May 10. 1822. This question may come under what the Noble Lord alludes to with respect to Americans (in consequence of what has passed particularly in the United States by the independence of the United States). in this country who are not British subjects. The Court of Session in Scotland would have an equal right to declare in that case as it has in this case, if this case can be sustained. I conceive it is a question of the utmost importance, and every thing which has been done by the Court of Session on the subject cannot in my mind establish such a jurisdiction. It would be establishing a great principle which cannot stand in this case, and nothing more fully confirms me in my view of it, than that the learned counsel have not at all grappled with that argument.

Pursuer's Authorities.—1.—1. Ersk. 1. 55.; 2. State Trials, p. 594; 22. Geo. II. c. 45; 7. Anne, c. 5; 10. Anne, c. 5; 4. Geo. II. c. 21; 13. Geo. III. c. 21.—(2.)—1. Term. Rep. p. 44; 15. Cha. II. c. 15; 11. and 12. Will. III. c. 6; 25. Edw. III. c.—; 3. Ersk. 10. 10.—(3.) —4. Term. Rep. p. 2. 4.—(4.)—3. Ersk. 7. 10.

Defender's Authorities.—(1.)—1. Voet. 4. 17; 1. Ersk 1. 53. 55; 1. Coke, 129; 1669, c. 7; 1661, c, 39; 1661, c. 40; 1681 c. 12—(2.)—1. Bank. p. 61—63; Leslie, June 8. 1749, (4636—4641, and Elch. 45. Foreigner.)—(4.)—1. Geo. I. c. 4; 13. Geo. II. c. 7; 20. Geo. II. c. 44; 4. Geo. III. c. 25; 14. Geo. III. c. 84; Muir and others, Jan. 15. 1791,* (Bell on Election, p. 484.)

J. RICHARDSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 20.)

No. 34. Hon. MARY F. E. STEWART MACKENZIE and Husband, Appellants.—*Warren—Clerk—Adam.*

Hon. FRANCIS C. E. S. K. MACKENZIE and Others, Respondents.—*Jeffrey—Moncreiff.*

Entail.—An entail having been made in favour of A. and his heirs,—whom failing, B. and his heirs,—whom failing, C. and his heirs,—and the fetters applied nominatim to A., but only by the descriptive terms 'heirs and substitutes of entail, and successors' to the others; and A. and B. having predeceased the granter, on whose death the entail was to take effect—Held that C. was bound to make up titles, subject to the limitations of the entail.

May 13. 1822. FRANCIS LORD SEAFORTH had two sons, William Frederick Mackenzie and Francis John Mackenzie, and six daughters, of

2D DIVISION. Lord Craigie.

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* This case is only noticed by Mr. Bell in his Book on Election, who mentions that he had been unable to obtain the interlocutor pronounced by the Court. It was in these terms: 'The Lords having, &c. Dismiss the complaint in so far as concerns 'William Muir; sustain the objection to the election of Khlein, and find that, as being 'an alien, he was ineligible; and therefore reduce his election as a councillor of the 'burgh of Burntisland, dismiss the complaint, and decern.'

whom the appellant (formerly the wife of Sir Samuel Hood, and now of Mr. Stewart of Glasserton) was the eldest. In May 1810, and when all his children were alive, Lord Seaforth executed an entail of his estates, on the narrative of 'being minded and 'desirous to make suitable provision for the payment of my debts, 'and for my wife and children, with due regard to my title and 'dignity, and to the preservation of my estate, and of my name 'and family.' He then proceeds to 'give, grant, dispone, and 'convey to William Frederick Mackenzie, my eldest son, and 'the heirs-male of his body,—whom failing, to Francis John 'Mackenzie, my second son, and the heirs-male of his body,— 'whom failing, to the other heirs and substitutes herein after ad- 'pointed to succeed to my lands and estates in Scotland, in the 'order in which they are herein appointed to succeed thereto,'— all and sundry his estates, real and personal, which should belong to him at the time of his death; and he appointed, 'that whatever 'sum or sums of money shall come to the hands of the said Wil- 'liam Frederick Mackenzie, or of the heirs-male of his body, 'or of the said Francis John Mackenzie, or of the heirs-male of 'his body, or of any other heirs or substitutes appointed to succeed 'to my lands and estates in Scotland, in manner herein after 'mentioned and set forth, from the share belonging to me in 'certain lands, tenements, and hereditaments in the colony of Ber- 'bice, South America, with the appurtenances thereof, shall be ap- 'plied, in the first place, towards payment of my debts,' &c.—This is followed by a particular disposition of his estate in Scotland, and an enumeration of the classes of heirs in these terms: 'And 'without prejudice to the said generality, but for the purpose of 'completing my intention with respect to my lands and estates in 'Scotland, I hereby give, grant, dispone, and convey to and in 'favour of the said William Frederick Mackenzie, my eldest son, 'and the heirs-male of his body; whom failing, to the said 'Francis John Mackenzie, my second son, and the heirs-male of 'his body; whom failing, to any other son or sons to be pro- 'created of my body successively; and the heirs-male of the body 'of such son or sons respectively; whom failing, to the heirs what- 'soever of the body of the said William Frederick Mackenzie, 'my eldest son; whom failing, to the heirs whatsoever of the body 'of the said Francis John Mackenzie, my second son; whom fail- 'ing, to the heirs whatsoever of the body of any other son or sons 'to be procreated of my body, successively, in their order of seni- 'ority; whom failing, to Mary Frederica Elizabeth, my eldest 'daughter, wife of Sir Samuel Hood, Knight of the Bath, Rear- 'Admiral of the White, and the heirs whatsoever of her body;'

