JAMES CUNNINGHAME of Balgownie, Esq. Appellant. No. 13.

ROBERT CUNNINGHAME, Son of the late ROBERT CUNNINGHAME, of Bowerhouses, and his Trustees, Respondents.

Personal Objection.—Circumstances under which (affirming the judgment of the Court of Session) a party was held barred from reducing certain deeds made in contravention of an entail.

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2D DIVISION. Lord Cringletie.

IN 1762, John Erskine of Balgownie, Esq. advocate, was feudally vested in the lands of Balgownie and Thorsk, holding of the Crown, and of Poppletrees, holding of the family of Mar. He had also a personal right to certain subjects lying within the territory of the town of Culross, partly as heir-apparent of his father, and partly on dispositions in his own favour. On the 12th of June 1762, he executed an entail of the whole of these subjects in favour of himself and the heirs of his body; whom failing, of his nephew, the Rev. Robert Cunninghame of Comrie and Banton; whom failing, a series of substitutes. This deed contained prohibitions against selling, or altering the order of succession, fortified by a clause of irritancy, but no resolutive clause; nor was there any prohibition against contracting debt; nor was there a clause of registration; and it was never recorded. It, however, specially provided, 'that my said heirs, substitutes, 'and successors above-mentioned, shall be bound and obliged to 'enjoy, bruik, and possess my lands and other heritable subjects 'before disponed, by virtue of this present disposition and des- 'tination of succession, and infeftments, rights, and conveyances 'to follow hereupon, and by virtue of no other right or title 'whatever; declaring hereby, that if any of the said heirs, sub- 'stitutes, and successors before-named, shall at any time act or 'do in the contrair hereof, by selling, annalzieing, and disponing 'my said lands and estate; or any part thereof, except for the 'purposes above specified, or by altering the course of succes- 'sion and destination above set down, or bruiking or enjoying the 'lands and other heritable subjects before disponed, by any title 'other than this present right, and infeftments, rights and con- 'veyances to follow hereupon, all and every one of such acts 'and deeds, with all that shall happen to follow or may follow 'thereupon, shall be ipso facto void and null, and of no force, 'strength, or effect, sicklike, and in the same manner, as if the

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'said acts and deeds had not been made, granted, done, acted, 'or committed.'

In 1767 John Erskine died without issue, and was succeeded by his nephew, the Rev. Robert Cunninghame. To the lands of Balgownie, Thorsk, and Poppletrees, Mr Cunninghame completed titles, under the above entail; but to the Culross subjects he completed his title in fee simple; and was infeft in 1772. At this time the lands were affected by L.6000 of debts of the entailer, John Erskine, besides annuities to the extent of L.250. Mr Cunninghame was proprietor of the lands of Comrie and Banton, which, by his marriage-contract, were settled upon his children of that marriage. He sold these lands, and with part of the proceeds paid off the above debts, to which he took assignations in favour of a trustee, in order to be kept up against the entailed property, and the heir of entail. He also, with part of the price, purchased Bowerhouses.

Mr Cunninghame was twice married. By his first wife, he had a son John, who was the father of the appellant. By his second marriage, he had a son Robert, who was the father of the respondent.

On the 11th of August 1792, Mr Cunninghame executed an entail of Balgownie, Thorsk, and Poppletrees, which proceeded on the narrative, that he had made it 'for the purpose of ren-'dering more effectual the intentions of the deceased John 'Erskine of Balgownie, advocate, my uncle, and for the better 'preservation of my family, and the continuance of my estate 'with my children, relations, and heirs of entail herein and after-'described, and for certain other weighty causes and considera-'tions moving me.' The substitution and series of heirs were precisely the same as in the deed of 1762: but several new conditions and prohibitions were introduced; and particularly that the heirs should bear the name and arms of Cunninghame of Balgownie,—should possess the lands in virtue of that deed and the one of 1762 jointly,—and should not contract debt; all of which were fortified by irritant and resolutive clauses. He, however, reserved power to himself to alter or revoke the deed at any time during his life. At this time his son John was about to be married to a Miss Hutchison; and an arrangement was entered into between him and his father, by which John agreed to ratify the new entail, and the father to discharge his power of revocation. Accordingly, on the 27th of September 1792, a deed was executed by them, in which, in reference to the above entail, John was described as 'apparent heir of entail

