MRS INNES or RUSSELL, (Executrix of JOHN INNES, Esq.,) Appellant.—*Brougham**—*Spankie*. No. 37.

EXECUTORS of ALEXANDER DUKE OF GORDON, Respondents. —*Lushington*—*Robertson*.

Bona or Mala Fides—*Entail.*—Circumstances under which (affirming the judgment of the Court of Session) it was found, 1. That a party possessing under a long lease, in violation of an entail, was not entitled to claim meliorations from a succeeding heir of entail; and, 2. That he was liable in violent profits, from the date of the judgment of the Court of Session, reducing the lease.

Process—*Declinature.*—Where the Court of Session rejected the vote of a Judge who had not been present at a hearing in presence, but considered the subsequent written pleadings; and would not require the opinion and vote of a Judge who declined, in consequence of having been leading counsel for the pursuer, the House of Lords affirmed the judgment.

Nov. 10, 1830.

2D DIVISION.
Lord Mackenzie.

THE estate of Durris, situated on the banks of the river Dee, in the County of Aberdeen, extends to upwards of 32,000 acres, and comprehends the whole parish of Durris, and part of another parish. It was entailed, in 1669 and 1675, by Sir Alexander Fraser. On the 11th of April, 1780, Henry Earl of Peterborough made up titles, by special service, as heir of entail, and was infeft. He entered into a transaction, in 1793, with the late Francis Russell of Westfield, advocate, (the brother-in-law of John Innes, W. S., and the brother-german of the present appellant,) by which his Lordship sold to Mr Russell the estate of Durris. To ascertain judicially his power to do so, Mr Russell presented a bill of suspension, as of a threatened charge for the price, in which Mr Innes acted as his agent. The bill having been passed, the Lord Ordinary, on the 5th of June, 1793, suspended the letters simpliciter—thereby finding that his Lordship had no power to sell the estate. By consent of parties, this interlocutor was recalled, and informations ordered to the Court, who adhered to the judgment of the Lord Ordinary. An appeal was then presented by the Earl to the House of Lords; but, while it remained undisposed of, the parties entered into a new arrangement, the leading object of which was, to let the estate, for a long period of years, to Mr Russell, with powers almost equivalent to those of a proprietor,

* The Cases are reported of the dates when the judgments were pronounced, and previous to that in the present, and some of the following Cases, Mr Brougham was appointed Lord Chancellor.

Nov. 10, 1830. subject to a stipulation in a relative deed of agreement, that if the judgment should be reversed, and his Lordship found entitled to dispose of the estate, the sale should be completed. With reference to this arrangement, the subjoined memorial was, on the 29th of July, 1794, laid before Mr Mathew Ross, Dean of the Faculty of Advocates, to which he gave the annexed answers.*

---

* 'A. B. is heir of entail of an estate, the deed of entail of which contains this clause: "That it shall be noways lawful to my said son, nor his heirs of tailzie "and provision above written, mentioned and contained in the said tailzie and sub- "stitution, in order as is above prescribed, nor their foresaids, to alter, impugn, nor "innovate this present tailzie, nor to dispone, wadset, sell, or away put the lands, "baronies, and others foresaid, nor to contract debt thereupon exceeding the sum of "L.3000 Sterling, nor do any other fact or deed, civil or criminal, whereby the "said lands, or any part thereof, may be anyways comprised, adjudged, evicted, or "forfeited from them, in prejudice of the next person succeeding," &c.; "and if "they shall fail," &c. Then follow the usual irritant clauses.

'The deed of entail contains no other clause against alienating or contracting debts; and, in particular, contains no prohibition or limitation whatever respecting the granting of leases for any endurance.

'The memorialist, A. B, is desirous of setting a long lease of his estate, and of giving ample allowance for enclosing, planting, building stone walls and farm-houses, to be advanced by the tenant, but for which he is to be entitled to repayment before his removal.

'1. For what duration might A. B. grant a lease of his whole entailed estate, with security to grantor and receiver?

'2. Would there be any danger or imprudence in making the first period of the lease the life of the present heir of entail, and the longer period to commence at such heir's decease?

'3. Supposing it to be prudent not to diminish the present rental, and yet, the fact being, that, owing to every species of folly and bad management on the part of the memorialist's factors and agents, the present rent is considerably reduced from what it was some years ago, how shall a mode of ascertaining the present rent, probative and satisfying at a future day of dispute, be devised?

'4. Under the circumstances of such a case, will the most extensive power of meliorating, in building houses, stone fences, planting, and draining, be sustained to the tenant, before he can be removed from possession of the lands, provided such are actually, and bona fide, and beneficially laid out for the estate?'

ANSWERS.

'To 1st Query.—The entail containing no prohibition or limitation as to the granting of leases, I incline to think, that the heir of entail is at liberty to grant leases even of a very long endurance, and to which I can fix no precise limit. But I think it most advisable and safest for both parties not to exceed three nineteen years, being a term not unusual when nothing is in view but the accommodation of the tenant, or four nineteen years, for which there is an express precedent in the case of Orme *ag.* Leslie, in 1779.

'To 2d Query.—I see no reason or occasion for making any period in the lease at the death of the grantor; on the contrary, it may rather furnish a handle for some

A contract of lease, and a separate deed of agreement, between the Earl and Mr Russell, were thereupon executed, in

challenge of the subsequent part of the lease; and therefore, I think the term should run without paying any regard to the time of the grantor's death.

'To 3d Query.—The heir of entail appears to be at liberty to grant leases at a rent even lower than the former or present rent, provided the transaction is not gratuitous, and he may grant such leases either in consideration of a grassum, or without a grassum. Such being my opinion on the point of right, and the plan in view, as I understand, being to let a long lease for a considerable grassum, which implies that the stipulated rent is to be lower than a full adequate rent, the preserving of probative and satisfying evidence of the present rent, does not seem to be very material; and the more especially, as it is stated in the query, that the rent has been much reduced of late by folly and bad management, so that it can hardly be any rule.

