No. 139. determine the succession of the estate in all time to come. But further, supposing this entail should not be good against onerous creditors, it must at least be good against the heirs; and therefore the late Lord Kinnaird had no power to grant the tacks in question.

Pleaded for Hunter: The act 1685 is general, and points out the way of making entails complete; and, from the reason of the thing, it must extend to all entails whatever, whether made before or after the statute. The decision in the case of Rothes did not turn upon the want of infeftment, but went upon the general point: That the charter and possession following thereupon may be sufficient to secure the possessors from any challenge after 40 years, but can never cut off the effect of a subsequent statute making the registration of a tailzie essentially requisite to secure an estate against the alienations or debts of the heir in possession.

The Lords found, "That the requisites of the act 1685 not having been complied with, with respect to this tailzie, the same is ineffectual against singular successors; and therefore repelled the reasons of reduction."

Act. *Lockhart.* Alt. *Montgomery et Rae.* Clerk, *Kirkpatrick.*

P. M. *Fac. Coll. No.* 63. *p.* 147.

*** This case was appealed. The House of Lords, 18th February, 1765, ORDERED and ADJUDGED, That the appeal be dismissed this House, and the interlocutors therein complained of be, and the same are hereby, affirmed.

1764. *July* 24.

MARGARET LAURIE and ANDREW SLOAN LAURIE, her Husband, *against* ALEXANDER SPALDING of Holm.

No. 140.
Entail restraining the power of alienation implied by a reference to another deed of entail.; both recorded.

In 1727, Walter Laurie executed an entail of his lands of Red Castle in favour of himself and his wife for her life rent use, and to the heirs of his own body in fee; whom failing, to James Laurie of Skeldon his nephew, and several other substitutes therein mentioned.

This entail contained prohibitory and irritant clauses, restraining the heirs from alienating or incumbering the estate; and a *proviso*, that James Laurie, upon the succession's opening to him, should be obliged to convey to the next heir of entail his own proper estate of Skeldon.

Walter Laurie, having thereafter purchased the lands of Bargatim and Airds, he executed an entail of these lands under the same limitations as in the first entail: But the nomination of heirs was somewhat different; for he expressly excluded his nephew Alexander, who had been called to the succession by the former deed, and the heirs male of his nephew; and the daughters of his brother Thomas, though named in the first entail, were not mentioned in the last.

Both entails were duly recorded in the register of tailzies.

In 1740, Walter Laurie purchased the lands of Ervies. The conveyances from Robert and Agnes Glendinning, the sellers, were taken, "to the said Mr. Walter Laurie and his heirs of tailzie, under the restriction in the disposition of tailzie granted by him to his other lands and estate, or to his assigns heritably and irredeemably." No. 140.

Walter Laurie died without issue, and was succeeded by James Laurie, his nephew, who was both heir of line and of provision.

In 1742, James Laurie brought an action for setting aside the two entails before recited as incongruous and inconsistent, and to have it found, that the lands of Ervies did not fall under the prohibitions and irritancies of either of these entails, but might be taken up in fee simple.

Margaret Laurie, the next heir of entail, and her husband, brought another action, insisting that James Laurie should be obliged to complete his titles to the lands of Red-Castle and Bargatan, under the two deeds of entail before recited; and to have it found and declared, that the lands of Ervies should be subjected to the limitations and provisions contained in the said entails; and that he should be ordained to convey his own estate of Skeldon to the said Margaret, the next heir of entail, in terms of the foresaid settlements.

Upon the 12th of January 1743, the Court found, that James Laurie was obliged to denude himself of the lands of Skeldon in favour of Margaret Laurie; and, in the action at James Laurie's instance, they, by another interlocutor in February 1743, "repelled the reasons of reduction, viz. that there may be an incompatibility in the after succession between the series of heirs called by the entail of the lands of Red-Castle and that of Bargatan, Airds, and others, and found the same not relevant to set aside the deeds; reserving to all concerned to dispute the import and consequences of these deeds, when the event should happen in which such dispute may arise. And, with respect to James Laurie being at liberty to make up titles as heir of line, without subjecting himself to the prohibitory, irritant, and resolutive clauses, found the declarator repeated and insisted in was incompetent and inept, as asking advice and directions from the Lords; and dismissed the same."

Upon the 30th of July, 1743, James Laurie made up a title to the lands of Ervies, by a service in the usual form tanquam legitimus et propinquior haeres of his uncle Walter.

