KAIMES. I deny that the hypothec ceased at Whitsunday; for, if it did, how could the master attach the cattle at all. If the hypothec right expires after three months, then it expires by prescription, and this prescription not good against the factor, who was *non valens agere*, until the 2d August, the date of his commission, (*vellem indictum*; for how could one be *non valens agere* before the existence of a right.)

AUCHINLECK. After the three months, every one is at liberty to buy: if one buys within the three months, and no challenge is brought within the three months, he is safe.

GARDENSTOUN. The right of hypothec is limited to the year; the right of action is limited to three months after the year.

PRESIDENT. The factor insists for the hypothec of the former year. The Court allowed three months for that diligence, and no diligence has been done during that space.

ALEMORE. Corn farms and grass farms will then be in a different situation: the first will have a substantial, the second, an elusory hypothec. Why should not the cattle be perpetually liable for the rent of the year? Says analogy, they should; expediency says otherwise. Three months are allowed to the master for making good his hypothec on account of rent due, suppose at Whitsunday: if new cattle are brought in after Whitsunday, how can they be hypothecated? therefore, the hypothec itself rests, and every intromitter is liable.

HAILES. If the landlord may, after the three months, sue intromitters with the cattle of his tenant, then his right of action on the hypothec may subsist as long as his right of action for the rent. Here the master is in no worse situation than if the cattle had been suffered to remain on the ground until the expiry of three months. It is admitted that he did no diligence during the three months: if he did no diligence against the tenant after the cattle were carried off, it is impossible to suppose that he would have done diligence if the cattle had remained on the ground.

Dissent. Alemore, Coalston, Elliock, Barjarg.

1766. *June* 23. SIR THOMAS GORDON of Earlstown *against* JAMES MURRAY of Broughton.

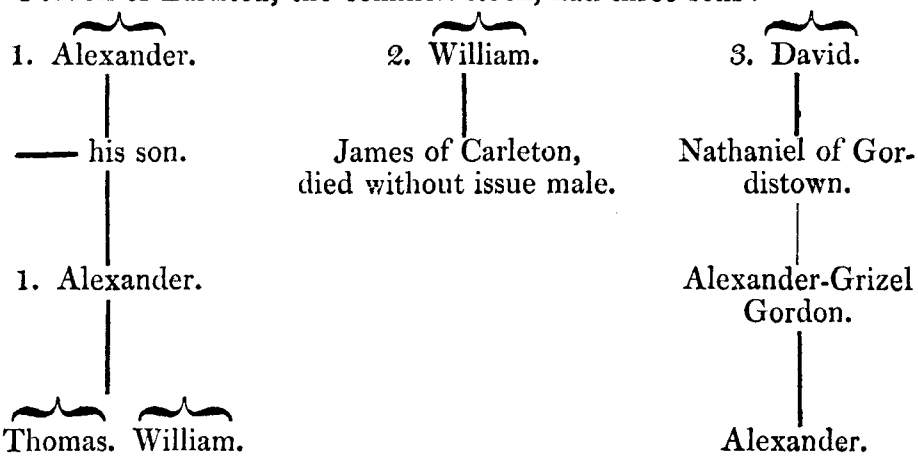
[*Faculty Collection, IV.* 216; *Dictionary*, 16,818.]

TAILYIE.

A. possessed an Estate under an Entail, not Recorded nor completed by Infeftment. He paid certain debts of the Entailer, on which Adjudications had been led, and acquired right to the adjudications. *Found*, 1*mo*, That the Entail was effectual against the Creditors of A. 2*do*, That the Entail could not be defeated in favour either of A or his Creditors by the Adjudications to which he had acquired right, and which were founded on as a separate title of property.

FOR understanding the question between those parties, it is necessary to state the genealogy of the family of Gordon of Earlston.

