

had been burnt, and who has been found to have even a real security on the subject; February 22, 1706, Temple *contra* Gairns, No. 8. p. 15355.

No. 49.

The statute 10th Geo. III. C. 51. was necessary for enabling Heirs of entail to grant such leases as, on account of their extraordinary endurance, were deemed equivalent to an alienation of the land itself ; and for subjecting succeeding heirs of entail to the expense laid out by their predecessors in meliorations, even where these had ceased to exist. From that enactment, therefore, it cannot be concluded, that this claim, which does not fall under the statute, must be altogether ineffectual against the heir of entail.

Answered : A party contracting with the proprietor of an entailed estate must be presumed to have framed his stipulations with a view to the precarious tenure of his debtor. Equity, therefore, cannot interpose to give effect to them after the right of the debtor is at an end. As little can equity interpose to oblige the defender to purchase a subject belonging to another, which is perishable in its nature, and which he can enjoy only for the period of his own life.

There is no instance hitherto known, where a debt binding on a person in the character of heir of entail, may not be the ground of attaching by legal diligence the estate itself. A decision favourable to the pursuer, therefore, must in the end annihilate all settlements of entail, by authorising heirs in possession to enter into engagements of this sort. It must entirely supersede the statute of the 10th of his present Majesty, providing, under proper limitations, for the improvement of entailed estates. As the principle on which it would rest, has no relation to the value of the estate, or the duration of the defender's right, it is even repugnant to that statute, which enacts, that the improvements shall not exceed four year's rent, and shall only be chargeable on each heir by certain rules there established.

The Lords at first moved by the equitable nature of the pursuer's demand, " found the defendant liable in the prestations of the lease ;" but, upon advising a reclaiming petition, with answers, they returned to the judgment of the Lord Ordinary.

1783. March 1.

MRS. DALRYMPLE of Orangefield, and JAMES DALRYMPLE, her eldest Son,
against The COUNTESS of GLENCAIRN, and Others.

By the terms of the entail executed by Governor Macrae, of his estates in the county of Ayr, the limitations, which were guarded by the usual prohibitory, irritant, and resolutive clauses, affected only the *nominatim* substitutes, whilst their descendants who were called after them were laid under no restrictions.

Mrs. Macrae Macguire, the wife of Mr. Charles Darlymple, succeeded in virtue of this entail, as a *nominatum* substitute, to the estate of Orangefield, and

No. 50.
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stitutes.

No. 50. being desirous to dispose of it, she granted to her eldest son and heir, James Dalrymple, a disposition, referring to Governor Macrae's settlement.

Mr. James Dalrymple then entered into a minute of sale concerning the estate, the validity of which came to be tried, in a declaratory action, instituted against the other heirs of entail by Mrs. Dalrymple and her son; for whom it was

Pleaded: By directing the prohibitions against the *nominativum* substitutes alone, and leaving to their heirs the absolute and unlimited property of this estate, Governor Macrae's evident purpose was merely to prevent the former, in the event of their having no issue of their own, from alienating the lands in favour of a stranger. In disposing therefore to her eldest son and her, Mrs. Dalrymple, instead of counteracting, has literally fulfilled the intention of the tailzier. Even in the case of an entail, guarded with the necessary clauses against the whole persons called to the succession, the power of an heir in possession, to denude of all or part of the estate in favour of his apparent heir, has been long acknowledged. *A fortiori*, such a power must be competent in the present instance.

Answered: By this entail, which is secured by the requisites prescribed by statute 1685, it is, in words the most clear and unambiguous, provided, that no deed by the *nominativum* substitute shall disappoint the order of succession therein established. Hence, as the transaction in dispute has for its avowed object a departure from these regulations, it must not only be destitute of effect, but must also found the defenders in an action of irritancy against Mrs. Dalrymple, in whose foefiture, it is to be remarked, by the tenor of this entail, that of her descendants is unavoidably included.

Neither is it of importance, that the children of Mrs. Dalrymple, by the singular construction of this settlement, will take the estate upon her death as a fee simple, it being a possible case, that before that period, these children, however numerous, may be extinct; an event by which the succession would devolve on the other substitutes, unaffected by her deeds. Nor can the permission given in ordinary entails, of making settlements in favour of apparent heirs, which can be attended with no disappointment of the entaller's views, be extended to warrant a transaction confessedly calculated to derange the order of succession proposed in this case by Governor Macrae.

The Court were of opinion, that this bargain, if carried into execution by Mrs. Dalrymple, would infer a contravention of the entail; and therefore assailed the defenders

Lord Reporter, *Stonefield*.
John Erskine.

Act. *Ilay Campbell, R. Dundas.*
Clerk, *Home*.

Alt. *George Ferguson,*

Fac. Coll. No. 103. p. 163.

C.

* * * This case was appealed. The House of Lords, 17th June, 1784, ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors therein complained of affirmed.