April 4, 1831. directing the stakeholder, the warehouseman, or the King's lock-keeper, to give the goods up, that is a delivery of the goods to the party; and all question as to *transitus* or stoppage in transitu is at an end. For these reasons I feel no hesitation in recommending your Lordships to reverse the interlocutors complained of.

The House of Lords ordered and adjudged, That the interlocutors complained of be reversed.

Appellants' Authorities.—1 Bell, 175; Auld, June 12, 1811; (F. C.) Knowles, 5 Barn. & Ald. 134; 1 Bell, 195.

RICHARDSON and CONNELL—M'RAE,—Solicitors.

No. 23. FRANCIS GRAHAM, Appellant.—*T. H. Miller—Rutherford.*

STEWART JOLLY, Respondent.—*Lord Advocate (Jeffrey)—Lushington.*

Entail—Homologation—Landlord and Tenant.—Held (affirming the judgment of the Court of Session), that an heir of entail had by acts of homologation rendered himself liable for meliorations under an obligation granted in a tack by a preceding heir.—But, 2, (reversing the judgment), that under a clause in a lease, providing that the tenant should have right to the difference of value between the houses on the farm at the date of the tack, and of those on the farm at the termination of it, the tenant was entitled to the value in so far as the houses on the farm at the date of the tack were improved, or others suitable to the farm built in lieu of the same, and better than the same at the expiration of the tack; but not of houses built new except as above.

June 29, 1831. 2D DIVISION. Lord Cringletie. CAPTAIN FRANCIS GRAHAM executed an entail of the estate of Morphie, which contained the following prohibition, fortified by irritant and resolutive clauses:—"That it shall be noways "lawful to the said William Barclay, and his foresaids, nor to "the other heirs of tailzie herein substituted to him, to alter, in-"fringe, or break the said tailzie, order, or course of succession, "nor to sell, dispone, redeemablie or irredeemablie, the said "lands of Morphie-Meikle, and lands of Pilmour, nor any part

" thereof, nor to burden the same with infeftments of annual rent, June 29, 1831.
" nor any yearly duties, more or less, to be uplifted furth of the
" same, nor to contract debts, nor to give bonds, bills, or obli-
" gations therefor, nor to do any other fact or deed whatsoever,
" civil or criminal, or even treason, (which God forbid), whereby
" the said lands of Morphie-Meikle, and lands of Pilmour, or
" any part thereof, may be evicted from them, or become cadu-
" ciarie, escheated, or confiscated, or the order and course of
" tailzie and succession above specified, any way divested, frus-
" trated, or interrupted." In virtue of this entail William Graham succeeded to the estate. At this time the lands of Morphie-Meikle, and of Pilmour, forming part of the estate, was in possession of Jean Smith, with the exception of a small part held by James Abercrombie. In 1762 Graham let these lands (with the exception of the part possessed by Abercrombie) to William Gibson, his heirs and assignees, for the period of fifty-seven years, at a rent payable partly in grain and partly in money, amounting in all to 200*l.* per annum, besides a grassum of 100*l.* instantly paid. This lease Graham bound himself, " his
" heirs, executors, and successors whatsoever, to warrant to be
" good and sufficient to the said William Gibson and his fore-
" saids, at all hands mortal." Among other stipulations it contained the following, which gave rise to the present discussion :—
" And in order to encourage the said William Gibson, and his
" foresaids, to make parks and enclosures upon the said farm,
" and to plant hedges and trees along the dykes, ditches, or
" fences thereof, the said William Grahame hereby binds and
" obliges himself, and his foresaids, to furnish to the said William
" Gibson, and his foresaids, gratis, whatever plants of hawthorn,
" any young trees they shall call for, from time to time, for
" planting hedges, for enclosing these parks or enclosures, and
" also for planting trees along these hedges, or other dykes,
" ditches, or fences enclosing the same; and also, at the issue or
" expiration of this tack, to pay, or allow to the said William
" Gibson, and his foresaids, the value of all those dykes, ditches,
" hedges, and other fences and trees to be so planted, according
" as the same shall be then valued and appraised, by two neutral
" skilful men, mutually to be chosen, both by the heritor and
" tenant, seeing the heritor will then have the benefit of all those
" fences and trees. Furthermore, it is hereby provided and

June 29, 1831. "declared, that the whole houses and biggins on the said farm, "except the dwelling-house after-mentioned, are to be estimated "and appraised over to the said William Gibson, at his entry "thereto, by two neutral men, mutually to be chosen by both "parties; and as the dwelling-house presently possessed by the "said Jean Smith is in a ruinous condition, therefore the said "William Gibson hereby binds and obliges him, and his fore-"saids, at his entry to the said land, to build a new dwelling-"house on the ground where it stands, not less than thirty-six "feet in length, and fifteen feet in breadth, within the walls; "and the said William Grahame binds and obliges him, and his "foresaids, to furnish whatever timber shall be necessary thereto, "for making it a good and sufficient farm-house, with a loft "therein, and also to pay to him 120*l.* Scots, for helping to de-"fray the charges of the work, and that at the first term of "Whitsunday or Martinmas, after the said William Gibson shall "finish the said dwelling-house; and the said William Gibson "binds and obliges him, and his foresaids, to transport the "said timber from Montrose, or any place of the like distance, "and to furnish all the other materials, workmanship, and "charges, for completing the said dwelling-house; after which, "that house is also to be valued and appraised, by two neutral "men, to be mutually chosen, as aforesaid: And the said Wil-"liam Gibson and his foresaids are to uphold these houses and "biggins during the whole space of this tack; and at the expi-"ration thereof, they are again to be valued and appraised by "two neutral men, to be mutually chosen, by both parties; and "if at the said last appreciation, the appraised value of these "houses and biggins, including the dwelling-house so to be built, "shall exceed the values thereof at the first appreciation, then "the said William Grahame, and his foresaids, shall be bound "to pay, or allow the meliorations to the said William Gibson, "or his foresaids. And on the contrary, if at the last appre-"ciation the appraised values shall be less than at the first, the "said William Gibson, and his foresaids, shall be bound to pay "the deterioration, or deficiency, to the said William Grahame, "or his foresaids." No valuation was at this time made, and on the death of Grahame in 1776, he was succeeded by his son Robert. This person in 1785 granted a lease to Gibson of the part which had been possessed by Abercrombie, and had been