John Gordon of Earlston, the common stock, had three sons:



On the 15th April 1684, James Gordon of Carleton, by a holograph deed, executed a strict entail of his estate of Carleton, which belonged to him in right of his father William, who had married the heiress of Carleton. By this deed he called the heirs-male of his own body, John Gordon, third son of William Gordon of Earlston, Nathaniel Gordon of Gordistown, James Maitland, and the respective heirs-male of their bodies, and their heirs-male *successive;* whom failing, to any other person or persons he should nominate by a writing under his hand; and, failing such nomination, to return to his own heirs-male whatsoever and the heirs-male of their bodies. James Gordon, the tailyier, had no male issue of his body; John Gordon, substituted to them, died without male issue. The tailyier executed no nomination of substitutes. James Maitland, and his male issue, also failed, and thus the substitution resolved into this, to Nathaniel Gordon, and the heirs-male of his body, whom failing to the heirs-male whatsoever of the tailyier, and the heirs-male of their bodies. The intention of the settlement made by James Gordon of Carleton was declared to be for the payment of his just debts, and for the continuance of the estate in his family succession. The settlement is "with the burdens, and under the restrictions, provisions, and conditions," &c. therein after mentioned, "and no otherwise." The procuratory of resignation for new infeftment to be granted to the heirs of tailyie, is granted under the following conditions: "They, and each of them that so enjoys the benefit of the said estate, nowise breaking, altering, or innovating the aforesaid tailyie and order of succession, nor yet selling, wadsetting, impignorating, nor any ways away-putting, either legally or conventionally, my lands or estate foresaid, nor granting any annualrents nor yearly duties forth thereof, nor contracting debts, nor doing any other deeds, directly or indirectly above the equal of the full value thereof, whereby the same may be apprised, adjudged, or otherwise evicted in law from them, or any of them, in prejudice of the foresaid tailyie, but preventing, *debito tempore,* all inconveniences whatsoever that may anywise occasion the eviction of my said estate, and extinction of the said tailyie; wherein if they, or any of them, and their heirs and successors in time coming, shall anywise failyie or contravene in any point or article hereof, then, in these, or any of these cases, all such facts, acts, and deeds so done, or to be done, contrary or prejudicial hereto, are here-

by declared not only to be void and null in all time coming, without any declarator to follow thereupon, but also the person or persons so contravening, each of them, and their heirs abovesaid, shall from thenceforth lose and amit my lands and estate aforesaid, and haill benefit thereof, and be totally excluded therefrae, siclike as if they were naturally dead, and the same shall, in that case, fall and accresce to the next substitute person and heir of tailyie." Carleton reserved power to himself to alter and revoke the premises at pleasure; to sell the lands, or to contract debts without limitation: "All which," says the settlement, "my said heirs of tailyie succeeding to, and taking the benefit of my said estate, shall, by their acceptance hereof, be holden and obliged to pay, fulfil, and observe, in all points, and to relieve my heirs of line thereof."

This entail, like many others executed before the statute 1685, was not registered in the record of tailyies: it remained personal, and was never completed by infeftment in the person of the tailyier himself or of any of the succeeding heirs. Upon the tailyier's death, without issue, on the 6th May 1688, the succession opened to John Gordon, third son of William Gordon of Earlston, the first substitute, then a minor. Nathaniel Gordon of Gordiston, as tutor of this John, entered into possession of the estate, and continued to levy the rents until, upon John's death, the succession opened to himself. It seems agreed, in point of fact, that Nathaniel never accounted to John for his intromissions. The debts contracted by Carleton were not cleared by Nathaniel during the minority of John the substitute,—on the contrary, the creditors therein took decreets of constitution and adjudication. More particularly, 1*mo*, George Fullerton of Dreghorn, on the 18th January 1693, obtained adjudication in payment of the accumulated sum of L.2445 : 3 : 4. Scots. And in the same year obtained a charter of adjudication under the great seal, was infeft, and had his infeftment recorded. 2*do*, John Martin, writer in Edinburgh, on the 21st November 1694, obtained adjudication for the accumulated sum of L.808 Scots. 3*tio*, On the 9th July 1696, Mr George Rome obtained adjudication for the accumulated sum of L.4512 Scots. On the 23d March, Nathaniel Gordon acquired right, in name of a trustee, to Rome's adjudication. On the 12th December 1702, Nathaniel Gordon expede a general service as heir of tailyie to Carleton, but without reciting the irritant and resolutive clauses of the tailyie, though it refers to it, "*per quod dict. Jacobus Gordon, pro causis inibi specificat. cum et sub oneribus, reservationibus, provisionibus, conditionibus, qualificationibus, et restrictionibus inibi mentionat. dedit, concessit, et disposuit,*" &c.

