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footing; but in an ordinary case witnesses should be called to prove the facts; and rejection of the protest is not rejection of the fact. On the whole, therefore, we refuse the new trial.

LORD MACKENZIE.—I concur in this decision, and agree that *malus animus*, want of probable cause, must be made out. As to the protest, there is nothing in the law of Scotland making it generally evidence, and it is impossible that a party can be allowed to make up any statement which he may think proper. There are cases in which a protest may be held evidence, but it is clear this is not one of them.

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

1828. Jan. 12.

INNES v. LORD PETERBOROUGH'S EXECUTORS.

Damages assessed to the tenant of an entailed estate on account of his lease being set aside.

AN action of damages by a tenant against the executors of the proprietor of an entailed estate, on account of the lease having been set aside.

DEFENCE.—The clause of warrandice is li-

mited. The original lessee was aware that it was an attempt to evade the fetters of the entail. The defenders are not liable for meliorations, but simply for the value of the lease.

ISSUE.

The issue contained an admission that the lease was for seventy-six years and a lifetime; that it was assigned to the predecessor of the pursuer; that it was reduced; and that the pursuer was entitled to recover damages. The question was, What loss and damage, &c.?

Cockburn, for the pursuer.—The only question is the amount of damage, which consists of an annuity equal to the rents of the estate for forty-six years and a lifetime, and of the value of the plantations, roads, and drains made, and farm-houses, &c. erected on the property by the tenant. As the warrandice is absolute, the loss to the utmost extent must be made up. Ersk. B. 2. T. 3. § 30.

A witness, on cross-examination, was asked by whom a sublease was granted?

LORD CHIEF COMMISSIONER.—Are not the subleases in existence? If they are, this question is incompetent.

If a sublease is in existence, it is incompetent to prove by parol, by whom it was granted.

When the account of expenses in the action

A tenant whose lease has been re-

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of reduction was given in, an objection was at first taken to it as not falling under the issue; but the objection was abandoned on the Court intimating that they did not think it well founded.

duced, entitled in an action of damages to prove the expense of defending in the reduction.

Gordon, for the defenders.—The sum claimed is extravagant, and more than the value of the estate. The evidence is merely evidence of opinion, not of fact; and the annuity tables are not to be trusted. The free rent is not fixed, as allowance must be made for tenants not paying, and other contingencies.

Blayney on Life Ann. p. 28.

Jeffrey.—You must give the pursuer all she could possibly have made of this lease, as it was not voluntarily given up, but was taken from the tenant.

LORD CHIEF COMMISSIONER.—There is no law in this case; it is purely a question of fact. A party comes asking damages for the breach of a lease, and you are to consider what is the sound verdict to be returned. There has been evidence of opinion laid before you to prove the value of an annuity, which may assist you in coming to a conclusion; but these calculations were not made on the rent paid, but on a valuation of the estate. It would be better for you to take the actual rent, and to add something

for the annual value of the house and game. An annuity for eighty or one hundred years is in value very near equal to a perpetuity; and you should not limit a person from whom his property has been taken to the lowest sum for which the property would sell. To the value of the annuity is to be added the value of the wood. The expense of defending in the action of reduction I also think a fair claim. It was said that you must make some deduction for the expense of management; but this was the case of a man of business taking a lease as a profitable speculation, and with the intention of managing it himself. As to the deduction on account of tenants not paying, that is reasonable.

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Verdict—For the pursuer,—damages under different heads to the amount of L. 76,500.

Jeffrey, *Cockburn*, *Skene*, and *G. G. Bell*, for the Pursuer.
Gordon, *Fullarton*, *Lumsden*, and *More*, for the Defenders.

1827. Dec. 13.

The Court will not without cause shown change the place of trial fixed by the pursuers, or grant a view.

Before the trial an application was made, but resisted, to change the place of trial from Edinburgh to Aberdeen.

LORD CHIEF COMMISSIONER.—The pursuer had the right to give notice for Edinburgh, and the defenders must show cause for changing the place. As to the number of witnesses, this

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is a case in which, from its nature, great care should be taken in selecting witnesses. As in the Queensberry cases, we thought it better that they should be tried here; so it is desirable that this case should be tried at a distance from the scene where any local feeling may prevail.

If an application is made for a view, we must hear reasons for it, as at the institution of this Court there was too great laxity on this subject, and it is necessary to restrict the granting them; and I hold that in this case no view ought to be allowed. With respect to the time of trial, the pursuer ought to consent to delay the trial till a fuller bench may be had; for though this is not a case of difficulty, yet from the amount, it is desirable that more than one Judge should be present.

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

1828. Feb. 4.

GARDNER, &c. *v.* REEKIE, &c.

Finding that a usage existed different from the terms of the set of a burgh as to the election of magistrates.

THIS was a petition and complaint against the election of the Magistrates of the burgh of Kilrenny for the year 1823. The case was carried