1807. *November* 17.

WILLIAM DUKE of QUEENSBERRY *against* FRANCIS EARL of WEMYSS, and Others.

No. 15.

It was provided, that it should not be lawful to the heirs of entail to 'sell, alienate, wadset, or dispone the lands, &c.' and afterward that, 'notwithstanding the irritant and resolutive clauses' it shall be lawful 'to the heirs of tailzie to set tacks of the said lands and estate during their own lifetime, or of the lifetime of the receivers thereof, the same being always set without evident diminution of the rental.' Under these clauses, a lease for ninety-seven years, and for which a grassum was paid, although without diminution of the rental, was found to be unlawful.

BY a contract of marriage between Lord William Douglas, second son of the Duke of Queensberry, and Lady Jane Hay, second daughter of the Earl of Tweeddale, the said Lord William Douglas and Duke of Queensberry, on the 12th October 1693, resigned the lands and barony of Neidpath for new infeftment, under all the fetters of a strict entail.

Inter alia it was provided, 'That it shall be nowise leisome or lawful to the 'said Lord William Douglas, and the heirs-male of his body, nor to the other 'heirs of tailzie respective above mentioned, nor any of them, to sell, alienate, 'wadset, or dispone any of the said haill lands, or any part thereof, nor to 'grant infeftment of liferent, nor annualrents forth of the same, nor to con-'tract debts, or do any other fact or deed whatever, whereby the said lands and 'estate, or any part thereof, may be adjudged, apprised, or otherwise evicted 'from them or any of them, nor by any other manner of way whatsoever, to 'alter or infringe the order and course of succession above-mentioned.' The deed likewise contained the following clause. 'It is likewise hereby expressly 'provided and declared, That, notwithstanding of the irritant and resolutive 'clauses above mentioned, it shall be lawful and competent to the heirs of 'tailzie above specified and their foresaids, after the death of the said William 'Duke of Queensberry, to set tacks of the said lands and estate during their 'own lifetime, or of the lifetime of the receivers thereof, the same being always 'set without evident diminution of the rental.'

This entail was admitted to be valid and effectual, and to possess all the requisites of the act 1685. And at its date a rental of the estate was made up and signed by the parties.

William, the present Duke of Queensberry, the pursuer, succeeded to his father, in the year 1731, under this entail. On the 17th January and 11th April 1801, his Grace granted a lease of certain parts of this barony to Alexander Welch for 57 years from the preceding Whitsunday, at the rent of £86. 15*s*. 2*d*. Sterling, and at the same time received a grassum of £301 Sterling. On the 23d November 1802, Alexander Welch renounced this tack, and received from his Grace a new one for the space of 97 years at the same rent, for which he paid a grassum of £318. 1*s*. 2*d*. Sterling. This lease was not let to the diminution of the rental.

Certain doubts having occurred with respect to the validity of this lease, the Duke of Queensberry raised a declaratory action, concluding, that he had a right to grant these leases.

The Earl of Wemyss, and others, next heirs, appeared, and contended, that these leases were granted in contravention of the entail, and therefore not effectual.

The cause was debated before Lord Glenlee, Ordinary, by whom it was reported to the Court. Counsel were heard in presence. No. 15.

Argument for the pursuer.

1. As to the principle of interpretation applicable to entails.

From the earliest writers on the law of Scotland it appears, that entails were introduced with difficulty, and interpreted with rigour, and that the anxiety of a powerful aristocracy to perpetuate their names and families, was opposed by the opinions of lawyers who discerned the legal difficulties, and the public inexpedience of putting the property of land under such restrictions as could alone accomplish this object. Craig, p. 329 and 340. Edit. Baillie.

The first entails seem to have been conceived in the form of a mutual contract, but the mode afterward adopted was that of interdicting the heir from doing those deeds which the entailer wished to prevent. Hence, they received the same strict interpretation as a public interdiction. Spottiswoode Pract. p. 331 and 332. In the case of Stormont, in which the effect of these prohibitions, improved and strengthened by the addition of irritant and resolutive clauses, was first discussed, the Court had great difficulty in supporting them, No. 5. p. 13994. Stair, Edit. 1681, p. 271.

