No. 145.

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.

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*.

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

1803. *February* 1. SYME *against* DEWAR.

No. 146.
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militates against creditors contracting with a person infeft on a prior revocable disposition, and which infeftment has been revoked by the deed of entail.

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, 1726,) 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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Upon his death, in 1771, he was succeeded by his daughter Elizabeth. The tailzie was recorded in the register of tailzies in 1772; but no title was made up by her upon it. She died in March, 1796; and the succession having opened, by the failure of intermediate substitutes, to Henry Dewar, he served himself heir of provision to James, the maker of the entail, and expeded a charter on the procuratory of resignation contained in the bond of tailzie.

During the period of Elizabeth Dewar's possession, she contracted various debts; all of which remained personal at her death. To these John Syme, writer to the signet, having acquired right, he brought an action for payment against Henry Dewar, the heir in possession of the estate.

The cause was taken to report by the Lord Ordinary; and the pursuer

Pleaded: 1*mo*, During the whole period of Elizabeth Dewar's long possession, her title was the disposition and infeftment 1736; the same title upon which her father possessed down to the time of his death, in 1771. The disposition, no doubt, contained a power for him to alter; and he did exercise this power, by executing the bond of entail. If infeftment had been taken on it, the infeftment in 1736 would have been done away; but one infeftment can only be taken away by another; and while the entail continued only a personal right, neither the granter nor his daughter were divested of the estate:—the infeftment in 1736 remained entire. She thus appeared on the face of the records to have the fee-simple of this estate. The warrant of her infeftment, indeed, contained a power to revoke; but no revocation appeared.

The entail, indeed, was recorded, but no titles were ever made up under it, and it cannot therefore be effectual against creditors. For the act 1685 declares, "That such tailzies shall only be allowed in which the foresaid irritant and resolutive clauses are inserted in the procuratory of resignation, charters, precepts, and instruments of sasine;" and if these are not repeated in the rights by which the estate is held, it shall import an irritancy and contravention against the heir, "but shall not militate against creditors, and other singular successors, who shall happen to have contracted *bona fide* with the person who stood infeft in the said estate, without the said irritant and resolutive clauses in the body of his right." She held the estate apparently by an absolute right. No creditor can be affected by a latent tailzie, nor even by one recorded if it has not been repeated in the rights and the infeftments of the estate. She might have sold, she might have granted an heritable security over it, for these very debts, or it might have been adjudged from her in her life-time. The claim against it after her death is equally clear. The statute makes no distinction between creditors infeft or uninfeft; nor between those who have done diligence and those who have not: the only requisite is, that they shall have contracted The above clause does not refer merely to those infeft on an entail who have omitted the restricting clauses in their sasine; for the statute was intended to secure creditors from the effects of latent entails; to do which the more effectually, the restrictions are to be engrossed into all the rights of the estate; Murray against Murray, 5th July, 1744, No. 20. p. 15330;

No. 143.

Broomfield against Paterson, 29th June, 1784, No. 145. p. 15618. The creditors of a person possessing upon no other title than a personal deed of entail, would be affected by all the qualities of that deed; but when the person stands infeft, without any relation whatever to the entail, as the restrictions are not contained in his instrument of sasine, the general words of the statute apply; that they shall not be effectual against the person who is infeft, meaning any infeftment whether on the entail or not. If an heir of entail obtain himself served heir of line, without any relation to the entail, his debts affect the estate; Lord Strathnaver against Duke of Douglas, 2d February, 1728, No. 17. p. 15373; and it is not even sufficient to find the limitations in the rights to the estate, if the tailzie itself be not recorded; Willison against Creditors of Dorater, 8th December, 1724, No. 15. p. 15371.

2d, If Elizabeth did not possess on the infeftment 1736, she held the estate for twenty-four years as heir-apparent to her father; and on her death the defender, passing by her, connected himself with her father, and is therefore liable for her debts, 1695, C. 24. He was then apparent heir to her, the person interjected, and who was in possession of the lands and estate, to which he is served, for more than three years. The act makes no distinction between predecessors who were apparent heirs by the investiture, and those who were not; and as little between predecessors who were apparent heirs of line and those who were not; Creditors of Ross of Kerse, 31st January, 1792, No. 108. p. 10300; Graham of Hourstoun, 13th May, 1795, No. 56. p. 15439.

