

1774. November 29. MAJOR RALPH DUNDAS *against* WILLIAM MURRAY of Touchadam, &c.

TITLE TO PURSUE—TAILYIE.

Whether a very remote substitute, in a tailyie, is entitled, at common law, to pursue a declarator of irritancy against the heir in possession ?

Whether it is necessary that the other heirs of entail should be called into the process ?

[*Fac. Col. VI.* 369 ; *Dict.* 15,430.]

MONBODDO. The first question is, Whether all necessary parties are called ? The pursuer says, that he has called all whom he was bound to call ; and that the heirs not called will be benefited, not hurt by the action. The answer is good. The objection resolves into this, that all parties are not called *qui fovent consimilem causam*. 2d question, Whether an alienation *here* ? I think there is. 3dly, The remaining question is of more doubt, *viz.* Whether this pursuer has any *title* ? And that must depend on the preliminary question, Whether he has any *interest* ? There are two conclusions in this libel : the *first*, as to Mr Murray's right to the estate : Here the pursuer has an interest, because, by setting Mr Murray aside, he becomes the 25th substitute instead of the 26th : This is a remote interest ; but the law does not distinguish between the *greater* and the *less*, more than in the case of a greater and a smaller alienation. The *second* conclusion is as to the right of setting aside liferents : If the liferenters should fail before 40 years, the liferents would not be good against the pursuer. I admit that there would be no use for a reduction. What makes the difficulty is, the admission of Mr Murray's counsel, that, if the liferenters possess for the years of prescription, there will be established a liferent right unchallengeable. Here the liferenters are *in cursu* of establishing a right by positive prescription. If the prescription runs, the party is *valens agere*. I am therefore for sustaining the title.

AUCHINLECK. We have got a frenzy of vote-making. This is a deep game which the defender plays : he seeks to preserve the honour of his family by making votes ; his predecessors took another way, by entailing the estate, and *that* is probably the best of the two. This entail is as strict as the law will allow : all alienations are prohibited. *Here* there are various alienations. The present question is as to the title : It is admitted that Major Dundas is an heir of entail, but it is said that he is *distant* ; still he has a proper interest : by removing the contravener, he is always a step nearer than he was. There is no necessity for calling other heirs to see him do a part of their work. As to the effect which this action will have, that must be tried in the principal cause after the production is satisfied.

JUSTICE-CLERK. All the votes which have been of late created, are contrary to the intention of the law ; but with this we have nothing to do. I cannot exclude the pursuer's title, for none of the counsel have said *where* the line is to be drawn. If one substitute has a right, another has : the

right of each substitute is secured by the same law. One substitute may have a nearer, but not a better right than another. *Here* is a right complete in the person of Major Dundas. He may maintain an action for vindicating his right: this is not like a right of a corporation, or arising *ex societate*, or in a common subject. If this principle is right, Major Dundas has no occasion to call as parties others who may have an equal right with him. He is not bound to call them or wait for their appearing. I would have no doubt as to the irritancy being incurred, were that question to be now determined; for *here* there is an express contravention of the will of the donor. I can see no necessity for all substitutes concurring in this action,—an action even for the exhibition of an entail is competent to all substitutes, to every heir of entail. One or two substitutes were the pursuers in the case of *Carlowrie*. The same thing occurred in the case of *Westshiel*: the case of *Aiton* is also applicable to this case: *there*, as Fountainhall says, the action was at the instance of *remote substitutes*.

COALSTON. I do not blame the defender for extending what is called his political interest; but I must say that he plays a deep game in risking his estate on points of law and the benignity of judges. In judging of this cause, concerning title, we must proceed on the supposition that a forfeiture is incurred. The only question is as to the title, and whether all parties having interest are called. Neither the Act 1681, nor the entail in controversy, gives a title to pursue to a remote substitute. Yet I think that remote substitutes have such right at common law. Wherever there is a wrong, there must be a remedy. If the substitutes have a right created in them, they must have a remedy or right of action: were it otherwise, all entails might be set aside by collusion. The only question arises from the special circumstance, that it is a remote substitute who pursues. The answer is satisfactory. Where can we draw the line? We cannot deprive any substitute of his chance. It is admitted that prescription would be good on the liferent: if so, Major Dundas may be hurt. If an action were brought to set aside the entail, all the heirs ought to be called, for all of them have an interest in supporting the entail. *Here*, the only conclusion is in favour of the heirs of entail: if the defender thinks that a *res judicata* could not follow on this action, Why did he not call the other heirs?

