He begins with 'the old Mains of Tinwald, and the farm of Tinwald.' This farm, he says, was let to Mr Staig for nineteen years, from Whitsunday 1796, at £140 of yearly rent. In 1799, he renounced this lease, and obtained a new one from Whitsunday 1799, at the same rent, though, at this very time, he was receiving from Messrs Smith, his subtenants, £330. The real value of the farm at the period when the renewal was granted, was about £550. My Lords, with respect to this lease, the old lease would not have expired till the year 1815, which was three years after this action was commenced; but, for the sake of illustration, I will suppose that this was a lease subsisting at the time the present Marquis became the heir in possession, and subsisting after the renunciation of a former lease, which would at that time have expired; and then the circumstances come to be material in this way. The rent, in 1796, which was for a lease of nineteen years, was £140 yearly rent. The rent reserved in 1799 for nineteen years (that was a prolongation of the term for three years), was at the same rent, and, unquestionably, it might be the best rent that could be reasonably obtained. It is stated, that the real value of the farm was about £550. Now, it is a little difficult precisely to know what these words in this condescendence, 'the real value of the 'farm,' mean. If it means that the rent that could have been

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reasonably obtained, was £550, it would have been better, I think, that it should have been so stated, because if it had been an allegation that that rent could have been reasonably obtained, and yet that the rent was only £140, it would be very difficult, in the consideration of such a power as this, to say that that was not a circumstance which it was necessary to account for how it happened; so it is another circumstance in this part of the case that is material, namely, that at this very time the tenant who paid £140 a year was receiving from his subtenant (which means persons in the obvious possession of this estate), no less than £330. That is a circumstances which, though I do not mean to say, after inquiry, it will be conclusive, but, in the discussion of such a question in our Courts, as to whether the estate had been let for the best rent that could be obtained, there would be circumstances which, if proved, would be of very considerable weight for the consideration of a jury.

"My Lords, the next which is stated is 'Trohoughton,' which was let in 1797, at £100,—lease renounced in 1800, sixteen years of it being then unexpired; and new leases granted at £110; real value at that period is said to be £147, 7s. Now, my Lords, the circumstances of this case (after first observing that this was not expired), there is a very great difference, indeed, between propounding a case, as a case where the best rent was not reserved; and I would say, once for all, that by 'the best rent,' I do not mean a rent that could be got for the first year, but the most reasonable rent, which, as a rent of nineteen years, ought to be considered the best and most reasonable rent throughout the whole nineteen years; because the case may very easily happen, and often happens, where, if you take £550 for the first year, and that rent is to be continued, instead of letting at the best rent, you run a considerable risk of getting no rent at all for many years; and it would be the best rent, in the true sense of the words, and the most reasonable, to take £250 for the whole nineteen years, than to take £550 for the whole nineteen years, because you might not get it every year: and I have selected these two first cases for the sake of observing (if I understand what the law of England is on this subject), that if I sat at *Nisi Prius*, and were to direct a jury on such a subject, I should say, that if the words mean that a reasonable rent for the nineteen years could have been got, amounting to £550, and if you are convinced that the estate was sublet at £330, it is, upon this view of things, impossible to make out that £150 was the best rent, because the difference between £550 and £150, is immense; but, with respect to the other lease, where the £110 is reserved, and the allegation is, that the value is £147, 7s., if it means such a sum as would be got at auction, there is hardly evidence worth consideration; and the difference between £147, 7s. and £110, is not so considerable as almost to

be sufficient to run the risk of a miscarriage of justice, in a question of so much difficulty as this; and I make the observation, because it has been observed by a noble Lord at the table, that it would be desirable to confine a further inquiry to some leases, instead of extending it to all of them, though it is difficult to say how that can be done, if these words, 'real value,' are meant to hold out this idea of reasonable rent. If the real value is to be considered reasonable rent, I most fully adopt the doctrine stated in that case in the Court of King's Bench, that it must not be established merely that such a rent could be got, and might have been taken, but there must be some unfairness, some fraud, and some gross culpable negligence operating as mischievously as fraud would operate, before you can undertake to say, leases of this sort should be set aside. Making that observation, and suffering it to be applied to two of these leases, it is next to impossible to say there are not some others to which it does not apply. I have selected these two for illustration, and considering them contrary to the fact, as leases where the former leases would have expired, to explain what has occurred to me on the subject. There was one let in 1791, at £47,—valued by Mr Alexander, in 1801, at £58, and I mark that circumstance, because, in the condescendence, they remark on it. Supposing the two first leases renounced had expired, the whole that relates to Mr Alexander's valuation, would have no application to them, because they were renounced before he valued them. The lease renounced in 1807, three years of it being then unexpired, and new lease then granted for ten years, equal to nineteen years, from 1804, at £60, being £2 above the valuation of 1801,—real value at that period, £152, 15s. Now, here is a case not like the second case, where there was nothing alleged in the condescendence, except that a lease had been granted at £110, and what is called the real value, might be £147, but here is a complicated case, in which there is not only a difference between £150 and £60, but where the £60 being reserved during the subsistence of the lease, which was let at £47, a great deal less than half the estate had been subset to a tenant at £45. All this may be accounted for, I have no doubt. It is very easy to suppose circumstances accounting for it; but the question is, Whether it is or is not to be accounted for? There are five or six other cases of subsetting, and cases having circumstances of distinction, which do not belong to the generality of these leases.