To remove these legal difficulties the act 1685, C. 22. was passed; but although it legalized the constitution of entails against third parties, yet the same principles which opposed the introduction, continued to dictate a strict interpretation of them. Stair, Edit. 1681, p. 272. Edit. 1693, p. 228.

At an earlier period, (13th Ed. I.) the English aristocracy made the same attempt, and entails were introduced in England with the benefit of a more liberal interpretation. But to reconcile them to the principles of law, a fiction was adopted, that the fee of the estate was not completely vested in the heir. Blackst. vol. 2. p. 112.

In the law of Scotland, however, such a fiction was not resorted to; the fee is held to be in the heir, and the prohibitory clauses are not considered in the favourable view of deeds of intention, but as perpetual interdictions with respect to the estate. Every act, therefore, which is not specially forbidden, the heir is at liberty to do. In the opinion of all institutional writers, entails are so considered. M'Kenzie, B. 3. Tit. 8. § 17. Spottiswoode's and Bayne's Edit. p. 232, Note A. Bank. B. 2. Tit. 3. § 149 and 150. Ersk. B. 3. Tit. 8. § 12. By a numerous train of decisions the same principles of interpretation have been established, 24th November 1769, Edmonstone of Duntreathe, No. 68. p. 15461; 8th July 1789, Stewart against Home, No. 98. p. 15535; 15th January 1799, Bruce of Tillicoultry, No. 100. p. 15539. It is therefore now settled law, 1*st*, That the heir of entail is considered unlimited proprietor of the estate, unless in so far as he is fettered by the prohibitions of the entail; 2*dly*, That these prohibitions are construed in the most rigorous manner; And, 3*dly*, That their meaning cannot be extended by implication from other clauses of the entail.

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2. As to the meaning of the clause founded on.

Even if leases could be considered in law to be alienations, the prohibition that the heir shall *not sell, alienate, wadset, nor dispone*, does not contain a prohibition to grant leases. In legal language these terms characterise a sale or conveyance of the estate. They are terms appropriated to express a total divestiture of the property, an act altogether different from that of granting a lease. In granting a lease, the proprietor *sets, and in tack and assedation lets;* but the terms here used are those adopted exclusively in granting a feu or wadset, in accomplishing an excambion or a sale. As they are classed in the present case, they denominate a sale; and by a noted decision (Stewart against Hoome, No. 98. p. 15535.) they have been found incapable of a more extensive interpretation. By that decision, it was determined that the word *dispone* could not be separated and applied to a gratuitous conveyance. On the same principle, the word *alienate* cannot be separated from the rest of the clause, and applied to the transactions in question. If, in the view of the Legislature, the term *alienate* could apply in general to any mode by which the property could be taken from the heirs, there would not have been any necessity for specially prohibiting gratuitous and onerous conveyances, and contraction of debts, which the statute and the decisions of the Court have required to be specially prohibited. If the term *alienate* cannot reach a lease, it is equally certain that the clauses against *creditors, adjudgers*, and singular successors, are also ineffectual for this purpose. Ersk. B. 2. Tit. 7. § 1.

If leases had been considered as alienations, they would have been the subject of a special prohibition in the statute; and that tenants were known in law, is clear from the next act in the statute book 1685, C. 24. That leases are of a nature distinct from any of the deeds enumerated in the statute is further proved from the contemporary styles in which leases are the subject of a separate prohibition. Dallas, p. 552, 553, and 587.

3. Supposing the words of the clause could be taken alternatively, yet a long lease is not in law an alienation. Neither in technical nor in common language, is a lease an alienation. It is a personal contract; and whether it be of a long or a short endurance, from its nature it is supposed, and necessarily implied, that the granter of it, as well as the subsequent heirs, still continue feudal proprietors. In fact, the present heirs have a greater rent after this alleged alienation, than the prior heirs had before its date. There is not an authority in law which, when fairly considered, characterises a lease as an alienation. Craig, (B. 3. D. 4. § 5. and B. 2. D. 10. § 5.) whose knowledge of the law of Scotland was circumscribed and warped by feudal notions, does not explicitly term a long lease an alienation, but merely states the opinion of foreign feudists.

