APPENDIX.

PART I.

TAILZIE.

1776 *June* 26.

ALEXANDER IRVINE of Drum, *against* GEORGE EARL of ABERDEEN and the REPRESENTATIVES of PATRICK DUFF of Premnay.

No. 1.
An entail was executed in the form of a procuratory of resignation; which was followed by a charter under the great seal. The charter, and not the procuratory, was produced to the Court, when application was made to record the entail in terms of the act 1685. It was found, that for want of the procuratory, the recording had been irregular and was ineffectual.

IN 1683, Alexander Irvine of Drum executed an entail, in the form of a procuratory, to resign into the King's hands his estate holden of the Crown, to a series of heirs, to be named in a separate deed, under the usual prohibitions against selling, contracting debts, or altering the order of succession, with irritant and resolutive clauses, but with a declaration, that it should be competent to any of the heirs who should happen to succeed, to sell as much of the lands as should be necessary for paying the just debts of the entailer.

In virtue of the procuratory, resignation was made in the Exchequer, and Charles II. by sign manual, authorised a new charter under the great seal, containing a *novodamus*.

The charter passed, infeftment followed, and an act of the Parliament of Scotland was obtained, ratifying the charter and sasine.

A relative deed of nomination of the series of heirs was executed.

The son of the entailer, also named Alexander, happened to be an ideot.

The person next in remainder after the entailer's issue male, was Irvine of Murthill, a remote relation of the family.

Immediately after the entailer's death, Murthell applied to the Court of Session, to have the entail recorded according to the provisions of the act 1685, C. 22.

This happened to be the first application to the Court for registration of an entail, after the enactment of that statute.

No. 1. The record is in the following terms :—

'*At Edinburgh*, 31st *July* 1688: Upon the supplication presented to the 'Lords of Council and Session, by Mr. Alexander Irvine of Murthill, in name 'of himself and the other heirs of tailzie underwritten, to the effect after- 'mentioned, *the charter and nomination* relative thereto, containing the tailzie of 'the barony of Drum, being produced, read, and collationed, with the following 'record of the same, in presence of the said Lords, they interposed their autho- 'rity thereto, and ordained the said record thereof to be inserted and registered 'in their books, appointed for the registration of tailzies, conform to the 22d 'act of his Majesty's first parliament, concerning tailzies.' Then follow the charter and deed of nomination.

Irvine of Murthill was administrator for the ideot Laird, and under his administration a part of the estate was sold judicially, for payment of the entailers debts, and purchased by the above named defenders.

The residue of the estate came by succession into the person of the present pursuer, whose guardians, during his minority, thought it proper to investigate into the causes of the judicial sale. They considered it to have been fraudulently conducted, fictitious debts having been reared up to give a colour to the proceedings. An action of reduction was instituted.

The defenders produced the decree of sale, and insisted that they were not bound to make any other productions. The Court pronounced this interlocutor, (9th March 1769:) 'Find, that the defenders are not bound *in hoc statu*, 'to produce the writ and deeds called for, without prejudice to the pursuer to 'call the defenders to account for any particular debt against which he alleges 'fraud, reserving all defences as accords.'

This judgment was appealed from by Drum, and the House of Lords pronounced this decree, (2d April 1770:) 'It is declared, that the matter pleaded 'by the respondents is not a bar to this action, or to the appellant's insisting 'therein, reserving the benefit thereof to the hearing of the cause; and it is 'therefore ordered and adjudged, that the interlocutors appealed from so far 'as they are complained of by the appellants, be reversed; and it is further 'ordered, that the respondents do produce the writs and deeds specially called 'for.'

When the cause returned to the Court of Session, a dispute occurred, whether the defenders were obliged to produce the general and special charges, and other warrants of the decrees in dispute. The Court pronounced this interlocutor, (28th February 1771:) 'In respect that the general and special 'charges called for are not the grounds but the warrants of the decrees of ad- 'judication, which defenders are not obliged to produce after 20 years, find 'that the defenders are not bound either to produce the said general and spe- 'cial charges, or any other warrants of the decrees.'

