N.B. In this case a decision was quoted, *Douglas* against *Douglas*, observed by Home, 22d July 1724; where it was found, that an obligation in a contract of marriage to resign against a certain time, for new infeftment, to the heirs of the marriage in fee, reserving the husband's liferent, made the heir a creditor, and preferred him, having used inhibition, to a posterior purchaser: and this seemed to be held good law.

1750. *November* 6. HAMILTONS *against* WEIR.

[Elch. No. 19, *Tutor;* Kilk, No. 14, *ibid.*]

Two tutors administered ill and were both removed as suspect. One of them only acted, and there was evidence that he had acted fraudulently, as well as negligently. The other was an easy, indolent man, that let his co-tutor do what he pleased. The acting tutor was condemned to pay the pupil a considerable sum of money, chiefly on account of some debts which he had suffered to be lost by neglect of doing diligence. He now seeks relief for a proportionable part against the heirs of the defunct co-tutor. The Lords found, 1*mo*, that the action for relief lay against heirs, because, though a malefice had given occasion to the action, the obligation upon the defunct (if there was any,) arose not from a malefice, but from a contract, or *quasi* contract. 2*do*, That the defunct was bound in relief, though he never acted,—was not alleged to be partaker of the other's fraud,—and though supposing he had, it may be questioned whether there be any relief among thieves. 3*tio*, That the acting tutor was entitled to relief for one half of an article of personal expenses, laid out in managing the pupil's affairs, which he was not allowed in counting with the pupil, in consequence of the Act of Parliament. *Dissent.* Elchies.

Though the act speaks of expenses in general, yet it has been so construed as to mean only personal expenses, not expenses bestowed necessarily on the minor's subjects.

Actor, Geo. Brown. *Alter*, Lockhart.

1750. *November* 13. Claim, CAPTAIN JOHN GORDON *against* HIS MAJESTY.

[Elch. No. 39, *Tailyie.*]

In this case there were three points, 1*mo*, whether an irritancy of an entail could be declared against the crown, after the forfeiture of the person irritating: and the Lords found, unanimously, (Dun only excepted,) notwithstanding the opinion they had declared in the case of Charteris,—(see the decision, July 4th, 1749,)—that it could not, upon this ground, that the words of the entail notwithstanding, there is no irritancy with us *ipso facto;* that it only takes place upon declarator; that, till declarator, any deed done by the committer of the irritancy,

such as contracting debts to the extent allowed by the entail, letting of leases, marriage contracts, &c. is valid; and, for the same reason, the crown's claim by the forfeiture must be sustained, who cannot be in worse condition than a creditor; and it was so decided in a parallel case, in the last resort, *M'Kenzie of Assint*, quoted in the papers.

2do, The second question was,—whether an entail saved against forfeiture, so that an heir of entail committing treason only forfeited for his life, and the estate devolved to the next substitute upon his death? It was argued for the crown, 1*mo*, that the case of entails was by no means favourable; that they are public grievances, hindering men to provide wives and younger children, impeding commerce, &c. and as such they are represented by our lawyers, particularly Lord Stair, p. 228; that they began in Scotland no earlier than the year 1662, in the case of *Stormonth*; that afterwards they got the sanction of the statute 1685, but with several restrictions and limitations; that at the Revolution they were further enforced by the Act 1690, which protected them against forfeitures; but this was altered by the Act 1709, which in so far restricts them, as to make them liable to forfeiture; and it is believed it is now the general wish of the nation that that act had taken them away altogether. That in England, after a longer experience of them, (from the time of Edward I., when the statute *de Donis* introducing them was past, to the reign of Henry VII., when they were destroyed, partly by the statute of alienations, introducing fines, and partly by the inventions of lawyers introducing recoveries;) they too had grown weary of them and had shaken them off, so that both nations having judged them grievances, they cannot be looked on as favourable in this argument. *2do*, That it is not by the common law of this country, but only by virtue of the Act 1690, that entails save against forfeiture; for not only by the Act 1685, are they liable to forfeiture, but before that, according to the opinion of Sir Thomas Hope, *Minor Practicks*, 369, who founds his opinion upon that common principle of law, *quod privatorum pactis*, &c.; and the consequence, if it were otherwise, would be very dangerous to the public, because every man might entail his estate, and then, as Lord Bacon says, the owners would be less fearful to commit treason, because it could not hurt the heir of his inheritance. But *3tio*, it is not by the common principles of law, nor by our own statute law, but by the English law, that the matter is to be decided, which is made the rule, by Act 1709, making our law, in matters of treason, the same with the English; and by that law all estates of inheritance are forfeited for high treason. These are the words of the Act 26th Hen. VIII. Now a tailyied estate in Scotland is an estate of inheritance, or an estate descendible to heirs, and not an estate for life; for 1*mo*, such an estate is taken by succession to the last possessor or tenant. *2do*, The tenant by tailyie may commit waste, cut down timber, dig mines, and otherwise act as proprietor. *3tio*, His wife will have a terce, or if the tenant is an heiress, her husband will be entitled to the courtesy; nor will it alter the case that a tenant in tailyie is but a limited fiar, for no restrictions or limitations will change the nature of the right and make that a liferent which in its own nature is a property, any more than privileges and powers, how large soever, given to a liferenter, (such as we have examples of,) could change the nature of the right and make it a property. If therefore an estate tailyied in Scotland is an estate of inheritance, it will be liable

