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July 19. 1715, (1759.); Oliphant, Nov. 30. 1798, (1721.); Wedgewood, June 13. 1820, (not rep.); Duke of Athol, June 20. 1822, (2. Shaw and Dunlop, No. 560.); See also authorities in Queensberry Cases.

Respondents' Authorities.—2. Ersk. 6. 54.; Stair, p. 338.; 2. Bank. p. 117.; 2. Craig, 9. 5.; Inst. de Rei Div.; 1. Ersk. 1. 28.; Stair, p. 76. 176.; 1. Bank. 213.; 2. Ersk. 1. 25. 29.; Leslie, Feb. 13. 1745, (1723).; Gordon, Dec. 1. 1757, (Elchies, voce Tailzie, Aff. March 24. 1760.); Grant, Feb. 9. 1765, (1760.); Laurie, June 21. 1769, (1764.); Duke of Roxburgh, Feb. 17. 1815, (F. C.); Turner, March 3. 1820, (F. C.); Bonny, July 30. 1760, (1728.)

SPOTTISWOODE and ROBERTSON—J. RICHARDSON—J. CHALMER,—Solicitors.

(Ap. Ca. No. 34.)

No. 12. EXECUTORS of WILLIAM Duke of Queensberry, Appellants.—*D. of F. Cranstoun—Moncreiff.* WILLIAM SYMINGTON, Respondent.—*Whigham.*

Warrandice—Reparation.—An heir in possession under an entail, who was uncertain as to the extent of his powers in granting leases, having, on payment of a grassum, granted one for 31 years, or such other period as it should be found he had power to do; and having warranted the possession for 31 years, and the leases having been set aside as ultra vires;—Held, (affirming the judgment of the Court of Session), That the representatives of the granter were bound, under the warrandice, to make reparation.

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1ST DIVISION. Lord Alloway.

In 1792, Robert Symington, the father of the respondent, obtained from William Duke of Queensberry a lease of the farm of Edstoun, forming part of the Neidpath estate, for 57 years, at a rent of L.155. 7s., and for payment of a grassum of L.300. In consequence of the terms of the entail,* and the decision in the Wakefield case, doubts having been entertained of the validity of this and the other leases, an arrangement was entered into, by which, among others, Symington renounced his lease, and obtained a new one for 31 years, or for several alternative periods, down to 19 years, according as the Duke should be found to have powers to grant tacks under the entail. By this new lease, the Duke as principal, and his agent, Mr Craufurd Tait, as cautioner, bound and obliged themselves, that 'in case it shall be found that the said 'Duke has not power to grant the present lease for a term of 31 'years, and that the same shall only subsist for one of the afore-

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* See ante, p. 70.

'said shorter terms or periods, so that the said Robert Syming- March 10. 1824.
'ton, his heirs and assignees, shall only enjoy the subjects hereby
'let under this lease for 29 years, or 27 years, or 25 years, or
'21 years, or 19 years, from Whitsunday 1807, instead of enjoy-
'ing the same in full for 31 years from that term, then and in
'that case, besides warranting this lease for the term of endur-
'ance or period of years for which he has power to grant it, and
'for which in such case it is granted, to make up and pay to the
'said Robert Symington, his heirs and assignees, the difference
'between a tack for the shorter endurance for which this tack
'may be sustained, and a tack for the full term or period of 31
'years from Whitsunday 1807, or the damages he or they may
'sustain by getting a tack only for the shorter period for which
'this tack may be sustained, in place of a tack for the full period
'of 31 years from Whitsunday 1807, in the same manner as if
'they warranted this present tack absolutely as a tack for 31
'years from and after the term of Whitsunday 1807.'

After the death of the Duke, a reduction having been brought of this and the other leases by the Earl of Wemyss, the First Division of the Court of Session, for special reasons, some relating to the powers of the Duke, and others to fraud upon the entail, reduced the lease; and on appeal to the House of Lords, their Lordships found, on the 12th July 1819, 'that the said Duke 'of Queensberry had not power, under the entail founded upon 'between the parties in this cause, to let tacks partly for rent 'reserved, and partly for sums and prices paid to himself; and 'that tacks granted upon the renunciation of former tacks, which 'were made partly for rent reserved, and partly for sums and 'prices paid to the Duke himself, are to be considered as 'tacks made partly for rent reserved, and partly for sums 'and prices paid to himself; and that such tacks are not to be 'considered, in questions between the parties claiming under 'the entail, as let without evident diminution of the rental; and 'it is ordered, that with this finding the cause be remitted back 'to the Court of Session in Scotland, to do therein as is just and 'consistent with this finding.'

In consequence of this judgment, this and the other leases were reduced, and the tenants were found liable in damages or violent profits, from and after the date of that judgment.

