

No. 42.

Suppose a tenant in tail should alienate his estate gratuitously, and no challenge is brought for forty years, the purchaser is secure, and enjoys the estate as a fee-simple. What then will become of the disponent's debts, such of them as are preserved alive from the negative prescription? The purchaser is liable, as having acquired the estate gratuitously, in prejudice of these debts. This supposed case has a strong analogy to the present.

To shew that a tenant in tail is complete proprietor, a case may be put of an heritable bond granted by a tenant in tail, standing unchallenged forty years after infeftment is taken. The substitutes are barred from their declarator of irritancy, both by the negative and positive prescriptions; and the infeftment must stand good till it be extinguished by payment. This could not be if the full property were not vested in the tenant in tail; for if he were barred by any limitation in his right from granting such deeds, the maxim would be applicable *quod ab initio vitiosum nullo tractu temporis convalescit*; and the objection to a deed as flowing *a non habente potestatem*, can never prescribe.

The following interlocutor was pronounced: "In respect that, by the attainder of the late Earl of Cromarty, his estate, now vested in the Crown, is freed and discharged of all limitations, substitutions, and remainders, Find it not competent to the Crown to found upon clauses prohibitory, irritant, and resolute, which are intended for the benefit of heirs of entail, and for them only; and therefore sustain the claim."

Sel. Dec. No. 191. p. 255.

1762. March 3. LIVINGSTONE *against* LORD NAPIER.

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The Countess of Callander disposed the estate of Westquarter, "to and in favour of herself and her husband, James Earl of Findlater, and the longest liver of them, in life-rent and conjunct fee, and for the said Earl's life-rent use allenary, and to James Livingstone, and the heirs-male of his body; whom failing, such persons as the said Countess should name, by a writing under her hand; and failing said nomination, to the said James Livingstone's heirs and assignees whomsoever;" all under the usual prohibitory, irritant, and resolute clauses. The Countess died without ever having been infeft in the lands. James Livingstone, in his minority, was infeft on an unexecuted precept in a deed granted to the Countess, which was assigned to him in the deed of entail, and which contained all the conditions of the entail; and his father put the entail on record; but, on coming of age, James Livingstone resigned the estate in the hands of the superior, and obtained a charter free of all the restrictions of the entail; whereupon he soon after sold the lands, which came by progress into the possession of Lord Napier. Several years after the death of James Livingstone, his brother served heir of tailzie and provision to the Countess of Callander, under the last substitution of nearest lawful heir whatsoever to James, and brought an action to set aside the

conveyance to Lord Napier and his authors, on the grounds, *1mo*, That James Livingstone had made up no title to the estate, that a service was necessary, and without it the infeftment and subsequent charter were of no effect; or, *2do*, If James Livingstone was held to have completed his title, he was bound by the conditions of the entail, which had been inserted in his first infeftment; and, in either case, the deeds in question were null, and ought to be set aside. Urged in defence, That James Livingstone was joint fiar with the Countess, and not a substitute, and consequently not bound by the fetters of the entail. The Lords found, That James Livingstone was called to the succession as heir substituted to the Countess, and as the Countess' right was personal and complete, a general service of James to the person last infeft was necessary, and therefore that his base infeftment did not vest the lands.—See Livingstone against Napier, 9th March 1757, No. 38. p. 15409.

Fal. Dic. v. 4. p. 335.

* * Affirmed on appeal.

1765. June 14.

MRS. HELEN ADAM LAUDER *against* SIR ANDREW LAUDER, of Fountainhall,
Baronet.

The pursuer, Mrs. Lauder, having been privately married to Mr. Lauder, son to the defender, who, a short time after the marriage, went abroad to the East Indies, without having settled any alimentary provision upon his wife, she found herself under the necessity of having her marriage declared before the Commissaries, whose decree was affirmed by the Court of Session.

Upon this, she brought an action before the Court of Session, against her father-in-law, for an aliment; in which, after a good deal of opposition, the following interlocutor was pronounced by the Court: "In respect of the particular circumstances of the case, and that the pursuer's husband is gone abroad to the East Indies, Sustain action at the pursuer's instance against the defender for aliment, and find the defender liable to aliment her accordingly; and modify said aliment to the sum of £.16 Sterling yearly, to be paid at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at Whitsunday last, for the half year immediately preceding."

In this judgment her father-in-law, Sir Andrew Lauder, acquiesced, until such time as he got intelligence of his son's having died, after receiving an ensign's commission in the East India service.

Upon this he offered a suspension of the interlocutor, and repeated a reduction of it. The grounds upon which he contended that he was no more bound by the interlocutor of the Court, decerning an aliment to his daughter-in-law, were these: That as the charger's claim of aliment was grafted upon her husband's right to

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The widow of an apparent heir to an entailed estate entitled to no aliment after the death of her husband.