

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

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 defender liable in the prestations of the lease;" but, upon advising a reclaiming petition, with answers, they returned to the judgment of the Lord Ordinary.

Lord Ordinary, *Braxfield.* Act. *Cullen.* Alt. *Swinton, Ilay Campbell* Clerk, *Tait.*  
C. *Fac. Coll. No. 99. p. 190.*

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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 resolute 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 Dalrymple, succeeded in virtue of this entail, as a *nominatim* substitute, to the estate of Orangefield, and

No. 50.

Entail where the limitations affected only the *nominatim* substitutes.