Respondent's Authorities.—(1.)—3. Ersk. 8. 44; Stevenson, June 24. 1784, (14862); 3. Stair, 5. 25; 3. Bank. 5. 22; 3. Ersk. 8. 73; Gordon, Feb. 8. 1748, (14368); Campbell, Nov. 28. 1770, (14949.)—(2.)—Syme, Feb. 27. 1799, (75473, Aff. April 25. 1803, No. 5. Ap. Tailzie); Edmonstone, Nov. 24. 1769, (4409); Steel, May 4. 1814, (F. C.)

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A. MUNDELL,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No.* 21.)

No. 35.

JAMES DUKE of ROXBURGHE, Appellant.—*Gifford—Mackenzie —Riddell.*

Lieut.-Gen. WALTER KERR, Respondent.—*Clerk—Cranstoun —Thomson—Fullerton.*

Proof.—Circumstances in which it was held, (affirming the judgment of the Court of Session,) that the description of a person in an ancient deed as filius carnalis did not prove that he was illegitimate.

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2D DIVISION.
Lord Pitmilly.

ON the death of William Duke of Roxburghe, General Kerr laid claim to the honours and estates of the family of Roxburghe, but was successfully opposed by the appellant, then Sir James Norcliffe Innes. These estates were strictly entailed, and, on failure of the appellant without issue, they descended to General Kerr. With a view to the assertion of his claim in the competition, General Kerr had obtained himself served heir-male of Robert first Earl of Roxburghe, and of Henry Lord Kerr, and, pending it, the appellant raised an action of reduction to set aside these services. After, however, memorials had been ordered by the Lord Ordinary to the Court, he applied for leave to withdraw the action, and the Court in consequence, on the 11th December 1811, pronounced this interlocutor: 'Having heard this petition, in respect the petitioner has desired to 'withdraw this action, allow him to do so, and assoilzie the de- 'fender, and decern; find the defender entitled to his expenses,' &c. Thereafter, in 1815, and subsequent to his success in the competition, the appellant, conceiving that he had obtained evidence affecting the legitimacy of General Kerr's ancestors, brought a new action for reducing his services, and the decreet of absolvitor pronounced in the former reduction; and concluding to have it declared that he, the appellant, as the last heir of entail, held the estate in fee-simple, and that the pretensions which were made by General Kerr to the character of a substitute heir of entail were not well founded. The chief grounds on which this action was rested were, 1. That Mark Kerr of Dolphinstone or Littledean, from whom General Kerr derived his descent, was not the

May 24. 1822. legitimate son of Walter Kerr of Cessford; and, 2. That even supposing that Mark Kerr were legitimate, yet that John Kerr, the son of Sir John Kerr and Margaret Whytlaw, through whom also General Kerr traced his pedigree, was illegitimate. In support of the first of these allegations, the main evidence relied on by the appellant was an instrument of sasine in May 1499, by which infeftment was given by Walter Kerr of Cessford, 'Marco 'Kerr, suo filio carnli;' and he contended that the word carnalis, according to the technical phraseology of the law of Scotland, was at that time synonymous with the term naturalis; and that although it was capable of expressing legitimate connexion when used along with adjuncts to that effect, such as 'et legitimus,' &c., yet, where it was employed by itself, it was understood to mean that the birth of the party was tainted by bastardy;—that such being the case, and there being deficiency of evidence of his alleged legitimacy, he must be regarded as having been a natural son. In relation to the second ground of reduction, it was stated that Sir John Kerr of Littledean, &c. who was married to a lady of the name of Julian Home, formed in 1577 or 1578 an adulterous connexion with Dame Margaret Whytlaw, the wife of Sir Alexander Hamilton of Innerwick—that, in consequence, Sir Alexander obtained a decree of divorce against his wife, and that a similar decree was in 1589 obtained against Sir John Kerr by his lady, Mrs. Julian Home—that within 12 days after the last of these decreets, and while both Sir Alexander Hamilton and Mrs. Julian Home were alive, Sir John Kerr married Dame Margaret Whytlaw—that John Kerr was the son of this marriage, which by the common law of Scotland was unlawful, and therefore that he must be regarded as a bastard. In defence, General Kerr pleaded, 1. That the decree of absolvitor in the former action, having been pronounced in foro, formed a res judicata; 2. That the legitimacy of Mark Kerr was proved by a variety of documents and circumstances which were quite inconsistent with the idea of his being a bastard—that the instrument of sasine was not lawful evidence, but the mere assertion of a notary, the charter to which it referred not being produced, and that the term carnalis was proved by various authorities, and by its being applied to persons lawfully born, not to be expressive of the meaning attached to it by the appellant; 3. That as the marriage between Sir John Kerr and Dame Margaret Whytlaw took place prior to the stat. 1600, c. 20. it was perfectly lawful; and accordingly a decree to that effect had been pronounced by the Commissaries, and its validity had been recognised both by the Court of Session and the General Assembly, and John Kerr had been served and retoured as 'le-

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'gitimus et propinquior hæres' of his father. Lord Pitmilly repelled the reasons of reduction, and assoilzied General Kerr; and to this interlocutor the Court adhered on the 16th November 1819, and 11th March 1820,* and modified the expenses to £1521 : 8 : 6. Against these interlocutors, and also against the decree of absolvitor in 1811, the appellant James Duke of Roxburghe having entered an appeal on the above grounds, the House of Lords found, that 'in this case, in which it has been 'insisted on the part of the respondent, among other matters, 'that the appellant is barred by the plea of res judicata, that it is 'not necessary to determine whether he is so barred; but assuming that he is not so barred, the several interlocutors complained 'of ought to be affirmed: It is therefore ordered and adjudged, 'that the interlocutors complained of be accordingly affirmed.'

Appellant's Authorities.—(2.)—Geddes, Feb. 25.1796, (12641); Haddington's Collection, Vol. I. No. 636.—(3.)—1592, cap. 11; 1. Craig, 14. 14; Mack. Crim. Law, p. 93; Ferguson's Reports, 364.

Respondent's Authorities.—(2.)—2. Craig, 7. 7; 2. Mack. 294; 2. Bank. 3. 42; 2. Ersk. 3. 35; King, Nov. 15. 1682, (12523); Keble, Dec. 4. 1804, (14314);—(3.)—1600, c. 20; 1. Stair, p. 445; Crawford, Feb. 25. 1642, (12639.)

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

(*Ap. Ca. No. 22.*)

No. 36.

CHARLES FERRIER and Others, LYELL's Trustees, Appellants.—*Gifford—Clerk—Jameson.*

JAMES HECTOR, Respondent.—*Cranstoun—Vere.*

May 24. 1822.

1st Division.

Lord Alloway.

Trust—Mutual Contract.—A tenant having entered into an agreement with his landlord to renounce his lease at a particular period in consideration of a certain sum, and the landlord having prior to that period become bankrupt, and conveyed his estates to trustees—Held, (reversing the judgment of the Court of Session,)—1.—That the tenant had no right to insist that the trustees should accept of the renunciation, and pay the stipulated price, but that he was bound to elect either to retain his lease, or rank as an ordinary creditor under the trust for the price;—and,—2.—That there were not sufficient circumstances alleged to infer an adoption of the agreement by the trustees, so as to bind them to implement it specificially, either officially or personally.

In 1787 Robert Davidson obtained a lease of the farm of Fernieflat, part of the estate of Kinneff, for the lifetime of the tenant in possession, at the yearly rent of £276 : 5 : 6. This lease Davidson assigned to Hector, who took possession; and some years

* Not reported.