to forfeiture, by the rule of the English law, though not alienable, because there is no natural or necessary connexion betwixt the power of alienation and forfeiture. It is true that estates in tail in England were not forfeitable while they were not alienable; but that depended upon a particular explanation of the statute, *de Donis*,—(see the papers;)—and so little connexion had it with their being not alienable, that even after they became alienable by fine and recovery, still they were not forfeited till the statute 26th Hen. VIII. was made; which plainly shows that under estates of inheritance, in that statute, are comprehended all estates descendible to heirs, whether alienable or not; and there are at this day estates in England which are not alienable, yet forfeitable, viz. estates in tail with reversion to the crown. These were made not alienable after the foresaid Act 26th Hen. VIII., by a statute, 34th Hen. VIII., which, says my Lord Hale, was thought in so far to revive the statute *de Donis*, that these estates were not forfeitable, but afterwards by the statute of Edward VI., declaring, in the very same words with the 26th Hen. VIII., all estates of inheritance forfeitable, they were adjudged to be forfeitable; which confirms what was said before, that under estates of inheritance are comprehended all estates descendible to heirs, whether alienable or not. And lastly, the Act 1709, excepting entails from forfeiture, under certain circumstances, plainly supposes the rule to be that entails are liable to forfeiture, according to that plain rule of interpretation, *exceptio firmat regulam*, &c.

To which it was ANSWERED, *1mo*, Whether entails be an advantage or disadvantage to the country, and whether or not we ought to imitate, in this matter, the policy of England, is not the present question, nor a question *hujus fori*, but belonging to the high court of Parliament, not to a court of justice. The question is, what is the effect of entails, as they stand at present established by the law of Scotland? *2do*, The claimant cannot admit that according to the common principles of law an estate should be forfeitable that is not alienable; and he holds the position laid down in the preamble of the Act 1690, to be a principle both of law and equity, viz. that a man cannot forfeit for his crime what he cannot alienate by his voluntary deed; and the contrary principle, by which heirs of entail, vassals, and creditors, are forfeited, (for all these are most justly joined together in our articles of grievances at the Revolution,) is a principle of feudal, barbarous, and tyrannical laws, equally repugnant to natural justice and to the laws of the Romans and other civilized nations. *3tio*, Though the English law of treason be our law, yet we have a law of private property of our own, reserved to us by the Articles of Union, and not taken away by the Act 1709; and therefore we must consider what is the nature of the right of a tenant in tailyie by the law of Scotland, and then consider whether rights of the same nature are forfeitable by the laws of England. I say we must consider the nature of the right, not the name, or even the form of words by which it is constituted; for it sometimes happens that the same form of words creates very different rights, in England and Scotland; a strong example of which we had in a late case, viz. the claim of Hay of Listerick, where a right of property was found to be created in the forfeiting person by a form of words which in England would have only given him an estate for life. (See further on this head, p. 16 of information for the claimant.)