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'of the said Robert in the said entailed estate;' and it proceeded on the narrative of being made 'in contemplation of the mar-'riage of the said John Cunninghame with Miss Jane Hutchi-'son, eldest daughter of Mr James Hutchison, merchant in 'Burntisland, and for the better preservation of our family, and 'the continuance of the said estate, by a permanent settlement 'thereof upon our children, relations, and heirs of entail above-'named and described, and for certain other onerous causes and 'weighty considerations;' and they therefore ratified the new entail in every respect, and bound themselves and their heirs to abide by it; in consideration of which Robert the father discharged his power of revocation, and of binding the estate with any sums except his onerous debts and suitable provisions to his wife and other children. In farther testimony of his ratification of the deed, John signed each page of it. On the 29th of November thereafter, an antenuptial contract was executed between John and Miss Hutchison, to which Robert was a party, and which proceeded on the narrative of the new entail, the ratification of it, and the power therein contained of making proper provisions out of the estate to the wives and younger children of heirs of entail; and therefore they bound themselves to infeft Miss Hutchison in a certain jointure out of the land of Poppletrees, and secure certain sums to the children; and farther, Robert bound himself to pay to his son and wife during his own life, L.100 per annum, and also gave him L.100 of cash. On the same day, the new entail and ratification were recorded, and sasine was thereafter taken.

The subjects in Culross were not included in the above entail; and in addition to those to which he had succeeded, Mr Cunninghame purchased two portions of ground. The mansion-house was built, and the garden and part of the pleasure-grounds were formed on the former of these subjects, and the office-houses were erected on the latter, and also an addition made to the garden by means of them.

On the 14th of January 1795, Mr Cunninghame executed another deed of entail, embracing the whole of the Culross subjects, precisely in the same terms as the deed of 1792. This entail was ratified by his son John on the 4th of February, and both the entail and ratification were afterwards recorded, and infeftment taken. In December 1796, Mr Cunninghame, on the narrative of the above two entails, and of his desire to relieve the estate of debt, executed in favour of his son and the other heirs

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a renunciation and discharge of the debts which he had hitherto kept up by a trust-assignation.

After having conveyed Bowerhouses to his son by his second marriage, Mr Cunninghame (the respondent's father) died, and was succeeded by John, who thereupon made up titles to the entailed properties, as heir of tailzie under the above deeds. Soon thereafter he brought an action, founding on his father's contract of marriage, by which Comrie and Banton had been provided to the heirs of the marriage, and also on the deeds of entail, (by which an obligation was imposed on his father's heirs-general to free the heirs of entail of all claims against him); and concluding against the respondent's father to have it found, that he was entitled to Bowerhouses as a surrogatum pro tanto for Comrie and Banton, and payment of L.6000, as part of the proceeds of these lands which had been applied to the extinction of the debts chargeable against the entailed estate. The Court found him entitled to payment of the L.6000; and on an appeal the case was settled by the respondent's father paying him L.5000. John continued to possess under the entails till 1811, when he died, leaving a son, the appellant, who was then in minority, and to whom he named curators. These curators immediately proceeded to complete his titles to the above lands under the entails. Accordingly, he was served heir in special, as the eldest lawful son and nearest heir of tailzie of John under the entail in 1792, on which he was infeft in Balgownie and Thorsk holding of the Crown. In the lands of Poppletrees he was infeft on a precept of clare constat from the superior, also in the above character: and in regard to the Culross subjects, he was cognosced heir of tailzie as to those holding burgage, and got a precept of clare constat in that character from the Magistrates relative to those holding feu, in virtue of which he was infeft. On attaining majority he granted a discharge to his curators, which proceeded on the narrative of the entails and ratifications in 1792 and 1795; and that 'in virtue of the foresaid two dispositions and deeds of entail I succeeded to the whole lands 'and estate of Balgownie, Thorsk, and Poppletrees, and others;' and that 'they have rendered to me a full and particular account 'of the management of my affairs, and of the actings and intro-'missions of the factors foresaid, appointed by and acting for me 'and them; which accounts have been examined and found to 'be correct, and with which I am perfectly satisfied,' &c. He therefore ratified, approved, and confirmed 'the whole acts and 'deeds done by my said curators, or others authorized by them,