Fraud or culpable negligence necessary.

"My Lords, after this condescendence was given, there was, as is usual, an answer to the condescendence, which is in these words: 'In the condescendence, the noble pursuer gives a sepa-
'rate view of each farm on account of which damages are claimed,
'1st, The rent at which it was let before the present lease was
'granted. 2dly, The time when the former lease would naturally

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'have expired. 3dly, The valuation put upon the farm by Mr 'Alexander. 4thly, The rent at which it was re-let by the late 'Duke;' and then there is the fifth, which seems to put a natural construction upon the pursuer's words, the *real value;* '5thly, The 'rent which he avers it was worth at the time it was re-let. As 'to the four first of these particulars, the condescendence, so far as 'the respondents have observed, is correct. The fifth, they hold 'to be irrelevant, for reasons stated in a minute given in for them 'of this date; but, on the point that the rents stipulated by the 'present leases were reasonable, they aver, and it will appear 'from the deposition of Mr Alexander, which was taken by the 'authority of your Lordships, and remains at present sealed up. '1stly, That he was a person much employed in valuing land, not 'only in the county of Tweeddale, where he resides, but in many 'other counties. 2dly, That he was applied to by the Duke's 'agent to value the estates belonging to his Grace, in Dumfries-'shire, and particularly the Tinwald estate. 3dly, That he was 'instructed, in doing so, to specify what, in his opinion, would be a 'fair rent for each farm, supposing that it had been at the moment 'out of lease. 4thly, That he, accordingly, inspected all the farms 'carefully, and endeavoured to make himself master of every cir-'cumstance of local situation, markets, distance from manure, &c., 'which could affect their value to a tenant. That after obtaining 'this information, he affixed such a rent on each, as, to the best of 'his judgment, was fair and adequate.' Then follows this, which is certainly a most material allegation, 'that the rent so fixed was 'calculated on the supposition that the current lease had been at 'an end, and the farm open for being re-let. If these four alle-gations were proved, it appears to me, I own, to be one of the most dangerous things possible, to say, that a tenant for life (I speak now of English tenants for life), that a tenant for life is in the execution of a power to be placed in this situation, that if he employs a man of real skill to inform him what is his duty to himself and those who are to come after him, with respect to letting his lands, or, to put it still more strongly, in the case of those who have the peculiar protection of the law-trustees; and if you please, to clothe an heir in tail with the character of an administrator, or trustee (a coat which has been oftener put on his back elsewhere than it has here), I say, in that case, which has the peculiar protec-tion of all the Courts, if these circumstances were proved, I really do not know in what situation of safety, and in what situation other-wise than that of the utmost peril and danger, such a tenant for life would be, if that conduct is not to protect him in a question, whether he has let for a reasonable rent, or in what situation the trustee would be, if, in such a case, damages could be recovered, or it could be said he was guilty of a breach of trust; but, then, general allegations of this sort must always be considered with

reference to the actual circumstance, without meaning to say that it really makes a material difference. Nobody can deny it may make a most material difference, whether, in 1801, I let upon the valuation of Mr Alexander, or do not act on it with respect to many parts of the estate (and that appears to be the case here) till 1808 or 1809, because Mr Alexander's valuation in 1801 may be a valuation he would not abide by in 1809, though he thought it most prudent in 1801. So, it may be a matter of considerable importance, whether the Duke of Queensberry, or Mr Alexander, did or did not know of the circumstances of all these subsettings. If a person, in the exercise of such a power as this, goes to work with that ordinary prudence, and makes those reasonable inquiries (which are deemed reasonable, because they are necessary), and if he is misled, the case is treated with great indulgence; but, if you can establish that I, a tenant for life, am letting a lease for twenty-one years, at £100 a year, and that I know that my tenant, to whom I am letting at £100 a year, is letting it for £500 a year, if I cannot account for the circumstance of letting him have it at £100 a year (a circumstance which might, in some cases, be accounted for, though it is difficult to say what are those cases), I say, if I did not account for that, then it might be fairly taken to be dealing with that sort of partiality to the tenant which I have no right to indulge at the expense of those who are to take after me.