In the last edition of Stair, long location is stated to be an alienation; but this has been inserted by an error of the editors, without the authority of any *MSS.*; and the passage is obviously copied from Craig. In the edition 1693,

published in his lifetime, a contrary opinion is stated, B. 2. Tit. 11. § 13; B. 1. Tit. 15. § 1; B. 2. Tit. 9. § 2; and the edition of 1681 contains the same opinion. No. 15.

M'Kenzie, on the act 1621, p. 8. and p. 33, states explicitly, that tacks could not be comprehended as alienations under *the letter of the law*, but that the statute reached them from the favourable interpretation given to laws for the prevention of fraud. But the principle of construction applied to entails is of an opposite nature; and as leases are not comprehended under the letter of this entail, this authority is favourable to the pursuer: From the observations of the same author, on the 11th James II. C. 41. it is clear that alienation, in its fair and legal acceptation, did not include leases.

Balfour, C. 15, 17, 18, *voce* ASSEDATION, refers merely to the powers of churchmen to grant leases of their benefices beyond their own lifetime, and affords no authority on the point.

Neither does the style of an inhibition, as given by Stair, p. 762, sanction the idea that tacks would be struck at by this diligence as alienations. Leases are there specially enumerated, and would not otherwise be held included.

That a person on death-bed cannot grant a lease beyond the ordinary term of administration, affords no authority on this question. A person in that situation cannot exercise any act of property beyond the compass of ordinary administration. Stair, B. 1. Tit. 20. § 38.—Crawford, No. 52. p. 3230. It is altogether a mistake, too, to allege that this part of the law originated in a statute of William against alienations. Stair, B. 3. Tit. 4. § 27. But at any rate, by settled principles of construction, an heir of entail is in a totally different situation, with respect to power, from that of a person on death-bed; and is entitled to do every thing from which he is not specially prohibited.

Dallas, p. 648 and 650, was of opinion, that a lease for a thousand years was not in law an alienation.

From a minute examination of every authority in law, it appears that a lease is not in its own nature an alienation; and, indeed the defenders, while they acknowledge that a lease of a short endurance is not such, merely contend that the one at present in dispute does, from the extent of its endurance, amount to an alienation. But it is clear, that in a lease for 97 years, the granter is as much proprietor as in a lease for 5, and he possesses in both cases the same privileges of enjoyment. There is not to be found in books of law any criterion of endurance to determine when a lease changes its nature and becomes an alienation, and a legal act of a totally different character. It is plain that law neither can, nor ought to afford any such criterion. The length of leases must necessarily fluctuate with the fluctuating opinions of mankind on agricultural affairs. Where the subject does not admit of definition, there can be no limit. Where the entailer himself has dictated no limit, the Court cannot exercise a discretionary controul, without overturning those principles of interpretation in the law of entails which require the fetters to be clear, explicit, and definite,

No. 15. and without introducing into the law the most dangerous uncertainty. Cuningham, Law Dict. *voce* WILLS, Vol. II. No. 137.

4. The general point involved in this case has already been decided, 2d March 1779, Leslie against Orme, No. 96. p. 15530. wherein a lease for 76 years, granted by an heir of entail, was supported, and this decision has, in the understanding of the country, been regarded as fixing the point, that in the absence of special prohibition any lease under 100 years may validly be granted.

It appears likewise from 10th Geo. III. C. 51, that the ideas of the legislature coincided with the principles of the Courts of law. For by that statute, heirs prohibited by entails to let leases beyond a certain endurance, are enabled, in certain circumstances, to grant leases of 38 or 100 years. The narrative of this act therefore proves, that it required an express prohibition to prevent heirs from letting leases of such an endurance.

5. By permitting liferent leases the entailer sanctions leases of every other kind. Liferent leases are the highest species of lease known in law, and the permission of these must include all of an inferior description. Accordingly, liferent leases, being a higher kind of property, are subject to liferent escheat, while those of a definite endurance fall under the single escheat, 1617, C. 15. In the opinion of Lawyers, the only leases which, in point of duration, can be assimilated to liferent leases, are those for 100 years, which is the legal term of life. M'Kenzie's Observations, p. 379. A liferent lease also may be assigned like those of a long endurance, and on the same principles. Bank. B. 2. Tit. 9. § 46. Stair, B. 2. Tit. 9. § 26.