excepted from the former lease. It was to endure for the remaining period of the original lease, contained a similar clause as to the valuing of the houses, and the rent was to be such "reasonable sum" as should be fixed by mutual referees. In 1792, Robert Grahame and Gibson subscribed an inventory and valuation, by which they declared that the true appraised value of the houses, as at the time of Gibson's entry, was 36*l.* 9*s.* 6*d.*, and that this should form "a rule for settling betwixt the heritor "and tenant regarding the houses on the farm at expiry of the "tack, agreeably to the stipulations therein contained." On the death of Robert in 1793, and of his son who died in apparency in 1794, the present appellant (who was son of the granter of the lease and brother of Robert,) succeeded to the estate. He did not challenge the lease, but took part of the rent, and on the 18th of July 1799, indorsed the following declaration on the second lease:—"I, Francis Graham, do hereby declare, that "the yearly rent payable by the within designed William Gibson, "for the possession within mentioned, was fixed at seventeen "pounds sterling, and the same has accordingly been paid since "his entry to the house; and that the houses thereon were "valued and appraised to fifteen pounds sterling, at the period "stipulated for that purpose by the tack." In the course of the same year, Gibson, in consideration of 1,000*l.*, and of a surplus rent of 90*l.*, assigned the lease to Stewart Jolly, who in consequence entered to possession. He continued undisturbed, and paid the rent regularly to Francis Graham, who received it without objection till the last year of the lease. The rent of that year Jolly declined to pay, on the ground that it was greatly more than extinguished by the claim which he had against Graham for the value of houses on the farm, which he had either repaired, built of new, or erected. In consequence of this Graham applied to the Sheriff of Kincardineshire for a warrant of sequestration, which was opposed by Jolly on the above ground, and he lodged a bond of caution in common form. At the same time he raised an action against Graham, concluding for payment of 1,250*l.* 8*s.* 11½*d.*, as the sum due to him. The sheriff having repelled the claim of retention, and allowed the bond to be enforced, Jolly complained to the Court of Session by advocation, and also brought up his own action by an advocation ob contingentiam. These processes were after-

June 29, 1831.

June 29, 1831. wards (5th Dec. 1820, and 17th Nov. 1821) conjoined, and the leading points which arose were: 1. Whether Graham was liable for the claim made by Jolly; and 2. Supposing that he was so, whether he was liable to the full extent demanded?

With reference to the first of these points, Jolly contended that there was no effectual prohibition in the entail sufficient to protect an heir from liability for a claim of this nature. But he mainly rested on an allegation that Graham represented the granter of the lease, and that he had by his acts and deeds homologated and adopted the lease.

In regard to the representation, the facts stood thus: in 1748 an entail was made, under a contract of marriage between Graham's father and mother, of the estate of Ballindarg, but which was not recorded till 1792, whereas the obligations in the lease had been contracted in 1762. In virtue of this entail Graham succeeded to Ballindarg. Under the same deed a provision was made in favour of the younger children, which was to be payable at their father's death, or at their respective marriages if these should happen previous to that event. Graham did not marry before his father's death; and being then in the position of one of the younger children, he received 900*l.*

The main circumstances relied on in support of the plea of homologation were that Graham received payment, without objection, of the rents stipulated in the lease, from the period of his succession till its termination. That he had indorsed the above certificate fixing the rent, payable under the second lease, which bore express reference to the first; and that a submission had been entered into between him and the respondent as to the cropping.

On advising the cause, the Lord Ordinary issued the subjoined note of his opinion*:—

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* "The Lord Ordinary has advised this cause, and will advert to the pleas urged "by the defender in their order.

"The first which naturally presents itself is, whether this action be competent at "all against him, until the heirs of line of William and Robert Graham shall be "discussed. On this, the Lord Ordinary is of opinion, that the action at Mr. Jolly's "instance against the defender is competent, in respect that he succeeded to the "subject out of which the claim arises.—See Erskine, b. 3, tit. 8. sec. 52.

"The next question is, whether the defender is liable or not for this claim, in "respect that he is an heir of entail only, who does not represent the granter of the "lease out of which the action has arisen. And here the Lord Ordinary thinks that

Thereafter, on the 22d of May 1822, his Lordship pro- June 29, 1831.
nounced this interlocutor: — "Finds, that Francis Graham,

"there is a distinction between the first and second tacks. For, with regard to the "second, the rent was not filled up in it, but was left blank; and although the lease "contained a stipulation relative to the value of the houses, and a stipulation that "meliorations should be allowed on these houses to the tenant at the end of the "lease, yet the value of the houses at the commencement was not specified in it. "Both of these defects were corrected by the defender himself. He wrote on "the lease itself a declaration, that the rent was 17*l.*, and the value of the houses "was 15*l.*, which was clearly making himself a party to that lease, and giving the "tenant reason to believe that the defender would implement the obligation as to "the houses.

