the defunct to make out the second testament without accusing himself of a crime; and it was said that, if such a witness was to be examined under any pretence, there was an end to all objections to witnesses. On the other hand it was said that he was not to be examined as a witness whom the Judge was to believe, whatever he said, but rather as a party, whom the Judge was to believe if he gave evidence against himself, but not if he gave evidence for himself, in the same manner as a party is examined in a trial of forgery; that it belonged to the office of a judge to take every method to get light in any affair, whether by the examination of witnesses, parties, or those connected with parties, giving to every one such a degree of credibility as the law has allowed them.

The Lords allowed him to be examined, by a division of six to five. *Dissent.* Elchies, Kaimes, Drummore.

1754. *August* 7. JOHN STEWART SHAW *against* LORD CATHCART.

[*Fac. Coll.* No. 132.]

SIR John Shaw, elder, and Sir John, younger, liferenter and fiar of the estate of Greenock, did tailyie the same in the son's contract of marriage, with strict irritant and resolutive clauses,—first in favour of young Sir John and the heirs-male of his body; whom failing, to old Sir John's five younger sons in order, and their heirs-male; whom all failing, to Margaret Shaw, old Sir John's daughter, and the heirs of her body. Of this marriage there was only a daughter, the mother of the said Lord Cathcart; and the five younger sons of old Sir John having failed without issue, the said Margaret Shaw became the presumptive heir of entail in exclusion of the daughter of young Sir John. This was the occasion of the said Sir John doing several deeds to burden and affect the tailyied estate in favour of his own issue, thereby to disappoint, as far as in him lay, the provision of succession in favour of his sister, Margaret Shaw, and her issue. And for this purpose, he took advantage of a clause in the entail, whereby it was "declared lawful for the said John Shaw, (that is, young Sir John,) or any of the said heirs of tailyie, to contract the sum of 50,000 merks Scots of debt, and therewith to affect and burden, in manner after specified, the said lands and estate, for providing of their daughters or younger children; but it shall not be lawful to any of the succeeding heirs of tailyie to contract any more debts for provision of their children, under the irritancies above-mentioned, until first the debts contracted by their predecessors for provision of their children be paid and cleared; at least it shall only be lawful for them to contract so much for the end foresaid, as, with the predecessors' debts above specified, unpaid, shall amount to the sum of 50,000 merks in hail." In the same tailyie, which, as said is, was in young Sir John's contract of marriage, there was an obligation upon Sir John the father, and his heirs of tailyie, to pay 30,000 merks to an only daughter of the marriage, with interest from her age of sixteen or marriage; and it is declared, "that this present tailyie and irritancies thereof are and shall be noways

prejudicial to any execution competent upon this contract, in so far as the same is conceived in favour of the daughters of the marriage, failing of heirs-male thereof." Now young Sir John did exercise those powers given him by the entail, by granting three several heritable bonds upon the tailyied estate to Lord Cathcart, who married his daughter, payable by himself and the other heirs of tailyie, with an obligation on the said heirs of tailyie to relieve Sir John's other heirs and successors of the said bonds, which all bore interest from the 29th November 1719, the date of Lord Cathcart's marriage. The first of these was for 30,000 merks, in implement of the foresaid obligation in the contract of marriage; and the second for 17,000 merks; and the third for 3000 merks. Of these bonds Sir John never paid any interest during all the days of his life; and upon his death, which happened in the year 1752, there arose a dispute betwixt Sir Michael Stewart's son, Sir John's heir in the tailyied estate, and my Lord Cathcart, his heir in the untailyied lands, concerning the growing interests upon these bonds, whether relief was competent for them to the heir of entail against Sir John's heir in the other lands.

And first, with respect to the interest upon the 30,000 merks' bond; all the Lords were of opinion that the interest upon this bond was a burthen upon the tailyied estate as much as the principal, because, so far as concerned this bond, the estate was to be considered as not entailed: they therefore found that the thirty-five years' interest upon this bond affected this tailyied estate, though by this means that bond of itself made a sum greater than the 50,000 merks, to which the faculty of burthening the estate was limited; and this moved my Lord Auchinleck to think that the annualrents upon this bond could not exceed the sum of 20,000 merks, which, joined with the principal, made the whole sum contained in the faculty: but in this opinion he was singular. The next question was with respect to the annualrents of the other two bonds, whether they could be accumulated upon the tailyied estate? And the President was of opinion that there was a difference, in this respect, betwixt debts contracted by an heir of entail by virtue of a faculty, and the debts of the tailyier. The annualrents of these, though not made heritable by infeftment or adjudication, he thought the heir of tailyie was under an obligation to pay, because he considered him as a liferenter, who is undoubtedly bound to clear all the annual burthens upon the liferented lands, and has only right to the residue of the rents; and he thought that a man tailyieing his lands neither did nor could tailyie any more than so much of the lands as remained after payment of the debt: so that the heir, by virtue of the entail, could only have right to the superplus rents after payment of the interest of the debts. But he thought the case was different with respect to debts contracted by the heir of entail, by virtue of a faculty: So far as that faculty went, he thought the estate was not entailed, nor the heir under any limitations; and therefore he was at liberty to spend the whole rents of the estate, and let the annualrents run up; and he thought there was no reason for limiting the faculty to the principal sum, because the intention for which it was granted, namely, the providing of younger children, and particularly daughters, showed that it was the intention of the parties that the sum contracted by virtue of the faculty should bear interest, at least from the time of the marriage of the daughters, as in this case; which interest he therefore thought was comprehended in the faculty as much as the principal sum. He added, that, for the same rea-

