"Between 1680 and 1730, no less than 340 instances of retours that bear special reference to the deed of taily to which the heir was served.

"It is true that in that period there are also several instances of retours that bear no such reference, though not nigh so many; and if from these shall be deduced the services which are of heirs-male of provision, and which are of heirs of line and of provision, which do not need to refer to the special deed of taily, the erroneous instances will be very few. Again, No. 2, between the 1730 and 1752, there are no less than 620 instances of general services which refer to the deed of taily; and the contrary instances in that period are yet less in proportion than in the former.

"*2dly*, There are no less than 32 instances wherein the blunder of the conductor of the erroneous service is corrected."

1753. *November* 21. CREDITORS of Carleton *against* WILLIAM GORDON.

This case is reported by Elchies, (*Tailyie, No.* 51.) also by Lord Kames, (*Mor. p.* 10260.) and in Fac. Coll. (*Mor. p.* 10258.) It was reported by Lord KILKERRAN to the Court. His Lordship's report is as follows:—

"JAMES GORDON of Carleton, made a tailzie of his estate in the 1684. It is wrote with his own hand, and being of his own dictament, was a very inaccurate performance, and has given occasion to a variety of questions, many of which being now finally determined, there is no occasion to mention them.

"All that is needful to say for understanding the question now to be reported is, That the persons first called were the heirs-male of the granter's body, whom failing, John Gordon, third lawful son to Earlstoun, and the heirs-male of his body, whom failing, Nathaniel Gordon, and the heirs-male of his body, whom failing, to James Maitland, and the heirs-male of his body, whom all failing, to his own nighest heirs whatsoever. And as there were no heirs-male of the granter's body, and that John Gordon, first called after them, predeceased the granter, and that no infeftment had followed on the entail, Nathaniel, to whom it next devolved, made up his title by service as heir in general to James, the maker of the entail.

"That by this tailyie, the several persons called to the succession were prohibited 'selling wadsetting, impignorating, nor anywise away putting either legally or conventionally my lands and estate aforesaid, nor granting any annual-rents nor yearly duties forth thereof, nor contracting debts, *nor doing any other deed, directly or indirectly*, (words which give rise to a good part of the present debate,) above the equal half of the full value thereof, whereby the same may be apprized, adjudged, or otherwise evicted in law from them, in prejudice of the foresaid tailyie.'

"The estate thus devolving to Nathaniel, he, in the contract of marriage of his son Alexander with a daughter of Earlston's, disponed the estate to him, and the heirs whatsoever of the marriage, in direct contradiction of the entail; and upon this title Alexander possessed all the days of his life, as an illimited fiar.

"It happened that, as Nathaniel had, during his incumbency, contracted several

debts, and Alexander, his son, contracted several debts also, and upon these debts of Nathaniel and Alexander, the creditors did severally adjudge, and the debts, with the annual-rents, having come to exceed the value of the estate, the creditors brought a process of ranking and sale; and after it had depended for several years, Nathaniel and Alexander having both died, compearance was then made for Alexander, now of Carleton, the son of Alexander, and grandchild of Nathaniel.

"And for him it was OBJECTED, that Nathaniel, his grandfather, had not made up proper titles to this estate; but that your Lordships overruled, and it is no part of the present question.

"He next objected, that both Nathaniel, his grandfather, and Alexander, his father, had irritate their right; Nathaniel by disponing the estate to his son Alexander, and the heirs whatsoever of his marriage; and both grandfather and father, by contracting debts, whereon the creditors had deduced their adjudications, whereby, as the debts themselves, so their right was irritate; and, therefore, as these debts were void and null, they could not affect the estate, and the same devolved to him free and disengaged thereof.

"But this objection your Lordships found incompetent for him to propone; in respect that, by the entail, the contravener forfeited not only for himself, but also for his issue.

"Compearance was then made for William Gordon, writer to the signet, a remote member of the entail, who proponed the objection which your Lordships had found incompetent for Alexander; and your Lordships remitted to me to hear him upon his interest.

"And, in the first place, the creditors allege, that it is not competent for him to make the objection. *His* interest is no other than as one who may happen to succeed as one of the heirs male whatsoever of the granter; but to which he has the most distant prospect, as he is only a younger branch of the family of Earlstoun, who can only succeed on the failure not only of all the substitutes *nominatim* called, but also of all the preceding branches of the family of Earlstoun. But *esto* his interest were not so remote, the creditors plead it thus high: That it is not competent for any to obstruct the sale, to whom the succession has not devolved; for that, as no other can pursue a declarator of irritancy, so no other can object the irritancy of the debts to obstruct the present sale.

