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the heir in possession. Besides, the act 1690, enacting that no heir of entail shall be prejudged by the forfeiture of his predecessor, provided the entail be registered conform to the act 1685, manifestly supposes that all entails containing prohibitive, irritant, and resolutive clauses, ought to be recorded.

For the Appellant, *C. York, Al. Wedderburn.*

For the Respondents, *Jas. Montgomery, Thos. Lockhart.*

NOTE—The 2nd point was not appealed, as is supposed by Professor Bell, (Com. vol. i. p. 659, n. 1.)

THE EARL OF ROSEBERRY, ... *Appellant;*

WM. FOULIS, Esq. and OTHERS, the Heirs-Substitutes and Creditors of the Entailed Estate of Primrose, ... } *Respondents.*

House of Lords, 4th May 1770.

ENTAIL—PROHIBITION AGAINST CONTRACTING DEBTS.—An entail was executed of an estate, with prohibitory, irritant, and resolutive clauses, directed against the contraction of debt, or burdening the estate, or selling or alienating the same. A subsequent heir of entail having contracted debt, a succeeding heir of entail applied to the Court for liberty to sell part of the estate for payment thereof: Held, that by the conception of the entail, the pursuer could not sell for the payment of debts. Affirmed in the House of Lords, on the special ground, that the debts were contracted since the death of the entailer, contrary to his intention.

The estate of Carrington originally belonged to Sir Archibald Primrose, and afterwards to his grandson, Hugh Lord Viscount Primrose. It stood devised by strict entail, executed by the said Archibald to his eldest son William, and the heirs male of his body, remainder to his youngest son Archibald, and the heirs male of his body, with several remainders over. It contained prohibitive, irritant, and resolutive clauses against altering the order of succession, aliening the estate in whole or in part, charging it with debts, or doing any fact or deed by which the same might be apprised or adjudged. The entail itself was lost, but charter under the great seal, 9th December 1681, passed thereupon in favour of the son, which, with the instrument of sasine, were extant; but the entail was never recorded in the register of tailzies.

In 1741, the male line of Sir William Primrose having failed, by the death of Hugh Lord Viscount Primrose without issue, James Earl of Roseberry, the appellant's father, eldest son of Archibald Primrose, the second son of the maker of the entail, was served heir of tailzie to his cousin, Lord Primrose, and was infeft in Carrington in 1742.

The question was, Whether this entail of the Carrington estate

was good against the debts of the creditors of his father and of Lord Primrose. The appellant having brought an action (ranking and sale) for the sale of part of the estate for the purpose of paying off these debts, and praying the Court to "authorise a sale of as much of the "said lands and estate as will pay the said debts, and to find and de- "clare that by such sale the appellant shall not incur any irritancy of "the entail." The respondent contended that the entail gave no power to sell part of the estate for the said debts.

The Court, after full memorials, "found, and hereby find, That "by the conception of the entail of the estate of Primrose (Carring- "ton) neither the pursuer (appellant) nor any of the heirs of entail, "are empowered to sell any part of the estate for payment of the "debts, and therefore refuse to interfere or authorise any sale for "that purpose." Mar. 6, 1770.

Against this interlocutor the present appeal was brought to the House of Lords.

After counsel were heard, it was

Ordered and adjudged that the interlocutor be affirmed, because the debts in this case have arisen since the death of the maker of the entail, contrary to his intention, and from a cause which he could not foresee; without prejudice to the question, if the debts had been contracted by the maker of the entail, or any of his predecessors.

For the Appellant, *Jas. Montgomery.*

Ex parte.

MRS. MARGARET HOUSTON STEWART NICOLSON, *Appellant;*

HOUSTON STEWART NICOLSON, ESQ., *Respondent.*

House of Lords, 18th Feb. 1771.

DIVORCE—PROOF—ADMISSIBILITY OF PARTICEPS CRIMINIS—ALSO OF A SLAVE.—In the course of a proof, in an action of divorce against the wife, the party with whom she had adultery was adduced as a witness against her: Held him admissible as a witness. This judgment affirmed in the House of Lords. It was also objected to a slave, that he was incapable of bearing testimony, he not being a Christian, or able to take the usual oath. The Court of Session ordered him to be examined as to his belief or creed. This affirmed on appeal.

This was an action of divorce brought by the respondent against his wife, on the ground of adultery, committed by her with William Graham, a servant man to Sir William Maxwell of Springkell, while on a visit at Springkell.

A proof being allowed by the Commissaries, in the course thereof the appellant stated certain objections to the witnesses offered as incompetent in law.