

Wednesday, May 13.

OUTER HOUSE.

[Lord Stormonth Darling.

MACKIE v. MACKIE.

*Feudal Title—Disposition of Lands a non domino—Mora—Personal Bar.*

The true owner of lands cannot be barred, by delay in taking steps to establish his claim, from challenging a right which is founded on a disposition *a non domino*, and has not been fortified by prescription.

In 1886 an illegitimate son made up a title by special service to lands forming part of the intestate estate of his father, and in 1889 sold them to a purchaser, who took them in reliance on the title thus appearing *ex facie* of the records. The heir-at-law was cognisant of the facts establishing the illegitimacy. In 1894 he brought a reduction of the title of the son and of the purchaser. Held that as the title of the latter, proceeding on a disposition *a non domino*, was subject to a radical defect, the plea of personal bar against the heir-at-law was irrelevant.

This was an action of declaration of the illegitimacy of John Mackie junior, house and insurance agent, St John Street, Edinburgh, and of reduction of a decree of special service, dated 8th February, and recorded in the General Register of Sasines 8th March 1886, whereby the said John Mackie was served heir in special to his reputed father, the deceased John Mackie senior, house factor, formerly residing in Edinburgh, and of a disposition of subjects at 21 St John Street, Edinburgh, granted by John Mackie junior, in favour of the Edinburgh and Leith Brewing Company Limited, dated 30th, and recorded in the General Register of Sasines 31st August 1889.

The action was at the instance of Robert Menzies, S.S.C., Edinburgh, acting as mandatory for William Mackie, Queensland, Australia, a brother of John Mackie senior, and failing John Mackie junior, his heir and one of his next-of-kin. It was defended by John Mackie junior, and by the Edinburgh and Leith Brewing Company, to whom the Edinburgh and Leith Brewing Company had transferred their rights under the disposition granted by John Mackie junior.

For both defenders it was pleaded—"The pursuer is barred by *mora*, taciturnity, and acquiescence from insisting in the conclusions of the action."

A proof was taken, the import of which appears in the following opinion of the Lord Ordinary:—

*Opinion*—"I hold it proved by the oral and documentary evidence in the case that the defender John Mackie is the son of the late John Mackie and Jane Stevenson or Macdonald; that he was born in the year 1851; that his parents were not married till 12th October 1854; that at the date of

his birth his father's first wife Elizabeth Sutherland was alive, and that she did not die till May 25th 1854. The legal result of these facts is, that the defender was incapable of legitimation by the subsequent marriage of his parents, and that he is not the lawful son of the late John Mackie. I regret to reach this result, but I think it is inevitable.

"One of the properties the title to which is in question was sold by the leading defender in 1889 to the Edinburgh and Leith Brewing Company, who transferred it a few months later to the defenders the Edinburgh United Breweries, Limited. It is not pretended that either of these companies had any reason to doubt the leading defender's legitimacy, or to question the validity of the service which he had obtained. With reference to this property, therefore, the question arises whether the pursuer is entitled to recover it from *bona fide* disponees for value who have acquired it on the faith of the records.

"Apart from the pursuer's silence and delay from December 1885 to January 1894 this question would not I think present much difficulty. A disposition *a non domino* cannot be validated by anything short of prescriptive possession. If a true heir resident abroad and ignorant of his ancestor's death was to find on his return to this country that a remoter heir had taken out service to the family estate in his own favour, I cannot doubt that even at an interval of 19 years from the date of the false service he would be entitled to vindicate the estate from a purchaser, however onerous and *bona fide* he might be. In that case of course there would be no blame imputable to the true heir.

"In the present case the circumstances are different. The pursuer was told of his brother's death immediately after it occurred. He knew then all that he knows now about the status of the leading defender. He gives no satisfactory explanation of his delay in raising the action, except that at first he was uncertain whether his brother had left a will. That might sufficiently account for a portion of the time which he allowed to elapse, but it does not account for anything like the whole. If, therefore, it was a sufficient answer to the pursuer's claim to show that he had slept upon his rights, I should be disposed to say that he had.