"To which it is ANSWERED for William Gordon, that every heir of entail, however remote, has interest to insist in a declarator of irritancy of the debts, by which the estate is endeavoured to be evicted; that, were it otherwise, it should be in the power of the heir in possession, and the next, colluding together, to vacate every entail; and quotes decisions where this has been determined. And, 2*do*, were there a doubt whether a remote heir could raise an original process of irritancy, there can be no doubt but he may defend, when called as a party, which every heir of entail must be deemed to be, in a process of sale of the tailyied estate; and, lastly, that your Lordships supposed the competency, when you remitted to the Ordinary to hear him in the cause.

"It was alleged, 2*do*, for the creditors, that *esto* it were competent for him to appear, his objections to the sale are not relevant.

"You have heard the objection that was proposed for Alexander, that Nathaniel had irritate by the disposition on his son's contract of marriage, and that both Nathaniel and his son had irritate their right, by the contractions on which

the estate has been adjudged, and as now endeavoured to be evicted; and the objection now made by William Gordon is the same.

"ANSWERED for the creditors,—That as no infeftment ever passed upon this entail, which remains to this day a personal right, however it may be good as a destination of succession, the prohibitory and irritant clauses in it cannot be effectual against creditors,—as the Act of Parliament 1685, which gives force to entails, supposes that they should be completed by charter and sasine, and registered in the register of tailyies.

"ANSWERED for Mr. Gordon,—That it is true the Act 1685, only concerns tailyies upon which infeftment passed; but it is not upon that statute that Mr. Gordon objects to the creditors, but upon the common law by which qualities in a personal right affect singular-successors; even a back bond would, and *multo magis* must it be so where the qualities are ingrossed *in gremio* of the right which creditors adjudge; and I may here add, that so it was found in the last resort between Mr. James Baillie and Mr. Archibald Stewart, then Denham of Westshiells, where your interlocutor, that had ground otherwise, was reversed.

"It was alleged for the creditors, in the *3d* place,—That by this tailyie the heirs are left at liberty to contract debts to the value of one-half of the estate; and as it is not pretended that the debts of Nathaniel did amount to the half of the value, the prohibitory clause did not strike against them; so neither did they strike against so many of Alexander's debts as fell within the half of the value; and for both it was alleged, that as they had severally deduced adjudications for debts with which the estate was chargeable, the legals whereof were expired, the tailyie was at an end.

"It is ANSWERED for William Gordon—That *esto* it had been allowable by the tailyie for the heirs to contract debts to a certain extent, which he does not admit, yet, abstracting from the irritancy laid upon the contracting of debts, there is a separate irritancy which Nathaniel had incurred, *viz.* by his disponing the whole estate in his son's contract of marriage to him and the heirs whatsoever of the marriage, which was a plain infraction of the order of succession established by the entail, which the heirs were forbid to do under an irritancy; and this irritancy having been incurred by Nathaniel, no debts of his can affect the estate. And they make the same answer to the creditors of Alexander; for I forgot to tell you that Alexander had sold a great part of the estate to Mr. Murray of Broughton, who led an adjudication in implement of the disposition, and was the original pursuer of this process of sale.

But, *2dly*, says William Gordon, the tailyie gives no liberty to the heirs to contract any debt whereby the estate may be adjudged. It was preventing the estate's being carried off by an adjudication that the maker had in view; and though the prohibitory clause to contract debt be thus expressed, to contract debt above the half of the value of the estate, whereby the same may be adjudged, it is impossible to conceive that he could mean to make it an irritancy, if the estate should be adjudged for debts exceeding the value of the half of the estate, and yet not making it an irritancy, to let the estate be adjudged for debts that were within the value of the half, as the *one was equally effectual* to carry off the estate as the other; and, therefore, the clause must be so understood as inferring an irritancy, in case an adjudication should be allowed to be led for a debt of whatever extent it might be; and if that is so, it is in vain to speak of an expired legal upon an adjudication, by the leading whereof an irritancy of the debitor's right was incurred.

"REPLIED for the creditors to the first of these answers—That the debts of Nathaniel cannot affect the estate, in respect of the irritancy he had incurred by the disposition in his son's contract of marriage; that the law knows of no *ipso jure* irritancy; and as this irritancy was not declared against Nathaniel in his lifetime, it cannot be declared against his heir. But, *2dly*, Suppose a declarator of this irritancy had been brought against Nathaniel himself, it could not have annulled the debts which before that he had contracted, and was allowed by the entail to contract.