As mentioned in the preceding cases, Duke William had left two sets of executors, one in England, and the other in Scotland; the former of whom had placed his funds in the Court of Chancery, and issued advertisements, calling upon all those who

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had claims on these funds to appear in that Court. In consequence of this, Symington lodged a claim for L.7000, as being the damages which he would sustain in the event of his lease being set aside; and thereafter, the respondent, William Symington, the son of Robert, having acquired right to the lease, brought an action against the executors in Scotland, libelling on the above clause of warrandice, and concluding for payment of such damages as 'the pursuer will sustain by and through the 'reduction of the said tack or lease, and by and through his being 'now to be deprived of his possession under the same, at the 'term of Whitsunday next, in place of enjoying the same for 'the full period of 31 years from and after the term of Whitsun-'day 1807, whereby he will be deprived of 17 years' possession; 'and which he has sustained or may sustain, by endeavouring 'to maintain himself in possession, against the challenge of the 'said Earl of Wemyss and March;' and further, concluding for relief of the claim for violent profits which had been made by the Earl, and had been sustained by the Court of Session.

In defence against this action the executors maintained,—

1. That as Symington had made the very same claim in the Court of Chancery as that for which he concluded in this action, he was barred by the plea of lis alibi pendens.

2. That the clause of warrandice was not of an absolute, but of a limited nature, having reference to the period for which the Duke had power to grant leases; and being therefore limited by the extent of the Duke's powers, it could not be the ground of an action of damages founded on the fact that the Duke had no power to grant the lease. And,

3. That as the entail was made under the authority of the statute 1685, and was duly published, it was equivalent to a local statute, prohibiting certain things being done on the estate; and as it had been decided that the lease was made in violation of that prohibition, and as both parties were equally sharers in that illegal act, no action founded on that act could be maintained by Symington against them for reparation.

The Lord Ordinary found damages due, and also that the executors were bound to relieve Symington of the claim by the Earl of Wemyss; and on advising a representation, his Lordship, on the 30th November 1822, pronounced this interlocutor: —'1*mo*, With regard to the plea of lis alibi pendens in the Court 'of Chancery, finds, that this cannot be a bar to the present 'proceedings, seeing, 1*st*, That the claim made in the Court of 'Chancery by the respondent and the other tenants, was lodged

'in consequence of advertisements in the newspapers, desiring 'all parties who had any claims against the late Duke of Queens- 'berry to lodge the same with the Master, and was done solely 'with the view of acquainting the Master with the amount of the 'existing claims, so as to limit the sums to be paid to legatees, 'or those in right of the reversionary interest, to the surplus of 'the estate beyond these claims: *2dly*, That this claim arises out 'of a clause of absolute warrandice, contained in a contract with 'regard to heritable subjects in Scotland, and which must be 'constituted in Scotland before the claim could receive effect in 'the Court of Chancery: and, *3dly*, That the respondent claims 'his relief not only from the heritable and moveable estate of the 'late Duke of Queensberry situated in Scotland, but also from 'Mr Tait, as his cautioner, upon the same warrandice; and 'payment from the Duke's heritable subjects, or from Mr Tait's 'subjects, all of which are situated in this country, cannot be 'obtained without a decree pronounced by the Courts here. 'With regard to the *second* plea, finds, That by the clause in 'question the Duke of Queensberry, for whom the representers 'act as trustees and executors, granted the most absolute and 'effectual obligation of warrandice known in the law of Scotland, 'upon which the respondent, on the lease being evicted from him 'through any defect in the right, was entitled to claim relief 'from any estate or property held by the late Duke, and liable 'for payment of his debts and obligations. And with regard to 'the *third* plea, finds, That there is nothing in the statute 1685 'which can prevent the operation of a clause of warrandice, 'granted in a lease by an heir of entail, affecting any of his other 'property not entailed, or which can prevent the person, whose 'right under that lease has been evicted, from claiming relief, 'either from any separate estate belonging to the granter of the 'obligation of warrandice, or from the cautioner for that warran- 'dice, provided it does not affect the heirs of entail nor the en- 'tailed estate. And therefore refuses the representation, and 'adheres to the interlocutor complained of.' The Court, on the 29th January 1823, refused a petition without answers.* March 10. 1824.

The executors having appealed, the House of Lords 'ordered 'and adjudged, that the several interlocutors complained of be 'affirmed, without regard to the findings of the Lord Ordinary 'of the 30th November 1822, and adhered to in the subsequent 'interlocutors, with respect to which the Lords do not find it

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* See 2. Shaw and Dunlop, No. 150.

March 10. 1824.

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* See 2. Shaw and Dunlop, No. 150.

March 10. 1821. 'necessary to give any opinion; and it is further ordered, that 'the appellants do pay to the respondent the sum of L. 200 for 'his costs.'

(Ap. Ca. No. 30.)

LORD CHANCELLOR.

