No. 50. John Vans Agnew, Esq. of Sheuchan, Appellant.—*Gifford—Sugden—Greenshields—Jeffrey.*

James Stewart and Ebenezer Drew, Esq. Respondents.—*Warren—Wetherell—Thomson—Keay.*

Entail.—Two parties having executed a mutual entail of their estates for onerous considerations, whereby they were conveyed to one of the entailers and his wife as the institutes, and a series of heirs-substitute, with a declaration that the entailer so instituted, and the succeeding heirs, should be bound to redeem any diligence which might be led against the estates for debts contracted by him prior to the entail; and infeftment having been thereafter taken in virtue of the entail; and the entailer so instituted having, subsequent to its date, contracted debts—Held, (reversing the judgment of the Court of Session,)

1. That the entail being onerous, the heirs substitutes thereby acquired a personal right to the estates, which was rendered real by the infeftment.
2. That it was not competent to attach the estate of the entailer so instituted for personal debts contracted by him subsequent to the date of the entail, and not made real prior to the infeftment;—and,
3. That it was attachable only for debts contracted prior to the entail, although not made real, in virtue of the clause ordaining the heirs of entail to redeem diligence led on such debts.

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2d Division.
Lord Pitmilly.

John Vans, Esq. proprietor in fee-simple of the estate of Barnbarroch in the shire of Wigton, was, in the month of June 1747, privately married to Margaret Agnew, the only child of Robert Agnew of Sheuchan in the same county. This marriage gave offence to Mr. Agnew, and for several years he refused to have any communication with the parties. At last, in the beginning of the year 1756, a reconciliation took place, and it was arranged between Mr. Vans and Mr. Agnew that they should execute a contract of sale, marriage, and entail of their respective estates of Barnbarroch and Sheuchan. By Mr. Agnew's own contract of marriage, his estates stood destined to the heirs-male of his body, whom failing, to his own nearest heirs and assignees whatsoever; and he was bound to pay to his daughter a provision of £500; but he had no heirs-male of his body.

On the 29th of December 1757, accordingly, a deed was executed by Mr. Agnew and Mr. Vans, in which it was narrated that it was 'contracted, agreed upon, and finally ended betwixt 'Robert Agnew of Sheuchan on the one part, and John Vans 'of Barnbarroch on the other part, in manner, form, and to 'the effect following: That is to say, whereas the said John 'Vans and Margaret Agnew, only child to the said Robert 'Agnew, were married without any matrimonial contract be'twixt them, whereby the said Margaret Agnew is not pro'perly secured in a jointure, nor a settlement made upon 'the issue of the marriage, nor a suitable provision given 'to the said John Vans with his said spouse: And whereas,

'for remedying of these, the said Robert Agnew and John 'Vans have, after mature deliberation, and from weighty 'and onerous causes and considerations moving them, agreed 'upon and finally resolved to execute a mutual tailzie, by way 'of contract betwixt them, of the lands and estates presently be-'longing, or that shall at any time after the date hereof happen 'to pertain and belong, or to fall and accresce to them, or either 'of them, and that to and in favour of the persons and of 'the heirs and substitutes of entail hereafter expressed, so as 'both estates may in all times hereafter go in one and the same 'channel, but that always with and under the reservations and 'conditions after mentioned. Therefore the said Robert Agnew, 'in implement of his part thereof, not only binds and obliges 'himself and his heirs and successors whatsoever to provide, 'secure, and make over to the said John Vans and Margaret Ag-'new, his spouse, and longest liver of them two, whom failing, to 'the other heirs of tailzie after specified, heritably and irredeem-'ably, the whole lands, teinds, tenements, and other heritable 'and real subjects which he shall at any time after the date 'hereof happen to purchase and acquire, or which shall fall and 'accresce to him, any manner of way whatever: But also he the 'said Robert Agnew, by these presents, gives, grants, alienates, 'and dispones to and in favour of the said John Vans and Mar-'garet Agnew, spouses, and the longest liver of them two, and 'to the heirs and substitutes of entail hereafter mentioned, 'and the order and course of succession under written, herit-'ably and irredeemably, all and whole his lands and estate of 'Sheuchan, comprehending the lands and other heritable sub-'jects after mentioned.' And then there was a description of those lands and other heritable subjects. 'For the which causes, 'and for the sum of £3000 sterling advanced and paid by the 'said Robert Agnew to the said John Vans, John Vans 'binds and obliges himself, his heirs and successors whatso-'ever, to provide, secure, and make over to and in favour 'of himself and the said Margaret Agnew, his spouse, and 'the longest liver of them two, and of the heirs and substi-'tutes of entail, hereafter wrote, heritably and irredeemably, 'the whole lands, teinds, tenements, and other heritable and 'real subjects which he shall at any time after the date 'hereof happen to purchase and acquire, or which shall fall 'and accresce to him in any manner of way whatever: But 'also he the said John Vans, by these presents, gives, grants, 'sells, alienates, and dispones to and in favour of himself and 'the said Margaret Agnew, his spouse, and the longest liver of