"And this leads to the second answer for Mr. Gordon, that the entail allowed no debt to be contracted whereby the estate might be adjudged. To which the creditors reply, that no argument is so much as attempted to reconcile the words of the entail, which only prohibits contracting of debts above the equal half of the full value, with the construction Mr. Gordon puts upon it, which, in short, comes to this, that the honest man, who was the framer of the tailyie himself, has not made it as he ought to have done, to answer his intention of preventing his estate from being evicted by creditors. He has allowed debts to be contracted, provided they do not exceed the half of the value. He has not, nor could he bar creditors from adjudging upon debts which he had allowed the heirs to contract, nor has he put the heirs under any obligation to redeem such adjudications, which, though led for debts far below the value of the half, may yet evict the whole of the estate; therefore, your Lordships should frame another tailyie for him, agreeable to his intention, which merits not a serious answer. The creditors do, therefore, insist that their argument upon this point admits of no answer; that the debts of Nathaniel, (and which is all they need say,) are below the half of the value, and, therefore, good debts in terms of the entail. Adjudications have followed upon these debts, the legals whereof are expired. Therefore, the entail is at an end.

"I have only one word more to add. It is said for the creditors that there is one adjudication for a debt of the tailyie maker, the legal whereof is expired; and though the creditors do not plead their expired legals against each other, yet this is of itself sufficient to cut out the heirs, and to this Mr. Gordon has made no answer."

[Lord Kilkerran's report ends here.]

July 20, 1753.—Upon the report of Lord Kilkerran, the Court "repelled the objection, upon the act of Parliament 1685, and find that the heir in possession might lawfully contract debts to the extent of the half of the value of the estate, and remit to the Ordinary to proceed accordingly."

The following is Lord Kilkerran's note of what passed upon the bench upon this occasion.

"*July* 20, 1753.—The Lords were of opinion that it was not competent for a remote heir of entail to stop the sale, but as they could not avoid to admit a *caveat* for him, that he should not be excluded from pleading his interest when he should come to have right, and that, farther, should they find he had no interest to stop the sale, they could not proceed to give judgment upon the other points otherways than in absence; the creditors, sensible that such a *caveat* should throw cold water upon the sale, were it to proceed, passed from their objections to William Gordon's interest, to compear and object. The Lords then proceeded to the other points, and repelled the objection upon the act 1685, which was agreeable to the judgment of the House of Peers in the case of *Westshiells*.

And as to the third point, the Lords had no doubt but that the heirs of entail might lawfully contract debts not exceeding the half of the value, but, nevertheless, were not of opinion that the sale would proceed unless the debts within the half of the value, with the annualrents growing thereon were to such amount as would render the estate bankrupt, for that the expired legal would not sustain the sale. The creditors might, indeed, pursue declarator of expiration of the legal as accords, but a sale they could not pursue, though the legals were expired, unless they could say bankrupt by the debts which the heir of tailyie might validly contract: for, by the act 1681, even where the legal was expired, the creditors could not pursue a sale without consent of the debtor, till that was altered by an after statute in 1685. And the bar, to whom this had not occurred, not being prepared upon this point, the interlocutor was pronounced on this point in the following general terms, Find that the heirs of entail were empowered to contract debts not exceeding the value of the half of the estate, and remitted to the Ordinary to proceed accordingly."

N. B.—A reclaiming petition was presented against this interlocutor, which, on being advised with answers, was refused.—*Nov.* 21, 1753.

1753. *December* 14. ELSPETH STEWART *against* AARON GRANT.

THE facts of this case are stated by *Elchies, (Dam.* and *Int.* No. 3, and more fully in his *Notes.)* The following is Lord KILKERRAN'S note of the opinions of the Judges:—

"On the advising this state, Nov. 22, 1753,—

"KAIMES.—That the *inscriptio in crimen*, by the Roman law, was a most unreasonable constitution, and effectually put a stop to all private prosecuting. In England, their Grand Jury is a right thing, for where they find a bill, the private party prosecutor can never be decerned calumnious. In Scotland, it were to be wished that no warrant were granted for commitment before some previous inquiry, which should have the like effect, though that does not seem to be the practice.

"After this said, he doubted if the action lay in any court for expenses of process, where the same had not been brought. I mean the demand made in the Court itself, where the trial was carried on, and that, at the time of the trial, as no other Court could so well judge whether the prosecution was malicious; and if the action lay, inclined to think the defence in this case good.

"DRUMORE.—Thought the action lay and the defence not good.

"JUSTICE CLERK.—That the action did not lie, and if it did, the defence was good.

"After so much said, it was proposed by *Elchies* to put the question. This was opposed by *Kilkerran*, who thought it was a complex question, wherein some might think the action did not lie, and yet that if it did, the defence was not good. And how could any one who was of that opinion vote on that complex question? That though it may be true that different votes are not to be put upon every different argument, yet it was never heard that a complex question was put upon the competency of the Court, and relevancy of the defence.