"The matter then comes before the Court after petitions and answer. There are petitions on your Lordships' table, certainly not more than so important a question requires; but, before I state the interlocutor, it is proper to state, that these answers having been put in, my Lord Ordinary states, in another interlocutor of the 14th June 1814, 'The Lord Ordinary having advised the 'condescendence for the Marquis of Queensberry, with the answers 'thereto, and relative minute, Allows the pursuer a proof of the 'facts stated in the condescendence, and the defenders a proof of 'the facts stated in the answers, and to both parties a conjunct 'probation thereanent.' My Lords, the respondents reclaimed to the Court against this interlocutor, 'and the Lords having resumed 'consideration of this petition, and advised the same, with the 'answers thereto, they alter the Lord Ordinary's interlocutor 'reclaimed against: Sustain the defences, assoilzie the defenders 'from the conclusions of the libel, and decern; but find the pur-'suer not liable in the expenses of process.' They reviewed that interlocutor, and upon the review, namely, on the 15th November, the appellant reclaimed against this interlocutor, first, by a short, and afterwards by an additional petition, but on advising these with answers for the respondents, the Court, of this date, 'unanimously refused the desire of the petitions, and adhered to 'their former interlocutor.'

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"Now, my Lords, I have, perhaps from ignorance (very likely indeed) of the strict nature of the forms of proceeding, found some difficulty in precisely understanding what this interlocutor is. It uses the same words as the Lord Ordinary's interlocutor of 'sus-'taining the defences.' If by that is meant, that on looking at the summons, and what is strictly called the defences, they thought it right to assoilzie the defendant in the conclusions of the libel, it seems to me difficult to sustain the judgment so understood, because your Lordships will recollect that the defences are threefold,—one with respect to leases, where the former renounced leases had not expired,—the next is, that the land was not let for a longer period than was permitted, neither of which positions or propositions affect the leases which had been granted upon the renunciation of leases that had not expired before the summons, nor do they affect leases not indeed granted on grassums—not granted for a longer period than nineteen years—but leases, if any such there be, as upon a fair view, and a just application of principles, cannot be considered as not let at the best rent that could be got for the same. Then, with respect to the third allegation, it is a pure allegation of fact, and without any proof of the truth of which allegation, in a mode of proceeding more familiar in Scotland than in England, they have been taking for granted all this is proved,—that all this is admitted, a great part of which is not proved or admitted, and as Mr Clerk justly observed, they have been arguing from what is in the dark,—they have been arguing from what is sealed up, as if every body had read it before it was put into the envelope. If, therefore, it means merely the defences, independent of the condescendence, it does not appear to me it can be sustained. If the Court mean to say—'Looking at your summons and the defences, 'and looking to the condescendence, we are of opinion, that if 'the condescendence was to be taken to be proved, you have no 'case.' If that is the meaning of it, then I dare say it has been very inaptly expressed in the interlocutor, because I have not the presumption to say, I can understand this language as well as those who framed it; but it would have been expressed in a way we should better understand here, if the interlocutor had stated that, 'giving you credit for everything you state in your con-'descendence, still you cannot sustain your action, and we will 'not put you to the proof of your condescendence, much less put 'the defender to the proof of the allegations in his answer, be-'cause we are of opinion, that if you proved every syllable men-'tioned, still you have not supported your summons.' My Lords, we must take it in the one way or the other. If we are to take it as a case which has been decided upon the defences merely, then it appears to me, that taking the summons and the defences together, and taking the summons to have intimated fraud in respect to the Duke's endeavour to take a profit to himself at the

expense of the heir of entail, the question will be, Whether the defences meet that case?—if these allegations are to be understood to be, that with that view he did not take a reasonable rent. On the other hand, giving credit in the nature of a demurrer to every syllable, you have not in that condescendence stated a case that entitles you to damages. My Lords, we have the case before us, with a condescendence. In my humble opinion, if the case is to be taken only on the defences, I mean by that, in the strict sense of the word 'defences,' in the same sense as Lord Gillies uses it, it does not appear to me, that those defences, whatever the nature of the case may be, sufficiently meet it; because the first does not apply to many of the leases; the second, though it applies to all, is not sufficient to bar the action as to any of the leases; and the third reason is a reason of fact entirely, which should be proved or admitted; and if it was shown to be proved or admitted, yet though it is a fact most material in the case, and which goes ninety-nine times in a hundred to conclude such a case (in England I mean), and for the sake of security, it should be adopted in Scotland.

"My Lords, there is another difficulty which has occurred to me, that, supposing this interlocutor in either way understood, as an interlocutor which could be sustained, as to a great majority of those leases, and (if I am to speak, if it were fit to use such an expression as *judicial conjecture*) judicially conjecturing, I think, the greater part of the leases will never be effectually touched; and yet, on the other hand, it is impossible for me, according to the principles which have governed my mind, borrowed from English cases, to say that, with respect to some of those leases, farther consideration is not due. The circumstance of a lease granted in 1808, on a valuation made in 1801, with an interim demise. My Lords, I always feel most grateful for a shake of the head; but if you will look at the lease 1787 (1797?), for instance, you will find that it was valued in 1801, that the lease was not renounced till 1807, that is six years; and there is the same circumstance as to others, and connected with subsetting in the meantime. I am very far from saying, that with respect to such a lease in that view, that could be touched, provided there was a due dealing with respect to it, which will keep the case within the principles laid down in the King's bench, in the case cited at the bar, which appear to me to be true principles. Lord Gillies, I think, did more than what has been done in this condescendence, because he says, 'In specifying the different leases granted by the late Duke 'of Queensberry, on account of which he now claims damages, 'and the facts and circumstances relative to each, which he avers, 'and undertakes to prove in support of his claim.' It would have been a very material thing, with respect to some leases, to have added many circumstances to show that those leases, where there

