JOHN INNES, W. S., Appellant.—*Clerk—Cranstoun—Skene.* No. 38.
MARY BARONESS MORDAUNT, and DUKE of GORDON, Respondents.—*Gifford—Warren—Lumsden—Robertson.*

Tailzie—Personal Objection—Process—Appeal.—Held, (affirming the judgment of the Court of Session,)

1. That a prohibition in an entail 'to dispone, sell, wadset, or away put,' is sufficient to prevent an heir of entail from granting a lease of the whole estate for 76 years and a lifetime.
2. That it is competent to reduce an act of contravention after the death of the contravener.
3. That although it is competent to an heir-substitute to bring a declarator of contravention against a contravening heir of entail in possession, yet his failure to do so, and the circumstance of not objecting to improvements made by a tenant possessing under a lease granted contrary to the entail, do not bar the heir-substitute from reducing the lease.
4. That although a remote substitute transact with such tenant, on the assumption that his lease is valid, and a nearer substitute obtain for a valuable consideration the cancellation of the transaction, this does not bar the substitute so cancelling from objecting to the lease.
5. That it is not competent to sist a respondent in the House of Lords in place of one who has died, and against the former of whom a personal objection not pleaded in the Court of Session is alleged to exist; and,
6. That, in order to obtain such respondent sisted in the Court of Session, the process must be remitted back from the House of Lords.

July 5. 1822.
2D DIVISION.
Lord Pitmilly.

SIR ALEXANDER FRASER, physician in ordinary to King Charles II., was twice married,—first to Mrs. Elizabeth Doghtie, by whom he had a son, Charles;—and, secondly, to Dame Mary Carey, by whom he had a son, Piedro or Peter, and a daughter, Carey. Having reacquired by purchase the estate of Durris, (which originally belonged to his family,) Sir Alexander executed a deed of entail on 22d November 1669, proceeding on the narrative, that 'for as meikle as, out of the zeal and desyre I have had 'to revive and restore the antient family of Durris, which has stood 'in a prosperous and flourishing condition for some hundreds of 'years in the persons of my predecessors of the surname of Fraser, 'whereof I am lineallie descended ane lawful son of the family, 'I have purchased the saids lands with the meins wherewith the 'Lord has been pleased to bliss me, and which are the product 'of my own vertew. Out of the same zeal, and for the standing 'and subsistence of the said house and family in the surname of 'Fraser, I have resolved upon establishing of the right of succession and tailzie underwritten, as ane proper mein to make the 'samen sua to subsist in law: And withal considering that the 'most part of the sums wherewith the said lands and estate are 'purchased have come in by my marriage with Dame Mary 'Carey, my present spouse, at least conquest during the marriage 'standing betwixt us; therefore, and for the love and favour I

July 5. 1822.

'have and bear towards my children under named, and for cer-
'tain other onerous causes, good respects, and considerations
'moving me, wit ye me to have sold, anailzied, and disponed, like-
'as I by the tenor hereof sell, anailzie, and dispone from me, my
'heirs, and all others my successors, to and in favour of Piedro
'alias Peter Fraser, my eldest lawful son procreate betwixt me
'and the said Dame Mary Carey, my present spouse, and the
'heirs-male lawfully to be procreate of his body; whilks failing,
'to the heirs-male lawfully to be procreate betwixt me and the
'said Dame Mary Carey, and the heirs-male of their bodies;
'whilks failing, to Charles Fraser, my second son procreate
'betwixt me and the deceast Mrs. Elizabeth Doghtie, my first
'spouse, and the heirs-male of his body allenarly; whilks fail-
'ing, to the eldest daughter or heir-female, without division,
'procreate or to be procreate betwixt me and the said Dame
'Mary Carey,' &c. The deed contained the usual prohibitive, irritant, and resolutive clauses; and among other prohibitions it was declared, 'that it shall be noways lawful to the said
'Piedro alias Peter Fraser, my son, nor his heirs of tailzie and
'provision above written, mentioned, and contained in the said
'tailzie and substitution, in order as is above prescribed, nor their
'foresaids, to alter, infringe, nor innovate this present tailzie, nor
'to dispone, wadset, sell, nor away put the saids lands, baronies,
'and others foresaid, nor to contract debt thereupon exceeding
'the sum of £20,000 merks Scots money, nor do no other fact
'or deed, civil nor criminal, whereby the saids lands and estate,
'or any part thereof, may be any ways apprized, adjudged,
'evicted, or forfaulted from them in prejudice of the next person
'succeeding in the foresaid tailzie, be virtue of the foresaid sub-
'stitution, nor their foresaids, in any sort; and if they or any of
'them shall failzie therein, and contravene the foresaid provisions,
'or either of them, then and in these cases all such deeds and
'debts sua to be done and contracted by them shall not only be
'void and null ipso facto, be way of exception or reply, without
'any necessity of declarator to follow thereupon, but also the
'committer of the said deed or deeds, and contractor of the saids
'debts, as said is, shall ipso facto amit and tyne the benefit of
'the foresaid tailzie and right of succession above written, and the
'samen shall pertain and belong to the next substitute person or
'heir of tailzie above specified, quha shall have right to succeed
'thereto be virtue of the foresaid tailzie, and be served and re-
'toured heir of provision and tailzie to us therein, without any
'necessity of being served and retoured heir to the said contra-
'veners, contractors of the saids debts, and committers of the saids
'deeds or crimes, sicklike and in the same manner as if the said