Suppose, therefore, there were in England no rights of the nature of an

entailed fee in Scotland, (as to be sure there are very few,) and consequently no estates in England that were unalienable and unforfeitable, it will not follow that entailed estates in Scotland are therefore forfeitable; for we must consider, if such estates were in England, whether they would be forfeitable by the laws of that kingdom. Now it happens, luckily for the claimant, that though there may be no such estates at present in England, yet anciently their estates in tail were, like our tailyied estates, unalienable, and in consequence of that, as the English lawyers tell us, not forfeitable; and when in after times they became forfeitable, that was not by the 26 Hen. VIII., forfeiting estates of inheritance, but by the alteration that was made in the nature of these estates in tail, by means of fine and recovery, by which, if unalienable they became alienable, though even after this, for sometime, (such is the lenity of the English law in matters of forfeiture,) they continued not forfeitable. But there not only were, but there are at this day, in England, estates not alienable, and in consequence of that not forfeitable, as estates in tail with reversion to the Crown, such as were created by Henry VIII. out of the church lands, which are not forfeitable, notwithstanding the authority of Hale, which is not supported by the case he quotes, and, suppose they were, would not prove much in this case. (See Information for Claimant, p. 20.) Such, likewise, are the estates of bishops and other corporations, which are now unalienable, and therefore, as the lawyers say, unforfeitable. (See p. 12.) My Lord Advocate's whole argument is founded upon the words, *estate of inheritance*, in the Act 26 Hen. VIII., which are no term of the Scotch law, and even in the English law seem to have no very fixed meaning; for in an act of the reign, 34 and 35 Hen. VIII., the meaning of this term is plainly restrained to fee-simple. But, allowing it to be taken as the Advocate would have it, in opposition to an estate for life, the claimant maintains, that the estate of a tenant in tailyie is no more than an estate for life, at least it comes nearer that than any other thing known in England, and so it was determined by the present Lord Chancellor in the case of *Mr Charteris*, (page 14, *ibid.*)

4*to*, To the last argument, the short answer is, That our statutes are not so accurately worded as that the strict rules of interpretation can be applied to them, and particularly the rule, that *omnis exceptio de regula*, &c. will not in many cases apply, because in our acts there are many exceptions, which are not necessary, *ob majorem cautelam*; witness the exception in the vesting act, (mentioned in a former case,) of the forfeiting person and his heirs. (See page 23, *ibid.*) But neither is the exception of the act 1709 entirely useless, because it comprehends entails not recorded, which, without the aid of that exception, would not have saved against forfeiture. And *lastly*, for the claimant were quoted the decisions in favour of entails by the Commissioners of Inquiry and Court of Delegates in the 1715.

The Lords found, That a tenant in tailyie can only forfeit for his own life; *dissent.* Preside et Tinwald.

N.B. The lawyers for the claimant admitted that Sir William's male-issue could claim in preference of him, and could take the estate, (being only an estate for life according to their principles,) notwithstanding the forfeiture of his father.

3tio, Whether or not by the act 33 Hen. VIII., saving remainders from forfeiture, the claimant might not be entitled to this estate, as a remainder-man, upon the failure of the attainted person and his issue male?

This plea was not moved by the claimant, nor is it stated in his paper, but was suggested by the President, and given unanimously in his favour by the Court.*

N.B. A remainder-man in England was understood to be what we call a substitute in a new line of substitution, or an heir that comes in by a *which failing;* as in this case the estate was devised by Sir James, the tailyier, to Sir William, his son, (the forfeiting person,) and the heirs-male of his body, which failing to his own heirs-male. Now, Captain John Gordon, claiming as heir-male of Sir James, is what the English call a remainder-man.

1751. *January* 9. CLAIM, KINLOCHS *against* THE CROWN.

[Elch. No. 17, *Forfeiture.*]

SIR JAMES KINLOCH, the attainted person, was heir-apparent of an entail made by his father, and completed by infeftment, but not recorded, and he was likewise heir-at-law to his father. His son, the succeeding heir of entail, now claims the estate, upon these two grounds:—1*mo*, That supposing Sir James could have given away the estate to onerous creditors or purchasers, so far that such creditors or purchasers would have been secure, yet it would have been a fraudulent deed in Sir James, contrary to an obligation which the entail, though not recorded, laid him, the heir, under, and such a deed as he would have been liable to make reparation for out of any other estate he might have, to the succeeding heirs of entail; and in this respect Sir James's case is different from that of an heir-tail in England, who can alienate the estate by the device of fine and recovery, and is under no such obligation to the succeeding heirs. Now, this being the case, the Crown is not in use of taking advantage of such fraudulent deeds of forfeiting persons, but makes good all claims against the forfeiting person, though they be such as might have been disappointed by his fraudulent deed, as in the case of *Garntully*, in the 1715, where a minute of sale was sustained as a good claim against the Crown, though undoubtedly it might have been defeated by the forfeiting person selling again, and that second purchaser being first infeft. *2do*, The claimant here was secure even against onerous creditors; because Sir James's right, being merely a personal right, must be taken with all its qualities and conditions, as was decided in the case of *Denham* by the House of Peers.

To the *first*, it was ANSWERED, That the claimant had no better claim here than every heir of a marriage, whose father may sell and burden the estate

* This decree reversed by the House of Peers, so far as to find that Sir William had forfeited not only for himself but for his descendants, being heirs of entail.