No. 140.

The Lords sustained the reasons of reduction, and reduced, decerned, and declared."

Act. *Advocatus et M'Queen.* Alt. *Montgomery et Dundas.*

A. W. *Fac. Coll No.* 140. *p.* 324.

1765. *February* 22. DOUGLAS *against* STEWARTS.

No. 141.
Entail not followed by infeftment.

Sir William Douglas of Kilhead executed an entail of the lands of Cumbertrees, in favour of himself in life-rent, and his son, afterwards Sir John Douglas, and the heirs-male of his body, in fee; failing whom, a series of other substitutes. This entail was recorded in the register of tailzies, but no infeftment followed. Sir John, the institute, possessed after his father's death, as apparent heir, and contracted considerable debts; whereupon his creditors charged him to enter in special to his father, and proceeded to lead adjudications against the estate. These adjudications were completed by infeftment, and the creditors pursued a ranking and sale of these lands, as well as others belonging to their debtor. This process was opposed by William Douglas, son of Sir John, and one of the substitutes, who insisted, that the entailed lands should be struck out of the sale. Urged for the creditors, That the entail was nothing more than a personal deed while infeftment had not followed on it; that the act 1685 requires not only the recording of the entail in the register of tailzies, but the recording of the sasine taken thereon; both these requisites are necessary to render the entail effectual against creditors, and neither of them by itself can have that effect. Sir John having possessed the estate solely as heir-apparent, and the act 1695 declaring, that the onerous debts of an apparent heir three years in possession shall affect the estate, the creditors were in perfect safety to contract with him, and no latent personal deed (for such is the entail if no infeftment on it appears on record,) can prevent their just debts from being effectual. The Lords found, That the lands of Cumbertrees ought not to be struck out of the sale. See APPENDIX.

Fol. Dic. v. 4. *p.* 351.

*** The like found, 1791, Peirse and his Attorney against Russel and Ross of Kerse. See APPENDIX.

1765. *June* 22.
NEIL EARL of ROSEBERRY *against* JAMES BAIRD, and other Creditors.

No. 142.
The act of Parliament 1685 was found to have retrospect to entails not only made, but complet-

The predecessors of Niel Earl of Roseberry executed an entail of the estate of Primrose, which, in the subsequent transmission of that estate to the several succeeding heirs, had been regularly recorded, with all its clauses, of whatever kind, in the register of sasines. This entailed estate having come into the possession of the present Earl, he was pursued by the creditors of his predecessors, notwithstanding of the entail prohibiting the contraction of debt, as it never had been

inserted in the particular record established for the registration of tailzies by the act 1685.

No. 142. ed by infeftment, before the date of that act, and recorded in the register of sasines.

In opposition to this claim, it was pleaded by his Lordship, That the act founded upon, in the same manner as every other law, could have no retrospect, and was only intended to provide a remedy against future emergencies. He insisted, too, that though the House of Peers, in the case of Rothes, No. 138. p. 15609. had declared, that the act 1685 was to regulate tailzies prior to the date of it, yet that the case itself, which was the foundation of that sentence, explained the sense in which it ought to be received. The tailzie, in the case of Rothes, was never completed by infeftment; consequently, the decerniture of the supreme Court could only have relation to tailzies in the same imperfect situation, but could never be intended to establish a rule for those upon which infeftment had followed, and which, like the present, were recorded in the public register of sasines, patent to all the lieges.

"The Lords found, That the tailzie was not effectual against the creditors, as it had not been recorded agreeable to the statute."

Act. *Lockhart.* Alt. *Burnet.*

A. C. *Fac. Coll. No.* 17. *p.* 30.

1776. *June* 26. IRVINE of Drum *against* EARL of ABERDEEN.

No. 143.

It was found, in the case of an entail, where both the charter and a relative deed of nomination of heirs had been recorded, that these were not sufficient, as the original tailzie itself had not been recorded. This judgment was affirmed on appeal. See APPENDIX.

Fol. Dic. v. 4. *p.* 350.

*** See a similar case, Kinnaird against Hunter, No. 139. p. 15611.

1781. *August* 3. ELIZABETH SPITTAL, Supplicant.

No. 144. Summary application, by a substitute in an entail, for recording the same in the register of tailzies, incompetent, when the entail is not produced.

The petitioner set forth, "That she was a substitute in an entail affecting the lands of Leuchat: That this entail, though executed on the 19th of December, 1678, and the title upon which the estate had always been possessed, had never been recorded in the register of tailzies," and concluded "for service of the petition upon James Spittal, the heir in possession, for an order upon him to produce the deed of entail, and for a warrant for recording the same in terms of the statute 1685."

The pethitioner referred to a decision, No. 135. p. 15605. where an application of the same nature was complied with, upon production of a copy of a deed of entail, nowise authenticated.

In this case, the Court refused the petition, as incompetent.

C. *Fac. Coll. No.* 80. *p.* 136.