Such likewise is the principle of the English law, where a lease of a definite endurance is of less value than that of a lifetime. Bac. abridg. *voce* LEASE.

In maintaining that the permission to grant a liferent lease amounts to a prohibition to grant those of any other description, the defenders attempt to create a limitation by inference which is contrary to the established principles of law. But if implication is to be at all permitted, the correct conclusion is, that it is a prohibition to grant a longer lease than what is equivalent to a lifetime, which, in law, is a hundred years. It is sufficient, however, for the pursuer to say, that this clause can have no legal effect from its defective expression. Every instance of a disappointed entail is an example of clauses defective in precision meeting with the same fate.

Argument of the defender.

1. As to the principle of interpretation.

That an heir of entail may do every thing which he is not expressly prohibited to do, and that the prohibition of one thing does not infer the prohibition of another, merely because their consequences to the substitutes of entail may be the same, is admitted. Thus a prohibition to sell does not include a prohibition to contract debt. Nor is either included in a prohibition to alter

the course of succession. Neither are prohibitions againt the substitutes effectual against the institute without express provision. But then these acts are substantially different, although one of the ultimate effects of either may be to disappoint the succession; and it is a probable or possible supposition, that the entailer might prohibit any one without meaning to prohibit the rest, or might desire to direct the prohibitions against the remoter heirs, without wishing to include the person whom he first called. It must also be observed, that although the Court, by the adoption of a strict interpretation, have established these points, it may now be asserted that the principle of strict interpretation has been carried as far as can safely be permitted, and would not be applied to new cases, which, though analogous, do not precisely correspond with those already determined. Even if the present, therefore, had a slight analogy with any of those modes of defeating entails which the law will not interfere to prevent, it would merit consideration whether the principle of strict interpretation would be applied to it, while entails are recognised in law. But this is a point which the defenders have no interest to dispute, for they do not plead that the leases complained of are like or equivalent to alienations, but that they are really in contemplation of law alienations. No. 15.

2. As to the import of the prohibitory clause.

The stat. 1685 did not introduce entails, nor prescribe any particular and technical form in which they should be conceived. It was passed to remove certain legal scruples, which the case of Stormont had excited. It had an obvious and general reference to those modes of guarding against the defeat of an entail which were at that time in use. Indeed the various devices by which entails may be defeated are almost infinite; and a specific enumeration is beyond the power of the most acute conveyancer, or the most prospective legislature. In the statute, therefore, those generic terms were used which in law bore a distinct reference to certain classes and descriptions of deeds; and in expounding these terms the defenders do not plead that they should be extended beyond their proper meaning, but that they should have that generic effect which was attributed to them by those by whom they were used. That the clauses in the entail do not fall short of those in the statute, is admitted. It is declared, that the heirs shall *not sell, alienate, wadset, nor dispone.* In maintaining that these terms in law and practice characterise nothing but a sale, the pursuer overlooks that they are connected by the *disjunctive* particle *nor*, and not by the conjunctive *and.* If they had stood connected by the conjunctive particle, there might have been some force in the argument; and it might have been said, that the meaning of the generic term *alienate* was restricted by those *sell* and *dispone;* but from their being grammatically connected by the disjunctive particle, each of the three terms denotes a distinct meaning. The term *alienate*, therefore, may be separated, and conveys a distinct meaning. It has a generic meaning, and applies to every transaction of which the effect is to give to another the substantial interest in the thing alienated. That it is

No. 15. not restricted to total and absolute divestiture of property is clear; because, on the one hand, there may be an effectual alienation, without any direct transference of the property,—and on the other, there may be a nominal transference of the property where there is no alienation. Of the one, a lease for an illusory rent, and for a thousand years, or the grant of a servitude of pasturage over a whole estate, are instances; of the other, the creation of a freehold, and the conveyance of the superiority. Neither is it necessary that the alienation be perpetual, for the conveyance of an entailed estate for a given period to a stranger would not be effectual against the succeeding heirs. The criterion of alienation therefore is to be discovered from the substance, and not from the style of the transaction. In deciding this question, the circumstances of the particuliar case must be examined, and the same species of transaction may in certain circumstances be termed an alienation, and in others an act of ordinary administration. That a lease is not an alienation in its own nature, and when granted as an act of ordinary administration, yet that it may be granted in circumstances (for an immoderate endurance, and for an illusory rent) which convert it into an alienation, cannot be denied.