HAILES. This is a singular case. Major Dundas says, that he was obliged to bring this action to maintain his political influence. Polmaise says, that he was induced to make these liferents to enlarge his own political influence, and add to the splendour of his family. The rights under challenge are life-rent superiorities; that is, rights which, from their appearance, must subsist during the life of the grantees. But Polmaise pleads, that they are not rights which can affect any substitute before prescription, and are only indisputable during the life of Polmaise himself: the liferents therefore, *ex facie* absolute, are defeasible after the death of Polmaise; and, if so, are not the rights which they appear to be—and, consequently, afford no title whereon to vote. How then can they add to the splendour of the family?—or, how can they hurt the political influence of Major Dundas?

GARDENSTON. At first, I thought that this was an imaginary sort of right. I am now satisfied that *here* there is a real and substantial interest. There is no proviso in the entail for challenging, except as to the next substitute, be-

cause it is only the next substitute who has a right to take the estate to himself; but every remote substitute has a right to see the entail preserved, and therefore he has an action to that effect. *Here* is not only a liferent, but also a real burden consequent on the liferent. Suppose the feu-duty to be equal to the rent of the estate, this would be an admirable method of docking entails by creating real burdens *debita fundi*, such as feu-duties are. 100 years' feu-duties might be incurred before this substitute succeeds; for, if one liferent may be constituted, why not a succession of liferents?

KAIMES. I have no doubt of the pursuer's interest, for the reasons already given. The objection that all parties having interest are not called, is nothing where the interest is not in common, but in each substitute for himself. The only difficulty lies *here*—May not the defender say, I must call every heir; because an absolvitor against them will be no *res judicata* against the other heirs. It is true that a reduction on the *res judicata* may be tried by all creditors successively; but *that* is a hardship, and perhaps ought not to be extended to other cases.

PRESIDENT. This is not a proper season for determining as to the irritancy. As to the title, I have no doubt. An entail is legal, and entitled to the protection of the law. It creates a separate right in every substitute. If he has a separate right, he must have an interest. If the heir of entail and the substitutes should forfeit, Major Dundas would take the estate as a remainder-man, on the principle established in the case of Park. I never could relish the argument that the chance of succession was small. The law admits not of such calculations. How could I answer to myself if I should suffer the estate to be carried off and the succession should thereafter open to this substitute. The Act 1685, and the entail, relate to the case of the next substitute, declaring an irritancy. To the purpose of making up titles, there is no necessity for calling more parties, or for sisting process till more parties are called. Whenever it is meant to hurt a right, all parties having interest in the preservation of that right must be called. This was the case of *Maxwell of Nithisdale*, which however did not come to a decision. Major Dundas pursues on his own separate estate. A judgment *here* will not indeed afford the exception of *res judicata*, but only a *practique* or *precedent*. There is no help for *that*; the same thing frequently happens. Such is the case, as is admitted on the Act 1621. Such is the case of superior heritors in a fishing. Where inferior heritors are said to fish irregularly, each superior heritor may successively pursue. Thus also, if an apparent heir should try, on a trust-bond, to set an entail aside, and be unsuccessful, every substitute might still try the same question. I do not say that the precedent would not be strong; yet still there would be no *res judicata*. The same is the case when a person pursues the principal without pursuing the cautioner. The cautioner will still be allowed to be heard; so also the different legatees in a testament. *Here* there could at no rate be a *res judicata*, for future heirs might hereafter insist as heirs of entail.

On the 29th November 1774, "the Lords found that there was no occasion to call more parties, and sustained the title."

*Act.* J. M'Laurin, H. Dundas, A. Lockhart. *Alt.* A. Wight. R. M'Queen, *Advocate.*

Hearing in presence, after report by Lord Gardenston.