MY LORDS,—Your Lordships have heard at your Bar most ably argued several appeals relative to the leases upon the Queensberry estate, and likewise several appeals relative to the leases on the Neidpath estate. With respect to the appeals upon the Queensberry estate, the first is an appeal which has been brought by the Duke of Buccleuch and his curators, appellants, and John Hyslop, tenant of a farm called Halscar, and the executors and trust-disponees of the late Duke of Queensberry, the respondents. The second is the case of the Duke of Buccleuch and Queensberry and his curators, appellants, and the trustees and executors of the late Duke of Queensberry, respondents. The third case in respect of the Queensberry estates, is the case of the executors and trustees of the late Duke of Queensberry, appellants, and John Hyslop, tenant in Halscar, respondent.—With respect to the Neidpath appeal, the first is the case of the Earl of Wemyss and March against the executors and trustees of the late Duke of Queensberry, respondents. Then there is a cross-appeal of the executors and trustees of the late Duke of Queensberry against the Earl of Wemyss and March, respondent; and lastly, an appeal of the executors and trustees of the late Duke, and Tait and Russell, appellants, and William Symington, late tenant in Edstoun, respondent.

There is one appeal, in its nature common to both, upon which it can be hardly necessary to trouble your Lordships with more than a single word; I mean that from the judgment with respect to the relief of the tenants, because it appears that the leases that were made contained an express clause of relief as to the tenants. It cannot therefore but be, that if the tenants do not enjoy the benefit of their leases, they have a right to recover the value of what they ought to enjoy against the estate of the late Duke of Queensberry; and that is all that I think it necessary to state with respect to those cases. With regard to the other cases, it becomes necessary,—not, I apprehend, with a view to conformity to the usual practice of your Lordships in giving judgment, the opinion I have formed being that which I am about to express, but in consequence of some differences of opinion that appear to me to have obtained in the Courts below,—to trouble your Lordships with a few words, before I offer in substance my humble opinion as to what ought to be done in these cases.

My Lords,—In the case of the Queensberry estate the summons is this:—They pray to have it found, that those leases respectively were

invalid and reducible, as in contravention of the entail, and ultra vires of the granter; and that the several defenders should be ordained to remove from their respective possessions, and also to make payment to the pursuer of the sums in sterling money, such as should be found 'to be the yearly worth and value of the lands, and that for the crop 'of the year 1811, and the like sum for every subsequent year during 'which the defender might continue to possess the lands.' That is the nature of the summons in that case. In the Neidpath case the summons goes farther, for that summons is, that the said William Duke of Queensberry, and the 'tenants and possessors of the said 'tailzied lands and estate to whom the said tacks and leases have been 'granted, defenders, ought and should be convened before our Lords 'of Council and Session; and it ought and should be found and 'declared, by decree of our said Lords, that it was not competent 'to, nor in the power of the said William Duke of Queensberry, to 'set or grant any tacks or leases of any part of the entailed lands and 'estate before-written, to endure for a longer term or period than his 'own lifetime, or the lifetime of the tenants receivers thereof, except 'in terms of and under the provisions of the Act of the 10th of our 'reign, chap. 51. "for encouraging the improvement of lands in Scot-'land held under settlements of strict entail," nor to grant any tack 'of the lands and estate, in consideration of fines or grassums, and 'thereby diminish the rental; and that all such tacks or leases so 'granted, either for a longer period than prescribed by the said en-'tail (unless they are in terms of the said Act of Parliament), or upon 'payment of grassums by the tenants, are void and null, and shall be 'of no force or effect in prejudice of the pursuer as heir of entail.' Then there was a supplementary summons against these respondents, that they ought to make payment to the pursuer of a sum sterling, 'or such other sum as our Lords shall modify, as the damages sus-'tained, or which may be sustained, by and through his illegal and 'unwarrantable granting of the leases.'

Your Lordships therefore observe, that one summons requires only to have the yearly worth and value of the lands; the other requires, as a compensation in damages, a sum which might go a good deal beyond the yearly worth and value of the lands. But it has been admitted at your Lordships' Bar, that the object in all these proceedings is simply that either the tenants or the executors should pay the yearly worth and value of the lands; the Duke of Buccleuch contending, that that yearly worth and value should be computed during a period and through a period antecedent to that which the Court of Session held to be the right period from which such increased worth or value should be computed.

In the case of the Queensberry leases, after a great deal of litigation, the particulars of which it is quite unnecessary to state to your Lordships, who have heard so much from the Bar, not only upon this hearing, but repeatedly upon former occasions, it is enough to say, that

March 10. 1824. the Second Division of the Court of Session held these leases to be good, in two consecutive judgments. This House was of opinion they were bad; and bad, upon the ground that grassums had been taken, and that they were let in diminution of the rental. In the case of the Neidpath leases, the other Division, that is, the First Division of the Court of Session, were of opinion, without reference to the question how far the endurance of that particular lease would make them bad, that the grassums being taken, the leases were therefore bad; but though that was held, it was so decided by what is termed the narrowest majority, three Judges being of opinion, that taking the grassums made the leases bad, two of the Judges being of opinion that the taking those grassums did not affect the validity of the leases: and it is to be observed, that your Lordships thought proper to remit the consideration of this branch of this most important question to the Judges of the Court of Session, requiring the Judges to whom you made the remit to take the opinion of the whole of the Judges; and as to the whole of the Judges, their opinion, when taken, stood thus:—ten of them were of opinion that taking of the grassums did not affect the leases; five of them were of opinion that the taking the grassums did affect the leases. When the matter came back to this House, your Lordships agreed with the five; and were of opinion that the ten were wrong.