'tailzie had never been conceived in their favours, and in favours 'of which substitute person and heir of tailzie above written they 'shall be holden to renounce their pretended interests, and denude 'themselves and their foresaids omni habili modo.' As the lands held of the Crown, a charter was obtained under the sign-manual of Charles II., on which infeftment was taken in 1675, and both in the charter and in the sasine the prohibitory clause was thus expressed: 'Et similiter quod minime licebit dict. Domino Pedro 'Fraser, nec ejus hæredibus talliæ et provisionis supra script. 'in dict. tallia et substitutione content. modo et in ordine ut inibi 'describitur, nec eorum prædict. dict., talliam mutare, infringere, 'seu innovare, neque dict. terras, baronias, aliaq. prædict. dispo- 'nere, seu impignorare, vendere, dilapidare, neque debita desuper 'contrahere summam viginti millium marcarum monetæ prædict. 'exceden.' &c.

On the death of Sir Alexander, his eldest son Peter succeeded to the estate, which he held till 1730, when he died without issue. Charles Fraser, the other son, had also died without issue. In the mean while his daughter Carey had married the Earl of Peterborough and Monmouth; and she having died, leaving a grandson, Charles Lord Mordaunt, (who afterwards became Earl of Peterborough and Monmouth,) he made up titles to the estate by serving heir in special of tailzie and provision to Sir Peter. Earl Charles was twice married. By his first marriage he had two daughters, Lady Frances Mordaunt or Bulkely, and Lady Mary, afterwards Baroness Mordaunt, (one of the respondents); and by his second marriage he had an only son, Charles-Henry.

On the death of Earl Charles, he was succeeded by his son Charles-Henry as Earl of Peterborough, who in 1780 made up titles to the estate of Durris under the entail, in virtue of which he was infeft. After attempting to sell it to the late Francis Russel, Esq. Advocate, (but which it was found in a suspension he had no power to do,) he entered into an arrangement with that gentleman, in the form of a lease, on the 28th of August 1784, by which he let to him the whole lands and estate of Durris, comprising an entire parish, for the period of four 19 years, or 76 years, and for the life of the tenant to be in possession at the end of that time, together with the fishings, woods, mines and minerals, and game,—giving him right to cut down the woods on condition of planting one acre of forest trees for every three acres of firwood cut down, binding himself to present to the parish church any qualified person recommended by Mr. Russel, and conveying to him the whole furniture in the mansion-house, with the mansion-house itself, and power to build a new one, subject, however, to the right of the heirs of entail to enter to possession of the house

July 5. 1822.

on certain conditions; and he agreed that, in the event of an appeal which he had entered against the judgment in the suspension being successful, he should sell the estate to him at a certain price.* On the other hand, Mr. Russel bound himself to pay £1000 per annum of rent for the first two 19 years,—£1100 for each of the third 19 years,—£1200 for each of the fourth 19 years,—and £1300 yearly for the lifetime of the tenant in possession at the expiration of the last of these periods. Prior to entering into this lease, reports had been judicially obtained from persons of skill, from which it appeared that the farm-houses were so ruinous, that they were not worth more than £100;—that the plantations and enclosures were greatly destroyed, and of very bad quality;—that the mansion-house was in a dilapidated condition;—and that the lands themselves were almost in a state of nature, so that the annual produce did not exceed £960. By a separate agreement in the shape of a lease, the rent during the Earl's life was restricted to £300 per annum, in consideration of which, and of the assignation of the furniture, the arrears of rent, &c., Mr. Russel bound himself to pay £15,107. 14s.