In the year 1711, Nathaniel Gordon transacted and paid off the adjudications which had been obtained in 1693 and 1694, by Fullerton of Dreghorn and John Martin, and took conveyance thereof in his own favour. These conveyances appear to have been put into the charter-chest of Carleton, where they were lately discovered. Nathaniel, notwithstanding the prohibition in the tailyie, contracted various debts. On the 14th June 1725, Alexander Gordon being about to marry Grizel Gordon, daughter of Sir Alexander and sister of Sir Thomas Gordon; Nathaniel, his father, did, in the marriage-contract, resign the estate of Carleton, and his other lands, in favour of Alexander, and his heirs-male to be procreated of that or any subsequent marriage; which failyieing, in favour of Alexander, his heirs and assignees whatsoever.

This marriage settlement was in fee simple, making no reference whatever to the tailyie of Carleton. The marriage was entered into, but no infeftment followed upon the contract, so that Alexander's right remained personal. Alexander Gordon contracted various debts: and, on the 15th April 1728, he entered into a minute of sale with Alexander Murray of Broughton, whereby, for a price therein mentioned, he became bound to dispone to Broughton certain parts of the lands of Carleton, with absolute warrandice. Broughton also acquired right to certain debts due by Nathaniel and Alexander Gordons. For payment of them, amounting to the accumulated sum of £433 sterling, and in implement of the minute of sale, Broughton, on the 2d July 1735, obtained adjudication of the lands of Carleton against Nathaniel and Alexander Gordons.

On the 26th July 1745, he obtained charter of adjudication under the great seal, and was thereon infeft. The other Creditors of Nathaniel and Alexander did, in like manner, obtain adjudications for their respective debts, in order to be within year and day of Broughton's adjudication. Broughton, instead of insisting on his right, by the minute of sale 1728, did, in the character of creditor-adjudger, bring a process of ranking and sale, as of a bankrupt estate. In this process he called Nathaniel and Alexander Gordons, and their creditors. The lands under sale were sequestrated by authority of the Court. During the dependance of this process, both Nathaniel and Alexander died. Alexander, the son of Alexander, was called into process by diligence, and he pleaded one general objection to all the debts, namely, that Nathaniel, his grandfather, had not made up any proper title for carrying over the personal right; for that he had served himself heir to Carleton the tailyier, instead of serving himself heir to John Gordon, the first substitute, who, it was contended, ought to have been considered as fiar.

On the 27th January 1748, the Lord Kilkerran, Ordinary, "found that the title was properly made up by the service of Nathaniel to James, the maker of the entail."

To this interlocutor the Lords, upon advising a reclaiming petition and answers, "adhered."

Alexander next objected that, by the tailyie 1684, the whole heirs of tailyie were restrained from contracting debt beyond the value of the half of the estate: That Nathaniel his grandfather, and Alexander his father, contracted debts even to the value of the whole estate, and had thereby incurred an irritancy and forfeiture: That the debts contracted by them were null, and therefore that the estate could not be rendered bankrupt by those debts, nor could the sale proceed.

On report of Lord Kilkerran, 21st June 1749, "The Lords found, that, by the conception of the entail, the person contravening forfeits for himself and his heirs; and therefore it is not competent to Alexander Gordon, the son of the alleged contravener, to object to the debts upon the estate of Carleton."

Alexander reclaimed, and pleaded that this objection was *jus tertii* to the creditors; for that, if he himself was not allowed to plead on the irritancy and forfeiture, the remoter substitutes undoubtedly might. The Court, however, after hearing counsel, on the 14th November 1749, adhered.

Alexander being thus barred *personali exceptione*, appearance was made for William Gordon, writer to the signet, brother of Sir Thomas Gordon, and one of the remoter substitutes in the entail; and the same plea was made for him that was made for Alexander. On the other hand, the Creditors contended that,—the tailyie not being recorded in terms of the statute 1685, nor the prohibitive, irritant, and resolutive clauses engrossed in the retour of Nathaniel's service, nor in Alexander's contract of marriage, whereby Nathaniel disponed the lands to him,—the Creditors were *in bona fide* to contract, and that at any rate the debts must stand good to the extent of one-half of the value of the estate, as allowed by the entail itself.

On report of the Lord Kilkerran, the Lords, 20th July and 21st November 1753, "repelled the objections pleaded for the Creditors upon the Act 1685, but found that the heir in possession might lawfully contract debts to the extent of the half of the value of the estate."