My Lords,—In the course of the proceedings which have taken place before your Lordships, a very able and powerful address was made to your Lordships, certainly by a very able and accomplished man—I mean the present Dean of Faculty—exhorting your Lordships to take care how you introduced English law into Scotch cases. My Lords, I have, in all that it has been my duty to do here, professed always the desire not to introduce English law into decisions upon Scotch cases, in judgments which we give in this House. We ought to consider ourselves sitting here as in truth the Court of Session, to dispense Scotch law, and Scotch law only; and it is impossible for the person who has now the honour to address your Lordships not to admit, that he never did discharge a more painful duty in his life, than when he stated to your Lordships the conviction of his mind that these leases were bad on account of the taking of grassums, not founded on any speculative notions that such leases should not have been supported by the law of Scotland, if that law did support them—not upon any notions derived from the law of England, but upon what he was fully persuaded was actually the law of Scotland.

I am very far from having the presumption to suppose that I was necessarily right in that opinion. I have, however, always felt it to be my duty, after endeavouring sedulously to inform myself upon subjects which come before us for judgment, firmly to deliver my opinion, attending to the responsibility which rests upon me in matters of such importance. It was with great regret that I found myself obliged so to determine in cases which have imposed, I fear, hardships

upon the owners of entailed estates in Scotland, such as are hardly to be endured, and from which I trust some relief will be given to them. I so say, in consequence of the information which I have received with so much satisfaction from the individual to whom I have before alluded, that he has this matter under his consideration, with a view to proposing some declaratory law as to the powers which persons having entailed estates ought to have; and whenever your Lordships shall have brought under your consideration that measure, it is my humble wish that those who have found that they have not the powers which they conceived they had, may be considerably relieved by the effect and operation of such law as may then be passed. March 10. 1824.

My Lords,—The leases themselves being held to be null and void, another question of course was this, viz.—from what time the tenants should be liable to pay, not the reserved rents, (the reserved rents being formed upon the principle that they ought to be much less than the yearly worth, because grassums were paid),—from what time they should pay what was the yearly amount and value of the lands they occupied. Another question arose, viz. not only whether the tenants were liable for bygone profits, but whether the executors and trustees of the Duke of Queensberry were also liable for improved rents. The liability of the trustees and executors to indemnify the tenants being quite clear, they are indirectly liable. The question is, whether, according to the Scotch law, a direct demand could be made by the land-owner against the executors and trustees themselves. And upon those two points, I take the judgments given by the different Divisions of the Court of Session to stand thus,—that with respect to the Queensberry estates, the tenants are liable from Martinmas 1819, which is the first day of payment subsequent to the last decision of the House of Lords—that decision which determined that those leases were bad. In the Neidpath estate, they have also determined that the tenants are liable from the same period; but there is this difference between their judgments, viz. that in respect to the Queensberry estates, there is nothing said in the interlocutor of the Court of Session appealed from, with respect to the liability of the executors and trustees, except what is said upon the question, how far those executors and trustees may be liable to account for any and what part of the grassums that were taken. In the Neidpath estate case, on the other hand, the action against the tenants and against the executors was conjoint, and the First Division of the Court, as I understand the interlocutor, held both the tenant and executors to be liable; that is, not both of them to pay the whole of the full rent, but each of them so liable that the whole of it shall be paid;—the decision in the Queensberry case going upon this, that the executors and trustees may be liable, with reference to the grassums, according to the principles of the law of Scotland, founded as they say on the civil law, the Duke of Queensberry having become locupletior by receiving the grassums. But they have given no opinion upon whether they are so liable,—that point being

March 10. 1824. reserved by their interlocutor for future consideration. As they have given no opinion upon the point, whether the executors are liable, in that respect the case is not before us at present so that we can determine how that consideration shall be finally disposed of. For though this House has power to dispose of the whole, if it thinks proper to dispose of the whole, I believe, except when taken by surprise and inadvertence, this House has been extremely careful, as most assuredly it ought to be if it means to preserve the law of Scotland, to be informed what is the judgment of the Court below upon each point, before it ventures to give its own opinion. That must therefore be considered as a point still reserved.

In the course of the hearing I took the liberty of inquiring, whether the reservation of that point was a reservation likely long to affect the division of the fund which will be to be distributed among the creditors and residuary legatees of the late Duke of Queensberry. It was very satisfactory to me to hear that the amount of the grassums was such as could be very easily ascertained, and therefore that that reservation threw no difficulty in the way of settling so much of the divisible fund as it may be necessary to set apart, in order to satisfy the claim on the other part of that divisible fund now in the Court of Chancery.