The right to this lease and agreement was, in October 1794 and May 1795, assigned absolutely by Mr. Russel to the appellant Mr. Innes, who immediately proceeded to make large and extensive improvements on the estate, in accomplishing which he alleged he had expended, between the period of his entry and the year 1814, upwards of £80,000. In particular, he alleged that he had erected 50 farm-steadings, 50,000 ells of stone dikes, a mansion-house and offices, and a bulwark on the river Dee to defend 200 acres of land;—that he had made 31 miles of road, planted 900 acres of wood, and trenched and ploughed 300 acres of ground out of heather, and brought them into a regular rotation of cropping. In virtue of the lease and assignation, he continued in the undisturbed possession till 1814, when the Earl of Peterborough died; and Lady Bulkely having predeceased him in 1798, he was succeeded by the respondent Mary Baroness Mordaunt, who obtained herself served heir of tailzie and provision to the Earl, and was thereupon infeft.

In the mean while, and in the year 1797, an agreement had been entered into between Mr. Innes and the Marquis of Huntly, (who was entitled to succeed to the estate on the death of Lady Bulkely, of the Baroness Mordaunt, and of the Duke of Gordon,) which proceeded on the narrative, that 'whereas the said Marquis 'is one of the heirs of entail of the estate of Durris in the county 'of Kincardine, and will be entitled to succeed thereto in case of the

* The appeal was subsequently withdrawn.

'failure of the Earl of Peterborough, who now enjoys the same, July 5. 1822.
'and of the other heirs of the body of the late Earl of Peter-
'borough, &c.; and whereas the said John Innes is in possession
'of the said estate, under a lease for a long term of years granted
'by the said now Earl of Peterborough, subject to payment, &c.;
'and whereas the said Marquis made offer to the said John Innes,
'to give up and convey his eventual interest in the said estate,
'and rents thereof, to the said John Innes;'—therefore, in consideration of the payment of certain sums of money, his Lordship assigned to Mr. Innes his interest in the estate, and the whole claims which he might have under the lease in the event of his succession. In 1805, his father, the Duke of Gordon, after certain communings between his agents and those of Mr. Innes, repaid to that gentleman the money which he had advanced to the Marquis, with interest thereon, in consideration of which Mr. Innes discharged the obligation granted by the Marquis, and delivered up the deeds whereby it was constituted, in order to be cancelled.

Immediately on her succession to the estate, the Baroness of Mordaunt (who resided in England) raised an action of reduction of the lease granted to Mr. Russel, and assigned to Mr. Innes, and of removing, on the ground,—1. 'That the said contract or lease,
'and relative articles of agreement, were granted and entered into
'by the deceased Charles Henry Earl of Peterborough and Mon-
'mouth, in contravention of the provisions in the entail after
'mentioned, under which he held and possessed the lands and
'estate of Durris, and it was therefore ultra vires of the Earl to
'grant the same;'—and, 2. That 'the foresaid contract or lease
'contains various other clauses and conditions altogether incom-
'patible with the rights and powers of an heir of tailzie, and
'which formed no proper part of, and are not to be found in an
'ordinary tack.' She then specified the various clauses in the lease, to show that it was not of that character, and that it was contrary to the powers of an heir of tailzie under the entail of Durris. Against this action Mr. Innes stated in defence,—

1. That the Baroness Mordaunt was barred personali exceptione from insisting in the action, because he offered to prove by her oath, that at the time when he acquired his right to the lease in 1795, she was fully in the knowledge of the whole of its terms and conditions; and that although she was possessed of that knowledge, she had allowed him for upwards of twenty years to make the extensive improvements which he had executed upon the estate without the slightest interruption, and that she had done so, although it was competent to her as a substitute to have raised a declarator of irritancy against the late Earl.

