

1774. *November 29.*

MAJOR RALPH DUNDAS *against* WILLIAM MURRAY of Touchadam, and Others.

No. 48.

Whether a very remote substitute in a tailzie 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?

The defender Mr. Murray had made up titles to his father's estate, in the county of Stirling, upon a tailzie which he had made, in the year 1756, under a variety of prohibitory, irritant, and resolute clauses, by a charter of resignation under the Great Seal, and infeftment following thereon, *in anno* 1759.

Mr. Murray, with a view of supporting his political interest in the county of Stirling, having lately, (as other heirs of entail had done before him) conferred nine several life-rent freehold qualifications over his estate, upon the other defenders in this process, Major Dundas, (who, it seems, was in a different interest) as one of the substitute heirs of tailzie under the settlement of that estate, executed by the late Touchadam, brought an action, concluding to have it found and declared, as against Mr. Murray of Touchadam himself, that, by so doing, he has irritated and forfeited his right to that whole estate, which thereby accresces and devolves to the next heir of entail, free and disburdened of any of these liferents; and against the other defenders, the grantees of these freehold qualifications, for having the same reduced and declared null and void, and to be no effectual burden upon said estate.

It was objected for the defenders, *1mo*, That the pursuer had no title to carry on this action; and, *2do*, Supposing him to have such a title, the action could not proceed until all the heirs of entail that are now alive were called and brought into the field.

Upon the *first* of these points, pleaded for the defenders: That no action can be maintained, unless the pursuer of it can show that he has both an interest and a title to carry it on. Now, this pursuer cannot possibly show that he has either the one or the other.

With regard to his having an interest, in the *first* place, as, before the succession can open to this pursuer, no less than twenty-five substitutes specially named, and their heirs, must fail, it is at least morally impossible that any one of the life-rent rights, now sought to be set aside, can be in existence when that event shall take place, if ever it take place at all.

With regard to the pursuer's title: However competent it might be to the next heir in succession to insist in an action for irritating the right of the heir in possession, on account of his granting the deeds in question, and to maintain a declarator of contravention against him, this pursuer, who is so remote a substitute, can have no title to insist in such action. The act of Parliament 1685 authorises the next heir of tailzie alone to insist in a declarator of contravention. Again, the pursuer's title, instead of being aided by the terms of the entail, seems rather to be thereby totally excluded in the present case. And, in support of his com-

mon law title, the pursuer is obliged to resort to the plea of his having an interest ; but it has already been shown, that he has none in the present case.

Upon the *second* point : The necessity of what is here required is apparent from this single consideration, that no decree, to be pronounced in the defender's favour in the present action, will have the effect of a *res judicata* against any one of the heirs of entail but the pursuer himself. The entail mentions all the substitutes by name, and the pursuer can be under no difficulty of calling them into the field ; at least, all further procedure in this action ought to be sisted until the defender Mr. Murray shall have time to raise a declarator at his instance against these heirs, for having it found and declared that he had power to grant the deeds in question, and that, by doing so, he did not incur a contravention of the entail.

Answered, upon the *first* point : Every heir of entail, without distinction, whether near, or remote, is a creditor to all the former heirs of entail, to compel a strict observance of the several conditions therein contained. There is an immediate right vested in them, though it cannot operate *cum effectu* till the succession opens to them. Remoter heirs of tailzie are entitled to sue for and compel registration of the entail, to oblige the heir first in succession to establish his titles upon the footing of the entail, and to engross therein all the prohibitory, irritant, and resolute clauses, as the only effectual security against alienating or burdening. His being near, or at a greater distance, in the line of succession, may render it more or less probable that the estate will devolve to him for many generations to come, if ever ; but the mere possibility gives him both a title and an interest ; and the maker of the entail did undoubtedly consider it in that light, when he placed him in the line of succession, and several others behind him.

It was no ways essential or necessary, that the deed of entail should specify to whom the right of action should accrue, upon the irritancy committed by the heir in possession ; *inerat de jure*, if nothing to the contrary was provided. Where there is a right, there must be an action to make it effectual ; and, wherever there is a wrong, there must be a remedy. Every heir of entail has an interest, common with the whole heirs of entail, that the estate should be relieved of every burden imposed upon the same, not authorised by the tailzie ; and he has an interest peculiar to himself, that, by declaring the irritancy against the contravener, he takes him out of the line, and brings the estate one degree nearer to himself.

One of the conditions of the entail is against altering the course of succession. The heir in possession colluding with the heir next in order, makes a total change in the course of succession. If the remoter heirs are not entitled to challenge the same, or declare the irritancy, there is an end of the tailzie, and an independent title set up, which, if not effectual *ab initio*, may be a good title of prescription to cut off the right of the remoter heirs, while, at the same time, their hands are bound up from interrupting the prescription. This is a system adverse to every principle of law, justice, or reason.

Next, The absurdity of the *second* branch of the defence must be obvious. The estate vests in that person, who, in the character of heir, possesses the same : He is

No. 48. the legal representative of the whole heirs: In matters respecting their common interest, he is entitled to defend the estate against every invasion; and any judgment for or against him will operate in favour of or against all the after heirs when they come to succeed. If the defender shall prevail, in having it found that he is at liberty to grant life-rents, as burdens upon this estate, the benefit of that judgment will accrue to the after heirs of tailzie, if they shall be disposed to follow the defender's example; and, on the other hand, if judgment goes against him, no after heir of entail will dare to attempt the imposition of such burdens upon the estate in time coming.

The Court "sustained the pursuer's title, and found there was no necessity to call any other parties."

Act. *Dean of Faculty, et alii.*

Alt. *Solicitor General Dundas, Wight.*

Clerk, *Tait.*

*Fac. Coll. No. 141. p. 369.*

1780. *January 14.*

LIN DILLON *against* JOHN CAMPBELL.

No. 49.  
Tailzie of  
burgage tenements.

The late Mr. Campbell of Blythswood set in tack to Lin Dillon a tenement in the town of Glasgow, consisting of two old houses and a small garden, and became bound to pay, at the end of the lease, the value of the buildings erected by the tenant.

Upon Mr. Campbell's death, the estate of Blythswood, comprehending this tenement, was taken up by his son, as heir under a strict entail; who, upon the expiry of the lease, was sued in an action for the value of the buildings erected in consequence of the stipulation above recited.

In this action the Lord Ordinary assoilzied the defender, "in respect it was not alledged that he represented the late Blythswood in any other manner than as heir of entail in the estate of Blythswood; which entail contains the usual prohibitory, irritant, and resolute clauses, *de non alienando vel contrahendo debita.*"

Against this judgment the pursuer reclaimed, and

Pleaded: The statute 1685, authorising entails, was calculated to perpetuate great estates, and cannot be extended to burgage-tenements, like the present.

This plea was without difficulty over-ruled by the Court.

Pleaded, *2do*, By the improvements in question, the defender enjoys an addition to his fortune and income. To that extent, therefore, independently of any passive title, he must be liable, upon the principle, "*Quod nemo debet cum aliena jactura fieri locupletior.*" Nor can the statute 1685, by which heirs of entail are prevented from selling, or burdening the estate with debt, be understood to bar claims of this equitable nature. The present case is analogous to that where a person, by the imbankment of a river, has preserved an estate from total annihilation, Kames's *Elucidations*, Art. 43.; or where one has rebuilt a house which