universal representative in all debts, heritable and moveable. This distinguishes the present from all the cases referred to by the pursuer; particularly that of Maitland, where, besides this, the heir succeeded through his mother to the entailed estate, and to the fee-simple of the debts affecting the estate through his father, who had purchased them with his own money; and it would have been unjust to hold, that by succeeding to the entailed estate, upon which he could not borrow a single farthing, he should lose the succession which opened to him through his father. No. 10.

The obligation to pay off the debts, is the condition of taking up the estate, and he cannot make it more lucrative than his ancestor has done for him. If, instead of allowing him to succeed to the unentailed property, he had transferred to him effects to a similar amount, by an irrevocable deed *inter vivos*, neither he nor his representatives could have claimed payment of the £5000, *quia debitor non præsumitur donare*. The gift will be held *pro tanto* as an extinction of the debt; and *multo magis* if it be to a greater amount, although it should not even be clogged with any obligation for payment of that or any other of the donor's debts.

The obligation by the entailer was to pay this £5000 to George Cockburn, his heirs, executors, or assignees, and he was to lay it out for the purposes of the marriage. The entailer indeed became bound to secure it on Gleneagles, in favour of the creditor; but this obligation was fulfilled, as he received not only security but payment of it, by the various settlements made in his favour.

The Court, considering that George Cockburn was himself liable to pay his uncle's debt, by the nature of the settlements executed in his favour, held, that he could not assign the bond in question to any of his own creditors, as the moment it came into his person it was extinguished *confusione*, and never could be again revived. They accordingly adhered.

Lord Ordinary, *Armadale*. Act. *H. Erskine, Hay, Forbes*. Agent, *T. Cranstoun*, W. S.
Alt. *Lord-Advocate Hope, M. Ross*. Agent, *A. Duncan*, W. S. Clerk, *Pringle*.

F. *Fac. Coll. No. 59. p. 133.*

1806. *May* 23. CLARKE *against* BRUCE.

No. 11.

SEE this case *voce* WARRANDICE, No. 98. p. 16643. relative to the consequences in a question with a creditor, where a tailzie is defective in the clauses against selling.

1807. *May* 14. SMOLLET'S Creditors *against* SMOLLET.

No. 12.
Personal debts contracted by the

MR. COMMISSARY SMOLLET (20th August 1769) made a general disposition of his property in favour of trustees for the purchase of land to be entailed

No. 12.
heir of tailzie infeft, before the tailzie was recorded in the register of entails, sustained against the estate and the succeeding heirs.

on a certain series of heirs. The trustees bought the estate of Symington, and (15th May 1786) disponed it to Mrs. Jean Smollet the first heir, and the other heirs in the trust-deed, under all the clauses of a regular entail. She possessed the estate, under this disposition, without infeftment.

On her death, Alexander Telfer Smollet, her eldest son, made up a regular title under the entail, and also took infeftment, which was recorded 8th September 1789, but he did not record the entail till the 12th June 1793. Previous to recording the entail, Alexander Smollet had contracted considerable personal debts.

Having died in 1799, his son Captain John Rouet Smollet served himself heir of entail to him, and took infeftment, but he did not otherwise represent his father.

Alexander Smollet's creditors, whose debts were contracted prior to the date of recording the entail, took the usual steps against Captain Rouet Smollet, by constituting their debts and leading adjudications, for bringing the estate of Symington to sale for payment of their debts. No opposition was made to this action, and a bankruptcy having been proved, a part of the estate was sold judicially. Maurice Carmichael of Eastend became (5th December 1804) the purchaser, who, doubting how far the creditors had power to bring this entailed estate to a judicial sale, raised an action of multiplepoinding, calling into the field the creditors, pursuers of the ranking and sale on the one side, and Captain Smollet, the heir of entail on the other side, to debate this point.

Both parties appeared.

The cause was reported by the Lord Ordinary on informations; and, on considering these, the Court ordered a hearing in presence.

The heir of entail

Pleaded:—The entail, before it is recorded, has no operation against creditors; but after it is recorded, it excludes all creditors, who have not already made their debts real upon the estate, except those of the entailer. In this respect, the recording of an entail is exactly similar to the taking of a sasine on an onerous disposition. The creditors of the person infeft, are not affected by any disposition till sasine is taken on it. Before that time, they can attach the estate for payment of their debts; and if they complete their rights before the sasine is recorded, theirs will be preferable to it; but if it be taken while the debts remain personal, all right in these creditors to touch that estate is extinguished. In the same way, while the entail was unrecorded, the creditors of the heir might have affected it; but when he put the entail upon record, he completed the right of the heirs of entail, and extinguished that of his own creditors to affect the entailed estate. The creditors, and the heir of entail, had each of them a power of affecting the estate. The one had the right of making their debts real upon it; the other had the right of completing the entail, by getting it recorded, and putting the estate beyond being affected by debt. Both rights are equally onerous; and the one which is completed first

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must exclude the other. The heir in possession is as much bound to record the entail as he is bound to pay his debts, or give security on his estate for payment of them. By recording the entail, he fulfilled the former obligation, he completed the right of the heirs of entail; and after this, it is impossible for his creditors to affect the estate. He might, instead of this, have voluntarily granted securities on the estate for the debts he had contracted before he recorded the entail; and if he had done so, these securities would have been good, and would have excluded the right of the heirs of entail. But he has not done so; on the contrary, he has completed the right of the heirs of entail, and thus excluded his own personal creditors.