'However, as it may afford some additional security against challenge, and it is therefore desirable that the rent by the new lease should not be below the present rent, it may not be amiss to fix the rent at an average of what the lands have yielded for some years past; if the tenant paying such rent, can also afford to give a sufficient grassum.

'And for ascertaining and preserving evidence of the fact, a rental of the estate for these years may be made up and signed by the proprietor and his factor, and the obligation granted by the lessee for the grassum, may proceed upon a narrative that he had agreed to take the lands at a rent equal to an average of the rents for so many years past, as stated in such a rental, (specially referring to it), and to pay besides such a sum in name of grassum. This obligation, retired with a discharge upon it, and the authenticated rental remaining in the hands of the lessee, will, it is thought, be sufficient evidence of the fact at an after period.

'To 4th Query.—I apprehend that the expense of improvement to an unlimited extent, cannot be made a charge against the succeeding heirs of entail, in the manner proposed in the query; and therefore, if the tenant means to lay out largely upon improvements, and to have a recompense from the proprietor for the expense, he must secure such recompense to himself in a different way; and it may be done either by diminution of the rent, or by a prolongation of the term. Another method might perhaps be taken under authority of the Act of 10 Geo. III. ch. 51, which empowers the proprietor of an entailed estate to charge the estate with debt, for the expense of improvements, to the extent of four years' rent; but when there is a long tack granted at a low rent, and a grassum taken, the succeeding heirs of entail may have more reason to complain of this method than of any other, and therefore it does not seem advisable.

'If the tenant takes his recompense for expense of improvements, by lengthening the term, the lease should be granted simply for the longest endurance that is intended, with a condition that there shall be a breach at an earlier period, which the proprietor may take the benefit of, upon paying the expense laid out by the tenant on improvements, as ascertained in some method to be prescribed by the lease. For example, if the agreed term, according to which the grassum is settled, shall be three nineteen years, and it is farther agreed that another nineteen years, or another nineteen years and the lifetime of the tenant in possession at the end of them, shall be given as a consideration for the expense of improvements, then the lease should be granted simply for four nineteen years, or four nineteen years and a lifetime, with a breach to the proprietor, at the end of three nineteen years, if he chooses to pay the expense of improvements.

Nov. 10, 1830. the month of August, by which his Lordship let, for the period of four times nineteen years, and thereafter for the lifetime of the tenant in possession at the end of that time, the whole estate, including the mansion-house, the mines and minerals; with power to cut wood, on condition of planting one acre for every three acres cut down; to exercise the exclusive right of shooting, subject to a personal privilege in favour of his Lordship; to nominate the parish clergyman; to pull down the mansion-house and rebuild it, subject to claims against the heir of entail; and, in general, to exercise substantially all the rights of a proprietor. On the other hand, he bound himself to pay, till Whitsunday 1822, a rent of L.1000 per annum; L.1100 for the subsequent nineteen years; L.1200 for the next nineteen years; and L.1300 posterior to the expiration thereof, and during the lifetime of the tenant in possession. No obligation was imposed on him to lay out any money on meliorations; but he was empowered to do so if he thought fit; and it was stipulated, that, for the meliorations, he should be allowed a just and reasonable sum at the expiry of the lease, and before removal. It was alleged by the appellant, that at this time the estate was in the most wretched condition; and it appeared, from a judicial rental, that the annual rent was L.1078.

On the 6th of September, 1794, these deeds were laid before

'It being intended that there should be a considerable sum laid out by the tenant in improvements, it may be proper that there should be an obligation to that purpose in the lease, obliging him to lay out in improvements, of a specified nature, not less than a specified sum, within a limited time; for example, within the first nineteen years. This will tend to strengthen the onerosity of the lease, with respect especially to the heirs of entail. And if the recompense is taken by lengthening the term, in manner above mentioned, it may also be proper to limit the claim of improvements at the breach to a certain sum, which it shall not exceed.

'If there are subsisting leases of some of the farms of the estate, and the present proprietor should die before these leases expire, it may be doubted if a general lease of the estate to be now granted, comprehending those farms, will be effectual as to them; and I rather think it would not be binding upon succeeding heirs of entail, with respect to such farms.

'If, therefore, there are parts of the estate in this situation, I apprehend one of two things ought to be done. Either renunciations of these leases should be procured, so as the new tenant may obtain actual possession of the whole estate, under the general lease, or, if this cannot be effected, there should be two leases granted, —one of those parts of the estate which are not under lease, or, at least, not under leases of any considerable endurance; and another of those parts of the estate which are under leases, of which there is more than one year to run, or so many years that the new tenant does not choose to take his hazard of the present proprietor surviving the termination thereof.'

Mr Solicitor-General Blair, accompanied by the subjoined memorial, to which he made the annexed answer.* Nov. 10, 1830.

* 'It was agreed upon betwixt these parties, that the Earl of Peterborough should, in consideration of a large sum of money instantly paid to him by Mr Russell, grant a tack to him and his heirs, assignees and sub-tenants, of the estate of Durris in Kincardineshire, for four nineteen years, and the liferent of the person in possession of the tack at the expiry of the fourth nineteen years, Mr Russell and his heirs to pay no rent beyond what might be equivalent to the burdens affecting the estate during the lifetime of the Earl, and thereafter to pay L.1000 per annum, subject to payment of the burdens. The Earl likewise agreed to make over to Mr Russell the whole furniture in the house of Durris, and stocking, &c., about the place, with the arrears of rent, and rent due and payable at Mr Russell's entry, he relieving the Earl of certain accounts due by him. It was also agreed upon, that if the Earl should afterwards be found to have a power of selling his estate of Durris, that he should be bound to sell, and Mr Russell to purchase at a certain price, the money now paid being imputed in part of that price. In the last place, it was bargained that the Dowager Lady Peterborough should convey to Mr Russell a liferent annuity for L.300, payable to her out of this estate of Durris.