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'or any other securities or burdens whatever, nor to commit or 'grant any act or deed, civil or criminal, directly or indirectly, 'in any sort, whereby the said lands and estates, or any part there-'of, may be affected, apprised, adjudged, forfeited, or become 'escheat and confiscated, or any other manner of way evicted 'from the heirs of tailzie, or this present-entail, or the order of 'succession prejudged, hurt, or changed in any sort.'

By the irritant and resolutive clauses it was declared, 'That in 'case the said John Vans and Margaret Agnew, or any other of the 'heirs and substitutes, shall contravene the before-written condi-'tions, provisions, restrictions, limitations, or others herein con-'tained, that then and in any of these cases the person or persons so 'contravening shall, for him or her self only, amit, lose, and for-'feit all right, title, and interest he, she, or they have to the said 'lands and estates, and the same shall become void and extinct, 'and the said lands and estates shall devolve, accresce, and be-'long to the next heir of tailzie appointed to succeed, in the same 'manner as if the contravener were naturally dead, &c.; and 'further, with and under the express provisions, &c., that upon 'every contravention that may happen by and through the said 'John Vans and Margaret Agnew, or any of the heirs of tailzie 'aforesaid, their failing to perform all and each of the conditions, 'or acting contrary to all or any of the restrictions, (excepting 'only as is before herein excepted and allowed,) it is hereby ex-'pressly provided and declared, that not only the said lands and 'estate shall not be burthened with or liable to the debts, deeds, 'acts, and crimes of the said heirs of tailzie, but also all such 'deeds, acts, and crimes contracted, granted, done, or committed 'contrary to the conditions and restrictions, or to the true intent 'and meaning of these presents, shall be of no force, strength, or 'effect, and shall be unavailable against the other heirs of entail, 'and who, as well as the said entailer, shall be noways burthened 'therewith, but free therefrom, in the same manner as if such 'debts and deeds had not been contracted, or such acts of omis-'sion or commission had never happened or been committed.'

It was also declared, 'That in case any adjudication, apprising, 'or other legal diligence, shall happen to be obtained or used for 'or against the fee or property of the said lands and estates, or 'any part thereof, upon any debts or deeds of the said John 'Vans and Margaret Agnew, to be contracted or done by them, 'or either of them, after the date of these presents, or to be con-'tracted or done by any other of the heirs and substitutes of 'tailzie, either before or after their succession to the said lands 'and estates, not only shall such adjudications, apprisings, or

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Power was given to the disponees and heirs of entail to feu certain parts of the estate, and to grant liferents to wives and husbands, and provisions to children to a limited amount, and then it was declared, 'That in case the issue male and female 'already procreated or hereafter to be procreated of the mar- 'riage betwixt the said John Vans and Margaret Agnew, and

'the heirs whatsoever of their bodies, shall fail, so as the succes-
'sion shall devolve upon the heirs of entail next in succession to
'them, that then and in that event the heir upon whom the suc-
'cession shall so devolve is hereby expressly bound and obliged,
'with and under the exception and reservation hereafter wrote,
'immediately upon his succession, or whensoever legally thereto
'required, to renounce and denude, or to dispone, convey, and
'make over to and in favour of the heirs and assignees what-
'soever of the said John Vans, or his heirs or their assigns, the
'foresaid lands and estate of Barnbarroch, comprehending there-
'in the several grounds and others before recited; excepting and
'reserving therefrom as many of the lands and others compre-
'hended in the said estate of Barnbarroch, and those he the said
'John Vans shall purchase or succeed to, and lying most remote
'from the mansion-house or mains of Barnbarroch, as will, at the
'rate of twenty-three years purchase of the then current free rent,
'be equivalent and correspond not only to the above £3000
'sterling, advanced and paid by the said Robert Agnew to the
'said John Vans, but also to what further sums of money the
'said Robert Agnew shall at any time of his lifetime advance
'and pay over to the said John Vans, or leave and bequeath to
'him at his decease.'