"With regard to the houses, and fences and trees on the lands contained in the "other lease, the pursuer does not say that any additions were made to the houses or "fences, nor that trees were planted by him; so that no plea can arise from the "defender's acquiescence in such acts. With respect to homologation, if the plea of "the pursuer rested solely on the ground that the defender had accepted payment of "rent from the pursuer, the Lord Ordinary would not have thought, that by the "mere acceptance of rent he would have subjected himself to obligations not other-"wise incumbent on him; but on the subject of homologation, there is something "said in additional articles to the pursuer, Mr. Jolly's condescendence, about a "submission entered into by the pursuer and defender, relative to the farm, the "nature of which is not explained, nor the submission itself produced; and the Lord "Ordinary inclines to think that the defender did not see these additional articles; "and therefore, this matter requires additional explanation.

"Independent, however, of this, it is stated, and not denied, that the defender's "father inherited the estate of Ballindarg in virtue of a deed of entail, which was "not recorded at the time he entered into the lease, nor till 17th November 1792; "and as the obligations contained in the lease were effectual against that estate, to "the effect of their being implemented to the tenant, Mr. Gibson, the Lord Ordinary "cannot see that, in consistency with the judgment in the case of Smollet's creditors, "14th May 1807, the defender is entitled to plead, that, holding that estate of "Ballindarg, he is not liable to implement the obligations of the lease in question.

"To the extent, too, of 900*l.* of provision received from his father, the defender "appears to be liable as an heir of provision to him; for although it be true that the "defender might have been a creditor of his father, provided he had married during "his father's life, yet he did not marry, and the provision descended to him at his "father's death. He was, therefore, a conditional creditor only; and the condition "not having been purified, he became an heir of provision in a question with onerous "creditors of his father.

"On the general point of law, that an heir of entail is not entitled to grant leases, "in which he imposes obligations on the subsequent heirs of entail, for sums of "money to be paid to the tenant at the end of his lease, for improvements during its "subsistence, the Lord Ordinary has no sort of doubt. If the entail be regular, and "prohibit the contraction of debt, under the usual irritant and resolutive clauses, "such obligations cannot be effectual against the subsequent heirs; and in addition "to this, to sustain such an obligation, would be to cut off their claims against heirs "succeeding to them, for a proportion of the cost of these improvements, competent

June 29, 1831. " Esq., although an heir of entail, is liable to implement to " Mr. Jolly the whole clauses and conditions in the two leases " originally granted by the deceased William and Robert Gra- " hame to William Gibson, and assigned to Mr. Jolly, both as " having homologated both these leases, and as representing his " father, the said William Graham, in the manner explained by " a note prefixed by the Lord Ordinary to his interlocutor, " dated 15th January last; but before determining to what ex- " tent the said Francis Graham is liable for meliorations, in " terms of said leases, to the said Stewart Jolly, as the reported " value of the houses appears to be quite extraordinary, when " compared with the value of the houses as declared by William " Grahame and William Gibson, and by Francis Graham, Esq. " and said William Gibson; appoints the complainer, Mr. Jolly, " to condescend whether the houses so valued in June 1820 be " the same houses which existed on the farm when the said leases " were granted, and were afterwards valued by the said William " and Francis Graham, or whether there are additional houses, " and if so, to specify them, when they were erected, and their " value; and if there be not additional houses, to specify the " improvements that have been made to enhance their value to " such a degree." Against this judgment Graham lodged a representation, which was superseded till the points of fact should be cleared up by the condescendence. On resuming consideration, the Lord Ordinary, " in respect of the judgment of the House of " Lords in the case of Vans Agnew," reported the cause to the Inner House on informations, and on the 24th of February 1824, the Court pronounced this interlocutor:—" In respect of his " own approbatory acts, find the said Francis Graham liable to

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" by 10th Geo. III. cap. 51; because, in order to recover that proportion, notice " must be given to the succeeding heirs before the improvements are begun, and they " must all be recorded in the Sheriff-court books, none of which solemnities were " observed in this case, nor are generally when tenants are left to make improve- " ments. But here, if the defender be liable, as having homologated the leases, and " also as representing the granters of them, it excludes entirely the general case of " the liability of an heir of entail, who does not represent the granter.

" As, however, it is proper that the whole facts of a case should be expiscated " before the cause leaves the Outer House, the Lord Ordinary will not divide the " cause by pronouncing any interlocutor on the merits, till the point of homologation " be entirely cleared up. The quantum of meliorations will afterwards be taken by " themselves."

" the said Stewart Jolly in implement of the whole clauses and " conditions in the two leases originally granted by the deceased " William and Robert Graham to William Gibson, and as- " signed to the said Stewart Jollie: Find, separatim, that the " said Francis Graham, in respect of his having succeeded to " the estate of Ballindarg, and that the entail thereof was not " recorded till after the dates of the said tacks, is liable to " implement the said obligations, suo ordine; and in order to " ascertain the quantum of meliorations for which the said " Francis Graham is liable, remit to the Lord Ordinary to hear " counsel for the parties thereon, and to do therein as his Lord- " ship shall see cause."* In consequence of this interlocutor, the Lord Ordinary (15th June) remitted " to the Sheriff-depute " or substitute for Kincardineshire, to name proper persons to " inspect the houses on the farm in question, and to report what " houses were on the farm when the tack commenced, what " houses are still thereon, whether these are fit and suitable to " the farm, in what order they were left, and to report a valua- " tion of each house separately." A report was thereupon made, and the Lord Ordinary having again reported the cause to the Court on cases, their Lordships†, on the 12th of December 1827,

June 29, 1831.

