

1784. June 29.

MAJOR STEPHEN BROOMFIELD *against* MRS. ANNE PATERSON.

## No. 145.

Whether a deed of entail being a continuation of a prior one inserted in the register of tailzies ought likewise to be recorded?

Whether it is sufficient that the restrictive clauses of such a deed be engrossed in the instruments of sasine and resignation?

In 1743, Sir John Paterson of Eccles executed an entail of his estate in favour of his grandson, with the usual prohibitory, irritant, and resolute clauses, under the reserved power of revoking or altering it at his pleasure. This entail was completed by infestment, and was recorded in the register of tailzies.

Afterwards, by another writing, he made a formal renunciation of the power of revocation. This deed, which was merely personal, was recorded in the above-mentioned register only.

In 1758, a new deed was executed by Sir John, with the consent of his grandson, the institute in the former entail, containing a disposition of the lands, differing materially from that settlement in respect of destination, and other circumstances. Instead of repeating in this the restraints of the foregoing deed, the following reference was made: "With and under the provisions, conditions, irritant and resolute clauses, as contained in the original bond of tailzie, and in the charter and infestment following thereon." This deed was not recorded in the register of tailzies.

The entailer having died, he was succeeded by the institute, who was the late Sir John Paterson. By him the procuratory contained in the last-mentioned settlement was executed; and in the instruments both of resignation and of sasine which followed, all the prohibitory and irritant clauses of the former entail were specially engrossed.

On the death of the late Sir John Paterson, his daughter, Mrs. Anne Paterson, made up titles as his heiress; when Major Broomfield, a creditor of his, to a large amount, brought an action against her, as liable for her father's debts, notwithstanding the above settlement.

Pleaded for the pursuer: By the settlement executed in 1758, which was the only title of the late Sir John Paterson, the predecessor of the defender, and which is to be considered as in itself a proper entail, an end was put to the prior one of 1743. But not having been recorded, it has no sanction from the statute of 1685, which prescribes registration as a circumstance essential to the validity of entails.

There is yet another objection to this settlement, though viewed not as a tailzie *per se*, but as a conveyance subsequent to another entail; because it contains no special recital of the clauses prohibitory, irritant, and resolute, but only a general reference to them, as engrossed in an anterior deed; Viscount of Garnock *contra* Master of Garnock and others, 28th July, 1725, No. 127. p. 15596.; Murray Kinninmound *contra* Murray, 5th July, 1744, No. 20. p. 15380. Nor is this defect supplied by the insertion of those clauses in the instruments of resignation and of sasine; for the act of Parliament requires, that they should be repeated in all the rights and conveyances of a tailzied estate.

Answered: The disposition of 1758 ought to be considered, not as a new entail, but as a continuation of the prior settlement effected in 1743. Indeed,

by the renunciation executed by Sir John, the elder, in 1755, he precluded himself from the power of revoking or altering that original entail. There was, therefore, no occasion to register in the register of tailzies the deed of 1758. No. 145.

Nor, since in the last-mentioned disposition a reference was made to the restraining clauses of the entail, is it of importance that a more special insertion of them has been omitted. The decisions quoted on the other side respected cases in which it had been neglected to repeat the restrictions in the instruments of sasine; whereas, here, they are fully engrossed in the instruments both of resignation and sasine. The following one affords a precedent more suitable to the present case; 24th July, 1764, *Laurie contra Spalding*, No. 140. p. 15612.

Replied: The renunciation executed in 1755 was merely a personal deed, nor was it recorded in the register of sasines and reversions; and, for that reason, could not qualify the real right created by the tailzie of 1743, or produce any effect against onerous creditors.

The Lord Ordinary reported the cause; when

The Lords found, "That the disposition 1758, differing in several particulars from the entail 1743, and being followed with charter and infeftment, is to be held a new settlement of the estate; and not having been recorded in the register of entails, is not an effectual entail." And found, "That in respect the limitations in the entail 1743 are not particularly inserted in the said disposition 1758, the same is not effectual against creditors."

To this judgment the Lords adhered, on advising a reclaiming petition and answers.

Reporter, *Lord Eskgrove*, Act. *Rolland, Blair*. Alt. *Abercromby*. Clerk, *Home*.

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*Fac. Coll. No. 165. p. 259.*

1803. February 1. SYME against DEWAR.

James Dewar, who stood infeft in his estate under investitures to "heirs-male," being desirous, upon the death of an only son, to call his daughters to the succession, executed (5th March, 1736,) a disposition of his lands of Lassodie to himself, in life-rent, and to Elizabeth, his eldest daughter, and the heirs-male of her body, and, failing of such heirs-male, to the heirs-female of her body, in fee; whom failing, to Euphan, his second lawful daughter, and other substitutes. This disposition contained a reservation of his power to alter, without consent of any of the substitutes.

Upon the precept of sasine contained in this disposition the granter and his daughters were infeft, (1st June, 1736,) which infeftment was duly recorded.

Afterwards, (3d July, 1763,) he executed a bond of tailzie of the same lands in favour of himself, and the heirs-male of his body; whom failing, his daughters, and the heirs-male and female of their bodies, the eldest succeeding without division; whom failing, other substitutes; with strict prohibitory and irritant clauses against alienating and contracting debt, and expressly revoking the disposition executed in 1736, and the infeftment following on it.

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An entail which has been recorded, but on which no infeftment has followed, militates against creditors contracting with a person infeft on a prior revocable disposition, and which infeftment has been revoked by the deed of entail.