'in relation to the foresaid entailed lands and estates.' He also, after his majority, obtained himself enrolled as a freeholder of the county of Stirling under the above titles. In 1818, and before the quadrennium was expired, he raised a summons of reduction of the entails and ratifications in 1792 and 1795, and of his own titles, and concluding to have it declared that these titles being reduced, 'it ought and should be found and declared, 'by decree foresaid, that the said James Cunninghame, pursuer, 'must make up his titles to the foresaid lands, barony, and others 'foresaid, under and by virtue of the foresaid disposition and 'deed of entail executed by the said John Erskine in the year '1762, and the investitures following thereon, in favour of the 'said Reverend Robert Cunninghame, previous to the foresaid 'pretended deeds of entail, said to have been executed by him 'in the years 1792 and 1795, and ratified as aforesaid: And it 'ought and should be found and declared, by decree foresaid, 'that the titles to be made up by the said James Cunninghame, 'as aforesaid, will effectually carry right to him, as heir of pro-'vision under the destination and deed of tailzie of the said Mr 'John Erskine, to the said lands, barony, and others aforesaid.' The chief grounds of reduction were, that the deeds were ultra vires of Mr Cunninghame, as he had succeeded to the lands under the entail in 1762, and that the appellant's titles have been made up per incuriam, and while in minority. In defence the respondent stated, '1*st*, The late Reverend Robert Cunning-'hame had full power to execute the entail in 1792 and 1795 'libelled, and sought to be reduced; 2*d*, The said entails were 'expressly ratified and homologated by the pursuer's late father; 'they have been homologated by the pursuer himself; and, on 'the faith of their validity, the entailed estate has been discharg-'ed of debt to a large amount, and other important family tran-'sactions have been entered into, of all which the pursuer has 'reaped the benefit; so that, even if it were true that the entails 'sought to be reduced were ultra vires of the maker, the pursuer 'is barred personali exceptione from challenging them.' On advising memorials, Lord Cringletie pronounced this interlo-cutor:—'In respect that the Reverend Robert Cunninghame, 'grandfather to the pursuer, acquired debts due by his uncle 'John Erskine of Balgownie, the maker of the deed of entail, 'under which alone the pursuer now desires to possess his estate; 'which debts he kept up against the entailed estate, by taking 'assignments to them, either to a trustee for his behoof, or 'directly to himself, his heirs and successors; and in respect

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'which were not included in the first entail, explaining also the 'nature of the titles under which they have been possessed; and 'along with the condescendence, to produce a copy of the claim 'upon which the petitioner was enrolled as a freeholder.' On advising the condescendence, with answers, their Lordships, on the 20th of February 1823, 'adhered to the interlocutor of the 'Lord Ordinary brought under review, in so far as it finds that 'the petitioner is barred personali exceptione from insisting in 'this process for setting aside the entail executed by his grand-'father, and ratified by his father; and assoilzied the defenders, 'and found them entitled to expenses.'* April 15. 1825.

Lord Craigie was of opinion, that the entails in 1792 and 1795 were reducible; that there had been no sufficient acts of homologation to bar the appellant from doing so, or setting aside his titles made up under these entails; and that on the assumption that he abandoned the Culross subjects purchased by Mr Cunninghame, the appellant could not be held to represent either him or his father.

Lord Glenlee thought that he was barred both by homologation, and as representing his father, from objecting to the deeds. He had taken up the Culross subjects, to which he had no right, except under the deeds quarrelled, or as heir of his father, and had after majority obtained himself enrolled a freeholder under these titles.

Lords Justice-Clerk and *Robertson* concurred with Lord Glenlee.

James Cunninghame appealed.

Appellant.—The appellant had a jus crediti under the entail of 1762, of which he could not be deprived by the acts of either his grandfather or his father; and therefore, and as they were bound to have possessed under that entail, the deeds executed in 1792 and 1795 were unwarrantable, and liable to be set aside. This has not been seriously disputed; but it is said, that the appellant is barred by homologation from reducing those deeds. It is, however, settled law, that there is no homologation by taking benefit of a reducible deed; and therefore the circumstance of his having possessed as heir, and being enrolled a freeholder, are irrelevant. So soon as he arrived at majority, he adopted means for setting them aside; and nothing can be founded on what was

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* See 2. Shaw and Dunlop, No. 207.