* 2 Shaw and Dunlop, 730.

† *Lord Justice Clerk* observed, I could have wished to have had the case more prepared for final judgment than it is. We must take for granted, that all the objections on the entail are at an end, and that Mr. Graham is bound to fulfil all the obligations of the lease as if he were a fee-simple proprietor; but all that I feel warranted to state at present is my opinion as to the principle of the construction of the lease. Admitting that there were no more buildings than were necessary, I am not prepared to say that Mr. Jollie is entitled to decree for all the sum claimed. The question is, what is the fair extent of the landlord's obligation? I think it is this, that to the extent of the buildings existing on the farm at the time the lease commenced, and which, by the decaying nature of such buildings, it became absolutely necessary to rebuild, in so far as they were rebuilt of nearly the same dimensions, or even with some reasonable improvements, the tenant would be entitled to reimbursement. But when we see the tenant proceeded to build large and commodious buildings, though no doubt a great advantage to the landlord, yet I cannot think that under the clause he was entitled to repayment, as if it had been provided that he was to have reimbursement for any new buildings, &c. which might be useful, while the clause in the lease relates only to the buildings then on the farm. Now, from the great change in the mode of cultivation during the long period of this lease, many new buildings became necessary and proper, but then they were not the buildings in the contemplation of the parties in the lease. As to the case of Ducat, I admit it is a pretty strong case; but even there it was only a new house in place of the one formerly existing for which

June 29, 1831. found, that "the advocator, Stewart Jollie, is entitled to meliora-
"tions for houses and biggins, whether repaired or built of new,
"in so far as the same are necessary and suitable for the farm,
"and remitted to the Lord Ordinary to proceed accordingly,
"reserving entire all question of expences." * His Lordship, on the 14th of June 1828, pronounced this judgment:—"Finds,

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remuneration was demanded, while here are buildings having no parallel in the old steading at all, and indeed a number of buildings which I cannot suppose necessary on the farm at all. And I cannot stretch the clause to buildings having no parallel in the former steading, and therefore I would only allow remuneration for the renewal of old buildings which had become ruinous.

Lord Pitmilly.—I agree that it would have been better had the case been more prepared, as at present we can only lay down principles, and send it back to the Lord Ordinary. But we must endeavour to lay down principles of decision; and I certainly think the landlord's construction of the clause a great deal too strict. He says it only applies to the identical houses existing on the farm when the lease was granted. I cannot put this construction on it; the whole clause proceeds on the supposition that the houses are to be repaired, and if rebuilding necessary, I think the clause extends to it; and a special provision as to dwelling-house was inserted, because the old house was in a ruinous condition at the date of the lease. And seeing that the old buildings were such that it was impossible to repair them, being made of mud, it is clear the additional value of new buildings must be paid for. I would by no means stretch it to this, that if the necessity of rebuilding arose from the neglect of the tenant, he should be entitled to reimbursement; but that is not the case here, as the houses from their construction necessarily became ruinous. As to the extent to which the tenant is entitled to remuneration, I am disposed to go further than your Lordship. I have always understood that the case of Ducat was well decided; and I think it lays down this principle, that when buildings are necessary and suitable, the tenant is entitled to repayment under a clause such as that in Ducat's case, which I cannot distinguish from this. I cannot say how far this principle will go as to the particular buildings here, but the case must go back to the Lord Ordinary to apply these principles, following the case of Ducat as nearly as possible.

Lord Alloway.—I concur entirely with Lord Pitmilly. The case is not ripe for decision, except to determine the general principle. I cannot go the length of saying that the whole articles for which remuneration is claimed are to be allowed; but according to the principles of the case of Ducat, I think the tenant entitled to repayment for all buildings necessary and proper for the farm; and I consider the case of Ducat much stronger, both as to the words of the lease, and because the tenant was put upon his guard by the landlord protesting that he was not to be liable. The appointing of an appraisement to be made at the end of the lease proves that the tenant was to be indemnified for houses to be erected; and he was entitled to make the new buildings correspond with the improved state of the farm. Thus if the farm only maintained 12 cows at his entry, and the byre only held that number, but if it now raises 200, was he to build the new byre only to hold 12? I would have been of the same opinion if there had been no case in point; but the case of Ducat, where a bill was actually refused at once, sets the matter at rest.

* 6 Shaw and Dunlop, 236.

