an heir of entail under the deed 1697, but a disponee, and therefore had powers to make such an entail." No. 53.

Lord Reporter, *Monboddo.* Act. *Lord Advocate Campbell, Mackintosh, Wight.*
Alt. *Blair, H. Erskine, N. Fergusson.* Clerk, *Menzies.*

C. *Fac. Coll. No. 215. p. 337.*

1790. *January* 20. BRUCE HENDERSON *against* HENDERSON.

No. 54.

A condition in an entail, that the heirs should denude in the event of their succeeding to a particular estate, found to apply, in a question with the next heir, to the case of an heir already proprietor of that estate, when the tailzied succession opened to him; and found effectual, though not fenced with prohibitory, irritant, and resolutive clauses.

Fac. Coll.

*** This case is No. 16. p. 4215. *voce* FIAR.

1791. *December.* WEBSTER *against* FARQUHAR.

No. 55.

Thomas Farquhar, heir of entail in the estate of Pitscandlie, let a nineteen years lease of forty acres to Webster, with liberty to the tenant to build barn, byre, stable, and other houses, which the tenant might judge necessary for the farm, to be appraised at the end of the lease, and the value paid by the granter and his heirs and successors in the lands. Action being brought by the tenant for payment of the value of his buildings, appraised at £.74, against a succeeding heir of entail, the Lords found the defender not liable. See APPENDIX.

Fol. Dic. v. 4. p. 343.

1795. *May* 13.
WILLIAM GRAHAM *against* The CREDITORS of HARRY GRAHAM.

No. 56.
A person having for many years possessed in apparency, and having died without making up titles to an

Harry Graham, senior, in 1737, executed a strict entail of the estate of Hourstoun. In 1738, he was succeeded by his son Charles Graham, who took infeftment on the entail.

In 1744, Charles was succeeded by his son Harry Graham, junior, who possessed the estate in apparency till his death in 1776.

The entail was recorded in the register of tailzies in 1773, upon an application from the substitutes.

No. 56.
estate which was strictly entailed, but the entail of which was recorded only a few years before his death, upon an application from the substitutes of entail, his creditors, who had done no diligence against him, were found not entitled to attach the estate, although their debts were contracted before the entail was recorded.

Harry Graham, junior, contracted debts to a large amount, chiefly before the entail was recorded, but partly after that period. None of his creditors did any diligence against him.

Upon his death, Alexander Graham, the next heir of entail, but not heir of line to Harry Graham, junior, entered into possession of the estate, and connected himself by regular feudal titles with Charles Graham, the person last infeft.

The creditors of Harry Graham, junior, and also certain creditors of Charles Graham, his father, then led adjudications against the estate; and upon Alexander's being succeeded by his only son William Graham, they raised a process of ranking and sale, in which the different substitutes were called as defenders.

The estate was sold by authority of the Court of Session, and the ranking of the creditors reserved for future discussion.

In the ranking, William Graham, the heir of entail, contended, that none of Harry Graham's creditors, not even those whose debts had been contracted before the entail was recorded, had right to be ranked on the price; and

Pleaded: By the common law of Scotland, the creditors of a person possessing a landed estate in apparency, however long that possession may have been continued, cannot attach it for payment of their debts; and the next heir is entitled to make up titles to the estate, without being obliged to discharge them, Stair, B. 2. T. 3. § 16. The act 1695, C. 24. was intended, in some degree, to remove this hardship. It declares, that every person who, since 1st January 1661, whether by adjudication on his own bond, or by service, has made up titles to an estate, or shall do so in future, by connecting himself with the person last infeft, and passing by his immediate predecessor, dying in apparency, shall, provided the latter had been three years in possession, be liable for his debts and deeds, "in so far as may extend to the value of the said lands and estate, and no farther, deducting the debt already paid; and also, with this order as to the time past, that all the true and lawful debts of the apparent heir entering, as said is, and already contracted, with the true and real debts of the predecessor to whom he enters, shall be preferred in the *first* place."

This statute, which being correctory of the common law, is to be strictly interpreted, did not make the debts of the interjected person real incumbrances on the estate; nor could it have done so consistently with feudal principles, and the security of the records. It merely created a personal claim against the next heir, in case he connect himself with the person last infeft, to the extent of the benefit which he draws from the estate. Bankton, B. 3. T. 5. § 107; Ersk. B. 3. T. 8. § 94.

The heir making up titles in the manner pointed out by the statute, becomes liable for his predecessor's debts, in the same manner as if they had been at that moment contracted by himself. The statute, however, certainly did not mean, that they should be in a better situation than his own debts. The claim under the statute can only apply, therefore, when the heir, by his entry, acquires a right of affecting the estate by his own debts and deeds; and this holds only where he

possesses in fee-simple, but not where, as in the present case, he succeeds as heir under a strict entail, and becomes little better than a mere life-renter. Indeed, from the last clause of the statute giving a preference to the debts of the predecessor last infeft, and to those of the heir who enters, over the debts of the interjected person, it is clear, that the statute was not meant at all to apply to entailed succession; for as these two classes of preferable debts do not affect any entailed estate, still less surely can the postponed ones. No. 56.

At any rate, the right of the creditors could only extend to a personal claim against the heir who made up titles, to the extent of the rents intromitted with by him.

Answered: The registration of an entail is essentially requisite in order to make it effectual against creditors and purchasers. Till that step is taken, the possessor of the estate, in so far as they are concerned, is to be considered as holding it in fee-simple. The rights which they have acquired cannot be affected by the entail being afterwards recorded, whether at the desire of their own debtor or of the substitutes; and their debts are to be considered as the debts of the tailzier, which are transmitted as a burden on the successive heirs of entail.

It was the object of the act 1695, to put creditors contracting with an heir apparent three years in possession, in case the next in succession should make up titles, passing him by, in the same situation as if their debtor had completed his titles; a fact which they very naturally take for granted, from their seeing him so long exercise the rights of proprietor.

No argument can be drawn from the clause in the statute, giving a preference to the creditors of the person last infeft, and of the heir entering, over those of the person dying in apparency. So strongly was the Legislature impressed with the favourable situation of the creditors of the latter, that in questions with the heir entering, it gave the statute a retrospect of thirty years, but it was thought unreasonable that this retrospect should affect the interests of those creditors who alone had formerly any claim against the heir in possession; but this clause, it is evident, applies only to debts contracted between 1661 and 1695.

The Lord Ordinary reported the cause.

Observed on the Bench: The question is not, Whether the debts, when contracted, were struck at by the entail; but, whether they can now be made effectual against the tailzied estate, although no step was ever taken to connect the person who contracted them with it, and although the next heir cannot affect it with his own debts, the tailzie having been rendered complete, by registration, before he succeeded? The act 1695 introduces merely a passive title against the heir in possession, and therefore it can only reach subjects which he himself can burden.

The Lords sustained the objection.

A reclaiming petition was, (2d June, 1795) refused, without answers.

Lord Reporter, *Dreghorn.* For the Objector, *Honyman.* Alt. *Da. Williamson. Ja. Montgomery.* Clerk, *Menzies.*

D. D. *Fac. Coll. No.* 168. *p.* 396.