It was also provided that John Vans and the succeeding heirs of entail should assume the name and arms of Agnew of Sheuchan; and in consideration of the provisions thus given, John Vans and Margaret Agnew renounced every claim which they had at law against Mr. Agnew. This deed, it was alleged, was revised and approved of by Mr. Macqueen, afterwards Lord Braxfield, whose wife was called as one of the heirs of entail.

From the period of its execution John Vans took the name of Agnew, subscribing himself on all occasions as John Agnew, and designing himself as younger of Sheuchan. His debts, at the time of its execution, (according to a report of an accountant afterwards obtained,) amounted to about £1481; but it was alleged by the appellant that they were overrated.

On the 18th of January 1758 the deed was, on the joint petition of Messrs. Agnew and Vans, presented to the Court of Session, and duly recorded in the Register of Tailzies.

Mr. Agnew died in the month of July 1774, having been predeceased by his daughter Mrs. Vans, and leaving, as was alleged, personal funds to the amount of £20,000. Soon after Mr. Agnew's death, John Vans executed the procuratory of resignation contained in the deed of entail, and obtained a charter in terms of it, in virtue of which he was infeft on the 20th of May 1775.

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John Vans died in June 1780, leaving three sons, Robert, Patrick, and John,—and two daughters, Robina and Barbara. With concurrence of his eldest son, he had made provisions in favour of the younger children, exceeding those allowed by the entail; and by a deed of settlement he nominated his eldest son to be his executor. The debts owing by John Vans at this time, and which were almost all personal, amounted, as was alleged, to upwards of £11,000, (independent of the provisions to his children, which extended to £3000,) the documents being signed by him under the name of John Agnew.

On his death, his son Robert assumed the name of Agnew; made up titles to the estates in terms of the entail; and was accordingly infeft on the 19th of October 1781. He had previously married Miss Dunlop of Dunlop, and the eldest son now alive of that marriage was the appellant.

In consequence of the large claims which existed against John Vans or Agnew, and which, it was said, his personal estate was inadequate to discharge, Robert became desirous to have the entail set aside, or at least to enable the creditors to attach the estate for payment of their debts,—he himself being a creditor to a considerable amount. In this it was alleged that the creditors concurred with him, and that mutual memorials were laid by them before Mr. Ilay Campbell, afterwards Lord President,—Mr. Maclaurin, afterwards Lord Dreghorn,—and Mr. Crosbie, for their opinions as to the possibility of setting aside the deed, and enabling the creditors to attach the estate. These lawyers accordingly gave opinions, in which it was said that they concurred in holding that, as there was no fraud, the entail was effectual to prevent the estate being adjudged for the debts subsequently contracted by John Vans or Agnew. *

Notwithstanding these opinions, the creditors resolved to institute judicial measures; and having assigned their debts to Messrs. Stewart and Drew as trustees, these gentlemen charged Robert to enter heir to his father; and he having declined to do so, except under the contract of entail, they obtained decree cognitionis causâ against him. They then raised an action, concluding that the entail should be reduced, as having been granted in fraudem creditorum, or at least that it should be found that all the debts of John Vans were effectual against his estate of Barnbarroch. To this action Robert and the heirs of entail in existence were called as defenders, among whom was the appellant, who at this time was about five years of age, and resided with his

* See these opinions quoted by the Lord Chancellor in his speech.

