# APPENDIX.

## PART I.

## HEIR APPARENT.

1800. *May* 23.

COUNTESS DOWAGER OF GLENCAIRN, *against* WILLIAM CUNNINGHAM CUNNINGHAM GRAHAM.

No. 1.
A liferent locality to a wife, granted by an heir of entail dying in apparency, after being three years in possession, by the act 1695, C. 24. binding on himself and the subsequent heirs, the locality being expressly allowed by the entail.

THE estate of Finlaystone is held under a strict entail, containing the following clause: "Excepting always forth and frae the said clause irritant, full "power and liberty to any of the heirs and members of tailzie above specified, "to grant liferent infeftments, but not of annual-rent or annuity to their ladies "or husbands, in satisfaction to them of all terces or courtesies, from which the "ladies and husbands of the said heirs and members of tailzie are hereby alto-"gether excluded and debarred, out of the said lands, lordship, baronies, and "others aforesaid, the said provisions not exceeding a fourth part of the said "lands, lordship, baronies, and others, and that only in so far as the same is "free and unaffected for the time, with former liferents, or real debts; and "which provisions of liferent foresaid, are to be burdened with the fourth "part of the teinds and public burdens or minister's stipends payable forth of "the same."

In 1791, John, Earl of Glencairn, succeeded to the estate on the death of his brother Earl James, who had made up titles to it, in terms of the entail.

In 1793, he executed a disposition of liferent locality, as authorised by the entail, in favour of his wife, to whom he was married before his succession, and he died in 1796, without having made up any feudal title to the lands.

Robert Graham, the next heir of entail, made up titles as heir of tailzie and provision to Earl James, and was infeft.

In 1798, he was succeeded by his son William Cunningham Cunningham Graham, who was served heir in general to his father.

The Countess of Glencairn brought an action against Mr. Graham, both as heir of entail to the estate of Finlaystone, and as representing his father universally by his general service, concluding, alternatively, that he should either grant a new disposition, or pay an annuity equal to one-fourth of the free rents, on the ground that his father had incurred this obligation, in terms of the act 1695, C. 24.

In defence, Mr. Graham

Pleaded: 1*mo*, The act 1695 does not apply to estates held under the fetters of a strict entail. It introduces only a personal passive title affecting the heir,

No. 1. passing by, but without making the debts and deeds of the interjected person a real burden on the lands, even when held in fee-simple, and cannot be extended to subjects which an heir of entail passing by has no power to burden; 13th May 1795, Graham of Hourston, No. 56. p. 15439.

*2do*, Being a correctory statute, it has always received a strict interpretation. Its meaning was to protect onerous creditors, contracting with an heir three years in possession, on the faith of his being feudal proprietor; Bankt. B. 3. Tit. 5. §108. It secures his onerous, but not his gratuitous debts and deeds; Ersk. B. 3. Tit. 8. § 94; Muirhead, No. 137. p. 9807; Clydesdale, No. 25. p. 5262. Now, the Countess could not have compelled her husband to grant her a liferent provision; 14th June 1765, Lauder against Lauder, No. 44. p. 15419. The deed executed by him, therefore, must be held as the fruit of his bounty, or, in other words, as gratuitous.

*3tio*, At all events, the statute creates only a personal claim against the heir who serves, limited to the value of the succession; Ersk. B. 3. Tit. 8. § 94. The rents, during his life, were the only benefit which Robert Graham acquired from passing by the interjected heir, and the defender cannot be further liable.

Answered: *1mo*, The terms of the statute are general, and apply to heirs of every description. The debts and deeds of heirs of entail are equally effectual against the estate, as those of heirs succeeding in fee-simple, in so far as they are not prohibited by the entail. The pursuer's provision is expressly allowed by it. The case of Graham of Hourston does not apply. The debts there claimed on, were struck at by the limitations of the entail, which had been rendered complete by registration, before the succeeding year had made up his titles.

*2do*, The statute does not seem to authorise any distinction between the onerous and gratuitous debts and deeds of the interjected person.

At all events, it is a settled point, that rational deeds are entitled to the benefit of the statute, as well as those which are strictly onerous; Bankt. B. 3. Tit. 5. § 108; Ersk. B. 3. Tit. 8. § 94; 30th June 1761, Maclean of Lochbuy, affirmed on appeal, 8th February 1765, (not reported*.) Reasonable provisions to a wife are not only rational, but are considered so much matter of civil obligation, that where she has no conventional provision, and the ordinary legal provisions are insufficient, she has an action against her husband's representatives for supplying the deficiency; 6th March 1778, Thomson against Macculloch, No. 70. p. 434; 15th December 1786, Lowther against Maclaine, No. 71. p. 435; 27th January 1790, Young against Campbell, No. 29. p. 400.

*3tio*, The act 1695, puts the debts and deeds of the interjected person in the same situation as if his titles had been complete. The pursuer's provision being authorised by the entail, the heir passing by, and, through him, all the subsequent heirs, became liable to grant a deed in specific implement, in the same

* See APPENDIX, PART II.

manner as they would have been, if her husband had been infeft, and her provisions had been constituted by a deed wanting procuratory and precept. Her claim can in no event exceed the value of the estate, as it is only payable out of it; and she makes her demand against the rents, or personally against the defender, only to supply the want of specific performance. No. 1.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: The act 1695 transmits the obligation of the interjected heir against his successor, in the same manner as if his titles had been completed. It protects his onerous and rational debts and deeds; and there is no occasion at present to consider its effect as to those which are gratuitous; because a widow's provision is clearly onerous. An heir of entail, in so far as he is not restricted by the prohibitions, is an unlimited fiar. The provisions in question being authorised by the entail, the late Mr. Graham and his successors are bound in specific implement, and the obligation does not depend on the amount of rents received by them.

The case of Hourston was well decided upon the grounds suggested in the pursuer's argument.

The Lords, by a great majority, repelled the defences, and remitted to the Lord Ordinary to proceed accordingly.

Lord Reporter, *Glenlee*. Act. *Mat. Ross*. Alt. *Fletcher*. Clerk, *Menzies*.

*D. D.* *Fac. Coll. No.* 179. *p.* 405.

*** This case was appealed. The House of Lords ORDERED and ADJUDGED, that the appeal be dismissed, and the interlocutors complained of be affirmed.

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1803. *February* 2. MIDDLEMORE *against* MACFARLANE.

No. 2.
What title necessary for taking up the reversion after a judicial sale at the instance of an apparent heir?

William Richard Middlemore, brother and apparent heir of the late John Middlemore of Donavourd, brought a process of sale under the act 1695, C. 24. against the widow and creditors of his predecessor. Part of the estate was purchased by Andrew Macfarlane, and, after payment of the debts, a considerable reversion remained for the heir of the deceased.

The greater part of the lands purchased by Macfarlane, had been held by John Middlemore under base infeftments, upon the precepts contained in the disposition from his authors, the procuratories of resignation continuing unexecuted.

It was objected by Macfarlane, that the reversion of the price should not be paid until the pursuer had made up a public feudal title to his brother, by entering with the paramount superiors. The pursuer maintained that this was not necessary; but at the same time offered to take out precepts of *clare constat* from the immediate superiors of the base infeftments, and infeft himself upon these. But Macfarlane was not satisfied with this, and