At this stage of the process a new plea occurred to the defenders. They presented a petition, setting forth, that it had been lately discovered that the

entail of Drum was never properly completed according to the directions of the act 1685, so as to be effectual against creditors and purchasers for a valuable consideration; for that the *original entail* itself, executed by Alexander Irvine in 1683, (meaning the *procuratory* of *resignation*,) had never been judicially produced before the Lords, as required by the statute, but only the *charter* and *relative nomination of heirs*. No. 1.

The answer made by the pursuer was, that the entail of Drum having been the first that was recorded in consequence of the statute, the Court had been particularly careful in following its directions, as appeared from the record itself, which stated not only that the charter and relative nomination were produced, but that they were read and compared with the record in presence of the Lords, who interposed their authority thereto agreeably to the statute: That the production of the procuratory, called by the defenders the principal entail, was not necessary, as the settlement was understood to be completed by the charter following on the procuratory, and which, together with deed of nomination under the entailer's hand, was in reality in every legal sense to be considered as the entail: Besides, the procuratory was likewise *in manibus curiæ*, being registered in the books of Session.

The defenders replied, that entails had always been most strictly and literally construed even in questions between the heirs of entail themselves, as in the late case of Sir Archibald Edmonstone, 1769, No. 68. p. 15461; but still more ought the act 1685 to be strictly interpreted, in questions with purchasers for valuable consideration, and creditors. Every the most minute circumstances, required by the act, must be scrupulously complied with, else the entail is ineffectual. The act expressly declares, 'That such tailzies shall only be allowed, in which 'the irritant and resolutive clauses are insert in the procuratories of resignation, 'charters, precepts, and instruments of sasine, *and the original tailzie once pro-* '*duced before the Lords of Session judicially.*' The original entail of Drum not having been judicially produced, was ineffectual. The solemnities required by the act could not be supplied by equipollents. Had the act been less express, it would still have been absolutely necessary, that the original entail should be produced, because if the charter alone were sufficient, there would be no evidence to the Court, that the settlement they are called upon to give effect to actually existed. Although a charter has passed upon an entail, it is still in the entailer's power to cancel the entail itself, after which the charter has no effect; and the charter may perhaps not contain all the conditions intended by the entailer to be effectual against his heirs. The entail and the charter proceeding on it are in the act 1685, mentioned as perfectly distinct. It requires production of the original entail, and that the whole conditions of it shall be fully engrossed in the charter. Although the production of the charter may, at the time of passing the act, have been thought a sufficient compliance with the enactment, still, an erroneous construction, contrary to the express words, could make no precedent in bar of the right. It was once thought unnecessary

No. 1. to record entails, made prior to the act 1685, but in the case of the Earl of Rothes against Philp, No. 138. p. 15609. it was determined, first by the Court of Session, and afterward by the House of Lords, (16th January 1761,) that an entail which had not been recorded, though made before the act, was ineffectual against creditors; which is now established law. The case of Lord Kinnaird against Hunter, No. 139. p. 15611. determined in the Court of Session, and affirmed in the House of Lords, (18th February 1765,) was an authority in point. There a charter had passed upon an entail. The charter was judicially produced, and recorded in the register of tailzies a few years after the act of parliament, viz. in 1694. This entail had been all along considered to be effectual, until one of the heirs objected to certain long leases granted by a former heir. The lessees stated the defence, that the deed of entail itself never having been judicially produced, was ineffectual; which defence was sustained.

The production of the deed of nomination, in the present case, could have no effect. It was not the entail, but only an extension of the line of succession.

The registration of the procuratory in the books of Session was equally ineffectual. It was the mere operation of the clerk of Court, without special authority; whereas, the record of tailzies can be made up only from original deeds, presented to the Court, and ordered by the Court to be recorded.

The Court, (3d July 1772,) found, 'that the entail executed by Alexander 'Irvine of Drum, in the year 1683, not being duly recorded, is not valid 'against creditors or other singular successors.