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done during his minority, nor can the discharge granted to his curators, which, although good to them, is res inter alios quoad the respondent. Neither can any weight be put on the circumstance, that, in erroneously making up his titles, his curators served him heir to his father, and that he in consequence got possession of the two trifling pieces of ground purchased by Mr Cunninghame. They were incorporated with the rest of the property; and it would be contrary to all equity to hold, that by this mistake he was barred from vindicating his rights under the deed of 1762.

Respondent.—Unless the appellant admits the validity of the entails, he has no title to pursue, so far as regards the Culross subjects, seeing that they were held in fee-simple by Mr Cunninghame, part having been acquired by successive titles made up in fee-simple, and prescription having taken place, and part by purchase. But, independent of this objection, he is barred from attempting to set them aside. He is the heir and general representative of his father who ratified the deeds. His titles were made up in virtue of these deeds, after attaining majority; and he approved of this having been done by the discharge granted to his curators. He got himself admitted a freeholder on these titles after his majority, and he enjoys possession of the Culross subjects, on which the mansion-house, offices, and gardens are situated, to which he can have no right, except either as representing his father and grandfather, or by virtue of the deeds in question; and besides, he has taken advantage of the discharge of the debts, amounting to L. 12,000. As the merits were not discussed in the Courts below, it is unnecessary to say any thing upon them till the question as to the personal bar is decided.

'The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

Lord Gifford.—My Lords, I will now beg to call your Lordships' attention to the case of Cunninghame against Cunninghame, which was heard before your Lordships the day preceding the holidays, and on Tuesday last. This was an action brought by the appellant, to set aside certain entails executed by his grandfather, on the ground that they were ultra vires of the granter, in consequence of certain clauses in a previous entail, and that the titles made up in the appellant's person were made up by his curators per incuriam, and were challenged within the quadrennium utile; concluding, therefore, that those titles might be reduced. It is sufficient for me to state to your Lordships, that in this action the interlocutor finally pronounced by the Court of

Session is, that they adhere 'to the interlocutor of the Lord Ordinary 'brought under review, in so far as it finds that the petitioner is barred 'personali exceptione from insisting in this process for setting aside 'the entail executed by his grandfather, and ratified by his father, and 'assoilzies the defenders, and finds them entitled to their expenses; 'and decern accordingly.' April 15. 1825.

I have stated to your Lordships, that this decision did not proceed on the merits of the case, but it proceeded on this ground, that by the acts of the appellant, Mr Cunninghame, done by him after he became of age, and the other facts stated in the papers, the Court considered that he had adopted and ratified, and in the language of the Scotch law, homologated those instruments which had been executed. My Lords, the grounds on which it was contended that the appellant had so homologated are stated in the papers, and were brought forward at your Lordships' Bar; and the question is, whether they are sufficient to satisfy the House that Mr Cunninghame had so homologated, as found by this interlocutor. It is sufficient for me to state to your Lordships, that after hearing the very able arguments at your Lordships' Bar, and maturely considering these arguments, it does not appear to me that there is sufficient ground for advising your Lordships to set aside that decision. It will be unnecessary for me to go into the various grounds which were adduced, to satisfy your Lordships that the appellant had homologated those instruments on the special circumstances, and indeed it is not usual, where it is proposed to affirm the judgment, to go into the merits of the case, and it does not appear to me on this occasion necessary to do so.

My Lords,—This is a case in which I shall say nothing about costs; because, unquestionably, it was a case which it was very fit should be brought before your Lordships for decision, involving very important points and very important interests. I shall therefore only move your Lordships, that the judgment be affirmed.

Appellant's Authorities.—Dict. voce Homologation, § "Taking the benefit," &c.; Munro, Feb. 13. 1810, (F. C.); Arbuthnot, July 4. 1792, (620).

Respondents' Authorities.—3. Ersk. 3. 47.; Anderson, July 15. 1760, (5701.); Mackenzie, Dec. 4. 1767, (5665.); A. Bishop of St Andrew's, March 12. 1684, (5699.); Home, Jan. 1734, (5700.); 1. Ersk. 3. 39.; Crawford, Jan. 1683, (5694.); Hay, Dec. 5. 1755, (5663.); Steele, Jan. 13. 1774, (5669.); 1. Bankt. 7. 90.; 1. St. 6. 44.

J. CAMPBELL—J. RICHARDSON,—Solicitors.