"But the real question in this case (and I think it is a question of difficulty) is, whether the plea of personal bar is available at all against the pursuer. There are undoubtedly cases where a true owner is barred from recovering property from a *bona fide* onerous disponee, though he would be permitted to recover it from the person who had disposed it. Perhaps the most familiar example is where a trustee holds property, whether heritable or movable, on a title *ex facie* absolute, and transfers it to a third party for value. In such a case, though the conduct of the trustee may be in breach of his duty, or even grossly fraudulent, he can communicate a valid right to his disponee. But, as explained by Lord Watson

in *Heritable Reversionary Company v. Miller*, 1892, App. Cas. 610, the validity of the disponent's right 'does not rest on the recognition of any power in the trustee which he can lawfully exercise, because breach of trust duty and wilful fraud can never be in themselves lawful, but upon the well-known principle that a true owner who chooses to conceal his right from the public, and to clothe his trustee with all the *indicia* of ownership, is thereby barred from challenging rights acquired by innocent third parties for onerous considerations under contract from the fraudulent trustee. There, however, the peculiarity is that the true owner has himself clothed the trustee with the legal title either by conveying the subject or by directing it to be conveyed in the trustee's favour. The trustee has therefore a good title to convey to a third party, and all that the true owner has to complain of is the trustee's breach of a personal obligation. That is a complaint good against him but not good against the donee. A different rule must, I think, apply where the true heir has done nothing active to confer a title upon the false heir, but has merely been dilatory in asserting his rights. In that case (which is the present) the title is infected by what Baron Hume (in his commentary on the case of *Calder v. Stewart*, at p. 446 of his Decisions), calls 'a *labes realis* intrinsic to the real and feudal right, and touching therefore all who acquire the subject how onerously and fairly soever.' It seems to me to be impossible to hold, consistently with sound principle that so radical a vice in title can be cured by a mere plea of personal bar, or indeed by anything short of prescription.

"Assuming I am right on the facts, there is no dispute as to the pursuer's right to decree of reduction with regard to the other properties which have not been transferred. The conclusions for accounting cannot be disposed of until an account has been lodged by the leading defender, and it may be that under that head the pursuer will have to suffer for his delay in raising the action."

Counsel for the Pursuer—Sym. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defender Mackie—Graham Stewart—Sandeman. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Defenders The United Breweries, Limited—H. Johnston—Cooper. Agents—Philip, Laing, & Company, S.S.C.

Friday, October 23.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

ROTTENBURG v. DUNCAN AND OTHERS.

Process—Amendment of Record—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 29.

In an action by the purchaser of a share in a ship, the title to which, at the date of the purchase, was vested in certain of the defenders, the pursuer averred that they had, in breach of trust, and without his authority, sold the ship to another of the defenders. In the record, as originally framed, the pursuer claimed repayment of the price of his share, with interest from the date of the purchase, or, alternatively, from the date of the alleged alienation, and for an accounting up to that period. After the action had been brought on appeal to the Inner House, the pursuer craved leave to add averments and pleas to his record, in which he claimed the sum sued for as damages due to him by the defenders.

The Court allowed the amendments.

Process—Judgment—Cancelling Interlocutor.

The Court issued an interlocutor in an action founded on a tender by the defenders. Between the date of the tender and the interlocutor the subjects tendered were sold by mortgages, but *per incuriam* of the defenders this fact was not stated in Court. On the motion of parties the Court cancelled the interlocutor and continued the cause.

This was an action at the instance of Paul Rottenburg, merchant, Glasgow, against John Duncan, Hope Street, Glasgow, James Brown, coal merchant, Glasgow, and the Triton Steamship Company, concluding against the defenders, jointly and severally, for payment of the sum of £450 with interest from 9th May 1892, or (*second*) for payment of £450 with interest from 2nd January 1895; and for an account of their intrusions with the funds and estate of the steamship "Triton" from May 1892 to January 1895, and payment to the pursuer of his share of the balance of profits.

The pursuer averred that the defenders Duncan and Brown were two of the persons in whom the steamship "Triton" was, until shortly before the action was raised, vested, and that she was held by them, along with Thomas Brown, Milford Haven, in trust for the defenders, the Triton Steam Ship Company; that on 9th May 1892 the pursuer invested £450 in the purchase of a part interest in the steamship "Triton"; that in December 1892 a limited company was formed to acquire the ship, and without the pursuer's authority, he was entered as a shareholder; that the