The middle point then, when a lease ceases to be an act of ordinary administration, must be ascertained; and no doubt this is difficult, from the fluctuations in the opinion and practice of mankind at different times. To solve this difficulty usage must be resorted to; and it must be enquired whether, at the date of the entail, leases like those in question would have been regarded as alienations, and would have been obnoxious to the prohibitions therein contained. In the law and practice of Scotland, there has always been a marked distinction between long leases and those of ordinary duration; and although the period of long and ordinary leases bears a distinct reference to the prevailing system of management of the day, and must therefore fluctuate, yet the distinction has never been overlooked. While the latter have been sustained, the former have been invariably characterised as alienations.

Thus long tacks of the property annexed to the Crown are prohibited as alienations,—M'Kenzie's Observations on Stat. 1455, C. 41.;—and after the act of annexation in 1745, wherein alienations of the annexed property were prohibited, it was thought necessary to invest the Ccmmissioners with special power to grant leases of a definite endurance.

Analogous to these limitations on the Crown, are those on churchmen in the management of their benefices. It appears that they were not permitted to let leases for more than a few years; and a liferent lease was accounted beyond the term required for ordinary management, and therefore prohibited as an alienation.—Balf. Pract. p. 203. C. 17.

In a chapter of the treatise *de Feudis*, B. 2. D. 10. § 5. devoted to the subject of leases, and professedly on Scotch law, the author explicitly distinguishes between long and ordinary leases, and characterises the former as alienations. In another passage the same distinction is pointed out—B. 3. D. 4. § 5. In

the passage quoted by the pursuer, L. 3. D. 3. § 23 & 24. the author is no doubt chiefly occupied in reconciling an inconsistency in the foreign feudal law, but he at the same time obviously refers to the principles of the Scotch law. No. 15.

In the opinion of Stair likewise long location is alienation,—B. 2. Tit. 11. § 13. Edit. 1759, which is the most correct of the three editions,—and there is no ground for presuming that this is an interpolation. In B. 2. Tit. 11. § 13. Edition 1693, quoted by the pursuer, the author is occupied with reconciling an inconsistency in the feudal customs of Italian states, and discusses the point noticed by Craig, and he merely says, that in the fedual law of the Italian states long location was not alienation. In B. 1. Tit. 15. § 1. Edit. 1693, he says that *tacks* in the *ordinary intent thereof* are not alienations. But the lease now debated is an enormous violation of the ordinary intent of that species of transaction, and, *ex converso* of the author's principle, must be considered to be an alienation.

In other branches of the law long leases are considered to be alienations. By the law of deathbed, into the origin of which it is unnecessary to enquire, a long lease is struck at as an alienation.—19th June 1759, Bogle, No. 55. p. 3235. DICT. *voce* DEATHBED, Sect. 7.

By the authority of M'Kenzie, Observ. on Stat. 1621, C. 18. against fraudful alienations to the prejudice of creditors, tacks are comprehended under alienations. And although this may have arisen from a liberal interpretation of the act, it is nevertheless evidence that, in the acceptation of law, a species of transaction, which in form is a location, may in reality be classed with alienations.

In like manner, in giving effect to the diligence of inhibition, it is beyond doubt that leases like those debated would be reduced on the ground of an alienation, without a special enumeration. In the style given by Stair, the alienaton of tacks, and not the granting of them, is specially prohibited, and therefore the granting of them could only be reached under the general head of alienations.

Law makes another marked distinction between long and ordinary leases. Of long and liferent leases, assignations may be granted without special power. In tacks of ordinary endurance, special power to assign is required, the former being a higher species of property than the latter, Bank. B. 2. Tit. 9. § 46.