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" that the valuators and inspectors, named by the Sheriff, in obe-
" dience to an order by the Lord Ordinary, differ in their opi-
" nions with respect to the buildings on the farm of Morphie
" being necessary and suitable for the farm, insomuch as that two
" of them swear that the court or straw-yard is too small, and
" cannot be extended, and the accommodation in general cannot
" be made such as it ought to be, unless nearly the whole of the
" buildings were pulled down, and rebuilt according to a judi-
" cious plan: but finds, that other five of the said valuators are
" of opinion that the said houses, so far as they exist, are fit and
" suitable to the farm, with the exception of the dwelling-house,
" barn, and two byres, which they consider to be unsuitable, so
" far as they are placed in an inconvenient situation: Finds, that
" the valuations made under the authority of the Sheriff, in June
" 1820, are those which must be adopted, as they were made
" after the expiry of the lease, which was the period stipulated
" for their valuation, and that the amount due to Mr. Jolly is
" 1,250*l.* 8*s.* 11½*d.*, for both houses and fences, after deducting
" the original valuation of the houses, made by the landlord and
" his tenant, Gibson, some years after the date of the lease to the
" latter: Finds, that Mr. Graham presented two petitions to the
" Sheriff for sequestration of Mr. Jolly's stock and crop on the
" said farms, in security and for payment of the victual-rents due
" therefor, for crops 1819 and 1820, so that any rents that were
" stipulated by the tacks to be paid in money, were tacitly ac-
" knowledged to have been paid, since the sequestration was not
" asked for payment of these rents in money; neither is there in
" the said petitions any allegation that said money-rents had not
" been paid: Finds, therefore, that the said victual-rents for said
" two crops amount to 343*l.* 1*s.*, which being deducted from the
" foresaid larger sum of 1,250*l.* 8*s.* 11*d.*, leaves due to Mr. Jolly
" the sum of 907*l.* 7*s.* 11*d.*, for which decerns in favour of the
" said Stewart Jolly; and as to the expences of process, finds the
" said Francis Graham liable for the expences of the question,
" whether he, as heir of entail, was bound to the said Stewart
" Jolly for the meliorations of the houses and fences; finds both
" parties equally liable, i. e. each for half of the proof and reports
" for ascertaining the extent of said meliorations; and further,
" finds said Francis Graham liable for the expences of resisting
" the sequestrations in the inferior court, and advocating these

June 29, 1831. "two processes to this Court; but to no other expences, after "these advocations were brought into this Court, except as above "specified."

Both parties reclaimed; Graham on the merits, and Jolly as to the expences and interest, in support of the latter of which he brought a supplementary action, which was conjoined. The Court, on the 2d of July 1829, adhered to the interlocutor, except as to interest, which they found due to Jolly from the date of the expiry of the lease in 1820.*

Graham appealed.

Appellant.—1. The appellant is not liable for the claim which has been made against him. The lease was not granted by the maker of the entail, but by an heir succeeding in virtue of the entail. Under that deed he had no power to grant the lease, which, both in respect of grassum and endurance, might have been reduced. Still less had he power to impose on succeeding heirs an obligation of the nature of that contained in the lease. It has been repeatedly found that claims for meliorations, arising at the end of a lease, must be made, not against the heir of entail, but against the general representatives of the granter of the obligation. Neither does any liability exist against the appellant in respect of representing the granter. It is true that he has succeeded to the estate of Ballindarg, and that the entail was not recorded till posterior to the lease; but this is of no relevancy in the present question. That entail was an onerous deed; and although the circumstance of non-recording might give rise to a question as to the effect of obligations contracted in reference to that estate, it is of no importance in the present discussion. Although it accidentally happens that the appellant is heir of entail to both estates, yet the case must be judged of as if the heirs were separate; and in that case it could not be pretended that he, as heir of entail of the estate of Morphie, was liable to implement this obligation. Neither is there any relevancy in the allegation as to the money provision, because as that was in one event

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* 7 Shaw and Dunlop, 824.

payable during his father's lifetime, the appellant was a proper creditor, and not a mere heir of provision. June 29, 1831.

The allegations in support of the plea of homologation are equally irrelevant. It is true that the appellant did not challenge the lease, and that he received payment of the rents; but it has been repeatedly found that taking payment under a reducible deed does not infer homologation. The certificate indorsed on the second lease was made with no view of homologating or approbating either it or the prior lease, but simply as declaratory of the fact (which did not otherwise appear) that the referees had fixed the rent at the sum there specified.

2. The interlocutors are erroneous, in respect that they do not give effect to the precise terms of the clause, but extend it beyond the contract of parties. The claim of the respondent, which has been sustained, is for 1,200*l.*, while the original valuation of the houses, &c. was only 36*l.* 9*s.* 6*d.* The reason which has been assigned for giving effect to this very large claim is, that the houses which were built were suitable to the farm. The clause, however, merely provides that the tenant should receive the appraised value of the original houses and biggings (including the dwelling-house to be built) on the farm, in so far as that value should exceed that of the first appreciation. It never could be the intention of parties that the tenant was to be entitled to build houses in a style and on a scale different altogether from the former houses, or at least that the landlord should be bound to pay for them, merely because judges in a court of law might think that the houses so built were suitable, under new and emerging circumstances, to the farm.

Respondent.—1. The entail of Morphie contains no prohibition sufficient to protect the appellant from the present claim. Independent of this, however, he is clearly bound, both by representing the granter of the lease and by his own acts of homologation. He admits that he has succeeded to the estate of Ballindarg, under an entail which was not recorded at the date of the obligation. Whatever effect that entail might have in a question inter hæredes, it could not protect the estate from being attached by the creditors of the appellant's father. But the respondent, as in right of Gibson, was a creditor, and the recording of the entail cannot place him in a different position.

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The appellant, therefore, having taken up the estate of Ballindarg, is liable to the respondent; for it is plain that the respondent might proceed by diligence to enforce payment of his debt out of that estate. He is also liable to the extent of 900*l.*, which he obtained as heir of provision from his father. That sum was granted clearly mortis causâ; and it is thus impossible for the appellant to pretend that he was a creditor.