After this litigation the present Broughton got payment of part of the debts due to his father, out of a separate estate belonging to Nathaniel Gordon, and acquired right to the debts due to sundry of the other Creditors. In 1757 Sir Thomas Gordon of Earlston, having become the next substitute to Alexander Gordon, insisted, in an action, for having it declared that Nathaniel, and Alexander his son, had irritated their rights to the estate, for themselves and their descendants, and that the estate had devolved to him as the next branch in the entail.

On the 27th July 1759, the Lord Coalstown, Ordinary, sustained the pursuer's title, and decerned.

Immediately after this, Mr Murray of Broughton appeared, and produced, as his interest, the minute of sale 1728, between his father and Alexander Gordon, his adjudication 1735, and his charter 1745. He pleaded that he was entitled to the property of the lands sold by the minute of sale, and to the other lands in payment of the debts adjudged for, and that his right could not be hurt by the entail 1684, a latent deed not upon any record, in respect that his authors, Nathaniel and Alexander Gordon, possessed the estate upon titles of property independent of the entails 1684. The titles of property on which he condescended were the three adjudications of the estate of Carleton, 1693, by Fullerton of Dreghorn; 1694, by Martin; 1696, by Rome. In the course of the debate it was thought necessary, by the Court, to try the validity of those three adjudications, and it was ultimately found that Martin's adjudication for £808 Scots was a subsisting adjudication, and unexceptionable; but the other two adjudications were restricted to a security for the sums truly due.

Matters thus standing, the Lord Coalstown, Ordinary, took the debate to report.

ARGUMENT FOR THE DEFENDER:—

The defender observed, in general, that the adjudications deduced by Fullerton and Rome gave Nathaniel Gordon a right to the estate in security of the debts for which those adjudications were deduced. The right to be carried by the unexceptionable adjudication, that of Martin, was no more than the reversion of the estate after payment of those sums. Those sums would nearly, if

not altogether, have equalled the value of the estate; so that there could be no equity in reponing the debtor against the expiry of the legal in Martin's adjudication, when the reversionary right truly carried by it did not equal the sum for which that adjudication was deduced. The question therefore resolves into this:—Alexander Gordon had a good right to the estate in virtue of Martin's adjudication: Whether then can the personal deed of entail afford a legal objection to the debts due to Broughton, or to the purchase made by his father of part of the lands contained in that entail? As to which question it will be observed,—1*mo*, That it is an established principle of the law of Scotland, that whoever contracts with a person standing in the right of lands by unlimited titles, cannot be affected by any objection arising from an entail not recorded: That the limitations laid upon property by entails might not prove a snare to third parties, the statute 1685 appointed entails to be published in two different ways: the first publication is that in the investitures of the lands, and it is required that the irritant and resolutive clauses be fully engrossed in the charter and seasine. The other publication required by statute, is that in a special register appointed to be kept for that purpose. The statute provided for both those publications: It declares, "that such tailyies shall only be allowed in which the irritant and resolutive clauses are inserted in the charters and instruments of seasine, and the original tailyie produced before the Lords of Session, and the provisions and conditions, with the irritant and resolutive clauses recorded in manner therein mentioned." It is only upon performance of both conditions that the statute declares the entail "to be real and effectual against creditors, comprisers, adjudgers, and other singular successors." Hence the engrossing the irritant and resolutive clauses in the titles of the heir with whom the creditors contracted, was held insufficient, because the entail was not recorded; *8th December* 1724, *Creditors of Callender of Dorrater*, and *17th July* 1740, *Creditors of Cromarty*. This last judgment was affirmed in the House of Peers. Hence also the registration in the record of entails was held insufficient when the tailyie was not completed by infeftment, the heir having a title to the estate independent of the tailyie; and so it was determined in 1751, *Creditors of Patrick Oliphant of Bachelton* against *Lord Oliphant;* and lately in the question with *the Creditors of Sir John Douglas*. When indeed the debtor has no other title in his person, but a disposition of lands granted to him by the proprietor, under restrictions, creditors may be affected by such restrictions, though not recorded; and so it was found by the House of Peers in the case of *Westshiels:* And the reason is, because in such case there is no other title upon which the creditor can affect the estate; and this title, being personal, must be qualified by the conditions of it: but whenever the debtor is possessed of another title, so that the creditor is not obliged to connect his title to the estate through the personal deed of entail, then the creditors may safely contract. To apply these observations to the present case; every one, by inspecting the records, might see that the only infeftment by which the lands of Carleton were taken out of the *hæreditas jacens* of James Gordon, was the infeftment upon the charter under the Great Seal 1693, proceeding upon Fullerton's adjudication. From the records it also appeared that other adjudications for accumulated sums had been deduced against that estate: That all