With respect to the Neidpath estate, your Lordships observe there is this difference, that with respect to it, where the actions were conjoint, the Court held both the executors and the tenants to be directly liable for the full rents;—whilst, in the Queensberry case, it is held that the executors may possibly be liable for the whole or a part of the grassums, but that they can be liable for no more: That the tenants have a relief against the executors in respect of their liability under the warrandice contained in the leases; but, on the other hand, that the executors are not directly liable for the increased yearly value or the rent of the lands.

Having disposed, in the very few words I have stated, of the appeals against the tenants with respect to their relief, namely, that it is quite clear that if the tenants are bound by law to pay, having had the covenant of the late Duke of Queensberry for their relief, the effect of that covenant must be given to them, and that whatever they are subject to, contrary to his engagement as to what they shall be subject to, must be recouped to them out of his general assets; the questions then are reduced to these:—First, Whether the Second Division of the Court of Session is right in saying that the tenants are liable only from Martinmas 1819, which is immediately after your Lordships' last interlocutor, and the executors liable not at all, except in respect of the grassum; and whether, in the other case, the decision of the First Division is right in saying that the tenants are liable from Martinmas 1819, but holding the executors both directly liable to indemnify the tenants, and directly liable to the substitutes in the entail from that period. My Lords, My humble opinion, after considering this case, (and really I must admit, after combating with and putting down what

appeared to have been prejudices upon this subject), my humble opinion is, that, with respect to the demand upon the tenants, that demand cannot be made at any period farther back than Martinmas 1819 in either of the cases; and my humble opinion also is, that though the tenants had a right of relief against the executors and trustees, the executors and trustees themselves are not directly liable to the demand of the substitutes. March 10. 1824.

My Lords,—It certainly strikes me that it is very extraordinary that there should have been an enjoyment against the right for so long a period in both cases as there has been here, and yet that an intermediate fair rent should not be accounted for—a rent in some degree settled with reference to the yearly worth and value of the premises occupied. This surprise perhaps was generated by what one knows to be the case with respect to English estates. Your Lordships perfectly well know, with respect to them, that when you have recovered the possession, you can go back to a certain period, but it is only to a certain period, to recover rents and profits which have been withheld. But I am not quite sure that, if we trace our own law back, we shall not find in it originally very much the same position with respect to past rents and profits as there was in the civil law. I do find it stated in our books, with respect to real actions, that past rents and profits could not be recovered; and there is a remarkable expression touching this in our books, to this effect,—that this was 'because till the 'determination was made, nobody could say that there was a wrong.' It was by statute that, in many cases, the right to recover damages which were measured by the worth of the thing which had been enjoyed,—it was by statute that that right was given; and then the Legislature of this country found, that if they gave a right to recover damages for the time past, without limitation for how long past, they would put persons into a situation of hardship that was quite intolerable; and they would, on the other hand, permit persons to be as negligent of their own interests as to the time of making their demands as they pleased to be, thereby inflicting on those enjoying without suspicion that they were enjoying against right, all the hardships of having to make good the fruits of the estate which they had, under mistake, and led on by that negligence, consumed and enjoyed.

Now, my Lords, looking to the law of Scotland, and to the various cases that have been stated to your Lordships, (and they have been many, very many in number), it appears to me that this observation is not unfair, viz. that if you have once established what is the principle by which the Court means to decide in those cases, there is not a great deal of use in examining the circumstances of each case. In this infinite number of cases, there are some of them in which the application of the principle has been made to circumstances which you may perhaps think do not authorize such an application of it. In other cases you may think the application of the principle has been right. If the principle is acknowledged in every case, many cases

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may appear to have been ill decided, and many may appear to have been properly decided, to those who reason differently upon the effect of circumstances, but who all mean in decision to uphold the principle itself. It does appear to me, after looking at all those cases, that the law of Scotland,—that law which I say your Lordships are bound to pronounce here,—that the law of Scotland is this, that until you can say that the person against whom the demand is made is in resisting it in mala fide, he shall not be held amenable for the fruits he has enjoyed and consumed.