'For carrying this plan into execution, the Earl of Peterborough applied to Mr James Chalmer of London to cause the necessary deeds to be made out. In consequence of which, the following deeds were executed betwixt the parties:—

'1. A tack for the space, and on the conditions specified.

'2. A disposition and assignation of the arrears of rents, household furniture, &c.

'3. A contract betwixt the Earl of Peterborough and Mr Russell, whereby the nature and import of the transaction is fully stated, and special reference is made to Robert Blair, Esq., Solicitor-General for Scotland, to say if the deeds executed are sufficient, or what alterations or further deeds are necessary for giving effect to the understanding of the parties; and both parties bind themselves to execute any new deeds that may be by him thought necessary.

'4. Conveyance by Lady Dowager Peterborough to Mr Russell.

'5. Commission by the Earl of Peterborough to Mr Russell, for the purpose of managing the estate.

'6. Mutual missives, declaring that the rent payable during the Earl of Peterborough's life, was meant to meet and pay public burdens and the interest of two heritable debts, and that if this rent fell short of doing so, Mr Russell was to have no claim, nor his Lordship for any surplus; and lastly, obliging Mr Russell to relieve the Earl of certain accounts due by him.

'These several deeds are laid before Mr Solicitor-General; and it is requested he will, for the safety and satisfaction of parties, examine the same, and give his opinion how far they are properly drawn for carrying the agreement and understanding of parties into execution, or what alteration ought to be made on them.'

ANSWER.

'I have perused the lease and other writings herein referred to, and I am of opinion that the same are accurately and properly framed for carrying into execution what I understand to have been the meaning of the parties; and it does not appear to me that any addition or alteration is necessary, or would answer any good purpose. There may be a doubt whether the obligations prestable by the landlord at the expiration of the lease, such as the repaying the expense of buildings and meliorations, &c. will be effectual against a succeeding heir of entail. But this is a question which arises not from any imperfection of the deeds which have been executed, but from Lord Peterborough's limited powers over the estate; and I do not know of any way in which it could be obviated, or how the lessee could be put upon a better footing than he now stands with respect to that matter.'

Nov. 10, 1830. The appeal was thereafter withdrawn; and, on the 21st of October, Mr Russell executed an assignation of the lease in favour of Mr Innes, who entered to possession. At this time, the next heir-substitute was Lady Mordaunt, whom failing, Lady Frances Bulkely, whom failing, Alexander Duke of Gordon, and on his failure, his eldest son, the Marquis of Huntley. In the month of July, 1797, Mr Innes entered into a transaction with the Marquis, by which, for certain valuable considerations, the Marquis became bound, in the event of his succeeding to the estate, to confirm all the rights which had been conferred on the tenant by the Earl of Peterborough. This transaction with the Marquis having become known to his father, he repaid the sums, and obtained a cancellation of the deed.

The lease was not recorded till December, 1806, nor the relative agreement till February, 1815. The Earl of Peterborough died in June, 1814, whereupon he was succeeded by the Baroness Mordaunt. In the course of the same year, she raised an action against Mr Innes, concluding for reduction of the lease and deed of agreement, for decree of removal as at Whitsunday, 1815, and for violent profits. A great deal of litigation took place in regard to the power of the Earl of Peterborough to grant the deeds challenged; but, on the 24th of June, 1817, the Court found, that they were in violation of the entail, and therefore reducible; but appointed memorials in regard to a plea, that although the leases could not be sustained in toto, yet they might be supported for a shorter period. To the above judgment their Lordships adhered, on the 9th of March, 1819, and also found, that the lease could not be sustained for any period; and therefore decerned in the reduction, and also in the removing, and remitted to the Lord Ordinary to hear parties as to the term of removal and the question of meliorations. The Baroness Mordaunt having died in June thereafter, and Lady Bulkely being also dead, Alexander Duke of Gordon was served heir of entail, sisted as pursuer, and the judgments were affirmed by the House of Lords on the 5th of July, 1822, without hearing the counsel for the Duke.*

The case having then returned to the Court of Session, and been remitted to the Lord Ordinary to proceed in the question of removal and meliorations, the Duke moved his Lordship to ordain Mr Innes to remove at Whitsunday then following (1823.) This was resisted by Mr Innes, on the ground, that he was entitled to retain possession till the value of the meliora-

* See 1 Shaw's Ap. Ca. 169.

tions was ascertained and paid; and, in consequence, the Lord Nov. 10, 1830.
Ordinary made a remit to an inspector to ascertain the amount and extent of the meliorations, and superseded the motion for removal. The inspector reported, that so far as he could, under existing circumstances, estimate their value, they amounted to about L.47,000.

In the meanwhile, Mr Innes had raised a summons against the Duke of Gordon, and also against the representatives of the Earl of Peterborough founding on the lease, averring that he had made extensive meliorations, and particularly, 'That he 'built a mansion-house, with kitchen, outhouses, and a com- 'plete square of offices: That he enclosed a garden, and planted 'it with fruit-trees, and planted ornamental woods round the 'place of Durris, containing many thousands of thriving hard- 'wood trees: That he made roads and drains through the plea- 'sure-grounds, and built above one hundred dwellinghouses and 'offices for the subtenants on the said estate: That the pursuer 'also trenched and limed, and brought into perfect cultivation, '368 acres of new land, which was never before under the plough, 'besides bringing the land which was under cultivation, but 'which was described in the said judicial rental as in wretched 'order, into good and husbandman-like condition: That the pur- 'suer built 60,350 ells of stone dykes, necessary for farming the 'said estate, and erected a bulwark to protect the best farm on 'the estate from the river Dee, at a very great expense: That 'he made roads at his own private expense through the said 'estate, and connecting the same with market-towns to a great 'extent, and enclosed, planted, and reared above 900 acres of 'wood, which is now of considerable age and great value: That 'the pursuer, trusting to the validity of the deeds before nar- 'rated, sold his large and valuable paternal property, and ex- 'pended the whole price thereof in improving the said estate, 'and likewise contracted large debts for the same purpose: That 'the rental of the said estate of Durris has been increased by the 'outlay and exertions of the pursuer from L.958 of yearly rent 'to L.5500, which it will now yield: That the said Mary Ba- 'roness Mordaunt, and the said Alexander Duke of Gordon, 'were in the perfect knowledge of the terms and conditions of 'the lease, and also of the pursuer's great outlay on the said 'estate, and allowed him to proceed with the same for the space 'of twenty years, without intimating any intention of challen- 'ging the said lease, till the said Earl of Peterborough's death.' And therefore concluding that the Duke of Gordon ought to be ordained 'to make payment to the pursuer of the sum of L.90,000, 'as the sum expended by the pursuer upon improving the said