May 13. 1822.

whom failing, to his other daughters (the respondents) in their order, the eldest heir-female always excluding heirs-portioners, and succeeding without division throughout the whole course of succession. The substitution of heirs is terminated thus: 'Whom 'failing, to any heirs-male whatsoever, being heirs-male of the 'body of Colin Fitzgerald, the predecessor of my family, who lived 'in the reign of Alexander III. King of Scotland;'—'but always 'with and under the burdens and provisions, and subject to the 'conditions, declarations, restrictions, limitations, and clauses 'irritant and resolutive, hereafter mentioned and expressed.'

This deed was accordingly fortified by clauses irritant and resolutive, directed in some instances against 'the said William 'Frederick Mackenzie, and every heir of entail succeeding to the 'said lands and estate;' in others, against 'the said William 'Frederick Mackenzie, and the heirs-substitutes and successors 'before mentioned.' And it was declared that, in the event of contravention, 'the persons so contravening or failing to fulfil,' &c. shall amit, lose, &c. 'And the persons so succeeding upon 'the contravention shall be subject to the same restrictions, pro- 'hibitory limitations, and clauses irritant and resolutive, to which 'the said Frederick William Mackenzie, and the heirs-substitutes 'and successors before mentioned, are to be subject and liable 'through the whole course of succession.' He then obliged himself 'to infeft and seize the said William Frederick Mackenzie, 'and the heirs of entail before specified, with and under the bur- 'dens and provisions, and subject to the conditions, declarations, 'restrictions, limitations, clauses irritant and resolutive, herein 'before expressed; dispensing however with delivery, reserving 'a power to alter or revoke, and declaring that the deed should 'be valid and effectual, though found in his custody at his death.'

His two sons predeceased him without issue; and his Lordship, without having any other sons, died in 1815, at which time the entail was found in his repositories, unaltered and unrevoked. The appellant, his eldest daughter, thereupon obtained a general service as nearest and lawful heir of tailzie and provision, duly recorded the deed of entail; and in virtue of the unexecuted precept of sasine contained in that deed, and of the retour of her service, she was afterwards infeft.

In the course of completing her title, however, it occurred to her that she had acquired right to the estate, not as an heir under the entail, but as an institute or disponee, and that the fetters did not apply to her. She therefore brought an action of declarator, in which she concluded, that in consequence of her two brothers having predeceased her father without issue, it

should be declared 'that the pursuer is institute, conditional May 13. 1822.
'institute, or disponee of the said lands and others, and as such
'has obtained right to the said disposition, and the unexecuted
'procuratory of resignation and precept of sasine therein con-
'tained, and is thereby entitled either to take a valid infeftment
'upon and in virtue of the said precept of sasine, and the decree
'to follow hereon, which may be followed by charters of confirm-
'ation from the superiors of the pursuer in the said lands or
'others, or, on the procuratory of resignation in the said dispo-
'sition, to obtain from the said superiors charters of resignation:'
And farther, 'That the said general service of the pursuer as heir
'of tailzie and provision to her father, and the infeftment taken
'and recorded as before mentioned, are inept and irregular, and
'do not operate as any bar to the pursuer of new taking infeft-
'ment, or expeding any other title upon the said disposition, in
'virtue of the decree to be obtained hereon; and the pursuer, as
'institute, conditional institute, or disponee, is entitled to hold
'the lands and others in fee-simple, and free from the fetters of
'the entail.'