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have been all those sub-settings, could be leases fairly granted. It was on the pursuer, I admit,—to make his condescendence clear, to make his condescendence sufficient. But there is this difficulty first in the case,—*first, non constat,* that the Court has decided on the condescendence. In the *next* place, this condescendence leaves me in a state as to some of the leases, in which, though I may know what to do with them, with respect to others, I do not know what to do with them; and, therefore, it is a case of the most anxious consideration, and a case which, if it stood by itself, and was not to form a precedent, as I think it will, of the very highest importance with respect to landed property in Scotland,—a question of immense consequence to the heir in tail in possession; because, if this action can be sustained, and this tailzie had been recorded, any one of those leases might have amounted to a contravention that would have created a forfeiture of the lease.

" It has appeared to me, on a most anxious attention to the case, and I will persume to say a most careful attention, regarding it as a case to form a precedent of such infinite value to that part of the kingdom, on the best consideration, I think, the proposition I shall submit to your Lordships (because I think it may be useful not to submit, though to throw out the general nature of that proposition till Wednesday next), but the general nature of it would be of this kind, namely, to *affirm* the interlocutor, so far as it affects leases, with respect to which the Marquis of Queensberry had no cause of action at the time he brought an action into Court. With respect to the other leases to send it back to the Court, to review the interlocutor, and with leave to the pursuer to propose to the Court an additional condescendence, if he thinks proper.

" I believe something of that kind will enable your Lordships finally to do that justice in the case which you can safely believe to be justice; and I do profess, either affirming it generally, or reversing this interlocutor generally, would appear to me a proceeding that would leave the law, on this most important subject (a law, the benefit of which is so seldom attainable in this country and on just and right principles, so seldom attainable in this country) —it would leave it in such a state of uncertainty, that it seems to me, that not only with respect to these parties (because the Marquis might institute another action, with respect to the leases, where the former leases were not expired at the time of the summons), but with respect to all other persons—tenants in possession—tenants in tail—and the occupiers of all other landed property; it would leave them open to such inconvenience, if damages are to be considered as recoverable in such a state of the case, that it must be necessary that something should be done to extricate them from it. I have thrown out, generally, the grounds

which have led me to this view of the case, meaning to consider again the nature of the proposition I have alluded to, in order to have an opportunity to farther consider it, praying of your Lordships a delay till Wednesday."

LORD REDESDALE said,*

"My Lords,

"This is a question of so much importance, that I shall humbly submit to your Lordships a few words upon it. In the *first* place, I wish to put out of my consideration the question, Whether these leases are sustained by the statute? If I rightly read the statute, it meant to prevent the granting of leases upon the surrender of the former lease; for, otherwise, the provision of the statute, that no lease shall be granted unless the former lease shall be expired, or within a year of expiry, is nugatory. If a surrender may be made, there may be twenty years to come of the existing lease, and that provision in the statute would be totally defeated. That is the impression on my mind; but, I apprehend, that the construction of this statute is not properly a question within the pleadings in this cause. It makes no part of the defence; the leases are not attempted to be supported in the defences, upon the ground of the statute. Whether the subsequent proceedings properly let the parties into that consideration, I cannot pretend, from any knowledge I have upon the subject, to say; but, unless that is the case, it seems to me clear that that is no part of the question in this cause.

"With respect to what is an important question in this cause, so far as it concerns not only the parties, but all other persons who are interested in entailed estates in Scotland, I think it very important to consider what is the nature of the prohibition contained in the deed of entail, and what is the nature of that power which is annexed to the prohibition to grant certain leases. I apprehend, according to the law of Scotland, the prohibition itself is to be construed most strictly; and you are not to consider that prohibition as going one jot further than the precise words in the prohibition; but, with respect to the power, that it ought to be construed liberally, and that you are to consider it as a restriction of the extent of the prohibition, intended for the benefit of those who, from time to time, should be in possession of the estate. Unless it is so construed, it seems to me that the situation of every person in the possession of an entailed estate in Scotland, where there is a prohibition against granting leases, must be extremely hazardous; for, if the full value for which the land might be let, is not reserved upon the lease, the heir of entail who is in possession, is to be liable to an action for damages for granting that lease; or, if his lease can be avoided, the entail being recorded,

* Mr Gurney's short-hand notes, revised by his Lordship.