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father. Lord Braxfield was appointed his tutor ad litem; and the case having come before Lord Justice-Clerk Miller, he reported it on informations to the Court, who, before answer, remitted to an accountant 'to make up from the books of the deceased John 'Vans, or from such other documents as shall be shown to him, a 'report of John Vans's debts at the different periods to be conde- 'scended on by the parties.' He accordingly reported that his debts amounted, at the date of the entail, to £1481; at the date of infeftment, £9319; and, at the time of his death, £11,093, independent of the provisions to the younger children. On advising that report, with the informations, the Court, on the 3d of March 1784,* found, 'That the tailzie under reduction is still a 'subsisting deed, and repelled the reasons of reduction; but found 'that the estate of Barnbarroch is still affectable by the debts 'due by John Vans of Barnbarroch at the time of his death; 'and remitted to the Lord Ordinary to proceed accordingly.'†

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* See Morison's Dictionary, p. 15435.

† The following notes of the Judges' opinions have been preserved by Lord Hailes:—

BRAXFIELD.—No fraud here;—the entail must subsist, but so as not to affect creditors. All debts contracted before recording infeftment must be good. This provided by the statute 1685, and this agreeable to the principles of the feudal law of Scotland. A personal deed of entail cannot qualify a right in a person by charter and sasine; 1751, Oliphant of Bachilton. But I incline to go farther. Prior to the statute 1685, entails were in use; but doubted how far, by the common law, a proprietor could lay such extraordinary burdens. The statute 1685 interposed to prevent such questions; it lays burdens on the heirs of tailzie;—but nothing in the statute which says that a man may tie up his own hands, possess the estate, and yet secure it from creditors;—that is contrary to the nature of property; and it would have been unlawful in the Legislature to do so. No one could make up a title to the entail, in case of the contravention of Mr. Agnew, the maker of the entail. A different case when the maker of the entail puts the fee in the heir, and reserves only a liferent. No difference that here a mutual entail;—that good among the persons contracting with him; but still the debts will be good quoad the creditors;—this determined in the case of Barholm.

MONBODDO.—Have no doubt as to the validity of all debts prior to recording of the entail by infeftment. Nor have I any doubt even as to posterior contractions, for the limitations of the entail are only against the heirs of entail. No man can possess an estate without being liable to debts contracted by him, unless there be a provision to qualify right. No matter that here a mutual entail; that is merely a personal contract;—however onerous, it will not affect creditors who contract on the faith of the records.

JUSTICE-CLERK.—I cannot perceive the principle which distinguishes mutual entails from simple entails. An onerous consideration for making the entail will not alter the nature of the right;—that may be a good obligation at common law to make the entail good, but will not affect creditors. All that they had to do was to look at Mr. Vans's titles, which contain no prohibition of irritancy.

Find the entail subsists, but that it cannot affect the just and lawful creditors of Mr. Vans.

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So far as Robert was concerned in this action, the appellant alleged that he was merely a nominal defender; and he referred to correspondence with his agents to show that he was colluding with the creditors, and was equally as desirous as they themselves were that they should gain their cause.

In consequence of this decision, an act of Parliament was applied for and obtained by Robert for selling parts of the estate in liquidation of the debts; and sales were accordingly made to a large extent. *

In 1809 Robert died, and the appellant, his eldest son, thereupon succeeded to the estate in virtue of the entail. By minority and absence abroad, it was still competent for him to appeal against the above judgment, finding the estate of Barnbarroch liable for the debts of John Vans at the time of his death; and he accordingly entered an appeal, on hearing which, the House of Lords, on the 24th of July 1814, ordered, 'That the cause be 'remitted back to the Court of Session in Scotland, to review the 'interlocutors complained of generally.' The case having been thereupon remitted by the Inner-House to Lord Pitmilly, he afterwards reported it upon informations.

On the part of the appellant it was contended,—

1. That as the deed contained effectual prohibitory, irritant, and resolutive clauses directed against John Vans for valuable considerations, and consented to by himself, and as it had been duly published, it formed a valid interdiction and inhibition against him at common law, independent altogether of the statute 1685, c. 22, so as to prevent him from thereafter contracting debts to affect the estate:—that it had been repeatedly decided, that if the fetters be applied to the institute or disponee, he is bound by them:—and that this, of necessity, arose from the operation of the common law alone, because the statute was meant to regulate only the succession of *heirs*, and not the present and immediate settlement of the estate upon the entailer or the institute, —the authority given by the statute being, 'to substitute heirs;'— and that, accordingly, entails had been given effect to prior to the date of the statute.

