1749. *July* 24. LORD BOYD *against* OFFICERS OF STATE.

[Elch. No. 8, *Forfeiture*; C. Home, No. 89.]

IN this case the Lords avoided determining the general question, Whether the clause of the Clan Act annulling all settlements since the 1714 was perpetual, as well as the clause giving a benefit to the loyal superior and vassal? but found that a disposition to an eldest son, with a burden of debts extending to near twenty-two years' purchase of the lands, fell under the exception of the act, being for just and onerous causes, though the lands were sold by the eldest son at twenty-seven years' purchase.

1749. *November* 14. ALEXANDER GORDON *against* CREDITORS of NATHANIEL GORDON.

[Elch. No. 87, *Tailyie*; Kilk. No. 7, *ibid.*]

A MAN made a disposition of tailyie with strict irritant and resolutive clauses, but did not live to execute it either by registration or infeftment, and the heir of entail made up titles by a general service to the maker of the entail, which gave him right to the procuratory of resignation, which, however, he never executed, but possessed the estate upon a personal right merely, and contracted large debts. Upon these debts the creditors adjudged, and thereafter brought on a ranking and sale of the estate, and called as defender the heir of their debtor, (he being then dead,) who appeared, and OBJECTED that he was heir of entail, and that the estate belonged to him clear of all debts, with which his father had no power to burden it; and as his right was merely personal, and so qualified that he could not affect it with debts, the creditors must take it as it stands, and cannot appeal to the faith of the records, which are intended for the security of those that lend their money on real rights. And so it was decided in the case of *Denham*; (*vid.* June 17, 1746,) ——— against *Hamiltons*.

To which it was ANSWERED by the creditors, That all this may be very good law, but that the heir in this case had no right to make the objection, because he had forfeited by his predecessor's contracting of debt as well as the contractor, for, by the irritant clause in the entail, not only the contractor forfeits but his heirs. The words are,—" If they (viz. the heirs of entail) or their heirs shall contravene, &c., then the persons contravening, and each of them, and their heirs above-mentioned, shall forfeit all right and title to the estate," &c.

My Lord President was of opinion, 1*mo*, That by these words of the forfeiting clause the heir contravening only forfeited for himself and not for his descendants, because the words of style by which the sons are punished for

the sins of their fathers are well known and constantly used when that is intended, and these are, " that the contravener shall forfeit for himself and the descendants of his body ;" nor have the words in the clause above-recited by any means the same force, for they may very well signify that the persons contravening shall forfeit, and their heirs contravening likewise, which is no more than understanding the word " heirs" in the latter part of the clause in the same sense in which it is taken in the former part, where it must be undoubtedly understood of heirs contravening by themselves, and separately from their predecessors, for otherwise it would be absurd to say that a man and his heirs could contravene. And there can be no reason why heirs should not be taken in the same sense in the forfeiting part of the clause, that is, so as to relate to heirs separate and distinct from their predecessors, as well as in the clause of contravention. That the statutory irritancy, in case of the omission of the provisions and irritant clauses in the rights and conveyances whereby any of the heirs shall enjoy the estate, by which irritancy the person guilty of this omission forfeits not only for himself but for his heirs, makes nothing against this doctrine, because it was very proper to make such provision, to prevent all foul play and connivance betwixt heirs of entail and their children and creditors, by which the entail might be destroyed ; but this will be no reason for extending conventional irritancies to heirs where the words are not express, because there is not in that case the same necessity.

2do, My Lord President was of opinion, that supposing, in this case, the heir had forfeited, it was not competent to the creditors to make the objection ; for such irritancies were conceived in favour of the next heirs of entail, to whom only it belonged to say that the preceding heir had forfeited his right.

3tio, My Lord President likewise thought, that this heir, supposing he had forfeited for the sin of his father, and so could not claim in that order of heirs, yet he might be admitted in the last series, namely that of heirs whatsoever ; and he held it to be unquestionable law, that not only the immediate heir of entail, but a remoter heir, nay the remotest of all, might appear and object to the sale of a tailyied estate which eventually might belong to him.

4to, He thought, in an extraordinary case of this kind, a judicial sale of an estate tailyied with clauses irritant and resolutive, all the heirs of the entail existing should be called ; and as that was not done in this case, he thought the process informal.

The Lords found, *1mo*, That the words of the forfeiting clause imported a forfeiture not only of the contravener himself but of his heirs ; and this carried by a pretty considerable majority.

2do, They found, by a very great majority, that the consequence of this was that the creditors could make the objection to this heir and bar him from stopping the sale ; by which they overruled the three last positions laid down by my Lord President ; namely, that it was not competent to the creditors to say that the heir had forfeited ; *2do*, That the heir in this case, though barred to claim in this order of heirs, could nevertheless claim in the last order of substitution, viz. as heir whatsoever ; for they admitted that a remoter heir could appear and object to the sale, and accordingly they ordained that one of the remoter heirs who appeared on this occasion should be heard for his interest

before the Lord Ordinary; *3tio*, That it was necessary to call all the heirs of entail existing; this they rejected, because the tailyie was not recorded nor executed by infeftment, but a latent deed, so that the creditors could not know whom to call as heirs of entail.

1749. *November* 22. GORDON *against* GRAY of Balgarny.

[Kilk. No. 3, *Tenor*.]

This was a process of proving the tenor of a tailyie, in which the Lords found the tenor proved, (*dissent. tantum Easdale ;*) though the *casus amissionis* libelled was the defender's destroying or abstracting the tailyie, which was not proved, but all that was proved was, that the paper was taken out of a charter-chest where it was kept, and was amissing, with pretty strong presumptions that it was the defender had taken it out. In this case Lord Elchies laid down the doctrine of proving tenors at pretty great length; the sum of what he said is comprehended in the following propositions: 1*mo*, That adminicles in writ, by our law, are not scrolls or copies deposed to by witnesses, but authenticated writings which make faith of themselves without the assistance of parole evidence, *e. g.* sasines upon charters, precepts of *clare constat*, bonds or contracts properly executed, and, as in this case, a retour of a general service as heir of the entail, mentioning the maker of the entail and the series of heirs, but none of the provisions and limitations, which Lord Elchies said he did not think necessary, because it was not necessary that an adminicle should contain the whole paper, but only so much as to show that it was the same paper as that the tenor of which was to be proved, and the rest of it might be proved *aliunde*, as in this case, by scrolls and copies. *2do*, That in some cases there may be no need for adminicles, scrolls, copies, or any written document whatsoever; but then there must be a very strong and circumstantial proof of the *casus amissionis ;* as in the case of a bond, of which there is rarely any adminicle or other document in writing, yet if there is a clear proof that it is burnt or otherwise destroyed, the tenor may be made up by parole evidence only. *3tio*, But if there is no special *casus amissionis* proved, there must be adminicles in writ, and scrolls or copies will not be sufficient, that all may not rest upon the faith and memory of witnesses; whereas, if there are adminicles in writ, it will not be necessary to libel or prove a special *casus amissionis*, but only in general that the writ is lost, and sometimes, as Stair observes, that is only proved by the pursuer's oath. *4to*, There is a difference with respect to the proof of the *casus amissionis* betwixt writs which by their nature are intended to be retired, such as bonds of borrowed money, and deeds which by their nature are intended to be permanent and to remain in the possession of the grantees, such as dispositions of lands, &c.; in these so strict a proof of a special *casus amissionis* is not required as in the first, and the reason is obvious.