In defence against this action, the younger daughters of Lord Seaforth, and substitutes in the entail, pleaded, 1. That the succession did not open to their sister as institute, conditional institute, or disponee, but as an heir or substitute; and 2. That although she were to succeed in either of the characters assumed by her, she would not be entitled to hold the estates in fee-simple, the whole fetters of the entail being effectual against her, in whatever character the succession might open to her. In support of the first of these pleas they stated, that laying aside any inquiry as to the application of the fetters to her, the question resolved into this, Whether she was to take under the conveyance as a conditional institute, or as a substitute under the entail;—that it was impossible she could contend that she was conditional institute, without admitting that if William Frederick Mackenzie had survived Lord Seaforth, the destination to her would have been entirely evacuated, seeing that the condition on which her institution depended was purified;—that the circumstances of his predecease could not give her a more extensive right; for although the deed was not delivered, yet a personal fee was created in his favour; so that, before she could be entitled to take up the estate, she must have obtained a general service as his heir, and consequently could claim right in that character only. In support of the second defence they observed, that it was necessary to distinguish between this case, and those in which it had been held that the institute was not fettered;—that the decisions in these cases proceeded

May 13. 1823. on the circumstance of the fetters being clearly directed against another and a different class of persons, so that the institute who was not included among them was held to be unfettered;—that, however, it was perfectly possible to apply the fetters to him, and that if this were done in words clearly expressive of the intention of the entailer, he would be bound by them;—that, in the present case, the fetters were directly applied, not only to the institute, but to every other person in the deed, and particularly to the pursuer herself; so that it was impossible that she could make up titles under this deed, without being liable to all the conditions and limitations under which it was granted in her favour. They also further contended, that the words 'persons and successors,' in reference to those who should acquire right under the entail, included the pursuer, whatever character she assumed, whether as conditional institute or disponee.

To the first of these pleas it was answered, that a party can only succeed to lands as an heir or as a disponee, (these two titles being different from and opposed to each other);—that a person succeeds as disponee, when the deceased proprietor has, during his lifetime, executed a disposition to take effect at his death in favour of that party;—that an entail is a disposition subject to certain conditions in favour of a series of persons, the first of whom is the disponee or institute, and the others heirs-substitutes; but that it depends upon events, whether the person so first named, or any of the others, be in fact the disponee;—that if that person die, without obtaining any right under the disposition, the second member of the entail cannot make up titles to him as an heir or substitute, because there is nothing vested in him which can be taken up by service; and therefore the second member succeeds as disponee in virtue of the conveyance to him, and is described in law as the conditional institute or disponee. In this case, therefore, it was contended, that as there was no vested interest either in William Frederick or Francis John, (seeing they predeceased the entailer, and at a time when the deed was undelivered and subject to revocation,) she could not be served heir to them, nor could she be to her father, because the deed had the effect to divest him at the moment of his death, and therefore she could only take in virtue of that deed, or, in other words, as conditional institute or disponee; and that although a service might be useful to show that her brothers had died without issue, yet this might be equally as well accomplished by a decree of declarator to that effect. With regard to the second defence, she answered, that although the dispositive clause was made in her favour nominatim, yet neither the irritant nor resolutive clauses were directed against

her personally; that they were confined to the heirs of entail, or substitutes or successors; but that she was neither an heir nor a substitute, nor was she a successor to any one under the entail. May 13. 1822.

The Court, on the report of Lord Craigie, found, 'that the 'pursuer is an heir of entail substituted in the deed executed by 'her father, and founded on in her summons; and that she must 'make up her titles to the lands and others contained in that 'deed as an *heir of entail*, subject to the conditions, declarations, 'restrictions, limitations, clauses irritant and resolutive, contained 'in the said deed;' and therefore in so far sustained the defences, and assolzied the defenders. Thereafter, on the 24th November 1818, they found, 'That the pursuer is an heir of entail sub-'stituted in the entail executed by her father, and founded on 'in the summons, and that she must make up her titles to the 'lands and others contained in that deed, subject to the con-'ditions, declarations, restrictions, limitations, clauses irritant and 'resolutive, contained in that deed; and, with this variation, ad-'hered to the interlocutor complained of.' *