The pursuer reclaimed, and prayed the Court, at least to postpone determining the validity of the entail, until the proof (relative to alleged fraud, &c.) was advised; but the Lords pronounced this interlocutor, (24th July 1772:) 'In respect, the interlocutor only finds, that the entail executed by Alexander 'Irvine of Drum, in the year 1683, not having been duly recorded, is not valid 'against creditors, or other singular successors, but determines nothing as to 'the plea and defences which may be competent to either party, the Lords in 'so far refuse the desire of the petition and adhere to their former interlocutor.'

The cause then proceeded; the facts relative to the alleged fraud were discussed; and it was finally determined, (26th June 1776,) by the following interlocutor: 'The Lords having advised the state of the process, testimonies 'of the witnesses produced, memorials *hinc inde* and whole papers and proceedings in the cause, and having heard parties procurators thereon, sustain 'the defences, assoilzie the defender, and decern.'

Lord Ordinary, *Gardenstone.* For Pursuers, *Hay Campbell.*
For Defender, *Henry Dundas.*

W. M. M.

*** The pursuer appealed. The House of Lords, (16th April 1777,) ORDERED and ADJUDGED, that the interlocutors of 24th and 31st July 1772, be

affirmed; and it is further ORDERED and ADJUDGED, that the interlocutors of 21st January, and 28th February; and 24th July, 1771, and the interlocutor 26th June 1776, be also affirmed; but without prejudice to any satisfaction in money that the appellant may be entitled to, in respect of any claim he may have in virtue of the agreement in 1733, and it is further ordered, that the appeal be dismissed. (See No. 143. p. 15617.) No. 1.

1777. *July* 8.

SIR WILLIAM GORDON of GORDONSTON, Baronet, *against* MRS. LINDSAY, HAY, and Others, Defenders.

No. 2.

The institute or disponee ought not, by implication from other parts of the deed of entail, to be construed within the prohibitory, irritant, and resolutive clauses, laid upon the heir of tailzie.

What sufficient alteration of an entail by the institute.

IN 1697, Sir Robert Gordon, the pursuer's grandfather, executed a bond of tailzie, whereby he obliged himself to make resignation of his title and dignity of baronet; and also of the barony of Gordonston, and other lands therein mentioned, in favour of himself in liferent, and Robert Gordon (the pursuer's father,) his eldest lawful son, and the heirs male of his body in fee, whom failing, to a long destination of heirs of tailzie, as mentioned in the deed.

Among other provisions, usual in entails, is the following: 'And in like 'manner it is hereby expressly provided and declared, and shall be contained 'in all the subsequent infeftments, and rights of the said estate and lands, in all 'time coming, that it shall be nowise leisome or lawful to the heirs of tailzie 'above designed male nor female, nor the heirs who shall happen to succeed 'to the said lands and dignity, to alter, infringe, or break the said tailzie and 'destination, nor the order and course of succession above written,' &c. And the tailzie contains the usual prohibitory, irritant, and resolutive clause, *de non alienando et contrahendo debita.* But these restraints are laid only upon the heirs of tailzie.

Upon the procuratory of resignation contained in this bond of tailzie, a charter was expede in the year 1698, by the entailer, in favour of himself in liferent, and his said eldest son, the pursuer's father, in fee, and they were thereupon infeft accordingly. But the sasine does not recite the conditions, and irritances of the tailzie, but only bears a general reference to them. The tailzie itself was afterward recorded in the register of tailzies, in the year 1700.

See No. 69. p. 15462.

Upon the death of Sir Robert Gordon the entailer, he was succeeded by his son the late Sir Robert, the pursuer's father, and who possessed the estate as fiar under the deed. Besides the estate of Gordonstone, contained in the tailzie, the tailzier died possessed of the lands of Garbettie, &c. Sir Robert the pursuer's father married, in 1734, Mrs. Agnes Maxwell, eldest daughter of Sir William Maxwell of Calderwood, by whom he had issue, his eldest son and