those adjudications had been conveyed to Nathaniel Gordon, the nearest heir of the last proprietor, who had deceased without issue, was a fact which every one might know. It is not uncommon for heirs to make up titles to their predecessor's lands by expired dilgences, and therefore creditors could have no reason to suspect that there did exist a latent entail. On the contrary, they had great reason to believe that Nathaniel Gordon was an unlimited fiar, when they saw him dispone the estate of Carleton simply and absolutely to his son Alexander, in the marriage-contract with Grizel Gordon, sister of Sir Thomas, a remoter heir-male of the deceased. The late Broughton could not scruple to lend money to Alexander Gordon, having in his person titles thus unlimited; and accordingly he entered into the minute of sale 1728. At that time, charter and infeftment had followed upon one of the adjudications. This real right was thirty-five years old, and, as no challenge thereof had been brought, there was a natural prospect of every objection being soon cut off by the positive prescription of 40 years. Martin's adjudication, though for the small sum of £808 Scots, is without exception: after the expiry of the legal it must be held a good title of property. In a question with the debtor or his heirs, the law does not require infeftment, either before or after expiry of the legal; neither does it require a declarator of the expiry of the legal; such declarator gives no new right; it only finds that the right had, by the operation of the law, accrued to the adjudger. Neither does the defender's right rest solely on Martin's adjudication. The adjudications deduced by Fullerton and Rome have been sustained, as rights in security for the sums due: those adjudications, with the interest owing at the time of Nathaniel's purchase, will be found to exceed the value of the lands: when, therefore, there is a formal unexceptionable adjudication whereof the legal is expired, and other adjudications less formal indeed, but subsisting as securities for debts nearly equal to the value of the lands, the Court will not open the legal of the adjudication formally deduced, for a sum however small; and so the Court found, in 1740, *Murray of Clardon* against *Sir Alexander Murray and his Creditors*. It is in vain for the pursuer to plead, "that Martin's adjudication did not expire, *quoad* the legal, till 1704; that, in 1702, Nathaniel Gordon made up his title to the entail by a general service, in consequence of which he was bound to prevent the expiry of the legal, and that he could not take the advantage of an expired legal occasioned by his own fault; but, on the contrary, the debts being acquired by Nathaniel Gordon, who was bound by the entail to pay them, they were extinguished *confusione*:" for it will be observed, *first*, that the import of the clause in the entail is, that the heirs shall not contract debts, and, if they do, shall clear the estate of them; but the clause relates not to diligence done for payment of the debts of the maker of the entail. Hence, the facts and deeds done contrary to the entail are declared void and null; which cannot apply to the heir's omission to pay off an adjudication not deduced on his own deed. The clause in the entail which reserves to the entailer the power of contracting debts, and takes the heirs of entail bound to pay the same, &c., is no other than an exegetic clause which is annexed to every reserved faculty, for rendering the debts effectual to the creditors; but it is never understood to preclude the heir from being relieved of the debts out of the defunct's moveables, or, failing them, out of the entailed estate. No man is presumed to entail more than what he has; the lands, in so far as they are burdened with his

debts, do not belong to him. The diligence of creditors must affect them, nor can the heir be bound to extinguish such debts, unless the entailer had left him effects for that purpose. The entail in question contains no irritancy of the heir's right, in the case of his not purging the adjudications, nor even in the case of his possessing the estate upon any separate titles. No funds are set aside for payment of the entailer's debts: the diligence of the creditors must take its course, and thus the property became vested in Fullerton, upon the expiry of the legal of his adjudication, in January 1703, to be communicated always to any creditor who had done equal diligence. The debts of an entailer are not extinguished *confusione*, by being acquired by the heir of entail: so it was found, in the case of *Pitrichie*, 1*st December* 1757, where the debts were only personal; and this applies *a fortiori* to the present case, where the creditor had, *ab ante*, acquired a property in the estate by virtue of his diligence. The right had become irredeemable in Fullerton, before it was acquired by Nathaniel, the heir of entail. Nathaniel was not bound to extinguish that right; it behoved, therefore, to subsist in his person, as it subsisted in the person of his author, Fullerton.