By the law of England a lease is classed with the modes of alienation. Black. B. 2. C. 28.

Tailzies effectual against third parties are merely the creatures of the statute; and if the statute does not from its terms enable an entailer to prohibit long leases, it follows, that any prohibition in the entail against them, however explicit and fortified with irritant and resolutive clauses, would be ineffectual against the tenant. The terms of the entail are co-extensive with those of the statute; if, therefore, long leases are not struck at by the prohibitions against

No. 15. alienations, it must follow that the statute is in a most important particular deficient. Nay, unless long leases are included under this term, there is nothing to prevent heirs to let effectual leases even to the diminution of the rental. For if leases are not included under the term alienation, or are a mode of alienation not prohibited by the statute, any regulations dictated in the entail, with regard to them, would be quite ineffectual.

But that this is not the interpretation of the statute, is clear from the terms of all cotemporary entails, and from the decisions of the Court. Of the entails executed at the date of the act, as well as subsequently, many contain provisions with respect to the duration of leases, and these provisions have been sustained by the Court.

Of the cases which appear among the reports, none sanction the doctrine of the pursuer. On the 26th November 1761, Kinnaird against Hunter, a lease for 25 years was sustained, on the express ground that the entail was not recorded, and the expression of this *ratio decidendi* in the interlocutor warrants the conclusion, that in other circumstances it would not have been sustained, No. 139. p. 15611. On the same principle, as appears from the appeal cases, was decided the case 22d February 1774, Carre against Cairns, No. 93. p. 15523.

The case of Leslie against Orme, on which the pursuer so much relies, was full of specialties. 1*st*, The leases seem to have been granted for money advanced for the purpose of recovering the estate for the heirs, of which the pursuer was one, and therefore he might be barred *personali exceptione*. 2*d*, There was a very extensive permission to grant leases, even to the diminution of the rental. 3*d*, The heir of entail, by whom the process was raised, had ratified the lease; and it does not appear how far this ratification was not binding on his son, by whom the process after his death was pursued to decree.

2. The clause which, notwithstanding the preceding general prohibitions, declares it to be lawful to let leases for the lifetime of the granter and receiver, is a distinct and express prohibition of leases of any other description. If heirs of entail had liberty to grant leases of unlimited endurance, notwithstanding the prohibition of alienations, the permission here contained would have been both useless and absurd.

It is a settled rule, however, in the construction of all deeds, that no clause shall be construed in such a manner as to render it useless, if it can bear any other construction; and further, that no clause in a deed shall be construed to import an absurdity if it can bear a reasonable meaning.

When a person having power to grant or deny, to permit or prohibit, any thing, does grant liberty to a defined extent, the conclusion is irresistible, that beyond the assigned limit the power does not extend. Lawful and unlawful, competent and incompetent, are co-relative terms, and a declaration that it shall be lawful to grant tacks for a certain term, necessarily and directly imports, by the unaided force of the language, that it is unlawful to grant them for a longer term.

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If a different construction be put on this clause, it must follow that the heir may grant leases not only for what endurance, but for what rent he may think fit. For the restriction, *without diminution of the rental*, applies only to those leases, which the heir is specially permitted to grant. It is only, therefore, a liferent lease that must be granted without diminution of the rental. This clause, then, must be understood taxatively, and as pointing out those leases which alone the heir was entitled to grant.

While the Court were unanimous in sustaining the defences in this question, they were equally unanimous in supporting all those decisions by which the principle of applying strict interpretation to entails may now be considered as settled law; and they did not think it necessary to go much into the argument drawn from the special clause in this entail, permitting liferent leases. The judgment rested on a different ground.

The Court were of opinion, that under the prohibition to alienate, long leases were comprehended. Alienate is a generic term, applicable to all those modes of which the direct object was to deprive the heirs of the substantial interest in the estate; modes which it was impossible to enumerate, and which must vary and multiply with the ingenuity of practitioners, and the progress of society.