Answered: *1st*, When a person appears to have acquired right to a subject by an original grant, those who contract with him ought to examine the terms of it. Here it properly was not a fee which was bestowed on Elizabeth, but only a right of succession, as James Dewar reserved his life-rent, and the power of revocation, and the infeftment refers to the conditions in the disposition. Till after his death she could have no substantial right of fee, but merely a nominal one, nor any power to burden the estate.

But, supposing it were necessary to secure James from any deeds of his daughter, that this power of revocation were inserted in the sasine, he is still secure against all who do not derive right from her by infeftment, and who thereby have a title to plead on the faith of the records. Personal creditors have no such right. But the defender is a disponee of James, who was entitled to contract debt, and to exercise every other power over the estate, and, having completed his right by infeftment, must take the estate unaffected by any claims of the daughter's creditors which are merely personal.

2d, The act 1695 was never meant to apply to apparent heirs of tailzie, as this would give them a higher right than they would have had, if they had been infeft; but it applies to the heir-apparent by investiture possessing on a personal right for three years, and who, if he made up titles, would be entitled to burden the estate with debt; Douglas of Kilhead, in the year 1765, No. 141. p. 15616; Creditors of Ross of Kerse, 31st January, 1792, No. 108. p. 10300; Achyndachy, 31st

No. 146. January, 1792, No. 178. p. 10971. Elizabeth was not apparent heir of line, or of investiture; the old investitures standing to heirs-male. Her father, too, never was infeft, except in life-rent, in the year 1736; and therefore she could not be heir apparent under that deed. Besides, the disposition 1736 was a defeasible deed, and actually defeated; but the tailzie, which remained personal, and which she recorded as her only subsisting title, continued to her death to give her the right of apparent heir of tailzie, under which alone she possessed the estate; and every person contracting with another, having only a personal right to his estate, must be affected by the conditions and qualities of that right; Denham of Westshield against Baillie, 1731, (See Appendix;) Gordon of Carleton, 14th November, 1749, No. 23. p. 15384.

The Court, upon these grounds, (14th January, 1803,) assoilzied the defender on advising informations.

And adhered, by refusing a reclaiming petition without answers.

Lord Ordinary, *Methven*. For Syme, *J. Clerk*, *W. Clerk*. Agent, *Party*.
For Dewar, *M. Ross*, *J. Wolfe-Murray*. Agent, *B. Whyte*, *W. S.* Clerk, *Menzies*.

F. *Fac. Coll. No.* 80. *p.* 179.

SECT. VIII.

Act 10. Geo. III. Cap. 51.

1793. *January* 22.
TRUSTEES of SIR FRANCIS ELLIOT *against* SIR WILLIAM ELLIOT.

No. 147.
Trustees of the proprietor of an entailed estate found entitled to claim from the succeeding heir, three fourths of the sums expended in improving it, though he had taken grassums, and had not raised the old rent.

Whether the notice given to the suc-

The late Sir Francis Elliot held the estate of Stobs under a strict entail, but which contained no limitation as to letting leases and taking grassums. It was his usual practice, after improving his farms, to let them in leases for nineteen years, at the old rent, and to exact a grassum at their commencement.

In an action brought upon the 10th Geo. III. Cap 51. by which the proprietors of entailed estates may, under certain conditions, have three-fourths of the money which they lay out in improving them, declared a burden upon the succeeding heirs of entail, he was found entitled to charge the sum of £.1926 15*s.* $3\frac{1}{2}$*d.* against them.

The sum which had been thus ascertained, Sir Francis conveyed to trustees for payment of his debts, and other purposes; and when, after his death, his trustees came to demand payment, Sir William Elliot, the succeeding heir,

Pleaded: When formerly the proprietors of entailed estates had no means of improving them, without diminishing the fund for providing their widows and