2. That as the deed was a contract of sale, marriage, and mutual entail, and proceeded on onerous causes, and particularly as a price in money had actually been paid by Robert Agnew, in consideration of the entail of the estate of Barnbarroch, each of the heirs thereby substituted became an onerous creditor under the entail, and so acquired a jus crediti:—that as infeftment had been taken in 1775, that jus crediti was rendered real, so

* See next Case.

that the right of the heirs of entail to the estate became preferable to that of any personal creditor of John Vans, excepting those creditors whose debts were executed prior to the date of the deed; and which exception arose,—not from the debts being contracted prior to its date,—but from the deed itself recognising the validity of diligence to be led against Barnbarroch for payment of them, and binding the heirs under a penalty to redeem.

3. That this was not a question between heirs and creditors, but between creditors having real rights under the entail, and personal creditors of John Vans; and that the terms of the prohibitory and irritant clauses were quite sufficient to prevent John Vans from thereafter contracting debts whereby to burden the estate.

To this it was answered by Stewart and Drew, on behalf of the creditors,—

1. That as the estate of Barnbarroch belonged to John Vans in fee-simple, and as by the deed of entail the property remained with him, he could not, consistently with the law of Scotland, do any act whereby to place his estate beyond the reach of the diligence of his creditors, and therefore that the judgment in 1784, finding Barnbarroch still affectable for his debts, was well founded:—that the proposition maintained on the other side that entails were valid, independent of the statute, was unfounded:—and that although the institute and disponee were not mentioned in the statute, yet it had been settled by decisions, that if the fetters were applied to them, they stood in the situation of heirs instituted, and came within the statute; and that as interdictions at common law were only available where they were executed in due and regular form by profuse or facile persons, and as John Vans was not of that description, the plea urged on this ground was untenable.

2. That there had been no such onerous cause as to entitle the heirs to the character of creditors, seeing that Robert Agnew was under obligations by his own contract of marriage towards his daughter; and as she was his heir at law, and so entitled to succeed to his estate, and she had a right of terce out of her husband's estate, the transaction was altogether gratuitous, and merely made to assume the form of onerosity, so as, if possible, to defraud the creditors of John Vans. And,—

3. That the prohibitory and irritant clauses were not effectual against third parties, because there was no prohibition against *contracting* debts, but merely against *burdening* the estate with debts; and besides, the irritant clause was directed against the heirs of tailzie only—an expression which did not include John Vans.

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The Court, on the 2d of June 1818, adhered to the interlocutor pronounced on the 5th of March 1784, and found Mr. Agnew liable in expenses.* Against the above judgments Mr.

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* The following opinions were delivered at pronouncing the above judgment:—

Lord Justice-Clerk.—A great deal is said in the papers of the unfavourable view taken by the House of Lords of the decrees obtained in 1784, but I see nothing of that in the judgment: it is neither more nor less than to allow the defender to be heard; and your Lordships are now to decide if you can at this late period alter the former decision. Notwithstanding the great labour and the long argument of the defender, I profess I see no reason to doubt the propriety and legality of the former judgment. It is quite clear, that on attending to the terms of the entail, or rather of the contract of marriage, and deed of entail therein contained, between Mr. Vans and Mr. Agnew in 1757, that deed cannot be countenanced for one moment, so as to deprive the creditors of their right of proceeding against the estate of Barnbarroch. On looking at the terms of the deed, though it is a mutual entail, and though there is, in regard to Mr. Vans, the introduction of the word 'sell' in that part of the deed, it is clear there is no foundation for the argument that the estate had been purchased by Mr. Agnew, or that it is to be held as an acquisition by him; for even with regard to the word 'sell,' Mr. Vans 'sells,' &c. to himself and the heirs called to the succession. I can pay no attention to such an agreement in reference to the creditors. By no contrivance whatever, even if it were deliberately intended to contrive a mutual contract for that purpose, could this gentleman's estate be withdrawn from the claims of his lawful creditors. This is a proposition requiring no argument, as it is supported by the whole law of Scotland. Looking at the state of his affairs, there were large debts owing by him at the time. Though the operation of recording the deed of entail was immediately carried through, yet, down to 1775, there was no alteration in the titles of Mr. Vans, but he just continued as the fiar of the estate. Then came the proceedings in this Court in 1784, and the question was, whether the entail could be set aside? The Court found that it could not be set aside; but that is qualified with the finding, that the estate continued affectable by all the debts due by him, and of course with the interest. The only question that remained was, the amount of the debts. These debts were made out in a satisfactory manner, and at last an act of Parliament was obtained, which comes more properly to be considered in the other case. But as to the main question here; as to the powers of this party to withdraw his estate from his creditors by the deed of entail, I have no doubt. I am for pronouncing a judgment now in ipsissimis terminis of the former judgment; especially when we recollect how the case was conducted; it was at least as well argued and determined as it can be now, by the greatest abilities that ever sat on this Bench.