Nov. 10, 1830. 'estate, with the said defender's perfect knowledge and acquiescence, and of which he and his heirs of entail will immediately 'reap the benefit, by the aforesaid rise in the rental of the said 'estate;' and that the representatives of the Earl of Peterborough should be decerned, in virtue of the clause of warrandice, 'to 'make payment to the pursuer of the sum of L.120,000, in name 'of damages and reparation, for the loss of the advantages of the 'foresaid lease, and assignation thereof in favour of the pur- 'suer, and of the further sum of L.10,000, or such other sum, 'less or more, as shall be found to be the expenses justly in- 'curred by the pursuer in defending said action of reduction, 'and interest thereof from the end of each year till paid: Also, 'of the said sum of L.90,000 of meliorations, or such part there- 'of as the said heir of entail shall not be found liable for.'

In defence against this action the Duke of Gordon pleaded that he did not represent the grantor of the lease;—that he was a mere heir of entail;—and that the meliorations had not been made effectual against the estate in terms of the statute 10th Geo. III. c. 51.

Thereafter the Lord Ordinary decerned in the removing as at Whitsunday 1824, to which judgment the Court adhered on the 13th of May of that year—the term of removal having been postponed by the consent of the Duke till Martinmas, when Mr Innes gave up the possession.

A demand was then made by the Duke for the violent profits from and after Whitsunday 1815, being the first term after citation. This was opposed by Mr Innes, who contended that he could not be held to be a mala fide possessor till the date of the judgment of the House of Lords on the 5th July, 1822. The Lord Ordinary took a view different from both parties, holding that the decision of the House of Lords, on the 12th of July, 1819, in the case of the Queensberry entail, was a certioration to Mr Innes of the invalidity of his title, and therefore found him liable in violent profits from that date. Both parties having reclaimed, the Court found 'That the bona fides of the defender, in retain- 'ing possession of the estate of Durris on the lease of the same 'acquired by him, ought to be held to have come to an end not 'sooner, but on the 9th day of March, 1819, being the date of 'the decree of reduction and removing pronounced by the Court. 'Therefore, that the defender is liable to account for violent pro- 'fits from and after the first term subsequent to that date; in 'so far, altered the interlocutor of the Lord Ordinary,' and remitted to him to proceed accordingly.*

* See 6 Shaw and Dun., p. 996, where the opinions of the Judges are given.

In the meanwhile, the Lord Ordinary reported the action relative to the meliorations to the Court, and at the same time issued the subjoined Note: 'The Lord Ordinary thinks, that, considering the nature of the question, and the circumstances of procedure in this case, the desire of the pursuer, that the case should be taken to report, is reasonable. The Lord Ordinary wishes only to observe, that in addition to the argument submitted to him, it may perhaps be considered, whether an heir of entail may or may not be liable to a bona fide melioration, if not to a greater extent, yet at least in as far as it can be proven that he himself individually is rendered locupletior, by receiving larger rents or profits from the estate during his own life, in consequence of the meliorations, *i. e.* liable to pay over a portion of the rents to the party whose expenditure produced that portion. The Lord Ordinary, of course, gives no opinion whatever on this or any point.'

The Court, on advising Cases 'with the important and interesting circumstances of the case,' appointed a hearing in presence of both Divisions. The hearing accordingly took place, in which Mr Cranstoun (afterwards Lord Corehouse) was leading counsel for Mr Innes, and at this time Lords Hermand and Robertson were upon the bench. On the 18th of June, 1825, the Second Division (before whom the cause depended) ordered Memorials to be laid before the whole Judges. These pleadings were prepared, and put into the boxes; but Mr Innes having thereafter discovered the memorials submitted to Mr Ross and Mr Blair, and their opinions, (which had gone amissing,) applied for leave to communicate them to the Judges, which was allowed. In the interval Lord Hermand had resigned, and was succeeded by Mr Cranstoun as Lord Corehouse; and Lord Robertson had also resigned, and Mr Irvine was appointed in his place as Lord Newton: The opinions of the Judges having been required both with reference to the memorials and the new productions, and the Judicature Act having come into operation, (by which votes were conferred upon the consulted Judges,) Mr Innes insisted that as Lord Hermand had retired before the productions had been laid before the Court, his opinion and vote should not be admitted; that although Lord Newton had not been on the bench at the time of the hearing in presence, yet, as the memorials and productions had been laid before him, his opinion and vote ought to be received; and that Lord Corehouse (who had declined to give an opinion in respect he had acted as counsel for Mr Innes) ought to be required to give his opinion. On the other hand,

Nov. 10, 1830. the Duke of Gordon maintained that none of these opinions should be received.*

The Court having declined to receive the opinions of these

---

* With reference to the above point, the following notes of what took place in the Second Division were laid before the House of Lords :

'*Lord Justice-Clerk.*—I have now to intimate what has passed in consequence of the situation in which we found ourselves when this case was last before us. We agreed to take the opinion of our brethren ;—at the same time, if any thing was considered of importance, we would have asked the assistance of the Counsel at our consultation. This was not considered necessary, and I have now to state the result. First, The peculiarity of the situation of Lord Hermand was brought under their Lordships' notice. His Lordship had not an opportunity of giving any opinion upon the point, which afterwards was brought out by the discovery of the memorial and opinion of Mr Ross ;—also the situation of Lord Newton, who was not a Judge on the Bench at the time of the hearing, but he had read the memorials and given his opinion. The opinion of the whole Judges was, that the opinion of Lord Hermand should be set aside altogether, as also the opinion of Lord Newton, because he had not an opportunity to hear the cause. This being the state of the matter, if there is any thing to be stated from the bar, it should be stated now.