But even admitting that otherwise the appellant would not have been bound by the leases, his acts of homologation are of themselves sufficient to render him liable. The lease was a good and effectual lease, and accordingly was never challenged. But supposing that it was not so, the appellant recognized its validity, and barred himself from objecting to it, by taking advantage of the provisions contained in it, exacting payment of the rent for upwards of twenty-five years, and testifying that it was good and effectual by the certificate which he indorsed on the second lease.

2. According to a fair construction of the obligation, the respondent is entitled to the full sum which has been awarded to him. A proof was taken in the Court below, in regard to the value of the meliorations, and the parties there declared that they had no further evidence to adduce. The fact, therefore, that the meliorations were of the value decerned for is undoubted; and the only question is, whether there is any part of it for which the appellant is not liable. In the case of Ducat against the Countess of Aboyne, it was found, with reference to an obligation similar to the present, that a new house, if not inadequate to the size of the farm, though larger than the old one, which had become ruinous, was a melioration for which the tenant was entitled to be paid at the end of the lease. Although, therefore, the houses which had been built are more valuable than those which were originally on the farm, yet it cannot be pretended that they are unsuitable, as the farm is now let at about 800*l.* a year. The judgments are well founded.

Lord Chancellor.—My Lords, it being admitted on all hands that that which has passed between succeeding heirs of entail may make a man who holds an entailed estate liable for the conduct of those preceding him, so far as the estate is improved by the execution of the contracts which have been entered into, the first question is,

whether there is any thing in this case to withdraw the party against whom the claim for meliorations is brought, out of the reach of the rule, by his having taken up, or those whom he represents having taken up, a qualified service, or in respect of acts homologating or confirming? Because it is admitted, that on one or other of these grounds a party may be liable, the heir of entail having become as it were privy to the contracts made in respect of that estate by those preceding him. Now, it is unnecessary for me to argue this at any length, as my opinion goes with the decision of the Court below. I shall recommend, therefore, to your Lordships to adopt the ground on which it has decided the bulk of this case. That would leave untouched the interlocutors of the 5th of December 1820, the 17th of November 1821, the 22d of May and the 14th of June 1822, of the Lord Ordinary; and this might seem to imply that there is an alteration necessary in the interlocutor of the 15th of June 1824 of the Lord Ordinary; because there for the first time he introduces, as far as I can perceive, the doctrine of additional houses built upon the farm coming within the scope of the meliorations to which the tenant is entitled, and an inquiry is directed whether those are fit and suitable to the farm or not. But as the inquiry might have gone on very well with respect to that which I humbly think is a fit subject for inquiry with that which appears not to be fit, it will be unnecessary to alter that interlocutor of 15th June 1822, because it was mere surplusage. The interlocutor of the 24th of February 1824 must stand, there being in it no departure from the general view I have taken of the case; but those of the 12th of December 1827 and the 2d of July 1829, I should suggest to your Lordships the propriety of varying, and, on that variation, of remitting. June 29, 1831.

My Lords, the second question is, to what extent he is liable; that is, what the tacksman, or the representative of the tacksman, is entitled to at the termination of the tack? Now, in my opinion, the Court below have not soundly decided the respective rights of the parties. The tack is and must be the governing instrument, settling the mutual rights of the parties; and it is fit to be observed, that a court of law or equity never more widely departs from that which usefully and safely is its office, than when it puts itself in the place of conflicting parties, or of a testator; for the observation applies equally to cases where the Court in effect permits itself to make a new will or a new bargain, instead of construing the will or the bargain. I cannot help thinking that their Lordships applied their attention too much to whether it was fitting that the party in the case should be made liable or not, and did not sufficiently

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attend to that which we should call here matter of further directions; that they set themselves in the situation of contracting parties, conceiving they might deal with and mould the contract; and that they appear rather to have made a new contract for the parties than to have construed the two contracts made in the years 1762 and 1785 respectively. The Court of Session appear to have taken these contracts as general contracts for meliorations, and that, consequently, if entitled at all, the tenant was entitled to every thing which could be called a melioration; that new buildings might be erected,—not only new buildings in the place of old, but if it pleased the tenant to erect what he considered improvements to the farm, which the landlord might not consider as such, yet he was to pay for them exactly as if he had contracted to do so at the expiration of the lease. But your Lordships will find that is by no means the contract between the parties. It is in these terms: "Furthermore, it is hereby provided and declared, that the whole "houses and biggings," which I take for granted means the out-houses, as contra-distinguished from the dwelling-house,—the barns, and out-houses,—"on the said farm, except the dwelling-house after "mentioned," and that is excepted, because it is dealt with in the next succeeding clause, "are to be estimated and appraised over "to the said William Gibson, at his entry thereto, by two neutral "men, mutually to be chosen by both parties; and as the dwelling-"house presently possessed by the said Jean Smith is in a ruinous "condition, therefore the said William Gibson hereby binds and "obliges him and his foresaids, at his entry to the said lands, to "build a new dwelling-house on the ground where it stands, not "less than thirty-six feet in length and fifteen feet in breadth within "the walls;" the very size of it is limited, and something like a price is fixed, for the landlord is to pay £120 in part of that; "and "that at the first term of Whitsunday or Martinmas after the said "William Gibson shall finish the said dwelling-house; and the "said William Gibson binds and obliges him and his foresaid to "transport the said timber from Montrose, or any place of the "like distance, and to furnish all the other materials of workman-"ship, and charges for completing the said dwelling-house, after "which that house is also to be valued and appraised by two neutral "men, to be mutually chosen as aforesaid." This, therefore, provides for that which had been previously excepted; and thus it stands, that all the buildings, not only the buildings already on the farm, but even the new one about to be erected, should be appraised. That exception shows how strictly they were dealing with the buildings on the farm; for it provides for the case of one new house