Lord Robertson.—The question is, whether the estate of Barnbarroch was affectable by the debts of John Vans at the time of his death: or whether it was protected from these claims by the deed of entail? In order to examine this question, it is necessary to attend minutely to the terms of the deed of entail, and, first, as affecting the heirs of entail; and then, separately and distinctly, how it could affect the rights of the creditors.

Mr. Vans and Mr. Agnew possessed their estates in fee-simple; but, about the middle of the last century, Mr. Vans married the only daughter of Mr. Agnew, and some time after they entered into the mutual contract and tailzie now under consideration. The entail proceeds upon a narrative that John Vans and Margaret Agnew were married without any matrimonial contract, whereby the said Margaret Agnew was not properly secured in a jointure, nor a settlement made upon the issue of the marriage, nor a suitable provision given to the said John Vans with his said spouse; and for remedying these matters, the parties entered into this contract and mutual deed of tailzie.

Agnew having appealed, the House of Lords 'ordered and adjudged, that so much of the interlocutor of the Court of Session

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By this deed, Agnew conveyed his whole lands and estate to John Vans and his wife, reserving only his own liferent; and Vans, in consideration of this conveyance, and £3000 made over to him by his father-in-law, conveyed the estate of Barnbarroch to himself and his wife. The destination of both estates is precisely the same, as long as there exist heirs of the marriage; but if these failed, the destination of the two are different, and a provision is made for the repayment of the £3000 which had been given to Mr. Vans.

This deed contains all the usual clauses, and was immediately recorded in the Register of Entails, and in the Books of Council and Session; but no infeftment took place upon it till 1775.

In these circumstances, I consider that the entail is strictly onerous; first, because it is a mutual entail, and each entail entered into in consideration of the other; secondly, because, from the preamble, which I have read, and other provisions, it is of the nature of a contract of marriage; and, thirdly, it is onerous, because it is granted in consideration of £3000 paid by Mr. Agnew.

In every question, therefore, between the parties to this deed and their heirs and representatives, it is onerous to all intents and purposes, and therefore not to be gratuitously defeated by Mr. Vans of Barnbarroch, or any heir in possession; and if Mr. Vans should burden it with debt, and have a separate estate, he might be made to free the entailed estate.

But we are not in a question with the heirs of entail, but in a question with these heirs and the just and onerous creditors of Mr. Vans; and the question is, How far the estate belonging to him was tied up against himself and the diligence of his creditors?

It is necessary to attend to the form of the conveyance. There is a distinction between the conveyance of the two estates. By this deed of entail, Mr. Agnew conveyed 'to and in favour of the said John Vans and Margaret Agnew, and the 'longest liver of them two, and to the heirs and substitutes of entail hereafter mentioned, in the order and course of succession under written, heritably and irredeemably,' &c. under the express reservation of the liferent of Mr. Agnew himself. So that Mr. Agnew was divested of the fee; he had nothing but the liferent. He was only liferenter, and could not have granted any lease to last longer than his own lifetime, except under a special liberty to let leases of 27 years.

There is a remarkable difference in the terms by which Mr. Vans disponed Barnbarroch; for there the conveyance is to Mr. Vans himself and wife, and the longest liver of them two; whom failing, to the other heirs of tailzie and provision therein after specified. So that, by the conception of this deed, the fee of Barnbarroch was completely vested in John Vans, and there was no necessity for reservation of liferent. The situation of Mr. Vans with regard to this estate is different from that of Mr. Agnew as to the other.