2. That as she had served herself heir to the late Earl, (who,

July 5. 1822.

she alleged, had been guilty of a contravention in granting the lease,) and had not passed him over as she ought to have done in terms of the statute 1685, she had identified herself with him, and therefore as she represented him, she was no more entitled to have the lease set aside, than he would have been, if he had been alive.

3. That the action was incompetent, because it had for its object to set aside an act of contravention, after the death of the alleged contravener; but that it was established law, that no declarator of irritancy could be raised after the death of the contravener; and that if effect were given to the present action, it would produce the very same consequences as if a decree of declarator of contravention were pronounced, seeing that it would give rise to a claim against the executors of the late Earl to the extent of £80,000, besides the damages arising from the loss of the lease.

4. That although it had been decided that a prohibition to *alienate* was sufficient to prevent the execution of a lease of more than ordinary duration, yet there was no such prohibition in this case; that the prohibition was merely not to dispone, wadset, sell, nor away put; but that it had been fixed by the Court of Session, that a prohibition to dispone was not equivalent to one against alienation; and that the only remaining prohibition (which was that against *away putting*) was not effectual to prevent an heir of entail from granting a lease of any duration whatever.

5. That the investitures were not in conformity to the prohibition in the deed of entail, because, in the original charter and infeftment, and in all the subsequent titles, the prohibition was, that 'quod minime licebit dict. Domino Pedro Fraser, &c., disponere, seu impignorare, vendere, *dilapidare*;' but that the word 'dilapidare' was different from, and did not convey the same meaning as the word 'away put,' and therefore that the prohibitions in the entail could not affect third parties.

To these pleas it was answered,—1. That the reference to the oath of Lady Mordaunt was not relevant, because, although it might have been competent to her to have brought a declarator of irritancy during the life of the late Earl, yet she was not bound to do so; and neither was she bound to object to any acts done by him, even although she had been aware of them, which she stated that she had not been, and that she had no opportunity of seeing the alleged improvements made by Mr. Innes, as she had all along resided in England.

2. That as the late Earl had been infeft in the lands, it was necessary to serve to him, seeing that he was the person who had died vest in the fee; but as she had served as an heir of entail,

and so held the lands in the character of a singular successor, she did not represent him. July 5. 1822.

3. That although an action of declarator of irritancy was not competent after the death of the contravener, yet it was perfectly competent to reduce and set aside any act done contrary to the terms of the entail, and which was injurious to the succeeding heir.

4. That the prohibition against disponing was of itself sufficient to prevent a lease of the nature of that in question (which was truly a lease of the proprietorship) from being granted; but that the term 'away put' was of the same strength as a prohibition to alienate, and it was admitted that such a prohibition was sufficient to set aside the lease.

5. That there was no discrepancy between the prohibitory clause in the deed of entail and the investitures; that the conveyancer had made a bonâ fide translation of each of the terms, and had not omitted any of the prohibitions, and that the word 'dilapidare' was quite sufficient to express the English term 'away put.'

The Lord Ordinary having reported the case on informations, and a defence having been stated at the Bar, that even although, the lease should be held contrary to the prohibition in the entail, yet that it might be sustained for a shorter period, the Court found 'that the deeds of lease brought under challenge are in 'violation of the deeds of entail of Durris founded on, and there-'fore reducible; but before further answer as to the plea now 'stated from the Bar, that the leases, though they cannot be sus-'tained in toto, may be sustained for a shorter period of duration,' appointed parties to prepare memorials upon that question, reserving any claims for meliorations for subsequent discussion.

Against this judgment finding the lease reducible, Mr. Innes presented a petition, and on the cause coming to be advised with answers, having stated the defence as to the discrepancy between the entail and the investitures, the Court allowed him to put in an additional petition, and thereafter ordered memorials 'as to 'the discrepancy between the deed of entail and the import of 'the word dispone, as relative to this case.' On advising these pleadings, their Lordships, on 9th March 1819, adhered to the interlocutor finding the lease reducible, and at the same time found that it could not be sustained for any period of duration, and therefore decerned in terms of the rescissory conclusions of the libel, and also in the removing; but remitted to the Lord Ordinary to hear parties on the question of meliorations.*

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* See Fac. Coll. 9th March 1819, No. 218.