My Lords,—The question therefore comes round to this, as it appears to me, in the circumstances of the present case, When is it you are to say that these persons were in mala fide—that they were no longer in bona fide? Now, my Lords, as to that, it has been argued, that they ceased to be in bona fide because they were enjoying under leases that were null and void. My answer to that is, that it is not the law of Scotland, unless you can see from the circumstances of the case, not only that the leases were null and void,—not only that it was doubtful whether they were null and void,—but unless you can see from the circumstances of the case that the tenants might be affected, and the executors affected with what is termed in those Cases the conscientiæ rei alienæ. Now certainly, my Lords, I must be the last man in the world to say that I can accede, after what I have stated to your Lordships of the feelings which dictated my judgment in 1819 on the grassums,—I must be the last man in the world, in respect of the Queensberry estates, to say that the tenants were in mala fide originally, or that the Duke of Queensberry was so in mala fide. That the Duke meant to get out of this estate every thing which he conceived to be his right,—that he meant to get out of this estate every thing which he was advised he could according to right get out of the estate, is most true: that he meant that nothing should go to the substitutes of entail, which he, as he was advised as to his legal rights, could withhold from them, is certainly true. But though a man's determination by himself, and himself only, to enjoy all he has right to enjoy, may be quarrelled with in some views, it cannot be quarrelled with, as it should seem, according to Scotch law, if he had strong reasons for believing that he had the right which he was advised belonged to him, though it should finally turn out that his supposed right stood upon grounds, which, however debateable, would not finally be established in judgment. It appears to me, that to say the Duke has made leases which are null and void, amounts to nothing material.

Let us look at the Queensberry case, and let us look at the Neidpath case. They are different in this respect:—In the Queensberry case, every judgment of the Court of Session was a judgment in favour of the Duke of Queensberry's leases: In the Neidpath case, as I have before stated to your Lordships, the first judgment was against the leases by what is called the narrowest majority. When the Queensberry cases came up to this House, and when the Neidpath cases came

likewise up to this House, your Lordships were so little able at that time to say that this was the clear law upon the subject,—you were so little of opinion that you could say this was a law which must be understood to be known to all the lieges in Scotland, or even to the learned Judges of Scotland, that you professed yourselves unable to determine what was the law upon the subject; and you made remits which called for the conjoint opinions of all the fifteen Judges of that part of the kingdom. Their opinion was in the proportion, taking numbers as I have mentioned, of ten to five that those leases were all good. Your Lordships were ultimately of opinion certainly that the leases were bad. But it is a very strong thing to say that a man was in mala fide who was seeking to enjoy leases that ten of the Judges of the land thought good, and that five of them, for the first time probably, thought to be bad. It is impossible to deny that, although ransacking through all which had passed in the law of Scotland, as that law is recorded, in respect to the taking of grassums, your Lordships were finally of opinion, that the taking of grassums affected the leases,—it is quite impossible, I say, to hold that that was an opinion consistent either with the judicial sentiments of all the existing Judges, or consistent with the judicial sentiments of many of their illustrious predecessors: That I am ready to admit. Well then, under those circumstances, how is it possible for me to say that there was a mala fides on the part of those who had been acting under the best advice they could obtain in the country where the property was, and where the thing had gone on in the way this had gone on. March 10. 1824.

My Lords,—If your Lordships look at the several cases which have been decided, you will find that the periods from which the computation is made, of what they call violent profits, which they are desirous to consider as the value of the land, have been very different. There have been cases where the violent profits have been given from the first interlocutor, and others in which they have been given from the summons or from the citation; but those were cases in which the circumstances made it a case of mala fides to hold on against what was stated and represented in the summons. But when we come to consider what was doing contemporaneously upon the Queensberry estate and the Neidpath estate,—true it is that three Judges out of five in the First Division were of opinion that the leases were bad,—all the Judges of the Second Division were of opinion they were good; the House of Lords joined the Neidpath case in the remit to the Queensberry case, and upon that you had the opinion of the ten against the five;—you have also had antecedent opinions, not strictly speaking judicial opinions, but very weighty opinions; I mean the opinions of great lawyers who had before lived, and who, as trustees of entailed estates in Scotland, had made many such leases as leases that were good,—I really cannot see that there is any substantial difference on the question of mala fides and bona fides between the Queensberry leases and the Neidpath leases. That being so, my Lords, it remains only for me,

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upon this branch of the case, to state my very humble opinion, that the judgments which found the tenants liable from Martinmas 1819 are good in both cases.

My Lords,—With respect to the other question which arises, Whether the executors were directly liable to the substitutes of entail? —I confess that I am satisfied by the reasoning I have read, and the reasoning I have heard, that the executors are not directly liable to the substitutes of entail. But supposing the executors were liable together with the tenants, I cannot myself see how it is to be made out, that if the tenants are to be considered as in bona fide till Martinmas 1819, the executors were in mala fide in continuing to accept reserved rents from those tenants till Martinmas 1819. It is very true, that after that interlocutor, and after the judgment of this House, the tenants could no longer claim to hold at the reserved rents, because the leases were void. Then comes the question, Whether the executors were directly liable for that loss and damage which has constituted the difference between the reserved rent and the yearly worth and value from Martinmas 1819 till the tenants were removed from the estate, and another loss and damage which may be constituted by the expense belonging to the suit for removing the tenants? Now, my Lords, with reference to this, in the first place, where there has been an entail under the Act of 1685, we have it as an admitted fact, that down to the year 1824 no such action has ever been maintained. And when you come to consider the situation and circumstances in which the owner of an entailed estate in Scotland stands, namely, that if he contravenes only for a single acre of land, having a property we will say of L.10,000 a-year, he forfeits the whole under that statute; I can easily conceive why it has been long thought enough, that he should forfeit the land and not also be liable in damages. My Lords, the fact that no such action has ever been brought,—the fact that you have a remedy against the actual possessor, the tenant, and that the tenant's means will be supplied in general cases by the responsibility of the landlord to indemnify the tenant,—considering this, and the general reasoning to be found in the Cases on your table, and in the judgments of the Judges in the Court below, I am of opinion, that there is no direct remedy against the executors, unless it be in respect of the reservation which is contained in the Queensberry case, and which is not contained in the Neidpath case,—I mean the reservation upon the ground that the Duke of Queensberry became locupletior by receiving grassums. The interlocutors, therefore, affecting them directly must be altered; but with a reservation alike to that in the Queensberry case respecting grassums. Whether that reservation will finally establish any demand against the executors, is a question upon which I do not intimate any opinion to your Lordships, whatever my apprehension may or may not be about it. I think it would be a very dangerous thing for us to meddle with it at all, until the Court of Session shall have decided upon it.

