

1783. January 23. EARL OF EGLINTON *against* EARL OF LAUDERDALE.

COMPETITION.

In a Competition between the singular successor of a reverser, entitled to redeem upon an elusory prestation, and the heir of the nominal fiar, the singular successor preferred.

[*Fac. Coll. IX. 124; Dict. 2864.*]

BRAXFIELD. Lord Lauderdale produces, as his title, a charter and infeftment in 1642, together with a charge to enter heir to his predecessor; but he does not allege any possession. This is no better than if the charter had been granted yesterday. A recent charter, without its warrant, is good for nothing: the progress on the other side is sufficient. As to the other points of the cause: In modern times, when a man executes a settlement, and yet means to keep his estate in his own power, he reserves liberty to alter: without exercising this faculty he may contract debt, and, if he commits treason, he will forfeit. In Lord Lovat's case, the nominal fee was in the son, but the substantial right was found to be in the father. A donation, made by a husband to a wife, will be good if not revoked, and yet it will serve no purpose if the husband contracts debts, for then the creditors of the husband will be preferable. Lord Abercorn conveyed lands and patronages to Lord Lauderdale, redeemable for 20 merks; the substantial fee was in Lord Abercorn, and the order of redemption was a mere form. If an order was to be held necessary, I should, *post tantum temporis*, presume that it was used. The case of a wadsetter is very different, for the substantial right is in him, and he must be denuded. I should be sorry to see real property in the law of Scotland dance backward and forward.

JUSTICE-CLERK. All the rest of the estate conveyed to Lord Lauderdale in 1642 has been possessed in consequence of different progresses from Lord Abercorn, and I cannot suppose this solitary patronage to be in a different situation.

ESKSGROVE. I doubt as to Lord Braxfield's doctrine concerning a charter and infeftment without possession, more especially as Lord Eglinton does not produce the original disposition any more than Lord Lauderdale does, and that the one claimant can no more plead possession than the other. The letter of reversion is good, because there is no improbation proponed. Lord Eglinton's right is good in time coming, but my only doubt is as to its effect before he claimed it; and I think that the presentation, given by Lord Lauderdale, must be effectual as to this vice.

HAILES. That cannot be ; for then the Court, deciding against Lord Lauderdale, would give him all the effects of a favourable judgment. The interlocutor of the Ordinary could not mean that Lord Lauderdale should have any right, after evidence of a reversion used ; and Lord Eglinton would have used that order directly : so that Lord Lauderdale's right could never have gone beyond this vice.

PRESIDENT. The disposition by Lord Abercorn to Lord Angus carried the real right to him and his successors. If an order of redemption is necessary, the right is in Lord Lauderdale ; but, *post tantum temporis*, I will presume that such order was used. From the circumstances of the case, I would allow a declarator of trust in consequence of the disposition to Lord Angus and the long taciturnity.

On the 23d January 1783, "The Lords preferred Lord Eglinton, and discerned in his declarator ;" altering the interlocutor of Lord Hailes.

For Lord Lauderdale, Ilay Campbell. *Alt.* A. Wight.

1783. February 6. ALEXANDER LESLEY *against* JOHN STUART.

PRISONER.

Act of Grace, whether applicable to persons imprisoned for penalties imposed for security of the Revenue ?

[*Faculty Collection*, IX. 140 ; *Dictionary*, 11,817.]

BRAXFIELD. It is a *malum in se* to counteract a statute. This is a species of smuggling on which punishment has been inflicted ; so the case falls not within the Act 1696.

PRESIDENT. The fine does not come in place of the license : the sum paid for the license goes to the public, the fine to the king's privy purse. The case of *Burnet* is nothing to the purpose : all that was found in that case was, that certain revenue preferences did not extend to Scotland. I never heard that the king was liable to pay aliment.

JUSTICE-CLERK. The fine is merely a penalty for offence : the form of prosecution makes no difference ; there are many penalties recovered before Justices of Peace, by horning and caption.

ESK GROVE. No aliment is due when the imprisonment is for payment of a fine ; but there may, when for damages arising *ex delicto*.

GARDENSTON. In England, the imprisonment is for three months ; how then can it be perpetual in Scotland ?