then intended to be erected, as to which it distinctly provides that there should be an appraisement and compensation. That, in my opinion, very much aids the construction I am putting upon this contract, and counteracts the construction put upon it by the Court below; "and that the said William Gibson and his aforesaid are "to uphold these houses and biggings," that is to say, all the houses then on the farm, together with the biggings, "during the "whole space of this tack; and at the expiration thereof they are "again to be valued and appraised by two neutral men, to be "mutually chosen by both parties; and if at the said last appre- "ciation the appraised value of these houses and biggings, including "the dwelling-house so to be built, shall exceed the values thereof "at the first appreciation, then the said William Grahame and his "foresaid shall be bound to pay or allow the meliorations to the said "William Gibson or his foresaid," not of any houses the tacksman might think proper to put upon the farm, but of those houses and biggings, that is, the houses and biggings existing at the time of the lease, and also the dwelling-house to be built immediately afterwards, for the time is specified. They leave us in no doubt as to that, for they again anxiously enumerate the dwelling-house; that if the value of these houses and biggings, including the dwelling-house so to be built, shall exceed the then values thereof, he is to receive compensation, and if it shall be less, then he is to allow for the pejoration, —which is a new term both to my noble and learned friend and myself, though perhaps a convenient one—he is to pay for those pejorations. Now, what ameliorations and what pejorations are to be taken into the account? If he had built a new house, and that new house had been worth less at the end of the lease than it had been at the former period of the lease, it is clear he would not have had to pay for that, for it would not have to be valued at the time of the entrance, and then at the expiration or ish of the lease. Then he ought not to receive for meliorations any more than for the meliorations on the houses and biggings, either then existing or by the substitution, which is distinctly referred to, of a new dwelling-house for a ruinous one, which is twice over in that part of the lease mentioned as the only exception, the houses and biggings in every other case meaning the houses and biggings existing at the time of the entrance on the lease. My Lords, I think it is material, both for the sake of landlords and tenants, to know, that if they are to receive at the expiration of the lease for meliorations, they are not at liberty to put on farms any kind of houses they may think fit, in the course of speculation, even though they may have been improvements at the time, nay, even

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though they are at the end of the term thought by two men who may be selected proper and suitable for the farm; that the landlord is to be himself the judge of that. If it was to be carried further, the tenant ought to have bargained with his landlord, and not having done so, he has no right to complain, if, at the expiration of the term, he shall be left without reimbursement for his expenditure. The question is, what, by the terms of this lease, are the particular kind of meliorations; what, as it regards different buildings, houses, and out-houses, are those, in respect of which the tenant stipulated for reimbursement, and the landlord contracted to pay? Now, Ducat's case in 1803 by no means goes to this extent; it only says, that a new house may be substituted for an old one, though twice as good as the old one; and I observe the minority of the Judges by no means went so far as the majority. The other Judges did not feel themselves justified to consider so much what was proper and suitable for a farm, as what was the agreement between the parties; a very rational view. In so far as it was larger, they considered it the erection of a new subject, and not a melioration of the old; holding that if he had repaired the old, and not built a new one, this would have come within the contract; and they felt it important that the Court should avoid making a bargain for the parties different from the one which they had themselves made, and which it was the Court's office to construe. The question is, what was the bargain between these parties? and I have no doubt the bargain was, that the tenant should keep up the houses and build a new one instead of a ruinous one, a reasonable latitude being given; and if any one of these houses was considerably larger than the old one, unless there was something exorbitant and unreasonably large, and wholly unsuitable to the state of the farm, that it would come within the construction of this bargain; but I cannot, on the best consideration I have been able to give the case, say that all these houses (a great number of which were additional, as a smith's shop and a smith's dwelling-house,) can come within the description of those houses and buildings which are to be the subject of compensation. I should therefore submit to your Lordships the propriety of amending the interlocutors to the extent, that after the words purporting that Stewart Jolly "is entitled to meliorations "for houses and biggings," we should leave out, "whether repaired "or built of new," and going on, "in so far as the houses and "biggings on the farm at the dates of the tacks are improved, "or others suitable to the farm built in lieu thereof, but find, that "he is not entitled to any compensation for additional houses not "built instead of old." I should suggest to your Lordships the

propriety of amending this interlocutor, and remitting the case, leaving it to the further consideration of the Court. My noble and learned friend, I believe, will say something on the other branch of the case. June 29, 1831.

