DALZIEL AND OTHERS *v.* THE EXECUTORS OF THE LATE DUKE OF QUEENSBERRY.

PRESENT,

THE LORD CHIEF COMMISSIONER AND OTHER LORDS COMMISSIONERS.

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1825. Dec. 27, and 1826, Feb. and March.

Damages assessed to tenants whose leases were reduced.

THESE were actions brought by tenants on the Queensberry estate against the executors of the late Duke of Queensberry, to have the damage ascertained which they had suffered in consequence of their leases having been set aside.

In one case, the tenant deprived of his lease had taken a new lease of the same farm under different conditions;—in another, one of several tenants had taken the new lease;—in another, the tenant had taken a different farm;—in another, he had not taken any;—but in all of the cases the principle was so much the same that it has not been thought necessary to report them separately.

ISSUE.

"It being admitted that Crawfurd Tait, writer "to the Signet, as commissioner for the late Wil- "liam Duke of Queensberry, by a lease dated

" day of produced
" in process, let to the pursuers, and their heirs,
" assignees, and subtenants, the farms of
" mentioned in
" the lease, lying in the parish of
" and county of Dumfries, for the period of
" nineteen years, from as
" to the houses and grass-lands, and from the
" separation of the crop from the
" ground, as to the arable lands:

" It being also admitted, that, by a decree of
" Lord Cringletie, dated
" now final, the said lease was reduced and set
" aside:

" What loss and damage have the pursuers
" suffered by and in consequence of the said
" lease having been reduced and set aside as
" aforesaid?"

To the issue in each case was annexed a schedule of the damages claimed.

For the tenants, it was maintained that they were entitled to the whole produce of the farm under deduction of the rent and expence of cultivation; or to what they could have got as rent from a subtenant, to which, in most cases, was to be added the profit of the subtenant. They also claimed *solatium* for disturbed pos-

Bell *v.* Leighton; Matheson *v.* Nicolson; Paterson *v.* Blair; 2. Mur. Rep. 76, 141, and 177.

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session during the dependence of the action of reduction, and the loss suffered by the sale of their stock at the time they were removed from their farms. They also maintained, that as they could not claim consequential damage; so the executors could not plead their having got more beneficial leases in diminution of damage.

The executors maintained, that where the tenant got the same farm under different conditions, the measure of the loss was the value of those conditions: That when he got a different farm, there was to be added a small sum for the inconvenience of removal: That when the tenant was deprived of a farm, still he carried his skill, industry, capital, and stock with him, and so was not entitled to tenant's profit, as he would draw this from a new farm elsewhere: That where part of the farm was subset, the subrent was the measure of the loss as to that part. They denied that any loss had been caused by what was termed disturbed possession, or by the sale of the stock, as it must have been sold at the end of the lease. But they admitted their liability to repair the actual loss suffered.

In most of the cases witnesses were called on both sides, who valued the farms in two ways, —1*st*, By stating the produce and deducting the

expence;—2*d*, By stating the rent at which they might have been subset, and what they considered a fair profit for the subtenant. The witnesses differed materially as to the value of the farms, and particularly as to the value of the additional conditions in the new leases. The witnesses for the pursuers estimated these conditions as a loss of from twenty to thirty per cent., while those for the defenders estimated them at about five or six per cent.

In opening the second case, and again in opening the fourth, allusion was made to what was done in the first.

A verdict in one case may be referred to in explanation, but not as evidence, in another, where the parties are different.

LORD CHIEF COMMISSIONER.—It is not correct to allude to another verdict, or proceedings before another jury. However, when what has been done by former juries bears a strict relation to, and simplifies a case, there is no objection to it being stated, but you cannot mention what is to have an influence on the evidence to be adduced.

In point of fact, we did not decide that where there is a sublease the rent in it was not to be taken as the value; but that where a new lease had been granted at a higher rent, that in addition to the difference of rent must be added a sum as tenant's profit.

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In one of the cases it was objected that a statement of fact made by the counsel for the defenders was not in the answers to the condescendence.

LORD CHIEF COMMISSIONER.—A fact being in the condescendence or answers makes it impossible to object on the ground of surprise; but it is a very different proposition to state, that a fact not being there renders it surprise. It cannot be required to aver every fact that it is necessary to prove to make out the case.

Qu. Whether a party may object to a statement on the ground of surprise when it is not in the condescendence or answers?

A witness who held farms under new leases stated that he considered 30 per cent. a fair value of the additional restrictions; and was asked on cross examination, Whether he held more than one farm? and Whether, by his leases, he was bound to residence? To this an objection was taken.

Competent to prove the practice of an estate by parol, but not the conditions of a lease.

LORD CHIEF COMMISSIONER.—It is clear that neither in chief nor on cross-examination can you prove the contents of a lease. You may prove the practice of the estate, but you cannot get the conditions of particular leases.

I agree that you may get at the grounds of the opinion of the witness, but you cannot give evidence of the contents of a writing; and

any part of the contents got in this way ought not to go to the jury.