In the same way, either right may be completed by judicial process, if the heir does it not voluntarily. The debts may be rendered real by adjudication; and, on the other hand, the entail may be recorded at the instance of the substitute heirs. Now, in this way, too, whichever right was first rendered real, excluded the other.

The creditors cannot complain of any hardship in this. They lent their money, not on the security of the estate, but on personal credit; and to this they continued to trust, though they knew that the estate was liable to be carried out of the reach of their diligence by any completed alienation. But, moreover, they must, if they thought or inquired at all about the estate, have known, that it was entailed, since the entailing clauses are in the title-deeds, and must naturally have concluded, that the entail would be recorded. This was an event, therefore, still more under their eye, than an alienation of the estate; and yet, in this last case, no plea of hardship could have been pretended by creditors who lost their recourse on the estate by their own delay, and their reliance on personal security; Grahame against Creditors of Grahame, 13th May 1795, No. 56. p. 15439; Sym against Dewar, 1st February 1803, No. 146. p. 15619.

The debts of Alexander Smollet cannot possibly be effectual against the estate of Symington now, even if they could have been so during Alexander Smollet's life: That estate has passed to Captain Smollet, who having only served heir of entail to his father, does not represent him in any other capacity, so that the debts cannot be constituted against him; and without being constituted against him, they never can affect the estate, in which he alone is vested.

Answered:—The act 1685, C. 22. which requires the registration of entails, decidedly enacts, That an entail, till recorded, shall have no force in relation to creditors. Before recording, it is just as if it had never been executed at all. Whatever effect it has, therefore, against creditors, must be, by its operation, after it is recorded, and not before. It cannot have a retrospect.

Entails were not created by the act 1685. It only gave them unquestioned legality. It confirmed and established the ancient form of entails, sanctioning

No. 12. clauses against contracting debts, or doing deeds by the heirs of entail, that might affect the estate; but it authorised no clause directly against the diligence of creditors. No attempt has ever been made to introduce any such clause into any entail. Diligence done by creditors is neither a debt contracted, nor a deed done by the heirs of entail. It is only by prohibiting and annulling the contraction of debts, that diligence against the estate is prevented. Again, an entail only affects debts *to be* contracted, and deeds *to be* done, not those that have been contracted or done already; there is nothing in such a deed which can be retrospective. Debts contracted before the entail is made, are neither prohibited nor annulled by it. It is impossible that the adjudications and judicial sale in this case can be struck at directly by recording this entail; because adjudications and a judicial sale are not directly prohibited or voided by the entail at all; and it is impossible, that the debts on which that diligence had been used, can be voided in relation to the estate, so as to strike at that diligence, because these debts were contracted before the entail had any operation at all against creditors.

An entail, in this respect, is exactly similar to an interdiction. This, indeed, was clearly the intention of the inventors of entails; and, in the famous case of Stormont, No. 5. p. 13994. the clauses of the entail were found effectual, expressly because it was 'equivalent to an interdiction.' It will be observed, too, that in the statute 1685, the Lords of Session are ordered to 'interpone 'their authority to entails,' which sufficiently shews, that the Legislature adopted this view of the nature of entails.

Now, an interdiction prohibits all debts and deeds of the interdicted person that may affect his heritable estate; and it declares such debts to be null, *i. e.* in relation to the estate. It does not prohibit diligence, and it does not affect debts contracted, or deeds done before its own date of operation. Accordingly, diligence against the heritable estate of the interdicted person is not struck at by the interdiction, provided it be done upon debts contracted prior to the operation of the interdiction; Ersk. B. 1. T. 7. § 53.

2*dly*, It is evident from the provisions of the statute 1685, relative to the publication of entails, that the Legislature did not mean they should ever have effect against creditors who had contracted prior to the time of recording the entail.

If creditors had been left without any public warning beyond that contained in the title deeds, to trust a person whom they saw in possession of a large estate, and could then have been cut out from all recourse against it, much evil must have resulted to the community. Personal credit is given to a person on the faith of the property he possesses. A man with a large estate in land, is sure to have personal credit to a great amount, merely from his possessing it. The ordinary creditors of a man of fortune can have no means of making themselves acquainted with the state of his titles: They must, therefore, have frequently given credit to the possessors of entailed estates, and would have been

ruined, if this had been the operation of recording the entail. But, to prevent this evil, the statute 1685 provided a mode of giving public notice of the existence of entails, that might enable every one easily to know whether an estate be entailed or not, and consequently, whether he should give credit to the possessor. The object of this provision is to make *personal* creditors safe; and when they find no entail in the register of tailzies, they are entitled to regard the estate as a fee-simple, and their recourse against it as perfectly secure. No. 12.