By the terms of this deed, the fee being conveyed to Mr. Vans, he continued in possession during his natural lifetime. No infeftment was taken till 1775; and no inhibition, no legal step of diligence, was taken by any party to limit his right, or make it different from what it was by the terms of the deed itself.

It is clear in the law of Scotland, and runs through the whole system of it, that the whole estate of every debtor is liable to be affected by the diligence of his creditors; and it is impossible for any man to have in his own person the fee of an estate,—to continue in possession of it, and at the same time by any deed or operation of his own, to prevent the attachment of it by his creditors.

On these grounds, I concur with your Lordship in opinion as to the debts contracted prior to the infeftment in 1775.

There is a separate question, How far, after the infeftment, the estate was liable

July 31. 1822. 'in Scotland, of the 3d of March 1784, as found generally that 'the estate of Barnbarroch was still affectable by the debts due 'by John Vans of Barnbarroch at the time of his death, be, 'and the same is hereby reversed; and the Lords find that such 'estate was affectable only by the debts of the said John Vans 'which were due at the time of the date of the deed of tailzie of 'the 29th day of December 1757, and which remained due at 'the time of his death, and such other debts of the said John 'Vans (if any) as had become real charges upon the said estate 'before the infeftment of the 20th day of May 1775. And it is 'further ordered and adjudged, that the said interlocutors of the '2d day of June 1818, and the 26th of February 1819, com-'plained of in the said appeal, be, and the same are hereby re-'versed. And it is further ordered, that the cause be remitted 'back to the Court of Session in Scotland, to do therein as may 'be consistent with this finding, and as shall be just.' *

Appellant's Authorities.—(1.)—2. Mack. 489; 3. Ersk. 8. 21; Hope's Min. Pr. 362; 3. Ersk. 8. 23; Stormont, Feb. 26. 1662, (13966); 1. Stair, 14. 5; 2. Stair, 3. 59; 2. Bank. 3. 141; 3. Ersk. 8. 24; Mackenzie, July 1. 1752, (15459, and Elch. No. 36. Tailzie); Don, Feb. 5. 1713, (15591, and Robertson's Ap. Ca. 76); Shaw, July 15. 1715, (15572); Gordon, Jan. 25. 1771; Syme, Feb. 27. 1799, (15473); 3. Ersk. 2. 4; 5. Bell on Deeds, 72; Robertson's Ap. Ca. 207. —(2.)—L. Advocate v. Creditors of Cromarty, April 10. 1759, (H. of L.)

Respondents' Authorities.—(1.)—Campbell, Dec. 22. 1622, (7159); Dickson, March 10. 1786, (15534); 1. Bell, 26; Kames' Law Tr. 150; Hamilton, March 3. 1815, (F. C.)—(2.)—Campbell, June 17. 1746, (15505); Nisbet, Nov. 1765, (15516); Edmonstone, April 15. 1771, (4409, rev. in H. of L.); Bruce, Jan. 15. 1799, (15539.)

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(*Ap. Ca. No.* 43.)

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for the future debts contracted by Mr. Vans, the heir in possession? But I was much satisfied with the argument, that the irritant and resolutive clauses are not sufficient to tie up his hands. So that, upon the whole, I am for repelling the defences.

Lord Glenlee.—For my own share, it is inconceivable to me how any one can doubt the propriety of the judgment formerly pronounced.

It is stated that by the original law of Scotland it was quite competent to a man to tie up himself by irritant and resolutive clauses, but not to tie up his heirs, and that this made an act of Parliament necessary to authorize entails; but that no such thing was necessary for enabling him to tie up himself. There is a great extravagance in this idea. If that was the only argument omitted formerly, I am not surprised that it was omitted, for I dare say such an argument never occurred to mortal man before.

Lord Craigie.—I am entirely of the same opinion. I think not only that the irritancy was not properly against Mr. Vans, but that he had always the fee of this estate. It is far different from the case of an institute who takes it qualified from the proprietor. Mr. Vans had the right of property, and it was never taken from him.

* See the Lord Chancellor's speech at the end of the next Case, p. 343.