'*Jeffrey* here expressed his regret that the Court had not considered it proper to have Counsel present at the consultation of the Judges. After looking into all the series of regulations as to the duties of consulted Judges, he had not been able to discover any grounds for doubting that Lord Newton and Lord Corehouse were entitled to give their opinion on this matter. The hearing took place before the act passed directing the manner in which the opinion of the consulted Judges shall be taken. That is now done by queries, in which there is no argument ; and the opinion of the Judges may be given upon these abstract queries, without having seen or heard any argument. The point may be stated in a short query, and there is nothing in the statute containing an injunction that a hearing shall take place before the consulted Judges give their opinion.

'*Lord Justice-Clerk.*—Although there may be a great deal in what Mr Jeffrey states in the abstract, we cannot give way to it in this particular case. When we required the opinion of the Judges in July, 1825, it was the opinion of the Judges who then composed the Court. When we made the remit to the other Judges, we had reference to those Judges who were then in Court. A contrary doctrine would lead to this, that if we were not to consider ourselves confined to the opinions of the Judges at the time the remit was made, we might have the opinions of 25 or 30 Judges, in consequence of changes on the bench, before the case was finally advised. Those that were unable to give their opinion must just be deducted from the number. We thought Lord Hermand's opinion not perfect, because he had not seen the memorial which was afterwards produced. As to Lord Corehouse, the Court were quite clear, that under the delicacy which his Lordship felt from his having been leading Counsel for one of the parties, he was not in a situation to give the same consideration to the case as the other Judges ; and at all events, we were all of opinion that we could not ask his Lordship to do in this case what he had declined to do in other cases.

'The result, then, of the whole, is this,—there is an opinion in favour of Mr Innes's claims from four Judges who have been consulted, and also two of your Lordships' number ; while, on the other side, there are five of the consulted Judges, and two of your Lordships. Therefore, the judgment of the Court must be, that Mr Innes's claim is refused by a majority of one.—Sustain defences—assoilzie defender.'

Judges, the result was that there were seven votes in favour of the Duke of Gordon and six in favour of Mr Innes, in consequence of which their Lordships assoilzied his Grace on the 21st of December, 1827, but found no expenses due.* Nov. 10, 1830.

A verdict was afterwards obtained for a large sum of money against the representatives of the Earl of Peterborough, under the clause of warrandice.

In the meanwhile Mr Innes died, and his widow, as his executrix, was sisted as pursuer in his place; and the Duke of Gordon having also died, his testamentary trustees and executors appeared as defenders.

Mrs Innes appealed both against the judgments in relation to violent profits, and also against those in regard to the meliorations, maintaining that on the latter point the interlocutor had not been pronounced by a lawful majority, and on the merits that Mr Innes was a bona fide possessor, and therefore not liable in violent profits till the date of the judgment of the House of Lords on the 5th July, 1822, and that he was entitled to be repaid the amount of his meliorations.

With reference to the latter point,

Brougham, for the appellant, contended, that the question here, is not the way, the extent, or how the payment is to be arranged, or if to come against the present heir, or how, but, have we a right to get any thing? And, unless you think that we cannot get a shilling, this judgment cannot be supported. But if there is a difficulty as to the arrangement of the payment, then remit the case, and the difficulty will be settled one way or another. But be the arrangement what it may, the appellant is entitled to a consideration for the sum expended in ameliorations.

Lord Wynford.—Some civilians confine the claim to what was necessarily laid out on the lands.

Brougham.—Some of the civilians do make that distinction; that is, between expense necessary to keep the lands as they were, and expense in absolute improvements. But the weight of authority clearly admits both claims. The doctrine is founded on the principle, debitor non presumitur donare; that holds in cases of bona fides. But where a party has been in mala fide, the law, instead of giving him the advantage of that presumption, takes the reverse, presumitur donare. In that consists

---

* See 6 Shaw and Dun., p. 279, where the argument is fully reported, and the opinions of the Judges given.

Nov. 10, 1830. Lord Stair's mistake. The respondents try to get the better of these authorities, by saying, that they do not apply to a lease. But that is a mere absurd sophism. The tenant in a lease lays out money in ameliorations, exactly as he does when he conceives the property, the solum, to be his own. He does so for his own advantage; and he gets the advantage he expects during his life, if he be a liferenter, or during the subsistence of the lease, if for a term of years.

Lord Wynford.—If the respondents would allow you to keep the lease until the end of the term, I suppose you would not trouble them for ameliorations.

Brougham.—Certainly not. That opens the very case. The tenant does not lay the ameliorations in solo alieno, but suo solo for the time. That is the distinction; and yet, because the ground is not out and out the tenant's, the respondents raise the argument, that the case of tenancy is excluded.

The Duke's executors contended, on the other hand, that there was a lawful majority of votes, but that any decision as to this was immaterial, seeing that the question before the House must be, whether, on the merits, the pleas on the other side were well founded;—that, under the circumstances, it was impossible to view Mr Innes as a bona fide possessor, whether regard was had to the nature of the title, and the circumstances under which it had been obtained, or to the attempts made to support it; and that, at all events, no claim could be made for meliorations against a party succeeding as heir of entail, by whom the title of possession had been immediately challenged.

