

1757. *March 10.* WILLIAM NAIRNE *against* SIR THOMAS NAIRNE.

Upon the 29th February, 1704, an entail was executed of the lands of Dunsinnan by Sir William Nairne.

Upon the 17th October, 1752, Sir William executed a second entail of the same estate, varying in some particulars from the former. Neither of these entails was recorded in Sir William's life.

Sir Thomas succeeded to his father, and served himself heir in general.

William Nairne, brother of Sir Thomas, a remote substitute, presented a petition to the Court, craving, That the entail 1704 should be recorded, for his own behoof, and for the behoof of Sir Thomas' children, to whom he was named curator by Sir William; and for that purpose produced one of the original copies of the entail, which had come into his possession in a regular manner.

Sir Thomas Nairne objected to this, and argued, That a remote substitute of an entail could not apply in a summary manner, by petition, for recording an entail: That such application was only allowed to the maker, or to the heir in possession: That a substitute had no other remedy, but to bring an action against the heir in possession, to compel him to apply for recording the entail; and if such an action were brought, the heir in possession would be allowed to state his defences against the recording: That this form of proceeding had been found necessary above twenty years ago, in the case of Drummond of Carron, and in the case of the tailzie of Callender: That it was even a doubt, in point of law, whether an heir in possession could be at all compelled to record an entail which had not been completed by registration during the life of the maker; and in this case it appeared that Sir William had made a second entail in the year 1752.

“The Lords appointed the entail to be recorded.” See No. 133. p. 15602.

Act. Nairns.

Alt. Mackintosh, Ferguson.

W. J.

Fac. Coll. No. 24. p. 41.

1758. *February.* CREDITORS OF HUMBIE *against* HEIRS OF ENTAIL.

In the year 1663, an entail was made of the Barony of Humbie, containing certain prohibitions and irritancies; particularly, That the heirs of entail shall not have liberty to alien or contract debt; but no resolute clause against the tenant in tail who contravenes. By want of this clause, the entail was universally considered as ineffectual against creditors. The heirs accordingly who succeeded to the estate found credit, and a ranking and sale was raised. Appearance was made for the heirs of entail, for whom it was urged, that the prohibitory clause against alienating or contracting debt was sufficient to bar the sale, without a clause re-

No. 135.

Whether a remote substitute can apply summarily for the registration of an entail?

No. 136.

An entail is not effectual against creditors, unless it have a clause resolving the right of the tenant in tail, upon contravention.

No. 136. solving or forfeiting the contravener's right. And though the contrary was established, not only by decisions, but by the opinion universally of lawyers, yet the objection was so far regarded as to occasion a hearing in presence. The established opinion however was more and more confirmed by the hearing; and the Court unanimously found, that an entail wanting a resolute clause of the right of the tenant in tail who contravenes the will of the granter by aliening or contracting debt, cannot be effectual against creditors.

Sel. Dec. No. 146. p. 202.

* * The report of this case from the Faculty Collection is No. 86. p. 15507.

1758. July 12.

CAPTAIN JOHN NOBLE of Farm, *against* ANNE DEWAR, Relict of GEORGE NAPIER of Kilmahew.

No. 137.

A trust-adjudication against an apparent heir under a tailzie, not recorded, a good title to pursue reduction of rights affecting the estate.—An unregistered tailzie a ground for restricting an extravagant jointure to a reasonable provision.

In the year 1687, John Napier of Kilmahew made a settlement of his estate, in favour of himself, and a certain series of heirs, in the form of a strict entail, with the usual prohibitory and irritant clauses; but under an exception, that the heirs of entail might grant life-rent infestments to their Ladies, not exceeding a third of the lands, so far as the same are free, and unaffected for the time with the former life-rents or real debts.

Upon the death of the tailzier, the succession opened to George Maxwell, the eldest son of his eldest daughter; who assumed the name of Napier, and was served heir in general of tailzie and provision to the said John Napier the tailzier, whereby he had right to the unexecuted procuratory in the bond of tailzie.—He thereupon resigned the estate in the year 1694, and obtained a charter from the superior, upon which he was infest. In both the charter and sasine, the whole prohibitory, irritant, and resolute clauses were inserted; but the tailzie never was recorded in terms of the act 1685.

The said George Napier had a son, who married Lady Jean Bruce, and in the marriage-contract the father provided her to a life-rent out of the estate; but the son died in his father's life-time without leaving issue.

George Napier taking advantage of the non-registration of the tailzie, sold off the greater part of the estate; and Lady Jean Bruce having consented to the sale, and to a restriction of her provision, her life-rent was thereby reduced to about £.50 *per annum*. The residue of the estate was also adjudged for considerable debts.—Having become a widower, he entered into a second marriage with Anne Dewar, who brought him no portion; and in the year 1737, when he had no prospect of having children by her, he entered into a postnuptial marriage-contract, whereby he disposed to his wife, in case of her surviving him, the total life-rent of the estate of Kilmahew, with the mansion-house, gardens, and inclosures, and the whole woods growing on the estate, with power to cut and dispose of the same.—