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conveyance to Lord Napier and his authors, on the grounds, *1mo*, That James Livingstone had made up no title to the estate, that a service was necessary, and without it the infeftment and subsequent charter were of no effect; or, *2do*, If James Livingstone was held to have completed his title, he was bound by the conditions of the entail, which had been inserted in his first infeftment; and, in either case, the deeds in question were null, and ought to be set aside. Urged in defence, That James Livingstone was joint fiar with the Countess, and not a substitute, and consequently not bound by the fetters of the entail. The Lords found, That James Livingstone was called to the succession as heir substituted to the Countess, and as the Countess' right was personal and complete, a general service of James to the person last infeft was necessary, and therefore that his base infeftment did not vest the lands.—See Livingstone against Napier, 9th March 1757, No. 38. p. 15409.

*Fol. Dic. v. 4. p. 335.*

*** Affirmed on appeal.

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1765. *June* 14.

MRS. HELEN ADAM LAUDER *against* SIR ANDREW LAUDER, of Fountainhall, Baronet.

No. 44.
The widow of an apparent heir to an entailed estate entitled to no aliment after the death of her husband.

The pursuer, Mrs. Lauder, having been privately married to Mr. Lauder, son to the defender, who, a short time after the marriage, went abroad to the East Indies, without having settled any alimentary provision upon his wife, she found herself under the necessity of having her marriage declared before the Commissaries, whose decree was affirmed by the Court of Session.

Upon this, she brought an action before the Court of Session, against her father-in-law, for an aliment; in which, after a good deal of opposition, the following interlocutor was pronounced by the Court: "In respect of the particular circumstances of the case, and that the pursuer's husband is gone abroad to the East Indies, Sustain action at the pursuer's instance against the defender for aliment, and find the defender liable to aliment her accordingly; and modify said aliment to the sum of £.16 Sterling yearly, to be paid at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at Whitsunday last, for the half year immediately preceding."

In this judgment her father-in-law, Sir Andrew Lauder, acquiesced, until such time as he got intelligence of his son's having died, after receiving an ensign's commission in the East India service.

Upon this he offered a suspension of the interlocutor, and repeated a reduction of it. The grounds upon which he contended that he was no more bound by the interlocutor of the Court, decerning an aliment to his daughter-in-law, were these: That as the charger's claim of aliment was grafted upon her husband's right to

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aliment, as the apparent heir of his father in an entailed estate, it must fall with his right, which undoubtedly determined with his life: That the natural obligation upon parents to maintain their children, when unable to support themselves, could not avail the charger in the present case. He had done every thing already that he could be compelled to do in consequence of this natural obligation, as he had equipped his son, upon his going to the East Indies, after giving him a suitable education, at a much greater expence than his small fortune could afford, or his family spare, which consisted of ten younger children, all unprovided: That though, by the statute 1491, an heir is entitled to an aliment when his estate is totally liferented, yet this claim subsists no longer than his character of heir and fiar remain. If he should renounce, and betake himself to singular titles to the estate, he would have no right to an aliment from the life-rentrix: That the right to an aliment by an heir-apparent in an entailed estate was derived from this statute, and could subsist no longer than his apparency continued, which certainly died with himself.

That a wife, upon her marriage, became entitled to all the rights and privileges belonging to her husband, which were transmissible by him, and in his power to alienate.

But the claim of an apparent heir of tailzie was not of this sort: That his right was strictly personal to himself, and intransmissible to any other person; and whatever pretensions his wife may have in the right of her husband during his life, yet, as that right died with himself, it was impossible it could subsist, after he was gone, in her person. If such was the case, an heir of entail, who is no better than a life-renter, might, without any act or consent of his own, be loaded with alimentary provisions to several wives at the same time, sufficient to exhaust the estate.

The charger, on the other hand, supported her plea of aliment upon the general principle of parents being under a natural and indispensable obligation to maintain and aliment their children:

That, if a father was bound to aliment his son, when otherwise unprovided, this right competent to the child, behoved necessarily to be communicated to his wife, as wives are unquestionably entitled to all the privileges belonging to their husbands: That the connection between man and wife was so intimate, that, in all matters where the civil rights of either are concerned, the greatest doctors in the canon, the municipal, and natural law, have uniformly been of opinion, that there was no distinction to be made, the parties themselves being considered as one flesh. A great many learned authorities were quoted in support of this doctrine, and particularly from the civilians, to show in what an extensive sense this obligation upon parents was interpreted, in every country where the Roman constitutions had prevailed: That, under the appellation of children, a son's wife was always comprehended, and that a father was as much bound to support his *nurus*, or daughter-in-law, as he was his own son: That where the natural

obligation was so strong, the particular institutions of any state were hardly sufficient to dissolve it:

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That the law of this country, so far from having laid down any rules inconsistent with this obligation, was, in every case, particularly attentive to the interest and provision of wives; and it appeared extremely hard, that, when a right is acknowledged to be competent to an heir of tailzie, his wife, who participates of every other, should be excluded from that, for no other reason but because the law in this instance favoured the interest of her husband.

"The Court found no aliment due." See No. 30. p. 400.

*Montgomery & M'Intosh.*

*A. C.* *Fac. Coll. No.* 14. *p.* 23.

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1768. *January* 27. ANNE MACLAUCHLAN *against* JOHN MACLAUCHLAN.

No. 45.
**Tailzie of a small burgage tenement.**

A formal tailzie was executed of a small burgage tenement, of a few acres of land, worth £.10 of yearly rent, with all the clauses usual in tailzies of great estates, for taking the name and arms of the family, allowing provisions to children to the extent of three years free rent, &c.

John Maclauchlan, the heir in possession, and whose son was excluded by the tailzie, wishing to set it aside, disponed the lands in trust, with a view of bringing a reduction in name of his trustee.

The next substitute, Anne Maclauchlan, brought a reduction and declarator of irritancy, in which she founded upon the trust disposition as an act of contravention

Objected, 1*mo*, Tailzies were introduced for securing the succession to *estates*, properly so called, and not for perpetuating a trifling burgage tenement, like that in question.

2*do*, The mere granting a disposition does not infer an irritancy till infeftment be taken, agreeably to the principle established, 18th July, 1722, Scot of Gala *contra* Creditors of Gala, Sect. 5. *h. t.* and ever since understood to be law, that the contracting of debt does not irritate the right of the heir contravening, till it be made real upon the estate by adjudication.

Answered to the 1*st*: The act 1685 is general, extending to all lands, without distinction; and tailzies even of houses in burghs are not uncommon.

To the 2*d*: The clause in the tailzie is express, That it shall not be lawful to sell or impignorate the subjects; and the prohibition is fortified with a proper irritant and resolutive clause. The irritancy is declared to operate *ipso facto*, and therefore cannot be purged. This was found even in the case of the statutory irritancy, incurred by neglecting to ingross the clauses of the tailzie in a general retour; Denham *contra* Denham, No. 94. p. 7275.; and it must hold *a fortiori* in conventional irritancies, to which greater weight is justly given.