Lord Wynford.—My Lords, the questions that are now for your Lordships' consideration, are raised by appeals against two judgments pronounced by the Court below. My Lords, from the statement in the case, it appears that, very many years ago, the estate of Durris was strictly entailed; and the deed of entail contains these words: that the tenant should not 'alter, infringe, nor innovate this present tailzie, nor 'dispone, wadset, sell, nor away put the said lands, baronies, and others 'aforesaid,' nor contract debts. This estate descended in the female line to the late Lord Peterborough. Whilst Lord Peterborough was in possession, being in a state of distress, he was anxious, if he could, to break through the fetters of this entail, and to sell the estate. A sale was actually accomplished with a person who stands in a very near connexion to the party who afterwards took the lease on which these questions arise, —a very important circumstance in the consideration of this case. The party who afterwards took the lease was not only connected with the intended purchaser, but also the Writer to the Signet who managed for that person. The sale that was attempted was defeated, it being

determined by the Court in Scotland, that the entail could not be broken through. The determination was appealed against, but the appeal was abandoned. After this, my Lord Peterborough granted to Mr Innes a lease of this property; that lease was vacated by the judgment of the Court of Session. That lease being vacated by the judgment of the Court below, the persons who have succeeded to the estate of Lord Peterborough claimed the violent profits of the estate; and the representatives of Mr Innes, the lessee, insisted that they ought to be paid for meliorations of the property during the period from the time of the granting of the lease up to the year 1814, when they were served with process in the cause for reducing that lease.

Upon the first point, the judgment of the Lord Ordinary was, that Mr Innes was to be considered as liable to pay violent profits from the period of a decision pronounced in this House, in the month of July, 1819; because the Lord Ordinary considered that, at that time, it was quite impossible that Mr Innes must not know that any appeal to this House must be fruitless, inasmuch as, by the judgment then given by this House in the case of the Duke of Queensberry, it was determined that, under the word 'dispone,' which I have stated to your Lordships occurs in this settlement, the lease was void under the entail. When the question, however, came before the whole Court, the judges were of opinion, that the claim for violent profits should be carried back further, and that Mr Innes should be considered as liable to pay these from the time when they, in the Court below, pronounced their decision for the reduction of the lease; and the question that is raised by this appeal is, Was the Lord Ordinary right in ordering the violent profits to be paid from the month of July, when all hope of success upon the appeal was put an end to by the decision of the Duke of Queensberry's case? Or, Was the Court below right in deciding, that he was bound to pay those profits four months sooner, namely, from March in that year? My Lords, if there was not another question behind, I should have inclined to think that the Lord Ordinary was right, and the Court wrong; because, undoubtedly, from the state the Scotch law was in at that time, there was enough of doubt to encourage any man to bring his appeal before this House;—but I humbly submit to your Lordships, that it will not be necessary for us to consider this point, which has been a good deal argued before us, because I am decidedly of opinion, upon another ground, that Mr Innes was liable for violent profits from the time of the judgment; nay, I think he might have been rendered liable to violent profits from an antecedent period. Reference has been made to Mr Erskine to prove that a party is to be considered in mala fide when he continues in possession after being served with process. I think, when a person is served with process in an action, that he should make up his mind, whether he will try the cause, or surrender the estate. If he thinks proper to try the cause, he ought to take upon himself all the consequences of that conduct, and that it would be right to subject him to be called upon for violent profits from the period of the service. That rule would carry back the claim much beyond the date to which the present judgment carries it; but Mr

Nov. 10, 1830. Erskine adds, in the passage alluded to—'In favourable cases, they have 'postponed the period when violent profits became chargeable, from that 'of the service of the process to that of the final decision.' That, perhaps, brings us to the point upon which this cause is decided, namely, Whether this is that species of favourable case? Whether there is that kind of bona fides that entitles Mr Innes to be excused from the payment of violent profits to the period when the decision was pronounced, deciding the rights between him and the heritor of this estate? Or, Whether it is not a case which is not entitled to the favourable consideraation of this House? I think there is nothing like bona fides in this case; on the contrary, if we look at the transaction from the beginning to the end, we shall see, that it is a case in which a man, conversant with the law of Scotland, is taking advantage of the distresses of the heritor of this estate, to injure the estate whilst it is in his hands. I think, therefore, that the judgment of the Court below in the action for violent profits should be affirmed.

This brings us to the appeal in the action brought by the representatives of Mr Innes for ameliorations. In this case we are presented with the civil law—and I am speaking in the presence of those whose attention has been lately directed to the amendment of our law; it is worthy of their consideration, whether our law should not be rendered more like the law of all the other civilized states of the world than it is at present, upon the point which gives rise to the present discussion. By our law, if I build upon my neighbour's land, thinking the land is mine, he takes that land and takes my house, without making me any compensation. By the civil law—which is the law administered in Holland, according the authority of Huberis; and in Spain, according to the authority of Garcias; and in France, according to the authority of Pothier; and by the general and public law, according to Grotius and Cicero—if a man is in possession of property, and, believing it to be his own, improves that property, the person who recovers that property from him must either, as it is stated in the Digest, pay him for the improvements that he has made; or, if he is poor, and not able to make the payments, he is to allow the improver to remove those improvements, leaving the estate in the same condition as it was previously to the making of such improvements. Mr Brougham stopped short in quoting Grotius, and left it, as if, in all cases where a man builds a house upon the land of another, he is entitled to be paid for the house when required to give up the land. I was astonished at the construction that was put upon that writer upon the law of nations; because, if one person enters upon the land of another wrongfully, and improves it, he has no right to be paid for the improvements that he has made. The passage in Grotius must be taken with the qualification put upon it by the writers I have enumerated; and, by the language of the civil Code, the improvements for which a claim can be supported must be made whilst the party who makes those improvements is not conscious that the property improved is not his; and you must collect his opinion, not from any declaration, but from the nature of the transaction, from the words used in the different instruments, and from

the whole conduct of the parties. Where a case is clearly made out to be free from all suspicion that the party knew that the property was not his, he ought to be allowed for improvements; but, if all suspicion of that knowledge is not removed, he ought not to be allowed any thing. If that is not the rule by which Courts are governed, a man may take possession of my property, and ruin me by improvements. That cannot be done.