July 5. 1822. *The Judges* were unanimously of opinion that none of the preliminary defences were well founded, and that the word 'dilapidare' was sufficient to express the prohibition against away putting; but Lords Robertson and Bannatyne held that that prohibition was not sufficient to strike at a lease of the nature of that in question. On the other hand, Lords Justice-Clerk, Glenlee, and Craigie were of opinion that a prohibition to away put was equivalent to one against alienation, and that a prohibition against alienation was sufficient to prevent such a lease as this being granted. Lords Justice-Clerk and Craigie were also of opinion that the prohibition to dispone was alone sufficient.

Against the judgment finding the lease reducible, (which was final in the Court of Session,) Mr. Innes entered an appeal, and at the same time presented a petition against the judgment finding that the lease could not be sustained for any period of duration, and which was superseded till the issue of the appeal.

A few months thereafter Lady Mordaunt died, and the Duke of Gordon, as the next substitute, succeeded to the estate, and was duly served and infeft accordingly. He then applied to the House of Lords to be allowed to sist himself as respondent in place of Lady Mordaunt; but it being objected by Mr. Innes that he had a personal objection to state to the Duke, which had not been discussed in the Court of Session, the House of Lords, on the 2d of May 1820, ordered 'that the prayer of the petition of the Duke 'of Gordon be not complied with.' His Grace then presented a petition to the Court of Session, praying to sist him as respondent; but the Court, on the 17th of June 1820, 'in respect that 'the process has been carried to the House of Lords by appeal, 'and thereby removed from this Court, found it incompetent to 'entertain this petition,' and therefore refused the prayer of it. The Duke having again applied to the House of Lords, their Lordships, on the 22d of July of the same year, ordered 'that 'the said cause be remitted back to the Court of Session in Scot-'land, without prejudice to the appeal, with liberty to the Duke 'of Gordon to proceed therein as he may be advised, and to ap-'ply to this House as soon as the Court of Session shall have made 'any order in this matter.'

The Duke thereupon presented a petition to the Court of Session, praying to have the personal objection disposed of; and this having been appointed to be answered, Mr. Innes stated, that in addition to the circumstances which he had pleaded as against the Baroness Mordaunt, and which were equally applicable to the

Duke, his Grace was barred from objecting to the lease,—Because, as the transaction with the Marquis of Huntly recognised the validity of the lease, and as the Duke had subsequently entered into an arrangement whereby that transaction was given up for a valuable consideration, he was not only in the full knowledge of the existence of the lease, but had so acted as to impress Mr. Innes with the belief that the lease was unobjectionable, and had led him to lay out large sums of money on the estate. To this the same answer was made as to the relevancy, as had been stated by Lady Mordaunt; and further, That so far from recognising the validity of the lease, the Duke had obtained a cancellation and discharge of the obligation by the Marquis of Huntly, to give effect to it. The Court, on the 17th of November 1821, repelled 'the personal objections stated to the petitioner's right to appear as pursuer in this action instead of the deceased Mary Baroness Mordaunt, and sisted him as pursuer accordingly.' * July 5. 1822.

Lord Robertson observed, that it was unnecessary to inquire whether the transaction with the Marquis of Huntly could afford a personal objection against him, as that question was not before the Court; that the only questions which were before them, were, whether the Duke was barred, first, by acquiescence; and, secondly, by homologation. With regard to the first of these points, he did not think there was any relevancy in the allegations of Mr. Innes; for even although the Duke had been aware of the existence of the lease, and of the extensive improvements which were made, yet, as he was merely a remote substitute, and had only a contingent interest, he was not bound to bring an action for having it set aside. His right to bring such an action was res meræ facultatis, which he was not obliged to exercise. The cases of Ayton and Melville were not applicable, because the point which was there decided was, that if a party who has an immediate and existing interest lie by, seeing large sums laid out on the property, and do not bring his challenge, he will be held to have acquiesced. But the Duke of Gordon had no such interest. The whole question, therefore, turned on the alleged homologation. By the law of Scotland, a person, although not a party to a deed, may make himself so by his acts; but it is also the rule of law, that no person is presumed to bind himself, and therefore, in order to infer homologation, the acts indicative of the intention to be bound must be clear and explicit. The allegation of Mr. Innes, however, merely was, that the

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* See 1. Shaw and Ball, No. 182.

