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the same. The property of the tobacco at the time of the bankruptcy was in the person of the respondents. It had not been transferred to Wilson and Brown, and was undelivered. And as by law, the contract of sale, before actual delivery of the goods sold, establishes nothing more than the obligations which each has become bound to implement, the respondents are entitled to retain the tobacco, and the creditors not entitled to claim it, without payment of the price. All the hogsheads were in possession of the respondents on the 15th August, two days before the bankruptcy, and they are entitled to retain these as security for the price on emerging bankruptcy. There is no delivery by samples known in the law; but even if delivery to the bankrupts had been otherwise complete, it was only the act of an honest man to return back goods which they had no means of paying, and which they were bound to do if they contemplated bankruptcy. To do otherwise would be a fraud. And indeed the whole transaction was void, on the head of presumed fraud, because at the time it was impossible to suppose that they had purpose or ability to pay the price, and must therefore be looked on as parties having the intention to become bankrupt *cedere foro*, at the time of the delivery of the eight hogsheads.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *John Morthland, Wm. Adam.*

For Respondents, *Ilay Campbell, W. Grant.*

[M. 15,618.]

MRS. ANN PATERSON of Eccles, and PHILIP ANSTRUTHER, Esq. her Husband, MARY PATERSON, and ALEXANDER CAMPBELL her Husband, and HENRY CAMPBELL their Son, - - - - } *Appellants;*

STEPHEN BROMFIELD, Esq. - - *Respondent.*

House of Lords, 19th May 1786.

ENTAIL.—A party had made an entail with power to alter. He afterwards altered, and made a new entail, differing in the destina-

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tion from the first, with a clause merely referring to the prohibitory, irritant, and resolutive clauses in the first deed. Held, this reference clause not sufficient as an entail to protect against creditors.

In 1743, Sir John Paterson, Bart., of Eccles, executed an entail of his estates of Eccles and Hope Pringle, containing the usual prohibitions, with irritant and resolutive clauses; but reserving power to alter or revoke at pleasure. The entail was duly recorded, and was granted, under burden of the entailer's debts, with power to sell the estate called Hope Pringle for payment thereof. Jan. 29, 1743.

By a subsequent deed, Oct. 1755, he revoked the power given to heirs of entail to grant heritable security for infeftment over the estate, and he also discharged all further power of revocation of the entail. This deed was recorded in the register of entails.

A new deed was executed by the entailer, in July 1758, materially differing from the former destination. It recited the previous entail, and the power reserved therein; but was obviously granted with the view of its having the force of an entail. It had not the usual prohibitory and resolutive clauses; but a reference merely was made to the prohibitory, irritant, and resolutive clauses in the previous entail, by the insertion of the following clause:—"With and under the "provisions, conditions, irritant and resolutive clauses, as "contained in the original bond of tailzie, and in the char-"ter and infeftment following thereon." This deed was not recorded. July 1758.

On the death of the institute, the respondent, one of his creditors, brought an action against the heiress of his debtor for payment of his debt, in which the question came to be, Whether the latter deed, containing only a reference to the prohibitions, irritant and resolutive clauses contained in the former entail and infeftment, was effectual to protect against creditors?

The Court pronounced this judgment, on remit from the House of Lords:—"In obedience to a remit from the Lords "Spiritual and Temporal in Parliament assembled, find, "That in respect the disposition 1758 differs in several ar-"ticles from the entail 1743, and in particular, that certain "heirs or substitutes called by the entail 1743, are omitted "in the disposition 1758, and that this disposition was fol-"lowed with charter and infeftment, therefore it is to be "held a new settlement of the estate; and not having con- Mar. 11, 1786.

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" tained the clauses prohibitive, irritant and resolutive, and " not having been recorded in the register of entails, is not " an effectual entail: Find, that in respect the clauses irri- " tant and resolutive in the entail 1743, are not particularly " inserted in the disposition 1758, the same, though held as " a conveyance, is not effectual against creditors, and remit " to the Lord Ordinary to proceed accordingly."

Against this interlocutor the present appeal was brought.

Pleaded for the Appellants.—The judgment of the Court of Session, upon the present and former appeal, has proceeded on the supposition that the deed of 1758 was a separate and distinct entail of the estate, and as such, not good against creditors, unless it contained the usual prohibitory, irritant and resolutive clauses, and was recorded as a separate entail in the register of tailzies. But the appellant humbly conceives, that if the deed is to be considered as a new and distinct settlement, in so far as it differs from the previous one, it was not in the power of Sir John to execute such a disposition, as far as the same was inconsistent with the entail of 1743 and 1755, because, by the last of these two deeds, Sir John Paterson had renounced and discharged his power to alter and revoke, reserved in the entail of 1743. But, in point of fact and law, the settlement of 1758 was not a new settlement of the estate, but merely a continuation of that previously made, and must, from the precise and special reference made from the one deed to the other, be held to be one and the same deed, though in point of fact a separate deed; yet, as it contains a clause making reference to the prohibitions, and irritant and resolutive clauses in a former one, this ought to be held just as equally sufficient, as if it had contained these clauses expressly enumerated.

Pleaded for the Respondent.—When entails are set up against onerous creditors, a stricter rule of construction is to be applied to them than is commonly done where the question is between heirs; and, accordingly, unless the requisites of the statutes in regard to these deeds be complied with, they cannot be effectual against creditors. In the present case, the disposition 1758 was a new settlement of the estate, in many respects different from the previous entail. It contained no prohibitory, irritant and resolutive clauses, and though it bore a reference to the prohibitory, irritant and resolutive clauses in the former entail, yet this was not sufficient to make it effectual; and, besides, being unre-

corded, it was totally inoperative as such. Even assuming that it was not a new settlement, still it was a conveyance under which the institute enjoyed the estate. And in this view, it was equally necessary, in terms of the entail act, to have engrossed the limitations of the first entail in this title, which not having been done, and the general reference contended for not being sufficient in law, did open the estate to the diligence of his creditors.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Ilay Campbell, Alex. Abercromby, J. Anstruther.*

For Respondent, *Alex. Wight, Wm. Adam.*

ALEXANDER ROBERTSON, Merchant in Portsoy, *Appellant;*
HELEN INGLIS, Daughter of JOHN INGLIS, *Respondent.*

House of Lords, 14th Feb. 1787.

MARRIAGE BY COHABITATION AND ACKNOWLEDGMENT.—Circumstances in which the marriage was held complete.

This was a declarator of marriage and adherence, brought by the respondent, Helen Inglis, against the appellant, Alexander Robertson, setting forth that he, Robertson, had in 1769, made his addresses to her,—that he had urged her to be his wife, which, after some solicitation, she agreed to, and soon thereafter he fitted up a house for her,—that she, the pursuer, thereafter became desirous of being formally married by a clergyman, but he told her that this was not necessary, and that they were really man and wife, and that the ceremony would only give publicity to a thing which he wished concealed from his father and mother. That, in order to satisfy her, he wrote out and delivered to her a contract of marriage, which he afterwards abstracted from her repositories,—that, in virtue of these solicitations, and on the faith of these assurances, they cohabited together, and lived and resided in the house above mentioned as man and wife, from the year 1769 to 1783, during which time he behaved himself to her in all respects as a husband would do to his wife,