Nov. 10, 1830.

Now, that being the principle, let us look at all the circumstances of this case, and see if it is possible for any man to entertain a doubt that Mr Innes always suspected the validity of this lease, and was therefore conscious that he was not the rightful possessor of the estate. We must not forget the attempt that was made before the lease was granted. Are there not grounds for suspicion, that this last was another mode of succeeding in the attempt in which they had been before defeated, to get rid of the entail? Then, let us come to the lease itself, and see, whether the lease does not clearly shew, from the very extraordinary terms of it, that there was not the least good faith in it. In the first place, It is not a lease of any one farm, nor of any two or three farms, but a lease of all the property that Lord Peterborough had in Scotland, with all the rights and advantages that belonged to it, or were in any way connected with it, or could be derived from it. Even the pews in the church are conveyed, and the right of appointing to the living. Lord Peterborough could not lease away the patronage of the living, but he makes himself an attorney to appoint to the kirk whoever this gentleman should recommend. Then the game is all conveyed away; but there is a curious reservation. Though the game is leased, Lord Peterborough may himself come and shoot over the lands, but he must not be attended by any gamekeeper: and it is not very likely he would trouble the estate for the purpose of shooting game under any such circumstances. The lease is for three 19 years—to commence after the death of a young man of thirty-five; so that your Lordships must take it that this is an effectual disposition of this property for a period very little short of one hundred years; and persons in the habit of calculating these matters, would not consider the freehold, after this period of one hundred years, as worth much. It is, in substance, and we cannot shut our eyes against it, a conveyance of all the property, and all that belongs to it, except one thing, and that they could not convey by lease, namely, the right of voting. Then, my Lords, I come to another thing which is decisive. Mr Brougham touched upon it, but glanced away immediately, as he thought most prudent; because a man of his knowledge and experience could not have looked at that lease for a moment, without seeing that it is grossly fraudulent. When I use the term grossly fraudulent, I do not mean it offensively; I mean in point of law. I allude to the lease of the mines. Did any man ever see a lease with a reserved rent stipulated, under which the lessee was to have liberty to open any mines, and carry away minerals, paying nothing for them? In an office I had the honour of holding for some time, I was pretty conversant with these leases, and I never saw one where the reservation did not correspond with the quan-

Nov. 10, 1830. tity of mineral brought to grass, as was the phrase in those leases; I mean in the Duchy of Cornwall. Now, here this gentleman is to dig out the bowels of the earth, and carry it away, and pay nothing for it. Mr Brougham says, it is necessary to take up lime to manure the estate, and coal for the use of the tenant. Then the right should have been restricted to these two articles; but if the right of opening mines is general and unquestioned, coals might be taken for sale, and any other minerals that they might find might be raised. But the part of the lease relating to the timber is also very extraordinary. This tenant taking possession of the estate, upon which we are to assume trees were growing fit to be cut, is to be at liberty to cut three acres, and not to plant ten or twenty acres, which would be the case if the lease was honestly made, but he is to plant one acre of young trees for every three he cuts down. Is not this a fraud upon the owner of the estate? And then, when he plants one acre, what is to become of it at the end of the lease? The landlord is to pay for one-half; and, if he does not do that, the tenant is to take the timber away. Did any man ever see such a covenant? But it is said this man was misled. He consulted professional men, and they misled him. No man will lay out L.5000 in the purchase of an estate without consulting counsel; but I state, as one of the Judges in the Court below stated, that the opinions given by those counsel, instead of inducing any man to think that this lease could be made, would induce him to think it was the most dangerous speculation he could enter into; for it is, in substance, neither more nor less than this—This is the very best way in which it could be done, but we do not insure you from risk; that is not to be got rid of by any conveyance; and that risk arises from the narrow estate of the gentleman about to grant it. Is not this enough to put any man upon his guard? I agree with Dr Lushington, and the able argument put by Mr Robertson, who has addressed your Lordships for the first time since I have had the honour of a seat here; I do not think this gentleman will be very much out of pocket, or have, in equity, much to claim. He has had, for many years, about L.3000 a-year clear, and he has expended for that L.43,000. I do not think he is much out of pocket if an enquiry was to be gone into. The question is, Whether any enquiry ought to be gone into? I had satisfied myself upon these grounds before I retired to rest last night; but this morning I have looked at a statute I was not before aware of, which decides this case at once. Mr Robertson referred to it, but he referred to it as the 55th Geo. III. It is the statute of the 10th Geo. III.; and I am almost warranted in saying, that this lease is a fraud upon that statute. Let us look at the statute of 10th Geo. III. Before that statute passed, the only statute that bore upon the subject was the famous statute of Scotch Entails of 1685. Now, this statute recites the statute of Scotch Entails of 1685, and gives not only a commentary upon that statute, but a history of the practice under it. It says,—' And ' whereas many taillies of lands and estates in Scotland, made as well ' before as after passing the said act, do contain clauses limiting the ' heirs of entail from granting tacks or leases of a longer endurance than

