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on the respondent, Newal's account, so that the claim now made for an assignment to this liferent estate, and also to his interest in the lease in Tibbers, is wholly untenable, and ought therefore to be rejected and disallowed.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors be, and the same are hereby affirmed.

For Appellants, *John Clerk*, *William Alexander*, *Geo. Jos. Bell.*

For Respondents, *Wm. Adam*, *Robert Corbet.*

NOTE.—Unreported in the Court of Session.

[Mor. App. i. Heir Apparent, No. 1.]

WM. CUNNINGHAME GRAHAM, of Gartmore and Finlaystone, - - - - } *Appellant;*

ISABELLA, COUNTESS DOWAGER OF GLENCAIRN, and WILLIAM INGLIS, W.S., her Attorney, - - - - - } *Respondents.*

House of Lords, 7th July 1806.

ENTAIL—LIFERENT LOCALITY—HEIR APPARENT—ONEROUS DEBTS—ACT 1695, c. 24.—An entail reserved power to the heirs of entail to grant liferent infeftments to their wives, the said provisions not to exceed a fourth part of the rental of the estate, so far as the same was free of former liferents. A liferent locality was granted by Earl John, in favour of his wife. He died without issue, and without having made up his title to the entailed estates. The next heir passed by him as apparent heir, and served heir to his immediate predecessor. In an action raised by the widow of Earl John, under the act 1695, c. 24, to compel him to grant a disposition of the locality lands, it was answered, that the statute did not comprehend such debts as apply to apparent heirs of tailzie or to tailzied estate, but only to fee simple estate, and to such debts as were onerous. Held the Countess entitled to her liferent locality. Affirmed in the House of Lords.

1708. William, Earl of Glencairn, executed a strict entail of the lands and barony of Finlaystone, containing the usual prohibitory, irritant, and resolutive clauses. The entail reserved power to the heirs of entail "to grant liferent infeftments "to their ladies or husbands, in satisfaction to them of all

" tercces or courtesies, from which the ladies and husbands " of the said heirs and members of tailzie are hereby alto- " gether excluded and debarred ;" " the said provisions not " exceeding a fourth part of the rent of the said lands, " lordship, and baronies, and others; and that only in so " far as the same is free and unaffected for a time, with for- " mer liferents or real debts."

William, the second Earl of Glencairn, on his father's death, was served heir of entail; and having been feudally vested with the estate by charter and infeftment, he executed a liferent locality and disposition in favour of his countess, equal to a fourth part of his estate. On his death, he was survived by the countess, and his son James succeeded to the title and estate, in which he was regularly infeft under the entail, but died unmarried in 1791, whereupon his brother John, the last Earl of Glencairn, succeeded, but died without issue in 1796, and without having made up a feudal title under the entail. Before his death, he had executed a disposition and liferent locality in favour of his countess, Isabella Erskine, Countess of Glencairn. At this time the Dowager Countess of Glencairn, spouse of the second Earl, was still alive, enjoying her liferent locality; but the disposition of this second liferent locality was granted merely to the extent of the fourth of the free rents of the said estate, after deducting the liferent locality payable to the Countess Dowager.

1775.

1791.

1796.

On the Earl John's death, the entailed estate of Finlaystone descended to the appellant's father, Mr. Graham of Gartmore, who completed his feudal title under the entail, by passing over Earl John, the apparent heir, and serving to his brother, Earl James, who was feudally infeft.

Mr. Graham died in 1798, and was succeeded by his son, who served heir in general to his father.

The present action was brought by the respondent against the appellant, in whose favour her husband, Earl John, had granted the liferent locality, second above mentioned, to compel him to convey to her in liferent the lands settled upon her by the disposition above mentioned, setting forth and narrating the act 1695, c. 24, by which " Our sovereign " Lord, considering the frequent frauds and disappointments " that creditors do suffer upon the decease of their debtors, " and through the contrivance of apparent heirs in their " prejudice, for remeid thereof, and also for facilitating the

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"transmission of heritage in favour of both heirs and credi-
"tors, [his Majesty, with the advice and consent of the
"estates of Parliament, statutes and ordains, that if any
"man, since the first July 1661, has served, or shall here-
"after serve, himself heir; or by adjudication on his bond,
"hath, since the time foresaid, succeeded, or shall hereafter
"succeed, not to his immediate predecessor, but to one re-
"moter, as passing by his father to his godsire, or the like,
"then and in that case, he shall be liable for the debts and
"deeds of the person interjected, to whom he was apparent
"heir, and who was in the possession of the lands and
"estate to which he has served, for the space of three years,
"and that in so far as may extend to the value of the said
"lands and estate."

In informations which were ordered, it was admitted by the respondent (pursuer) "that the disposition of locality "could not be directed against the estate of Finlaystone, in "regard that her husband, the late Earl, had died in a state "of apparency;" but she maintained, that the appellant could be obliged, in terms of the above act 1695, c. 24, to make good this provision to her, and to grant a new disposition of locality in terms of the one granted by her husband, Earl John, with a precept of sasine, upon which she might be infeft.