From the earliest period a distinction has been entertained between long leases, and those of an ordinary period required for the purposes of administration; and in contemplation of law, the former have invariably been considered as alienations. Whatever fluctuation there may have been in the definition of a long and a short lease, the distinction has never been lost. In the administration of the Crown lands under the different acts of annexation; in the administration of the great ecclesiastical benefices by the ancient churchmen,—in giving effect to the legal diligence of inhibition,—in determining the powers competent to persons on deathbed,—and in questions under the act 1621, the distinction between long and ordinary leases always has been, and is now recognised, and the former are classed with the alienations.

To define the limit at which a lease ceases to be an act of ordinary administration, and becomes an alienation, is difficult, but the reality of the distinction was not on that account the less evident. This is a point which must depend on the state of agricultural knowledge and the prevailing system of management at the time of its discussion. Perhaps the statute 10 Geo. III. C. 51. afforded the only criterion of the duration of a lease, and declared both the terms and the duration which must be observed in granting a lease beyond the ordinary period. But towards the decision of the present case, the determination of that point was unnecessary, and they did not consider themselves called upon to dictate any criterion for the definition of such a limit. The lease under discussion far exceeded the debateable bounds of validity.

On the 14th May 1806, the following interlocutor was pronounced: 'Sustain the defences, assoilzie the defenders from the conclusion of the declarator, and decern.'

No. 15. And on advising a reclaiming petition, and answers, the Lords adhered, 17th November 1807.

Lord Ordinary, *Glenlee.* Act. *John A. Murray, John Clerk,* and *Henry Erskine.* Alt *J. H. Forbes, Mat. Ross,* and Dean of Faculty, *Blair.* *C. Tait,* W. S. and *J. Anderson,* W. S. Agents. *Scott,* Clerk.

J. W. *Fac. Coll. No. 3. p. 14.*

1807. *November* 17.

KEITH TURNER of Turnerhall, and ANDREW TURNER, *against* ROBERT TURNER and JAMES WATSON.

No. 16.

A lease for a thousand years was reduced, under a prohibition to alienate.

The contravener, granter of the lease, being dead, an action of reduction, at the joint instance of the son of the contravener and the next substitute, was competent, altho' by the entail the contravener was to forfeit for himself and his descendants.

ON the 17th July 1688, John Turner, merchant in Dantzic, by his testament, directed his trustees to invest so much of his property in the purchase of lands in Scotland, as might yield fifty chalders of victual yearly, and directed these lands to be entailed on a certain series of heirs.

The trustees on the 13th November 1693, and on the 18th May 1694, purchased the lands of Rosehill, Newark, and Tipperty, in the shire of Aberdeen, and disponed them to the different heirs substituted, under the fetters of a strict entail. *Inter alia*, the deed of entail contains the following clauses:

'Providing, likeas it is hereby provided and appointed to be contained in 'the infeftments to follow hereupon, that it shall nowise be lawful to the said 'Robert and John Turner and the other heirs of tailzie foresaid, to sell, an-'nalzie, and dispone the lands and others above written, or any part thereof, 'heritably or irredeemably, or under reversions ane or mair, nor to grant in-'feftments of annualrent, or yearly duties, greater or smaller, forth thereof; 'nor to set tacks of the same in diminution of the true worth and rental may 'be paid for said tacks, without being obliged, nevertheless, to raise the rental 'in manner after provided, nor to contract debt, or burden the said lands; 'nor do any other deed whereby the samen may be evicted, apprised, or ad-'judged from them, or anywise impaired to their prejudice.'

Then follows a clause forfeiting and resolving the right of the contravener, and of the *descendants* of his body. The deed afterward provides, 'That the 'said Robert and John Turner, or their heirs of tailzie aforesaid, shall noways 'have power to heighten, raise, or augment the rents of the said lands, as the 'same is presently paid, nor remove the tenants forth thereof, sua long as 'they punctually and pleasantly pay the same;—the said tenants, and each of 'them, always yearly planting upon the ground of the said lands possessed by 'them, an oak-tree, or fir-tree, or some other commodious tree, in some con-'venient place of the said lands possessed by them, which may serve either for 'present decorment of the said lands, or use to the said heirs in time coming.'