'their own lives;' so that, under the first statute, they could grant no leases longer than their own lives—'for a small number of years only.' Your Lordships will not consider seventy-six years after the death of a man aged thirty-five, 'a small number of years only',—'and that much 'mischief arises to the public from adhering rigidly to this statute.' It allows you to make leases for two lives, or any number of years not exceeding thirty-one years. If you can make four leases for nineteen years each, what becomes of that statute? It is gone from the Statute-book. But, in the next clause, if you grant a term exceeding nineteen years, it shall contain a clause compelling the tenant to fence and enclose. This gentleman has charged for fencing and enclosing, although, as his lease was for four times nineteen years, he was bound to do it. Then, the statute points out a great number of regulations as to giving notice to all those interested. No notice has been given in this case; this notice is to be given in order that the parties interested may come and see whether that which is doing is beneficial to the estate. I do not see how it is possible that any one can consider that a lease of this description could be sustained after that statute passed; for when the Legislature says, in the 10th Geo. III., you have only had power to grant leases for a short term, but we will give you something more; we will give you a right to grant a lease for thirty-one years—how is it to be endured after that, that a lease is to be granted for four or five times nineteen years? If you can do that, you may do it for a hundred times nineteen years, and grant away the estate. Mr Robertson has satisfied me, that this lease is directly against the policy of this statute. I am quite satisfied that the tenant was aware of it from his conduct. It is evident from what he does. He does not rely upon his lease; he takes a warranty. Why take a warranty, if there was no doubt of the validity of the lease? There was nothing like bona fides in the transaction. This gentleman was always aware he had got a title that could not be sustained if ever it was questioned; and that being the case, it appears to me inconsistent with law and policy to exempt him either from violent rents, or to allow him for those ameliorations which he has employed upon the property. If he has acted with prudence, which no doubt he has, he has abundantly repaid himself from 1774 to 1814, when he was first interrupted, for all he could have expended for ameliorations. As to violent rents, there is no reason why he should not be held liable for that.

Nov. 10, 1830.

I should, therefore, humbly move your Lordships, that these appeals should be dismissed. I have had some difficulty upon another point, namely, the costs. As to the ameliorations, it appears there was a division of opinion amongst the Judges. I cannot, on that account, recommend your Lordships to give costs in that case. Differences of opinion amongst Judges occasion appeals. Then, upon the other case, at the time that appeal was lodged the law was doubtful, and the doubt was not removed for four months afterwards. Under these circumstances, I should advise your Lordships, in both cases, to dismiss the appeals, without costs.

Nov. 10, 1830. The House of Lords accordingly 'ordered and adjudged that 'the Interlocutors complained of be affirmed.'

Appellant's Authorities.—(*Bona Fides.*)—Dig. lib. 6. tit. 1. § 38; lib. 12. tit. 6. § 33; lib. 20. tit. 1. § 29; lib. 41. tit. 7. § 12; Grotius, lib. 2. c. 10. § 2; Pothier de Proprietè, p. 2. cap. 1. art. 6. § 343. 347; Leyser ad Pand; Spec. 447. vol. 7. p. 88; Vinnius, lib. 2. tit. 1. § 30. p. 157; Garsias de Melior, c. 14. § 10. fol. 309; 1 Müller voce Ædificatio, p. 127. § 5; Dig. lib. 12. tit. 6. § 33; Müller voce Retentio, 471. § 18. 478. § 73; Berger Economia Juris de Dominio, lib. 2. tit. 2. p. 216; 5 Voet. 3. 23; Garsias, c. 6. § 3. fol. 273; 1 Huber, p. 100; Franc Zypiæ Notitia Juris Belgicæ, vol. 2. p. 51. § 12; Pothier Traité Negot. Gest. § 1. art. 3. case 2. § 192; 1 Stair, 8. 6. 1; Bank. 9. 4; 3 Ersk. 1. 11: Kaimes's Pr. of Eq. b. 1. p. 1. § 2. art. 1; Binning, 18th Jan. 1676, (13401); Jack, 23d Feb. 1665, (3213); Halket, 24th Jan. 1762, (13412); Guthrie, 2d Feb. 1672, (10137); Halliday, 20th Feb. 1706, (13419); Rutherford, 28th Feb. 1782, (13422); Mackenzie, March 8, 1793, (13370); 2 Stair, 1. 40; Müller voce Posses. Mal. Fid. p. 540. § 8. and p. 524; Pothier de Proprieté, p. 2. c. 1. art. 5. § 3; 2 Ersk. 1. 25; Maxwell, 9th Feb. 1693, (1697); Grant, 9th Feb. 1765, (1760.)—(*Entail.*)—Müller Fid. Com. p. 161. § 4. 94 and 115; Garsias, p. 313; Berger, p. 312 and 372.

Respondents' Authorities.—(*Bona Fides.*)—Domat. 1. 81. p. 272.; Voet. ad Pand. lib. 6. tit. 1. § 36, 37, and 38; Vinnius ad Inst. lib. 2. tit. 1. § 30; Zoezius, lib. 41. tit. 1. § 58- 61, and 80.—(*Entail.*)—2 Stair, 1. 24; 2 Ersk. 1. 25; 1 Bank. 8. 12. and 2. 19. 25; Kames's Pr. of Eq. p. 114; Blair, Nov. 18, 1783, (1775); Cardross, Jan. 2, 1711, (1747); Bruce, July, 1822, in H. of L. (1 Shaw, 213.); Hodge, Feb. 13, 1664, (2651); Burns, Dec. 4, 1735, (13402); Dillon, Jan. 14, 1738, (15432); Webster, Dec. 7, 1791, (Bell's Cases v. Entail, No. 7.); Taylor, eo die, (Ibid. No. 8.); Campbell, Feb. 20, 1812, (F. C.); Tod, Jan. 14, 1823, (2 S. and D. No. 110. p. 113.) affirmed May 27, 1825. (Ante I. 217.) 10 Geo. III. c. 51.

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

No. 38. GEORGE PENTLAND, Appellant.—*Brougham—Romilly.*

LADY GWYDYR and Husband, Respondents.—*Lushington.*

Sale—Construction of the terms of a Contract of Sale.
Proof—Incompetent to control the terms of a written contract by an extrinsic document.

Nov. 12, 1830.

2D DIVISION. Lord M'Kenzie.

The Respondents, proprietors of the estate of Stobhall, in Perthshire, announced for sale, in autumn 1817, a wood on the estate called the wood of Strelitz, or Strelitz plantation. Under this name, two divisions were included, the one containing about 209 acres, and the other about 60 acres. They were separated from each other by a feal (turf) dyke, and a road. About six acres of the larger division were disposed of prior to January