Upon the 20th of June 1744, the Court found, "That Mr. Walter Laurie, by taking a disposition from Lady Parton and her son, (Agnes and Robert Glendinning), in the year 1740, to the lands therein contained, (*i. e.* the lands of Ervies), under the restriction therein mentioned, intended that the defender, (*i. e.* James Laurie), who was his heir, should possess the same under all the restrictions, limitations, and clauses irritant and resolutive, that affected the tailzied estate of Bargatan; but found the action not competent to the pursuer, (*i. e.* Margaret Laurie), to compel the defender to make up his title to the lands contained in the disposition, under such restriction."

Upon the 25th of February 1745, James Laurie completed his titles to the

No. 140. two entailed estates of Red-Castle and Bargatan, by a service tanquam proximus et legitimus haeres masculus et talliae et provisionis to his uncle Walter in these lands, under all the limitations of the entail.

Of the same date, a separate title was made up to the lands of Ervies, by a service as nearest and lawful heir-male and of line to the said Walter Laurie, and also heir of provision to him in the lands of Ervies; and, in this service, the limitations in the second deed of entail before recited were ingrossed; to which was subjoined the following proviso: "Sub hac protestatione, quod non obstan. dict. praesentis clamei et servitii desuper sequen. quod nihilominus licitum et legitimum erit, dict Jacobo Laurie, terras praedict dispositione, per dict dominam Parton, concess. impugnare, quasi sub dict. dispositione talliae non cadentes."

Upon the 25th of February 1755, James Laurie took infeftment in the lands of Ervies, upon the precept contained in Glendinning's disposition to his uncle, to which he had right in virtue of his general service as heir of line in 1743.

In May 1755, James Laurie sold the lands of Ervies to Alexander Spalding of Holm, who immediately entered into the possession, which he continued without challenge, till after the death of the said James Laurie in 1757, when an action was brought at the instance of Margaret Laurie and her husband for setting aside the purchase.

Pleaded for the pursuers: 1*mo*, As, by the disposition to Walter Laurie from the former proprietors, the lands were conveyed to him and his heirs of tailzie, under the restriction in the disposition of tailzie granted by him of his other lands and estate, it was not in the power of James Laurie, who could only take under the entail, to sell them contrary to the prohibition of that entail; and the Court accordingly found, in June 1744, that Walter Laurie intended that his heirs should possess the lands of Ervies under all the restrictions, limitations, and clauses irritant and resolutive, that affected the tailzied estate of Bargatan.

2*do*, The right of Walter Laurie to the lands of Ervies remaining personal at his death, and descendible to his heirs of entail in his other lands and estate, James Laurie's general service in 1743, as heir of line to his uncle, and infeftment following thereon, could not carry this personal right, which stood limited to a different series of heirs; and as, by the subsequent service in 1745, the right to these lands was taken up under all the limitations of the entail, so the subsequent device of James Laurie, in taking infeftment, as in fee simple, was highly fraudulent: That infeftment was void, as without a warrant, being to James Laurie, his heirs and assignees; whereas, the service of 1745 was to him as heir of entail and provision, *secundum dispositionem per Agnetam Glendinning*, under all the restrictions of his uncle's entail. James Laurie's right remained therefore, merely personal, for want of an infeftment upon his service in 1745; and every condition and limitation attending such personal right must accompany the assignment thereof to the defender, agreeably to the decision of the 11th May 1733, Stewart against the creditors of Sir Robert Denholm, (see APPENDIX).

Answered for the defender: Entails can have no force against creditors or purchasers, unless they are recorded in terms of the act 1685; and whatever

effect the words of the conveyance from the Glendinnings might have to divert the succession from the heir at law, no entail was thereby created. There was no act or deed under the hand of the supposed maker of the entail, nor any evidence of his intention, but a general reference to one deed of tailzie, when two deeds had been executed so entirely different, that the succession of the two estates thereby settled might probably divide in a very few years; and to one restriction, though these deeds contained many restrictions. However informal, therefore, the service as heir of line may be supposed, the defenders must have the benefit of the other title made up by James Laurie as heir of provision, under which he could be subjected to none of the limitations of Mr. Walter Laurie's entail; because the repetition of these limitations, in reference to other deeds, was a matter of mere form, and qualified with an express proviso and protestation, "That the heir should be at liberty to impugn or contend, that the lands in question were not subjected to any entail;" and therefore the nature of this entail was nor could possibly be altered by this act; much less could it affect a purchaser, as it entered no record, and was in fact unknown, till discovered in the course of the action. No. 140.