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he is to be liable to an action from the tenant for having granted a lease that cannot be sustained, the situation of every heir must be extremely hazardous, unless he thinks proper to let the lands in a way extremely injurious to enjoyment of property of that description in Scotland, and injurious also to the public.

"The words of this entail are not exactly what the summons attempts to interpret them. The words are 'To set the lands for 'such *reasonable rents* as could be got therefor.' The summons takes these words to be (in other words), for the *best rent* that can be got therefor. I cannot give that construction. I think the words, 'for such reasonable rents as could be got therefor,' do not amount to words of the same strictness as the words, 'for the '*best rents* that could be got therefor;' and that all the circumstances under which a person of the description of the heir of this large property might, with propriety, think fit to let his estates, are to be taken into consideration.

"I do not apprehend that it could be the intent of the person who was the creator of this entail, to put the persons who were to succeed to the entail into a situation which he would not have acted upon himself. Could the late Duke of Queensberry, when he came into possession of the estate, and with the influence that belongs to such a property, have had the idea of exacting, or have wished to exact, the most rent that could be got? I apprehend that cannot be the construction which ought to be given to such a power as is contained in this instrument. I take it that the power to grant leases is given for these reasons,—that the estate may be let to respectable and responsible tenants, and be occupied by respectable and responsible tenants; that it may be let with a view to future improvement by such tenants, and, because persons who hold only from year to year, lands that are capable of improvement, will not improve, from the uncertainty of their tenure; therefore, the consideration, what is reasonable rent to be taken under such circumstances, is a consideration of difficulty. Unless the person who has the enjoyment of the estate, and has the power to grant those leases, is to be considered as giving beneficial leases to the tenants, and to be at liberty to give such beneficial leases as should induce good tenants to offer for the estate, and such as should induce the tenants to improve the estate in their hands, and to look to the person who should grant the leases as a benefactor. That is the idea which, I believe, has generally been considered as influencing the decision of questions of this nature, in this country, and such, I think, must have been the intention of the creator of this entail. Therefore, I cannot conceive that the interpretation that has been given in this summons to the words which are used in the clause in the entail, is a right interpretation, supposing these words, 'for the *best rent* 'that could be got therefor,' are to be interpreted strictly or in

any other sense than the words actually used, 'at such reasonable 'rents as could be got therefor.' I therefore conceive, that, looking to this case, we ought to consider it as a case in which the person who granted the leases in question, was at liberty to act with considerable liberality to the persons who were to be tenants of the estate.

"Upon the proceeding itself, the summons goes upon this ground, that these leases were let in contravention of the deed of entail, and to the manifest defraud, hurt, and prejudice of the heirs; that is, that the person who granted these leases, did, by this act, defraud. Now, my Lords, fraud must be accompanied with *intention*, and he must *mean* to defraud. A man cannot be said to defraud another, who does not mean to defraud him. In the subsequent proceedings, that is more distinctly stated, but in the summons itself it is also stated, that what was done by the Duke of Queensberry, was done by him for the sake of present profit to himself, and to the prejudice, therefore, of the heir, with a view to that present profit, and so far it must be considered as in the nature of an *intention* to commit fraud; but that I take to be the very gite of this action, and that there was a view to defraud the succeeding heir. My Lords, the defences that are made, have been observed upon by the noble Lord who has already addressed you, and I will only further observe that, with respect to the second, it does not truly state the subject which is in issue, for it merely asserts, that the leases were not made for any longer period than is permitted by the entail, and that grassums were not taken—both of which statements are certainly true; but they do not meet the case made by the summons, namely, that the leases were granted with a view to the personal profit of the Duke, to defraud the succeeding heir of entail. The *third*, as the noble Lord has justly observed, puts matter in issue which is necessarily the subject of proof, namely, 'that the whole of the 'estate was let by the valuation of a person of approved skill at 'what was deemed an adequate rent.' That is a fact to be tried; and the proceeding which had been taken for this purpose by the Lord Ordinary was to try that fact. But, the decision which has been finally made, has been to shut out all trial of any fact whatsoever. The Lord Ordinary having conceived that it was fit that the circumstances attending these different leases, and the grounds upon which the Marquis of Queensberry made objection to them, should be put in a course of trial, that the facts should be ascertained by evidence on his part, and should be met by evidence on the other part; he, therefore, authorised the Marquis to give in a condescendence of what he would prove with respect to the different leases. Whether that goes as far as Lord Gillies intended it should go, may be questioned; but the Marquis put in a condescendence which does not state certain facts from which certain

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inferences might be possibly drawn, which might tend to impeach the leases. Those facts, and the inferences that might be drawn from them, have been also particularly stated to you by the noble Lord. But, what is the answer to the condescendence? It observes, that in the condescendence these things are stated, 1st, The rent at which each farm was let before the present lease was granted; 2dly, The time when the former lease would actually have expired; 3dly, The valuation put on the farm by Mr Alexander; 4thly, The rent at which it was relet by the late Duke; and 5thly, The rent which the Marquis avers it was worth at the time it was relet. As to the four first of these particulars, the condescendence is admitted to be correct, that is, it is admitted that these farms being let at certain rents, the former leases were surrendered before their natural expiration, and, in many instances, a considerable time before their natural expiration; and that a valuation having been put on each farm by Mr Alexander, the rent at which it was relet by the late Duke, was correctly expressed in the condescendence.