Secondly, Although it were supposed that the clause in the entail bound the heirs, under an irritancy, to purge adjudications deduced for the debts of the entailer, yet this could have no effect while the irritancy was not declared nor the entail known. No creditor could have discovered this entail from the strictest search into the records. There was no infeftment upon it: the only infeftment after the death of the entailer, was that of Fullerton, which had become an irredeemable right of property before the creditors contracted with Nathaniel Gordon and Alexander his son. It must be admitted by the pursuer, that, if infeftment had followed upon the minute of sale, 1728, any objection competent against Nathaniel and Alexander Gordons could not have been competent against Broughton the purchaser. See *27th June* 1737, *Bell* against *Gartshore*, Dictionary, vol. I., page 183. Now, it is apprehended that the minute of sale, 1728, was made real by infeftment. It has been observed, that the adjudication deduced by Broughton's father, bore, both for implement of the minute of sale and for payment of the debts: that, on this adjudication, a charter was expede, and infeftment taken by the adjudger. The *quæ quidem* of the charter does not, indeed, set forth, that the adjudication was deduced upon the minute of sale; but, as the adjudication was as much in implement of the minute as for payment of the debts, every thing in the adjudication must be comprehended in the charter, and the infeftment will extend to the one particular as well as the other. But, although the adjudication had been deduced only for payment of the debts, and no infeftment had followed upon the minute of sale, yet it is apprehended that the irredeemable right to the lands was fully vested in Broughton. When a creditor is infeft upon a charter of adjudication, the feudal right to the lands is vested in him, but subject always to the legal reversion. When that right of reversion is cut off by the elapse of ten years, the right of the adjudger becomes an irredeemable right of property, and the aid of a new infeftment is not required. In the like manner, if the debtor should, before the expiry of the legal, grant a discharge of his right of reversion, the adjudication would become an absolute and irredeemable right of property, in consequence of the former infeftment; and the right of reversion, being personal,

would require no new infeftment. Thus standing the case, a minute of sale entered into betwixt the adjudger and the debtor, and conveying an irredeemable right to the lands, must imply a discharge of the right of reversion. Nor will it vary the case that the adjudication followed after the sale instead of preceding it; for an infeftment upon an adjudication vests the feudal right in the adjudger, and the sale, whenever made, must convey all that remains with the debtor, and be equivalent to a discharge or conveyance of the right of reversion. But farther, the late Broughton may be said to have entered into the minute of sale upon the faith of the records. When he made his purchase, he must be presumed to have consulted the records. From them he must have seen the complete feudal title, by the adjudication deduced in 1693, with charter and infeftment thereon. As he could see no later infeftment upon record, he must have concluded that the estate was possessed in consequence of those titles. Supposing, however, that he knew nothing of the adjudication 1693, yet still it would be available to support his purchase. No entail, unless duly recorded in terms of the statute 1685, can affect purchasers: private knowledge of the existence of an entail is of no moment. It is true that, when an entail is not clothed with infeftment, the conditions and provisions therein will be good against purchasers from one who has no title to the estate but such entail; for a purchaser cannot object to conditions and provisions in a deed, by which alone he can plead a right to the estate; but, whenever the seller has a separate title to the estate, which of itself would be sufficient to a purchaser, then the purchaser is not bound to acknowledge any other title, such as an entail. It was because there were not two separate titles in the heir of Westshiel, that judgment was pronounced against him. From the principles here laid down, it is held to be law, that, when one who is both apparent heir of the former investitures and heir of entail, does contract debts, even without making up titles, those debts will be effectual against the estate, notwithstanding the entail: for that the estate may be carried by an adjudication, upon a special charge against him as heir of the former investiture, and the entail will not be acknowledged at all: and so it was lately determined in a question among *the Creditors of Douglas of Kelhead.* It matters not that the creditor, at the time of the debt being contracted, was not aware that the estate might be so affected, or that he did not know of his debtor having any estate at all; and thus, if a debtor, even after contracting debt, should succeed to an estate entailed, but without record, such estate might be affected by his anterior creditors. In like manner, the separate title in the person of Alexander Gordon would be available to Broughton, at whatever time he came to discover the existence of such separate title.