I have troubled your Lordships with these views of the cases, for the purpose of shewing, that in the judgments we pronounce, we must, by proper language, have due attention to the circumstances I have pointed out, as forming differences in the interlocutors of the respective cases. March 10. 1824.

I shall trouble your Lordships no further than by saying, that if there is a desire which, with respect to such a subject as this, an Englishman may be supposed most anxiously to entertain, it is, that from the difficulties in which the agitation here of the Duntreath case and these Queensberry cases have placed the owners of entailed estates in Scotland, they may be relieved by some law that shall let them know what their rights are; for I certainly do agree with what has been stated from the Bar, that it is very difficult for the owners of an entailed estate in Scotland, with prohibitory, irritant, and resolutive clauses, to know what he may do for his creditors or his family. The Duntreath case was a case which, according to Mr Cranstoun's account of it, has let the law of Scotland loose,—it is a case in which, speaking my humble opinion, it would have been impossible that I could have concurred in the judgment which held the institute not to be an heir of tailzie; when, if the institute is not an heir of tailzie, there is not one word in the statute of 1685 that authorizes you to bind him at all by the prohibitory, irritant, and resolutive clauses; and when in that very instrument, in every clause of it, the words had occurred, 'the 'said Thomas such a one, and the other heirs of tailzie,' the institute being described by his name, and the heirs of tailzie described as 'the 'other heirs of tailzie;' yet it was found that he was not an heir of tailzie. Your Lordships were informed at the Bar, that from that construction here of that entail, there had been inferences and conclusions drawn which appear to have led to the greatest part of the difficulties which now rest upon the owners of entailed estates in Scotland.

Upon the whole, my Lords, my humble opinion is this, and that opinion I should recommend to your Lordships should be embodied in proper form in a judgment, which may be laid before the House the next day we meet, unless any noble Lord differs from me,—that the computation of bygone rents and profits, with respect to the tenants, should be from Martinmas 1819,—that the executors are liable to the relief of the tenants, but that they are not directly liable to the substitutes of entail. Apologizing to your Lordships for going so largely through the case, which I have done purely for the purpose of pointing out the differences there are between the two cases, I will close with stating, that when I put the question for reversing these judgments, it is impossible that I can agree to reverse further than is necessary to make a change in the language of some of the interlocutors, with reference to the particular circumstances which I have adverted to. If any other noble Lord, who has considered the subject, is disposed to state his sentiments, I am sure your Lordships will have great pleasure in hearing him.

March 10. 1824. LORD REDESDALE.

My Lords,—I will simply say, that all which has fallen from the noble and learned Lord completely meets with my concurrence, as far as I have formed a judgment upon the subject.

My Lords,—It must strike every person as a very extraordinary thing, that the late Duke of Buccleuch, having litigated these leases for nearly ten years, happening to die before the final judgment was pronounced avoiding the leases, should obtain nothing by the suit which he instituted, and which is the result of the determinations which have been made; but, my Lords, they appear to me to be determinations perfectly conformable to that which has been considered as the established law of Scotland, and founded upon the civil law; for I do not conceive, as far as I have any judgment upon the subject, that it is true that in Scotland the Scotch Judges have gone beyond the rule of the civil law upon the subject. It appears to me that, generally speaking, they have conformed to the rule of the civil law upon the subject; for I apprehend that, according to the civil law, as it is laid down in the different writers upon the subject, unless it clearly appears in the course of the litigation that the right is with the person who demands the property, the bona fides still continues until judgment.

That this is the rule which in a certain degree prevailed in this country, till it was altered centuries ago by the Legislature, is perfectly true also, and the reason why it was altered by the Legislature of this country was this, that it was an encouragement to litigation; and surely this case shews that the rule is an encouragement to litigation. It induces every person who has a doubtful right which is demanded against him, if he has the least probable cause of contesting the claim, to contest it to the utmost; for what is the result here?—that the contest which has taken place upon this subject has enabled the persons who held by wrongful title to receive sums of money, perhaps a hundred times the amount of the costs of the litigation: that has been the result of the establishment of this rule in Scotland, which has been put an end to by Act of Parliament in England.