If we take some of these circumstances, is there no ground whatever for inference from them? The noble and learned Lord who has already addressed your Lordships, has stated what in his mind might afford considerable ground for inference, which, as a question of fact, would be left to the consideration of a jury. If such evidence had been offered here on such a trial, it would be for the jury to consider whether these circumstances were of themselves sufficient to draw an inference prejudicial to the leases. Whether they are or are not sufficient, is a question that would, perhaps, deserve very great consideration in some of those cases; in others, perhaps they would afford very little ground of complaint.

"With respect to the fifth, that is, the rent which the Marquis avers each farm was *worth at the time, to be relet*, by which words he has interpreted the meaning of the words, 'real value,' and understood the words to mean what the farm was worth to be let at the time it was let. This the Court held to be irrelevant; but on the point that the rents stipulated by the present leases were reasonable, the respondents aver and assert, that it would appear from the deposition of Mr Alexander, which was taken by the authority of your Lordships, and remained sealed up, *first*, 'That 'he was a person much employed in valuing land; *secondly*, That 'he was applied to by the Duke's agent to value the estates be-'longing to his Grace, in Dumfriesshire, and particularly the Tin-'wald estate; *thirdly*, That he was instructed in doing so, to specify 'what, in his opinion, would be a fair rent for each farm, suppos-'ing that it had been at that moment out of lease; *fourthly*, That 'he accordingly inspected all the farms carefully, and endeavoured 'to make himself master of every circumstance of local situation,'

&c., and so on. This answer to the condescendence expressly puts in issue the points which are necessary, for the purpose of drawing from the whole the conclusion which ought to be drawn, and, perhaps, something more. 'Adverting to some special aver-'ments made as to particular farms, they say No. 1, the Duke or 'his agents were ignorant of the terms, or the existence of the 'subset here spoken of.' That is a matter which they put in issue, whether the Duke was or was not ignorant of that fact. If any pains had been taken for information on that, that must have been known to the Duke or his agents, and was a subject matter of proof, and properly a subject of proof for the purpose of determining whether that fact was or was not one which ought to weigh in the consideration of the case. With respect to other circumstances, they observe of the subsetting stated in the condescendence,—'That these farms are said to have been subset soon 'after the present leases were granted, either wholly or partially, 'at higher rents than were payable by the principal tenant. This 'is a fact of which the respondents know nothing, but it appears 'altogether irrelevant.' Is it absolutely irrelevant? It might be shown that, though in truth the subsetting was actually made at these higher rents, yet these higher rents were extravagantly given, or if not extravagantly given, the agents of the Duke, in granting the leases, were not aware they could be so subset, that Mr Alexander was not aware they could be so subset, and it might be shown that those higher rents that were given, were rents which could not be sustained. We well know that rents which have been agreed to be given by tenants, in various parts of the kingdom, are rents which cannot be sustained. I believe the noble Lord and myself are aware of that —that the rents which we let farms for, are rents which we cannot receive now from those farms. The question, therefore, is, whether, upon this condescendence and upon the answers supposing them to have been taken into the consideration of the Court of Session, there were or were not matters put in issue, which ought to have been the subject of evidence? But the Court proceeded in a way that seems to me to show, that they excluded, in their consideration of the condescendence, and the answers to the condescendence; that they conceived that the Lord Ordinary had done wrong in granting the condescendence; that his interlocutor, by which he allowed the appellant in this case to give in a condescendence, was an interlocutor which ought not to have been pronounced; for, if they had conceived that the Lord Ordinary had done right in granting this condescendence, and they had proceeded to consider the effect of the condescendence, and the effect of the answers to that condescendence, it seems to me impossible to say that there were not matters put in issue, the proof of which might materially affect this case, for if, in truth the lands