The case of Sir Robert Denholm does not apply; for, 1*mo*, The defender did not purchase upon the faith of a personal deed uncompleted by infeftment. James Laurie was infeft in the lands several months before the purchase, in virtue of the precept contained in Glendinning's disposition, to which he had right by his general service as heir of line to his uncle in 1743; and it can make no difference, though this general service is challenged as erroneous upon an investigation of facts and circumstances unknown to the purchaser, who treated upon the faith of no other title but this infeftment upon record, which contained no limitations. 2*do*, The personal deed in that case was an entail executed in the strictest form, containing all the usual prohibitions *de non alienando et contrahendo debitum*, without any uncertainty or general reference, as in the present case; and the question was with a creditor, an agent for the family, who most fraudulently made up the titles to the estate in favour of an excluded heir, omitting the limitations of the entail, on purpose to secure his own debt; and this fraud alone destroyed every pretence of a *bona fides*. 3*tio*, If the disposition from Glendinning to Mr. Walter Laurie had contained all the prohibitions of an entail, inserted at full length, and at his own desire, it might probably be deemed a deed of entail, so far as to affect a creditor or purchaser contracting only upon the faith thereof. But this personal deed contained no limitation or condition whatever. It had not the form, style, or appearance of an entail. It could not have been entered into the record of tailzies, nor have had any effect or operation even as to the course of succession, without a previous action against the heir in possession; and therefore, in the present question, it can, in its utmost extent, only be considered as a destination of succession, founded on the presumed intention of the owner of the lands, but can never create a limitation on property.

No. 140. The Lords sustained the reasons of reduction, and reduced, decerned, and declared."

Act. *Advocatus et M'Queen.* Alt. *Montgomery et Dundas.*

A. W. *Fac. Coll No.* 140. *p.* 324.

1765. *February* 22. DOUGLAS *against* STEWARTS.

No. 141.
Entail not followed by infeftment.

Sir William Douglas of Kilhead executed an entail of the lands of Cumbertrees, in favour of himself in life-rent, and his son, afterwards Sir John Douglas, and the heirs-male of his body, in fee; failing whom, a series of other substitutes. This entail was recorded in the register of tailzies, but no infeftment followed. Sir John, the institute, possessed after his father's death, as apparent heir, and contracted considerable debts; whereupon his creditors charged him to enter in special to his father, and proceeded to lead adjudications against the estate. These adjudications were completed by infeftment, and the creditors pursued a ranking and sale of these lands, as well as others belonging to their debtor. This process was opposed by William Douglas, son of Sir John, and one of the substitutes, who insisted, that the entailed lands should be struck out of the sale. Urged for the creditors, That the entail was nothing more than a personal deed while infeftment had not followed on it; that the act 1685 requires not only the recording of the entail in the register of tailzies, but the recording of the sasine taken thereon; both these requisites are necessary to render the entail effectual against creditors, and neither of them by itself can have that effect. Sir John having possessed the estate solely as heir-apparent, and the act 1695 declaring, that the onerous debts of an apparent heir three years in possession shall affect the estate, the creditors were in perfect safety to contract with him, and no latent personal deed (for such is the entail if no infeftment on it appears on record,) can prevent their just debts from being effectual. The Lords found, That the lands of Cumbertrees ought not to be struck out of the sale. See APPENDIX.

Fol. Dic. v. 4. *p.* 351.

*** The like found, 1791, Peirse and his Attorney against Russel and Ross of Kerse. See APPENDIX.

1765. *June* 22.

NEIL EARL of ROSEBERRY *against* JAMES BAIRD, and other Creditors.

No. 142.
The act of Parliament 1685 was found to have retrospect to entails not only made, but complet-

The predecessors of Niel Earl of Roseberry executed an entail of the estate of Primrose, which, in the subsequent transmission of that estate to the several succeeding heirs, had been regularly recorded, with all its clauses, of whatever kind, in the register of sasines. This entailed estate having come into the possession of the present Earl, he was pursued by the creditors of his predecessors, notwithstanding of the entail prohibiting the contraction of debt, as it never had been