But all the advantages of this provision must be overturned, if it is now to be held, that an entail, though not registered when debts are contracted, will cut out the creditors in those debts from all recourse against the estate whenever it is registered. In that case, personal creditors would be as insecure as ever. Though no entail was known of, one might be lurking in the hands of the debtor himself, who might register it whenever he chose, and cut them out from ever affecting the estate; or the same thing might happen by the heirs of entail obliging him to record it. It would be vain for personal creditors to endeavour to realize their debt by diligence: For the form of registration, whether voluntary or judicial, is far more rapid than adjudication or judicial sale, and could always carry off the estate. In short, it is plain, that if an entail, when registered, were to strike against debts contracted before registration, the registration of tailzies is of no earthly use, and merely serves to ensnare personal creditors by a delusive shew of security.

There can be no doubt, therefore, that when the Legislature provided that entails should not be effectual against creditors till they were recorded, it must have regarded them, as being by their form and nature, which it had expressly designated, calculated to affect only those creditors who contracted after the period when the entail began to operate. This, accordingly, is the import of all our authorities and decisions upon this subject; Stair, B. 2. T. 3. § 58; Bankt. Vol. 1. p. 585.; Ersk. B. 3. T. 8. § 26. do not even hint at the exclusion of creditors by an entail registered after contraction of debt. And the doctrine was recognised in Baillie against Stewart, 23d November 1741, No. 130. p. 15600; Earl of Rothes, 14th December 1758, No. 138. p. 15609; Earl of Roseberry, 22d June 1765, No. 142. p. 15616.

Captain Smollet does represent his father, because he has taken up by service an estate in which his father was vested. It is true, he has taken it by service as heir of entail; and, in regard to the world in general, he is truly a mere heir of entail of his father; because to the world in general, the entail is valid. But to the creditors of Alexander Smollet, who contracted before recording of the entail, Captain Smollet is not an heir of entail; for, in relation to them, the entail has no validity. His service, so far as relates to them, is equivalent to service as heir of a fee-simple. They are entitled to hold the entailing clauses as if they were blotted out of the deed. So far as regards them, therefore, Captain Smollet does represent his father.

No. 12. 'The Lords find, That the lands and estate contained in the deed of entail 'executed by Mr. Robert Scott Moncrieff, as surviving trustee of the deceased 'Mr. James Smollet, are attachable for the debts contracted by the late Alex- 'ander Telfer Smollet, the heir of entail in these lands, prior to the date of re- 'cording said entail in the register of tailzies; and therefore find that the diligence 'used by the creditors on their debts, is good and effectual against said tailzied 'estate.'

Lord Ordinary, *Armadale.* For the Creditors, *Dean of Faculty Blair, J. H. Mackenzie.*
Agent, *Richd. Mackenzie*, W. S. For Captain Smollet, *J. Clerk, Moncrieff.*
Agent, *Ja. Balfour*, W. S. For Carmichael the Purchaser, *Cathcart.*
Agent, *W. Patrick*, W. S. Clerk, *Scott.*

F. *Fac. Coll. No. 279. p. 629.*

1807. *June* 23.

COMPETITION.—Sir JAMES NORCLIFFE INNES,—BRIGADIER-GENERAL WALTER KER,—AND BELLENDEN KER.

No. 13.
Sequestration of estate in competition.

Construction of doubtful clauses.

SIR ROBERT KER of Cessfurd, was created Earl of Roxburghe, 18th September 1606, by King James VI., with remainder to his heirs-male.

By the predecease of his only son, Hary Lord Ker, the Earl, seeing that his honours would die with himself, obtained from his Sovereign a power to institute a new series of heirs, both to his title and estate; and on the 17th July 1643, he executed a procuratory, resigning his dignities and estates of Cessfurd, &c. into the hands of his Majesty, in order to obtain new grants thereof to himself, and the heirs-male of his body; whom failing, to his heirs and assignees in his option, to be designed, nominate, made and constituted by him at any time in his lifetime, or before his decease, by assignation, designation, nomination or declaration, under his hand-writing, and under the provisions, restrictions, limitations and conditions therein to be contained, and no otherwise.

A deed of nomination was accordingly executed 22d March 1644, by which the Earl calls to his succession certain near relations, under condition that they should marry one of his grandaughters, the children of Hary Lord Ker; and they and the heirs-male of their body form the first branch of the succession. If their marriages should not take place, or if the male issue of them should fail, he next calls his grandaughters themselves, and the heirs-male of their bodies, by any other husbands, of the rank and quality pointed out by him in this clause; 'and failzieing of all the before-namit persounes be deceis or not per- 'formance of the fors[d] conditiounes In that case we have designit and be thir 'pntts designes the saides Lady Jeane Margaret Anna and Sophia Ker our oyes