Another reason which was given for altering the law in England upon that subject was, that it was a rule which encouraged the purchase of doubtful titles, and the law of England has been particularly anxious to prevent the purchase of doubtful titles. Your Lordships will see that this rule tends extremely to induce the purchase of doubtful titles; for if a man can, after a doubtful title is questioned, hold the possessor of the property in protracted litigation ten or twelve years, giving always for a doubtful title considerably less than the actual value if the title was clearly good, the result is, that though the title may be finally avoided, he may put into his pocket the whole sum he has originally paid, and perhaps more, taking himself the chance also of having a profit from retaining the possession, or the chance of making his doubtful title available. My Lords, I therefore take it to

be a rule contrary to the policy which has been adopted in this country, but a policy which has been adopted by positive law. I therefore, my Lords, do not feel upon this subject any doubt that the Courts in Scotland have been right in these particular cases with respect to the tenants. March 10. 1824.

My Lords,—If I could have formed a doubt upon the subject, it would have been from a case which has been since, and very lately, argued at your Lordships' Bar, when the noble and learned Lord now upon the Woolsack was not present, and in which it seems to me that the Court in Scotland has been a little forgetful of this principle. My Lords, when that case comes to be decided, I shall take the liberty of stating my reasons for dissenting from what the Court has done there; for they have given back-rents in fact,—for that is the mode in which they have done it, in the shape, and in the name of damages,—they have in fact given back-rents, not only from the institution of the suit, but before the institution of the suit, and from the moment that those rents could possibly be demanded. When that case comes to be discussed, I shall take the liberty of saying what I think upon the decision of that case, and how far it interferes with the case which is now before your Lordships.

My Lords,—I would observe, too, upon the peculiarity with regard to the Neidpath case, because the question was first debated in the March and Neidpath case in the lifetime of the Duke of Queensberry, and then the demand against the Duke of Queensberry was a demand for damages. Your Lordships will observe, that the mode in which this question has been treated, has been to consider the demand made against the tenants as a demand for what are called violent profits, and the application of the term violent profits seems to me to shew what was the original idea upon the subject of those who framed the civil law, upon which these cases are in a great degree decided,—they considered a person who was possessed of a property of this description to be in the nature of a robber, and that therefore he was to be proceeded against, if the decision was against him, as a person that was to be treated with the utmost severity and hardship that could possibly be applied to this case; and they said, that no person could be considered as an absolute robber if he is free from what they call the dolus in those cases. In truth, my Lords, that seems to have been the original idea in the civil law, but it has been refined upon, as many law questions have frequently been refined upon, until it is extremely difficult to see what was the original principle upon which they have proceeded.

My Lords,—However, the claim of the family of Buccleuch against what is called the Queensberry property is a demand of a different description; it is a demand of nothing more than the just rent as it is described, which might be made of the land. Perhaps the demand that is made in respect of what is called the Neidpath estate, commencing in the lifetime of the late Duke of Queensberry, being a demand

March 10. 1824. for damages, cannot be considered precisely as of the same description at the time that suit was instituted by the Earl of Wemyss; unless he insisted, which he did not, upon the forfeiture of the property on account of the violation of the entail, the demand could only be for damages, because he had no title for rents during the lifetime of the late Duke of Queensberry;—the same idea with respect to damages which has been followed up in the proceeding in the case to which I have alluded which has been before the House, (not that now under its consideration), and that perhaps has occasioned the difference in the decision which has taken place in the Court below in that case from the decision which has taken place in this case. It strikes me, however, that the decisions which have been made in the Court below, in limiting the demand for the real rents until the time of the judgment, is in conformity to what has been the established law of Scotland, taken from the civil law, as far as I can judge upon the subject, and that the Courts in Scotland have not gone, as has been suggested, beyond the rule which was adopted in the civil law.

My Lords,—I cannot agree in one of the principles upon which that rule is founded, for they say that one reason for this rule is non debet possessor temere in defensum.

Now I do not think that the law requires any encouragement upon that subject; but I do hope that those who are interested in the law of that country will consider whether this is not a subject which, for the purpose of avoiding litigation and preventing litigation, does require the interposition of the Legislature. I am sure there can be no rule which tends more to protract litigation than that which this establishes, because the consequence would be, and it has been in the case of the late Duke of Buccleuch, that though the late Duke of Buccleuch was entitled for ten years to avoid these leases and have the possession of the estate, yet his representatives can derive no benefit whatsoever from the right, merely because the litigation upon the subject has been so long protracted. My Lords, having said thus much, I will only add, that I perfectly concur in every respect in what has fallen from the noble and learned Lord who addressed your Lordships.

J. CHALMER—J. RICHARDSON,—Solicitors.