In this case the witness is not called to prove the conditions in the lease, but to give his opinion on the change produced to the tenant by the different conditions of the leases under the Duke of Queensberry and the Duke of Buccleugh, and the cross-examination is to try the truth of that opinion. There is nothing to prove the conditions of either lease, but the question supposes them different. The hypothesis is, that there is a condition binding to residence, and that must be taken into view in considering his testimony.

In summing up the cases to the juries, his Lordship said that they ought to endeavour to find out the loss suffered by the tenants, as the sum to be given was what they lost, and not what the landlord gained: that the loss having arisen without fault in the persons who are to repair it, no more should be given than will repair the loss. The sum ought to be commensurate to the injury suffered, but not more than was suffered. That it was difficult to ascertain the precise loss, and that they must apply their sound sense to the evidence, which, being evidence of opinion, was more of the nature of scientific evidence

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than evidence of fact: That where the grounds of their opinions were stated by the witnesses, the jury would consider these; and give such sum as appeared fair: That the farms had been valued in three ways,—1*st*, By stating the estimated produce, and the price at which it would have sold during the past years, and at which it would probably sell during the future years, and then deducting from this the expence of cultivation. 2*d*, By stating the rent which a subtenant would have given. 3*d*, By proving the rent paid under the new leases, and putting a value on the additional conditions. That in the cases where the two first were proved the second was what appeared to him the best and simplest way of ascertaining the value, but that the jury might take either: That where the tenant remained in the farm, the difference of rent under the old and new leases, with an allowance for the difference of the conditions, was probably the best rule: That it was impossible to hold the conditions of the value stated by the pursuer's witnesses: That where the tenant was removed from the farm, whether the jury took the new rent or the estimated subrent, they must give what they thought a reasonable sum as tenant's profit: That this profit should not be given

for the whole years of the lease, but for such time as they thought necessary to enable the tenant to get another farm: That if they took the estimated produce, this profit was included in it: That where the farm had been subset before the reduction, the subrent was the sum to be given.

That where the stock was sold, they must give what they thought proved as the difference between the sum for which it sold, and that for which it would probably have sold at the end of the lease.

That there must have been some disturbance of the possession during the dependence of the reduction, the claim upon which ground was of the nature of *solatium*.

Verdict—For the pursuers in each case with damages.

Moncreiff, Maitland, Henderson, Whigham, for the Pursuers.
Jeffrey, J. A. Murray, Cockburn, and *Cay*, for the Defenders.
(Agents, *F. & J. Brodie*, W. S. *Alex. Goldie*, W. S. *R. Welsh*, W. S. *Lamont & Newton*, W. S.)

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PRESENT,

THE FIVE LORDS COMMISSIONERS.

1826.
Feb. 2.

A tenant deprived of his farm is entitled to a sum as tenant's profit, and the Court will not grant a new trial, on account of a slight error in the sum given by the Jury.

IN one of the cases first tried a rule to show cause why there should not be a new trial was granted; and when the rule came to be discussed, the Lord Chief Commissioner observed, that it had been applied for on the grounds, that it was not competent to give tenants profits; that one of several tenants having remained in the farm, the damages as to him had been improperly assessed along with the others; and that, as no sale of the stock had been proved, damages on that account ought not to have been given.

That as to the two last, they were matters in which the verdict might be corrected by the Court without the expense of another trial: That the counsel should therefore confine their observations to the illegality of tenant's profit, as being consequential loss.

Moncreiff, for the pursuers, said, That it was impossible to go into the peculiar circumstances of the individuals interested in the lease

in this case, as there was no division of capital, but the father and sons had one stock. It is said the sum given includes tenants' profit; but evidence was given in two forms, and even if the jury took the subrent, the sum given is not equal to the average we proved without including tenants' profit. But it is said the direction by the Court was contrary to law. There was no direction in law, but observation on the evidence, and what was said was correct. The question is, whether we lost tenants' profit? and we proved it. There might have been a question of law, but they have not put themselves in a situation to maintain it, as they have not proved that the tenants were making profit on their stock and labour elsewhere. We are claiming direct damage, and they wish to cut it down by consequential benefits.

1826. Feb. 3.

Jeffrey.—The main question is on the misdirection or misconception of principle in the direction given. There is some difficulty from the use of the terms tenants' profit, as subrent is tenants' profit; but what we complain of is, that while the tenant was not deprived of his skill, capital, and industry, he has been found entitled to the profit of these.

LORD GILLIES.—Was there any *dictum* by

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which such a doctrine was laid down, as that the sum should be given for the whole period of the lease?

LORD CHIEF COMMISSIONER.—I adopted the term tenants' profit, as that expression had been used at the Bar; but my direction was to consider what was the loss in the particular case.

Jeffrey.—The direction, we conceive, was, that there was a surplus rent to be multiplied by the number of years, and that there was an additional profit which the jury were to estimate, and also multiply by the number of years.

Kames, Pr. Eq. 70, 415, 426.

1*st*, Where there is no *culpa* and no damage sustained, then there can be no reparation. 2*d*, What is given here is clearly consequential damage, *i. e.* the damage is a consequence of the loss, and not of the act done; it follows casually, and from the peculiar situation of the party, and is not the natural loss which would have happened to any one.