ARGUMENT FOR THE PURSUER:—

It was understood by all parties concerned, that the only right of Nathaniel Gordon, was the entail 1684; that, upon it, he established his title by service as heir of tailyie and provision, and, upon it, that he took and continued possession of the estate. Nathaniel, by acquiring the adjudications after he had acknowledged the succession through the entail, did no more than what he was bound to do by acceptance of that right; that is, he paid the debts of the entailer, and extinguished them in his own person. Neither Nathaniel nor his son Alexander ever attempted to set up the adjudications as a preferable right

or title of possession. Such also was the sense of the creditors, especially of Broughton. The various questions litigated by them during the course of many years, afford evidence of their sense of the matter. The questions, Whether Nathaniel was properly served heir of entail and provision to the entailer himself? Whether the not registrating the entail in terms of the statute, 1685, could be available to the creditors of Nathaniel and Alexander? Whether the estate could be brought to a sale by Broughton, a creditor adjudger? Whether Alexander, the second, was barred from pleading the nullity of the debts, in consequence of irritancies incurred by his grandfather and father? and, Whether the debts contracted beyond one half of the value of the estate, ought to subsist to the extent of that half?—All those questions were foreign to the purpose, upon the supposition that Nathaniel held the estate in virtue of the adjudications, not in virtue of the entail 1684. As to the defence founded on the statute 1685, " That the entail 1684 was not recorded in the register of entails, nor its prohibitive, irritant, and resolutive clauses repeated in Nathaniel's general service, nor in his disposition to his son Alexander, and, consequently, that those clauses affect not creditors or purchasers :"—this defence was overruled in the former question with Alexander Gordon, the second. But, independent of this, it will be observed, that the provisions of the statute, 1685, relate not to the case of those who contract upon the faith of rights merely personal. And so it was found in the last resort, in the case of *Westshiel*, and has, ever since that judgment, been held as law. This argument proceeds upon the supposition, that Nathaniel's only title was in virtue of his general service as heir of entail. For proving this proposition, the following circumstances will be observed :—1*mo*, The entail was intended for the special purpose of paying the debts of the entailer, and one half of the estate was left free for that purpose; 2*do*, As the heirs of entail were taken bound to pay the debts of the entailer, and to relieve his heirs of line thereof, so they were taken bound to do nothing that might prejudice the right of succession thereby established; 3*tio*, That Nathaniel Gordon, acknowledging this entail to be his only right to the estate, made up his titles accordingly, and possessed accordingly ; 4*to*, That Martin's adjudication, the only one now subsisting as a right of property, was not acquired by Nathaniel until 1711, after that he had been nine years in possession, by virtue of his general service as heir of entail; 5*to*, That neither Nathaniel nor Alexander ever expede an infeftment upon this adjudication, nor did any act tending to shew that they imputed their possession to this trifling adjudication for £808 Scots; 6*to*, That the creditors did not so much as know that the adjudication in question had been conveyed to Nathaniel; 7*mo*, That, during the long and complicated proceedings at law, with respect to the estate of Carleton, no one ever pretended that this adjudication could be set up to defeat the right of entail whereon the estate had been possessed. It was upon Fullerton's adjudication, completed by charter and infeftment, that Broughton originally pleaded; it was not till after Fullerton's adjudication had been restricted to a security, that recourse was had to that neglected unpublished adjudication deduced by Martin. From this state of the facts, it appears that Nathaniel neither could set up, nor meant to set up the adjudication of Martin, as a title of property for the purpose of defeat-

ing the entail; nor can his creditors act contrary to his declared intentions or beyond his powers. Creditors-adjudgers have no pretence of *bona fides*. They take, and indeed must take, the right as it stands in the person of their debtor. The argument which the defender rears up in consequence of the minute of sale so long departed from, is obviated by the consideration already mentioned, that the statute, 1685, has no respect to the case of personal rights; and this also will serve for answer to the decisions in the cases of *Dorrater*, *Cromarty*, and *Bachilton*. But, independent of this, the minute of sale, once derelinquished, cannot be now urged by the defender. Although the late Broughton threw the minute of sale into his adjudication in implement, yet he plainly omitted it in his charter; and this the present defender does himself confess: neither did he stop here, but he actually brought a process of ranking of the creditors, and of sale of the estate, upon this medium, that he himself was not the proprietor, but a creditor of the proprietor: and his proceedings in that process shew, that he had as little reliance upon the argument now drawn from the minute of sale, as upon the argument now drawn from Martin's adjudication. The whole of the question resolves into this, Whether shall an adjudication for £808, deduced upon a debt of the entailer's, and retired by the heir of entail, (in consequence of the entailer's purpose, and agreeably to the obligation of the heir of entail,) be set up as a paramount title of property in this estate, because the heir of entail took a conveyance which he never used, instead of taking a renunciation of the debt? There are few estates in Scotland, however strictly entailed, which are not subjected to some incumbrances. If an heir of entail, by taking conveyances to them, though neither completed by infeftment, nor made the title of possession, shall be at liberty to set them up as sovereign rights of property, and thereby defeat the settlements of estates, it will follow that the method of securing estates by entail may be disappointed and eluded at pleasure.