The pursuer having appealed, the House of Lords found, 'That, by the terms of the deed of entail in question, the disposi-'tion in favour of the appellant Mary Frederica Elizabeth Stewart 'Mackenzie, by which she can make title to the lands and estates 'in question is, by force of the words in such deeds constituting 'her an heir of entail substituted on failure of her brother Francis 'John Mackenzie, and the other heirs and substitutes by the 'said deed, appointed to succeed to the lands and estates prior 'to the disposition in favour of the said appellant: Therefore it 'is declared, that as her title to the said lands and estates is only 'by force of the words in such deed of entail constituting her 'expressly an heir of entail so substituted, the said appellant 'is bound by the conditions, declarations, restrictions, limitations, 'clauses irritant and resolutive, contained in the said deed of 'entail: And it is ordered, that, with this finding and declaration, 'the cause be remitted back to the Court of Session, to do therein 'as may be consistent therewith, and as shall be just.'

LORD CHANCELLOR.—My Lords, there is another case not of any great difficulty, though I admit it to be a case of great importance—I mean the case of Mackenzie *v.* Mackenzie. That case, to state it in a few words, amounts to this: Your Lordships know that entails are strictissimi juris—I mean those with prohibiting, irritant, and resolutive clauses, and so on; and it has been repeatedly held that a disponee,—that

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* See Fac. Coll. Nov. 24. 1818, where it is said that all the Judges, except Lord Bannatyne, concurred in the interlocutor.

May 13. 1822.

is, the person first named in a disposition, unless he is expressly named, is not to be considered as included by construction or by implication, unless the fetters are expressly imposed upon him, though they are imposed on all the heirs of entail, and even though he might have been, as is held in some of those cases (particularly the Duntreath,) called an heir of entail; and though it is very difficult to find in the statute of entails any description of a disponee, except under the description of heir of entail, yet it has been held,—and having been held, titles must not be shaken by any departure from what has been so held,—that in that case you cannot imply as against him.

Now, my Lords, the facts of this case are these: The author of this entail names A. as the first tail, B. as the second tail, C. as the third tail; and I will say that C. was Mrs. Mackenzie, the party in this case. He has laid the fetters upon all of them nominatim. If he had died the next day, and those three persons had survived him, they would have been all subject to the fetters of the entail, because the fetters of the entail were by express words imposed upon all of them. But the fact is this, that two of them, A. and B., die before the author of the deed dies; then C. comes forward as the first taker under the entail; and it has been argued that although C., if she had remained an heir of entail,—that is, if she had remained an heir of entail postponed to A. and B.—would have been bound by the fetters, yet, in as much as she becomes a disponee, or quasi disponee, and the fetters are not laid upon her as disponee, but laid upon her in the character of heir of entail, and she is no longer an heir of entail, but becomes a disponee, she is not bound by the fetters. My Lords, I confess I cannot adopt that reasoning. I apprehend you are to look to what was the effect of the deed, and the construction of the deed at the time the deed was made; and, therefore, though it may be difficult, and I think it is difficult to support the interlocutor in the particular expressions to be found in it, yet it does appear to me that the judgment of this House will be right, if we pronounce this as our declaration, that she is bound, notwithstanding those circumstances, by the fetters of the entail, and then leave the Court of Session to apply that finding as, in the circumstances of the case, it may be meet and just they should apply it. I beg only to add, that, in forming this opinion, I adhere, I think, to the doctrine, that you are not to imply that you are not to impose fetters by implication, and that it does not appear to me, on examining the whole circumstances, that the judgment would form a contradiction to, or be inconsistent with that finding.

Appellant's Authorities.—(1.)—2. Craig. 2—29; 3. Ersk. 9. 9; 3. Ersk. 8. 75; Leslie, Feb. 17. 1699, (3597); Denholm, Jan. 1723, (6346); Lord Strathnaver, Feb. 2. 1728, (15373); Forbes, Aug. 3. 1756, (14859); Campbell, Nov. 23. 1770, (14949); 1. Bank. p. 231; Inglis, July 16. 1760, (8084); 2. Craig, 17—22, and 29—31; 3. Stair, 5. 25; 3. Ersk. 8. 73; Wellwood, Feb. 23. 1791, (15463); Mercer, June 5. 1745, (9788); Elch. No. 4. Imp. Will, and No. 8. Prov. to Heirs.—(2.)—Menzies, June 25. 1785. (15436); Menzies, Jan. 18. 18039, (Aff. July 20. 1811.)

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

May 24. 1822.

A. MUNDELL,—J. CAMPBELL,—Solicitors.

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

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

No. 35.

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

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

May 24. 1822.

2D DIVISION.
Lord Pitmilly.

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