Rae *v.* Milne, June 20, 1750. Kilk. 491. Mor. 13989. Puncheon, *v.* creditors of Haig, Mar. 17, 1790. Mor. 13990. Paterson *v.* Blair, Mar. 2. Rep. 177. Scott *v.* Shepherd, 2. W. Black, 892.

LORD CHIEF COMMISSIONER.—As this is a motion founded on my direction, I wish the other Judges to deliver their opinions first on the general point; but on the special circum-

stances, (which his Lordship mentioned,) I wish to observe that they must have been in the view of the parties before the verdict was recorded; and that, when they are attended to, the sum alleged to be improperly given is so small, that it would not be advisable for the Court to grant a new trial on account of them. If, however, they are insisted on the Court must decide on them, but with such parties I should think it advisable to wave them.

LORD GILLIES.—This is a case in which there is a clause of absolute warrandice in the lease, and therefore the English case referred to does not apply, there being here no fraud. This is a case in which damages have been found due, and the Jury had merely to fix the amount; and to enable them to do so, evidence was laid before them of the value of the farm, and of the surplus rent which might be got for it. Had the Court told the jury, that, if they gave the value of the farm, they must not take the profit into consideration, that might have been a direction in law. But it was on the other view of the case that the observation was made, and I doubt if it was a direction in law. If, however, it was a direction in law, the jury were bound to take it, and I am satisfied the

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direction was right. Indeed, if it is held to be wrong, the clause of warrandice has no meaning, and to prove the direction wrong, it would be necessary to prove that a tenant who holds a farm at a full rent suffers no loss by being deprived of it. It is said his capital, &c. remains, but then the means of employing it are taken away. The period for which the profit is to be given is no doubt most material; but if he is deprived of his farm for one year, I should think him entitled to the whole profit; if for two, it may be doubtful; if for three, more doubtful; and if for fifty, there is no doubt he would not be entitled to the whole. But the direction by the Court was merely that the jury were to consider this; and there is no doubt that it was entirely and exclusively for their consideration, and they might either give a slump sum, or a smaller sum, for so many years, according to the probability of the tenant getting a farm, which depends on a great variety of circumstances.

But it is said this damage is consequential, and the Court ought to have directed them not to give any. The argument, it appears to me, should have been, that the Court should have directed it to be given for a limited period; for had they directed them to throw it out of view, the direction would certainly have been wrong.

As to the transfer of stock I have no doubt there was sufficient circumstantial evidence; and though it is said the shares of the different members of the family may have been different, the presumption of the law is, that they were equal.

LORD CRINGLETIE.—I most heartily concur.

LORD MACKENZIE.—I am of the same opinion. If the direction had been that the jury were to take the whole of the profit, and multiply it by the whole years of the lease, I think the direction would have been wrong. But the direction was only that the jury were to take the tenants' profit into consideration, and though this may be law I think it was right. It would not be consistent with reason that he should not get something for the loss he suffered.

LORD PITMILLY.—I concur in the opinions delivered. I am at a loss to see that a direction in law was given, as it seems to me to be observation on the evidence. The case of Puncheon has been referred to, which seems to me analogous. In that case the Lord Ordinary gave the whole sum claimed, but the Court remitted to him to ascertain the loss. Is not

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that what was done here? Your Lordship did not direct the jury to throw tenants' profit out of view, or to give it for the whole years of the lease, either of which might have been objected to. I agree that the period for which it should be given may vary in different cases. On the whole, I think it was not a direction in law, but that if it was it was right.

LORD CHIEF COMMISSIONER.—I am happy to find that I did not give any direction as to the number of years, and in this case the direction is better ascertained than in many others, because when the thing was questioned I wrote it down and read it to the jury.

Whether tenants' profit is to be given is not a direction in law, but advice on the evidence, and the anxiety I feel is, that too remote damages should not be given, but that all that are not too remote should be given. It is said that in this case the damage was too remote; but I contend that when a tenant is turned out of possession the loss of profit on his capital and skill till he gets another farm is clear and immediate, and that the proper direction to be given is to point out the principle, and to state that, on considering the whole evidence, the jury must give the tenant what he has lost, and

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no more. Human ingenuity cannot strike the exact sum, but the best way of getting at it is by balancing the opinions of intelligent witnesses publicly examined before a jury. If any principles of law are laid down in cases of this sort, they ought to be questioned at the time, and a bill of exceptions tendered. After a few of this great class of cases have been tried, principles will be established which will enable the parties to classify the remainder, and to settle them privately. In the present case, what I stated was advice to the jury, not direction in law.

The rule was discharged, subject to the correction of an error in the verdict.

PRESENT,

THE LORD CHIEF COMMISSIONER.

RODGERS *v.* HARVEY.

1826. Jan. 13.

Found that a public footpath existed for forty years and upwards.

AN action of declarator to have it found that a public road or footpath existed along the north bank of the river Clyde from the city of Glasgow to the village of Carmyle.