On the 23d June 1766, "The Lords declared the right of Sir Thomas Gordon, repelled the defences, and decerned."

Act. A. Lockhart. *Alt.* R. M'Queen. *Reporter*, Coalstoun.

OPINIONS.

AUCHINLECK. The entail of Carleton is only a personal right, and is not in favour of one *alioqui successurus*: it is therefore good against a creditor who can pretend no *bona fides*. The only difficulty is from the adjudication, which is said to import an ample right of property independent of the entail. Suppose that this adjudication were still in the person of Martin, could he say, "I will carry off the estate upon my adjudication for £808 Scots?" The present case is still stronger. When Nathaniel purchased, the entailer had laid his heirs under an obligation to clear the debt. Nathaniel could not have purchased the adjudication so as to rear it up as a title of property, to the subversion of the entail. His creditors cannot do what he himself could not: any objection competent against him, is also competent against them.

PITFOUR. The entail did not appear on any record for 50 years. Two registrations are necessary to render effectual an entail against creditors. An

entail not on record is no entail; Nathaniel was obliged by the entail, but his creditors were not. Here the heir had, in his person, title both real and personal. Fullerton's adjudication has indeed been restricted to a security, but it was a right apparently good, and the legal was expired: this sufficient for creditors. It is true that the debt in Martin's adjudication is small, but the diligence is unexceptionable; and it has been observed, that the sums of all the adjudications put together were sufficient to equal the price of the estate; and, so standing the fact, the decision, *Murray of Clendon*, precisely meets the present case.

COALSTOUN. The question is, How far the limitations, here, are effectual against purchasers? In order to make an entail effectual, the Act 1685 requires the two publications mentioned in the argument. The words of the Act are general; no distinction is made between rights real and personal. A distinction, however, has been established, and so it was determined in the case of *Westshiel.* Hence, if I purchase from one having a personal right, I purchase with the burdens contained in that right. Upon the same principle, the Court ought to have supported entails engrossed in the investitures, though not recorded; for, in both cases, the purchaser sees the burden *in gremio* of his right from whom he purchases; but at no rate does the case of Westshiel apply to the present case. *There*, there was but one title; *here*, two: not only the entail, but also the adjudications. The case of *The Creditors of Kelhead* applies invincibly to this case. *There*, a simple right of apparency was held sufficient.

BARJARG. The right of the purchaser depends upon that of Nathaniel, and his again upon the entail.

AUCHINLECK. There was a qualified right in Nathaniel, latent, as well as the adjudications.

KAIMES. Nathaniel was bound to have sopited the adjudication, or, at least, to have conveyed with the same burden.

JUSTICE-CLERK. The opinion in favour of the pursuer is perfectly agreeable to the principles in the case of *Spalding*, as determined in the last resort.

PRESIDENT. The adjudication deduced by Fullarton of Dreghorn is out of the question. The case of *Murray of Clarden* was strait. I cannot suffer an adjudication for £808 Scots, with an expired legal, to carry off an estate of how great value soever. It is asked, How can this latent entail affect the right of the defender, a creditor, or purchaser? It is answered, that an entail is a right with limitations; when one acquires from him who possesses upon a personal right with limitations, he acquires under those limitations. In the case of *Kelhead*, there was an apparent heir who had been three years in possession, and there was no iniquity there, because these were *aliunde* fair debts by adjudication, to the extent of sixteen years' purchase.

For Sir Thomas Gordon,—President, Justice-Clerk, Auchinleck, Barjarg, Elliock, Kaimes, Kennet, Hailes,—8.

For Mr Murray,—Pitfour, Coalstoun, Stonefield,—3.

Non liquet. Strichen, Gardenstoun,—2.

Absent.—Alemore, Milton,—2.