1750. *June* 26. CLAIM of JOHN HAY *against* OFFICERS OF STATE.

[Elch. No. 9, *Fiar.*]

JOHN HAY of Lysterig in his contract of marriage bound himself to provide a sum of money, (by settling it upon lands or other good security,) to himself and spouse in liferent, and to the heirs of the marriage in fee. In a question concerning his forfeiture, the Lords found, That the fee was in him, though the obligation was never executed, and consequently the children were not heirs but creditors, and though by far the greatest part of the money came by the wife.

N.B. This point was hardly pleaded by the bar, but the President said he thought it was the strongest point in the cause; and it appears to me that it might have been pleaded upon one or other of these footings :—1*mo*, That by the plain sense of the words, the father has only a liferent, and that the fee is given by a subtlety of our law, viz. that a fee cannot be *in pendente*, which, though it may be admitted in favour of creditors, ought not to be admitted *pro fisco; 2do*, That if a fee must be somewhere, rather than go against the express words of the deed, it were better to suppose a fiduciary fee in the father for behoof of the children; and, 3*tio*, The maxim cannot here take place, because there is here no fee at all established, but only an obligation to give a fee to children, which obligation we can suppose not to exist till the children are born, and then they are creditors upon the obligation, and can pursue for implement of it; and why may they not here claim as any other creditors?

1750. *June* 30. CLAIM, STEWART of ARDSHIEL *against* THE OFFICERS of STATE.

[Kilk. No. 8, *Tailyie.*]

THIS claim was founded upon the claimant's father's contract of marriage, by which the lands of Ardshiel were provided to the husband and the heirs-male of the marriage, and thereafter follows this clause :—" And it is hereby expressly provided, condescended, and agreed upon betwixt the said parties, that albeit it should happen the said Charles Stewart at any time to be convicted or attainted of high treason or any other crime, whereby he might come to forfeit or lose the lands foresaid, hereby provided in fee to his heirs-male, in manner above written, yet they shall not be thereby prejudged, but succeed to the fee of the said lands immediately after such conviction or attainder, in the same manner as if the said Charles Stewart had been naturally dead; upon which express condition and qualification these presents are entered into, and the said Charles Stewart bound and obliged, as he hereby obliges him and his foresaids, to

grant a full and ample disposition in favours of the said heirs-male *nominatim*, at any time he shall be required to do the same, under the penalty of 20,000 merks, by and attour performance."

Upon these last words, by which the father obliged himself to grant a disposition to the heir-male *nominatim*, the son founded his claim; but the Lords found, that these words did not make a clause by themselves, but were only a part and a sequel of the first provision saving the estate from an attainder for high treason, and were absurdly added by way of execution of that first provision, which was admitted on all sides to be absurd, illegal, and utterly void.

My Lord President was of opinion that if this clause had stood by itself it could only be considered as an implement of the provision of the lands to the heirs of the marriage, and that the disposition which the father was bound to grant was only a disposition to himself in fee, and to the heir of the marriage *nominatim*, failing of him, by which the claimant was only heir, but not fiar, and consequently could have no claim. The President was likewise of opinion, that this claim was excluded by that clause of the vesting act by which all persons are allowed to claim except the heirs, executors, administrators, and assigns of the forfeiting person. But to this it was ANSWERED,—That this exception only debarred the heir to claim as heir, but did not hinder him to claim *tanquam quilibet*, if he had any other right in his person: That it is true, by this way of interpreting the clause, it will operate nothing, since without any special exception, by common law, and by the nature of the thing, the heir of a forfeiting person, *qua* heir, can claim nothing: but that the clause is not necessary, but only added through that exuberancy of style which abounds so much in the British acts, is evident from this, that the forfeiting persons themselves are excepted, who it is certain cannot claim in any shape; and this example, among many others, shows that our British statutes are so loosely worded that the strict rules of interpretation will not apply to them, and that it is not a good argument to say, a clause must have such or such a meaning, otherwise it is useless, and that the common rule of interpretation, *quod omnis exceptio debet esse a regula*, will not hold in such inaccurate compositions as our British acts.

It was admitted in this case, that a personal faculty to burden to a limited extent, reserved in a disposition by the forfeiting person, did not fall to the Crown by the forfeiture; and so it was decided in the last resort in the case of the Earl of Nithsdale, who was attainted for the rebellion in 1715, and in another case quoted by the lawyers for the claimant; and from thence it was inferred that an unlimited faculty to burden *in infinitum* was likewise not forfeitable, and for this was quoted a decision in the year ——, where it was found that a woman disponing her estate to an hospital, with the burden of all her debts and legacies, but without reserving to herself a power to alter, could not make an after disposition in favour of another. But be this as it will, (for this doctrine was far from being admitted by the other side,) it follows, from what was admitted, that a faculty to burden with a limited sum is not forfeitable; that there is one law for the King and another for the subject, or, in other words, that by the genius of our law the favour is not *pro fisco*, for it has been often adjudged, and is looked on as certain law, that such a faculty is adjudgable by creditors.

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,