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were let, under all the circumstances which might be inferred from the condescendence, and which the answers to the condescendence agreed to be put in issue, were all really in evidence before the Court, then a different conclusion might have been drawn from that which has been drawn by the Court, in their final decision upon the subject; and, therefore, I think it must be conceded, that the Court has put out of its consideration everything alleged in the condescendence; and has proceeded upon this ground, that there was nothing shown which could sustain the action. I do not mean in the condescendence merely, but that nothing was shown in the proceeding, in the libel, and, in the defences, that put in issue a matter fit to be tried by evidence; and that the Court was competent to decide upon the case as it stood before them, and to decide that there was no ground for the action that was brought by the Marquis of Queensberry throughout. To that, my Lords, I cannot wholly accede. At the same time, I feel with the noble Lord, great difficulty in saying that any one of these leases can be finally impeached; but, I think, I am not prepared to say that *no* one of them can be finally impeached. I apprehend, that if it had been in the view of the Court below, that the condescendence had not expressed, with sufficient precision, the matter which ought to be in issue upon such a question, and that the answers to the condescendence did not supply that defect (those answers appearing to be to concede that the condescendence had put in issue matters that might be supposed to be strictly not put in issue by the condescendence), still the ordinary mode of proceeding would, I apprehend, be, by allowing the party to give in an additional condescendence, for the purpose of putting in issue the whole that ought to be put in issue, and be the subject of proof. If that be the proper way of considering this subject, then, as the noble Lord has stated, it seems to me, that with respect to the leases alluded to in the first defence, namely, those granted upon the renunciation of leases which would not have expired if they had not been renounced during the period before the commencement of this action, the Marquis of Queensberry could not say, at the time of bringing this action, he had sustained an injury, though he may now say he has sustained an injury by those leases; and, therefore, so far the Court has been right in sustaining the defence to that part of the action, and assoilzieing the defender from so much of it. With respect to the other leases, perhaps, the matter may be put into a better train for inquiry, and, therefore, it may be advisable to remit the cause to the Court below, with liberty for the party to give in an additional condescendence, if he should think fit so to do; or upon the condescendence, as given in, to allow of evidence upon the subject matter which is contained in that condescendence, so as to bring the question before the Court in a shape in which it can be determined with propriety, whether

the transaction of the Duke of Queensberry, in granting those leases, or any one of them (for that would be sufficient to prevent the general conclusion which has been drawn), whether the transaction has been such that it can be considered as a contravention of the power of leasing, in the true intent and meaning of this deed of entail?—That is, a fraudulent act of the Duke, for the purpose of injuring the succeeding heir, or from improper partiality to a tenant, without any particular view to defraud the heir, but with a view to benefit, improperly, the tenant in possession, by granting such a lease as he had no right to grant under such circumstances, and might, therefore, be responsible for any damage that might arise to the succeeding heir of entail from it. Without some case of that nature, it seems to me it may finally be impossible to sustain this action; but I do not conceive that the case is so fully before the Court, that this Court can now adopt the decision which has been made upon it by the Court below, namely, to say that there is nothing suggested, upon which this case should go to farther inquiry.

"My Lords, it is extremely important to consider this case in another point of view, which, I think, has not been adverted to. If the effect of the deed of entail is to prevent accepting a surrender of an existing lease, and granting a new lease without any regard to the former rent, what is the situation, and what was the situation in 1812, of the present Marquis of Queensberry, with respect to all the leases which have been granted? The Marquis of Queensberry must have been equally deprived of the possibility of accepting renunciations of any one of those leases; for the case amounts to this, that the Duke of Queensberry having once granted a lease, the Marquis must suffer that lease to expire, and cannot, during the continuance of that lease, accept of a surrender of that lease, and grant a new lease, unless in granting that new lease, he takes immediately all the benefit that may be derived from any improvements that the tenant may have made in the meantime; so that, at the time of granting the new lease, the property should be let at the full rent, which, with all the improvements of the tenant, the land was worth at that moment. My Lords, that will apply equally to the Marquis of Queensberry, if any of these leases of the Duke of Queensberry were in continuance at this moment. The Marquis could not take a surrender of any one of them, and grant a new lease; and that acts two ways—it operates with respect to the situation of the late Duke of Queensberry, and it operates with a view to the injury that the Marquis may allege he sustains by these leases, if he is right in contending that the Duke could not take a surrender, which, I think, must be sustained, for the purpose of this case. He is himself in that situation, and that situation is one of damage and injury to him, to the extent at which the land may be let under

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the present actual value. It is, therefore, a case, which in all its circumstances, is of an importance, that it is scarcely possible to conceive to what extent it may not be carried, and how far it may not render the situation of all persons in possession of entailed estates in Scotland, the most hazardous and inconvenient it is possible to conceive; and for that reason, if for no other, I should hold that the most strict construction is to be given of the prohibition in this deed of entail, and the most liberal construction to the words, which enable the granting of leases; and that it must be a clear case of fraudulent intent to deprive the heir of a fair advantage, which he otherwise might derive from the estate, that should avoid any lease of this description. I think it extremely difficult to hold, that a person who is in possession of an estate of this description, and which is subject to leases, should not be at liberty to accept of a surrender of the existing lease, and to grant a new lease, except upon terms which are equivalent to the full value of the land as it stood at the time of granting the new lease. When one recollects what is the beneficial way of managing an estate of this description as considered in Scotland, and that very often it is the object of a tenant in possession of an estate, to the close of his lease, to endeavour to draw out of the land all that he can, for the purpose of getting back to himself as much as he can of that which he has expended, in the meantime, in improvement, it is unquestionably, I believe, considered as often highly beneficial to the property before expiration of a term of this description, to accept a surrender, and to grant a new lease, so as to preserve the property in the same state of improvement at which it was at the time the new lease may be granted. If it could be sustained, that when a lease of this description has been once granted, there can be no surrender of that lease, and no new lease granted with a view to the effect which the remaining term in the old lease ought to have on the new lease, it would be extremely detrimental to all property of this description, and might be productive of great public as well as private injury.