July 5. 1822. Marquis of Huntly entered into an agreement to convey his interest under the entail, and his rights under the lease, and that the Duke of Gordon had connected himself with it. But the Duke, so far from ratifying this agreement, did the very reverse—he cancelled and annulled it; and he obtained its cancellation by paying to Mr. Innes a large sum of money. Such an act never could infer homologation; and indeed Mr. Innes could not lawfully plead such a defence, seeing that he had in his pocket the price which was paid for having the whole transaction set aside.—The other Judges concurred.

Against this judgment also Mr. Innes appealed, and maintained the same arguments which he had urged in the Court of Session. The Duke of Gordon also repeated his pleas, and founded on the reversal in the case of Elliot *v.* Pott on 14th March 1821, by which it was found that a prohibition to dispone deprived an heir of entail of power to grant a lease for 77 years. *

The LORD CHANCELLOR moved in both cases, and the House of Lords 'ordered and adjudged, that the interlocutors complain-'ed of be affirmed.'

Appellant's Authorities.—(1.)—2. Stair, 40. 29; 3. Ersk. 3. 47; Ayton, July 1. 1800, (No. 5. Ap. Property); Ayton, May 19. 1801, (No. 6. Ib.); Earl of Kinnoull, Jan. 18. 1814, (F. C.); Sommerville, July 16. 1698, (5694); Mackenzie, Dec. 4. 1767, (5665); Anderson, July 15. 1760, (5701); Erskine, Jan. 1682, (5703); Corsar, July 27. 1687, (5710); Linton, Jan. 1729, (5624); Cubbison, Dec. 30. 1724, (10449); Murray, June 13. 1746, (10454); Williamson, Aug. 4. 1761, (10459); Logan, Feb. 18. 1743, (5660); Bridg. Ind. *voce* Witness and Consent.—(2.)—3. Stair, 4. 23; 3. Ersk. 4. 32.—(3.)—Craig, June 13. 1712, (15494); 3. Ersk. 8. 29; Gordon, July 23. 1748, (7281); Mackay, Nov. 23. 1798, (11171); Gordon, Nov. 14. 1749, (15384); Gilmour, March 6. 1801, (No. 9. Ap. Taillie); Dundas, Nov. 29. 1774, (15430.)—(4.)—Bruce, Jan. 15. 1799, (15539); Elliot, March 10. 1814, (F. C.); Hamilton, March 3. 1815, (F. C.)—(5.)—2. Stair, 3. 58; 3. Ersk. 8. 26; 2. Bank. 3. 141; Garnock, July 28. 1725, (15596); Murray, July 5. 1744, (15380); Broomfield, June 29. 1784, (15618); Martin, June 22. 1808, (F. C.); Burn's Eccl. Law, 2. 52; 1491, c. 25; 2. Bank. 8. 115; 1581, c. 101; Macken. Obs. 201; Mack. Inst. 1. 5; Balfour, 237; Henderson, Nov. 21. 1815, (F. C.); 3. Ersk. 4. 9.

Respondents' Authorities.—(2.)—3. Ersk. 8. 51; Stormont, Feb. 1662, (13944); Dillon, Jan. 14. 1780, (15432); Campbell, Feb. 20. 1812, (F. C.)—(3.)—Cathcart, Jan. 21. 1775, (15399); Cases in Mor. 15611, 15519, 15530, 15450, and No. 6. Ap. Tailzie); Muir, Dec. 22. 1808, (F. C.); Malcolm, Nov. 17. 1807, (F. C.); Turner, Nov. 17. 1807, (No. 16. Ap. Tailzie.)—(4.)—1493, c. 50; 1587, c. 15; 2. Mack. 2.—(5.)—Hope's Min. Prac. 145; 2. Mack. 11. 2; 4. Stair, 5. 1. and 4; Dirl. p. 72; Dallas, 605, 618, 632; Jurid. Styles, 203; 5. Bell's Deeds, 75; 1581, c. 101; 1585, c. 2; 1606, c. 3.

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

(*Ap. Ca.* 26. *and* 27.)

* See ante, pp. 16. 89.