

which I think right ; as I think it also right that it should go so far, because it would be very hard to put a man to the expense of a special service before he knows, by the production, whether he has any right to reduce or no.

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1757. *March 10.* WILLIAM NAIRN, Advocate, *against* SIR THOMAS NAIRN.

[Kilk. *eodem die* ; and *Fac. Coll. II*, No. 24.]

THE question here was, Whether a remoter substitute in an entail could, upon a summary application to the Lords, get the entail, which had fallen into his hands, recorded? The heir in possession appeared, and contended that this could be done only by way of process, and that such had been the form for many years past; and that it had been so decided in a controverted case, when Mr Forbes and Arniston were upon the bench; since which time it was thought to be a fixed point. But the Lords were all of opinion that it could be recorded upon a summary application, except my Lord Kaimes, who said he had a very great doubt whether an entail could be at all recorded after the death of the maker, except by the heir in possession, who could record the entail made by his predecessor, for the same reason that he could make a new one. He said he thought that the recording of an entail was necessary to complete it, and make it an entail, in terms of the statute, that is, an entail against creditors and purchasers, as much as the inserting irritant and resolute clauses was; and the one could be no more supplied, after the death of the maker, than the other: Without both it might be a good deed *intra familiam*, but it was not a statutory entail. This point was argued in presence, about ten years ago, in the case of the entail of *Kinaldy*, and informations ordered upon the pleading, but it was transacted and never came to a decision; and it was said that the late President Arniston was clear of opinion against the registration, and Elchies was doubtful; but, at any rate, Kaimes said, if it could be registered at all, it must be by a process, in which the heir in possession would be heard upon any defences that he might have against the registration; such as that it was revoked by a posterior deed, or that it was nonsensical and unintelligible; upon which account it was said that in one case the Lords had refused to register an entail. But it was answered, that the registration of the entail would neither make it better nor worse; and, in the meantime, while the process was going on, the estate might be sold.

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1757. *November 16.* ROSS *against* SUTHERLAND.

Ross, creditor of the deceased ———, confirmed, as executor-creditor, certain debts due to the deceased; and, being informed that there were other debts of his which might be made effectual, and of which the documents were