"I, therefore, perfectly concur with the noble and learned Lord, that this case has not been so far considered as it ought to be considered in all its parts. I think the Court was perfectly right in holding that with respect to those leases granted upon the renunciation of leases which had not expired, the Marquis was not entitled to recover damage; he might have died before he could have suffered any damage. With respect to the other leases, although the case is not so made out that the Court could properly pronounce that there was ground for damages, I think the case was not so clear that the Court could pronounce there was no ground for damages, and that it ought to undergo a further revision and consideration in the Court below. The appellant ought to be at liberty to give in an additional condescendence, in

which facts and circumstances might be stated according to the view which the noble Lord and myself have conceived of this subject, to bring fairly in issue, and to the view of the Court, the facts of the case, so that the Court may ultimately come to such a determination as may be a guide to future decisions."

LORD CHANCELLOR,

"There is one circumstance I omitted. I stated that in my view of the case, the Duke was at liberty to take a renunciation of a subsisting lease, and to grant a new lease at a like rent, to himself and those to take after him. I had not forgot that it was stated by great professional learning at the bar, that a lease might have been granted by the Duke in the exercise of this power, reserving to himself the same rent as had before been paid, but reserving to those to take after him an increased rent; and I do not presume to form any judgment of the law of Scotland in that case, but I think no man in England would do any such thing as that; but I put it upon this ground,—if a lease is granted at a reasonable rent, it appears to me to be no objection to that lease, that the old lease has a time yet to run. Whether it is taken as the best rent that could be obtained, is a question which must be considered with reference to the circumstance. It occurs to me also to observe a looseness in the summons, namely, that the power is to let at the *best rent*, whereas, in the deed of entail, it is to let at a *reasonable rent*. My notion is, that that rent which is a reasonable rent, ought to be considered the best rent in many respects; with respect to the summons, in another part, they say it was let at inadequate rents. They cannot, I think, be considered reasonable rents, though reasonable rents, they may not be the very best rents."

Adjourned to Wednesday next.

25th May 1820.

"LORD CHANCELLOR,

"My Lords,

"In the case of the Marquis of Queensberry *v.* Montgomery, the proposition I have to make to your Lordships is, to affirm the interlocutor complained of, as far as it respects leases granted by William, Duke of Queensberry, on the renunciation of former leases, which, if not surrendered, would have been subsisting leases at the time the summons issued; and with respect to the rest of the leases to which the interlocutor relates, remit the cause back to the Court of Session in Scotland, to review the said interlocutors, with liberty to the appellant to give in an additional condescendence, in pursuance of the interlocutor of the Lord Ordinary; and to state in such condescendence, such further facts and circumstances as he may be advised to state with respect to

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each of such last-mentioned leases respectively, provided such further facts and circumstances be consistent with the terms of the summons, and warranted thereby. My Lords, I do not intend formally to move this now, but merely to lay it on the table until to-morrow, with a view that if the parties on either side have anything to suggest upon it, they may have an opportunity of doing it."

26th May 1820.

Journals of the House of Lords.

After hearing counsel, as well on Friday the 5th, as Monday the 8th days of this instant May, upon the appeal of the most noble Charles, Marquis and Earl of Queensberry, complaining of part of an interlocutor of the Lord Ordinary in Scotland, of the 24th June (signed 25th June) 1812; and also of two interlocutors of the Lords of Session, of 21st of February (signed 23d February) 1815, and the 15th November 1815, and praying the same might be reversed, varied or altered, &c. It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the said interlocutors complained of in the said appeal, so far as they respect leases granted by William, Duke of Queensberry, on the renunciation of former leases, which, if not surrendered, would have been subsisting leases at the time the summons issued, be, and the same are hereby affirmed, without prejudice to any action or actions to be hereafter brought on account of the said leases; and with respect to the rest of the leases to which the interlocutors relate, it is further ordered, that the cause be remitted back to the Court of Session in Scotland, to review the said interlocutors, with liberty to the appellant to give in an additional condescendence, in terms of the Lord Ordinary's interlocutor, and in such additional condescendence to state such further facts and circumstances as he may be advised to state, with respect to each of such last-mentioned leases respectively, provided such further facts and circumstances be consistent with the terms of the summons, and warranted thereby.

For the Appellant, *John Clerk, John Hope.*

For the Respondents, *C. Warren, Alex. Irving, Jas. Moncreiff.*