Lord Wynford.—My Lords, this case certainly is one of very considerable importance. It is fit, on the one hand, that we should protect the tenant. It is fit, on the other hand, that we should take care, while giving protection to him, that we do not give him a right which will enable him to ruin his landlord, which, I think, the tenant might do in some cases, if the law were carried to the extent to which the judgment of the Court below has carried it. The case has been reduced to two points; 1st, Whether these leases are binding upon the appellant; and, 2dly, The extent to which they are binding. It appears to be admitted, that but for the homologation the present appellant would not have been bound by the leases. I am of opinion, my Lords, that by homologation he has bound himself to all the covenants of that lease.. The most distinct homologation does not apply to the whole property. But there is another species of implied homologation which does apply to the whole, namely, the receipt of rent; and I think that it was impossible for this appellant to say that he had not acceded to every one of the covenants contained in the lease after having taken rent. He took advantage of the lease, and by taking that advantage he takes upon himself all its burthens. There cannot be a partial confirmation of a deed. In the cases cited it appears that in the law of Scotland receipt of rent is a confirmation, except in the case put and disposed of by the Lord Advocate. There the party could not set aside the lease, and on that account his acts, with respect to that lease, could not be taken as acts of homologation. In this case the party was in a situation to set aside the lease. That is admitted by the learned counsel on both sides. But it is said the party was not aware of the legal consequences of what he did. If he had been ignorant of the fact of such a lease being in existence, he would not have confirmed it by receiving rent. The maxim is, that ignorance of fact excuses, but ignorance of law does not excuse. It may seem strange that an ignorant man shall be presumed to know the legal consequences of his conduct, when it is often found that the most learned judges do not know these consequences; but it has been found that this presumption of knowledge of the law has promoted justice better than allowing the excuse of ignorance of the law to protect men would do. It would be absurd to say that a man confirmed an instrument he had not seen, but this gentleman did know of the deeds, and did receive

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rent according to those deeds; and therefore I conceive he must be taken to have sanctioned both the deeds to their full extent, and all the covenants contained in those deeds. I agree with my noble friend that the law does not oblige the landlord to pay for the erection or for the melioration of any building not on the estate before, except that which was about to be erected. We should be going beyond the words of the lease—we should be introducing into the instrument other words than those which the parties have put in it, if we were to say, that, under the covenant by which the party binds himself to allow for the melioration of those buildings, we were to oblige him to allow for the erection or melioration of buildings not in existence at the time. If any new building might have been included under the general terms of the lease, there would have been no reason for inserting that clause, to give the meliorations of that new building which was to be erected. That shows that the parties put that construction upon this instrument which I am advising your Lordships to give it. With respect to old buildings, I do not think that the landlord is bound to pay for enlargements of these beyond a size unnecessary for the cultivation of the farm when it came out of lease. At the same time I cannot say that he is to pay for no enlargement, if the melioration means something more than reparation. But the meliorations to be paid for by the landlord must be such as are permanent benefits to the estate. If the meliorations are adapted to a corn farm, and from the alteration in the times when the estate came out of lease that farm which the tenant had made a corn farm must be used again as a pasture farm, then meliorations are of no use to the landlord; they were more for the convenience of the tenant only, and he cannot request the landlord to pay for them. So I say of any other enlargement or alteration of the buildings, not useful to any new occupier, after the expiration of the lease; any meliorations that are useful to a new tenant must be paid for. Those which are not useful to a new tenant may be an addition to, but they are not, in the language of the lease, meliorations or improvements of the buildings. I think that the words introduced by my learned friend are sufficient to tie down the Court below, and prevent their compelling the landlord to pay for enlargements of the buildings, which, though they might have been convenient during the course of the lease, do not contribute to the benefit of the landlord at the expiration of that lease. My Lords, perfectly agreeing as I do with the noble and learned Lord, I shall conclude by seconding his motion, which is, in effect, that all the interlocutors of the Court below, with the exception of those of the 12th December 1827 and the 2d July

1829, be affirmed, and that those two interlocutors be reversed, and that the cause be remitted, with a declaration to the effect which has been stated, but without costs. June 29, 1831.

The House of Lords ———

Appellant's Authorities.—(1.) 2 Stair, 140. (3.) Campbell and Company, May 21, 1803; Brown's Synopsis, vol. i. p. 644; Fleshers and Candlemakers of Canongate, July 7, 1809; Wilson, Nov. 17, 1814; Falconer, March 4, 1815; Taylor, June 9, 1821.

Respondent's Authorities.—2 Erskine, 6, 29; Arbuthnot, Feb. 5, 1772; (Mor. 10,424); Walpole, Feb. 3, 1783; (Mor. 15,249); Morison, Feb. 3, 1787; (Mor. Dec. 10,425;) 3 Stair, 5, 17.

POWELL—M'CRAE,—Solicitors.

CHRISTIAN M'INTYRE, and others, Appellants.—*Lushington—Rutherford.* No. 24.

M'NAB'S TRUSTEES, Respondents.—*Lord Advocate (Jeffrey)—Russel.*

Landlord and Tenant—Removing.—Held (affirming the judgment of the Court of Session) that a tenant under a written lease must give notice forty days before Whitsunday of his intention to remove, otherwise he will be held to continue in possession by tacit relocation.

July 8, 1831.

2D DIVISION. Lord Pitmilly.

M'NAB, of M'Nab, disponed his estate in trust on the 12th of March 1812 to trustees, who were infeft, and allowed the estate to be managed by M'Nab. On the 28th of February 1813, he granted a missive of lease of the grounds of Portnellan to Duncan M'Intyre for seven years. M'Nab afterwards went abroad, and the estate was managed by Duncan M'Intyre, writer, in Callender, to whom the trustees granted a factory for levying the rents, but it contained no power relative to the removing of tenants. The lease was to terminate at Whitsunday 1820, and M'Intyre, the tenant, alleging that he had given notice of his intention to remove at that term, began to carry off part of his effects. The trustees denied that he had given any such notice, and proceeding on the footing that he had incurred a lia-