In defence, it was stated by the appellant, That an estate cannot be affected by the debts or deeds of any person whatever, unless he be a proprietor, feudally vested with the estate. That the statute 1695 did not infringe on this rule, and, moreover, did not apply to apparent heirs of tailzie, or to estates held under the fetters and limitations of strict entails. That even if the statute were applicable to entailed property, as well as that possessed in fee simple, yet it was only meant to protect onerous deeds, and could not therefore support the disposition in question, which was purely gratuitous. And that though his father, the late Mr. Graham, had incurred a passive title in terms of the statute, yet it was only to *the extent of the rents of the entailed estate during his possession*; and, therefore, in any view, the obligation of the appellant cannot be broader than his father's.

May 23, 1800. The Court pronounced this interlocutor:—"Upon report "of Lord Glenlee, and having advised the mutual informa-
"tions for the parties, the Lords repel the defences, and

"remit to the Lord Ordinary to proceed accordingly." * The Lord Ordinary accordingly ordained the (defender) appellant to execute the disposition *quam primum*. His Lordship afterwards found, that "she is entitled, from the "period of the death of the late Countess Dowager of Glencairn, to the liferent of the whole of these lands, and decern." On reclaiming petition, the Court adhered. Feb. 1801. Jan. 26, 1804.

Against these interlocuters the present appeal was brought to the House of Lords. Feb. 21, 1804.

Pleaded for the Appellant.—The act of Parliament 1695, c. 24, is not applicable to apparent heirs of an entailed estate held under the strict fetters of an entail, but to succession to a fee simple estate. But even supposing it applicable to entailed property, it is not declared that the *estate* is to be burdened or affected with the debts of the interjected apparent heir. For *that* in a strict entail, and in this entail in particular, cannot possibly be. Taking the act therefore in its most liberal sense, its only effect was to render the late Mr. Graham of Gartmore personally liable for the debts and deeds of John Earl of Glencairn, and that only "in so far as may extend to the value of the said lands "and estate, and no farther." But as his father, in this entailed estate, only interfered, and could only interfere,

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* Opinions of the Judges.

LORD PRESIDENT CAMPBELL said,—"1st point, This case is clearly within the act 1695. In cases of bankruptcy, even voluntary postnuptial provisions to a wife have been sustained as onerous, entitling her to rank with creditors; and, in cases of deathbed provisions to a wife, they are held onerous, and such are good, though to younger children. As to the 2nd and 3d points, I am of opinion that there is no distinction between tailzied and untailzied property, so far as the tailzie admits of the estate being burdened; and by the act 1695, succeeding heirs are personally bound to fulfill the obligation."

LORD JUSTICE CLERK.—"1st point., I think that the act of Parliament means just to supply the want of title, and that the rational deeds of the apparent heir, three years in possession, must be held as onerous and good. 2nd point. As to the extent of liability, and also the 3d point, I think the decision, Graham *v.* Creditors of Graham, 13th May 1795, does not apply." Mor. p. 15439.

LORD BALMUTO.—"I am of the same opinion."

LORD BANNATYNE.—"I am of the same opinion."

LORD METHVEN.—"I doubt if he has done it in the way intended by the entail."

LORD MEADOWBANK.—"I have the same doubt; it is a mere faculty."

President Campbell's Session Papers, vol. 97.

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with no more than the rents, it is only in so far as these were intromitted with during his possession, that the appellant can be liable to the respondent. By the act of Parliament, it is only the debts and deeds of the interjected apparent heir which can be made effectual against the succeeding heir who serves. But the disposition granted to the respondent cannot be considered in law as an onerous deed, and must be held in law as purely gratuitous, as to be revocable at pleasure by the grantor.

Pleaded for the Respondents.—This appeal, after so long an acquiescence in the interlocutor of 23d May 1800, was not expected, and the appellant is now barred in law by homologation from challenging the judgment on the original branch of the cause. He has even declared on the record, while discussing the second branch of the cause—namely, the extent of the locality, that he acquiesced in the judgment upon the first point. Nay, he has not only done this in words but also in deeds, *rebus ipsis et factis*; for he actually proceeded to execute a disposition of locality, in consequence of which she was infeft, has been in possession, and has exercised the power of turning out tenants and letting the lands on new leases. But, independently of homologation upon the part of the appellant, the interlocutors of the Court of Session are founded on law. The disposition to the Countess by Earl John was onerous, and such as fell within the provisions of the statute 1695, c. 24. That statute applies to entailed succession, as well as to fee simple estate. Nor does it follow, what the appellant contends, that if the statute applies to such estate, then it can only be to the effect of making him liable to the value of the estate intromitted with, which was merely the rents. This is a mere evasion. The obligation is to grant a disposition of a different locality, and that obligation falls on him. As to the extent of the locality, it is clear, that while the former locality existed, she could only be entitled, according to the conception of the entail, to the fourth of the free rents, after deducting said locality, but now that the first locality is extinguished, she is now entitled to the full fourth of the rents of the estate.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *Wm. Alexander, Ad. Gillies, J. P. Grant.*

For Respondents, *W. Adam, Samuel Romilly, Math. Ross, H. D. Inglis.*