son that the limitations of an entail were all strictly interpreted, the faculties and powers granted to the heir should be largely interpreted. But all the Lords, except Auchinleck, were of another opinion, and thought there was relief in this case to the heirs of tailyie against the heirs of line, for the growing interest upon the 20,000 merks: And, indeed, it should seem, that the quit, contrary to what the President said, was true; namely, that the interests upon the tailyier's debt might be accumulated, because with respect to them the heirs of tailyie seem to be under no restriction or limitation; nor will the comparison hold, in many respects, betwixt a liferenter and an heir of entail: but as to debts contracted by virtue of a faculty, he is under a restriction, and he exceeds the faculty as much by letting the annualrents run up as by giving a bond at first for a greater sum: and so the Lords determined, finding relief due for the annualrents of the faculty sum, but not for the annualrents of the tailyier's debts, such as the 30,000 merks to the daughters of the marriage.

To this interlocutor adhered, January 31, 1755. *Dissent.* Præside et Kaimes.

This interlocutor affirmed by the House of Peers.

Another question in this cause was occasioned by a clause in the entail, allowing the maker thereof and the subsequent heirs of entail "to grant feus or long tacks, for such spaces as they shall think fit, of any part or portion of the said lands; the feu or tack-duty not being under twenty shillings Scots for each fall of dwelling-houses, and five shillings Scots for each fall of yards and office-houses." By virtue of this clause, the Lords found unanimously, that young Sir John had no right to give a feu to the Lord Cathcart of the whole western barony of Greenock; the Lords being of opinion that this clause gave a power to Sir John of feuing out urban tenements, that is, houses and yards in or about the town of Greenock.

The next question was, Whether this last mentioned clause entitled Sir John to grant a perpetual feu-right of the principal messuage-house and gardens, at the rate above-mentioned, of so much per fall of houses and gardens; and it carried that it did not, because the clause could not be understood of feuing the principal mansion-house and seat of the family. There was also a question concerning tacks granted by Sir John, which he had a power to grant, by the entail, during his life, or for nineteen years, without diminution of the rental; and accordingly the Lords sustained the tacks which he had so granted during the space of nineteen years, except the tack which he had also granted of the mansion-house, as well as a feu, and which the Lords did not sustain, by the President's casting vote; because it was not a subject that made any part of the rent-roll of the estate, or was in use to be set. The last question was concerning woods standing at the time of Sir John's death, but to which Sir John had made a gift in favour of Lord Cathcart. The Lords were all of opinion that no heir of entail could give a right to cut timber trees after his death; they thought therefore that the grant of the woods could go no farther than the *silva cædua*, or copsewood, nor even that length, unless such wood was fit for cutting at the time of Sir John's death, which in this case it was affirmed by the one party, and not denied by the other, that it was not; but I do not see any ground of law upon

which an heir of entail can grant a right to cut any trees after his death. (See the papers upon this and the other points.)

The interlocutor in this cause affirmed in every point by the House of Peers.

1754. *November* 15. Town of Lauder *against* Brown, &c.

[*Fac. Coll.* No. 116.]

This town, besides the great customs usually paid in burghs, upon goods imported or exported, and besides the small customs usually paid in burghs, upon goods bought and sold, claimed a certain toll or duty called *cassie mail*, payable upon all goods that passed either through the town or the liberties thereof, even though they did not pass through the streets or highways near the town. This privilege they claimed upon the title of a charter from the crown in the year 1502, confirming their privileges, and granting them fairs and markets, and customs and tolls used and wont; and upon this title they had been in use for time immemorial to levy certain rates and customs upon goods passing through the territory, according to a book of rates entered into the records of their head-courts. The question was, Whether they had acquired a right to such an extraordinary taxation. All the Lords were of opinion that prescription in this case could take no place, because prescription was betwixt man and man, by which one lost and another gained, but could have no place where so many were concerned as in this case; but they thought that immemorial custom would take place here, so far as to explain the grant to the town, but only with this proviso, that the custom was not contrary to law and the good policy of the kingdom; and Lord Kaimes and Lord Justice-Clerk were of opinion that this custom was contrary to law and good policy, in respect that the town had been in use to uplift this tax without applying it, or being under any obligation to apply it, to the reparation of the roads in their neighbourhood; but my Lord President observed that every burgh in Scotland was obliged to keep up and repair the roads in its neighbourhood. The Lords found, by a great majority, that the town had a right to this toll, but not as to lime or coals, which never had been in use to pay any thing.

N.B. The Court in the year 1621, November the 15th, seems to have given a contrary judgment in the case of the burgh of Linlithgow.

The President observed that, by an Act in James I.'s time, the customs were annexed to the crown, and our kings took the liberty of giving grants of tolls and customs at pleasure, without consent of Parliament: but this is remedied by statute 57th 1661, by which the imposition of all customs and tolls upon merchandize, without consent of Parliament, was prohibited; to which act the king consented, upon condition that a book of rates should be made up by the Exchequer, according to the prices of goods that then were. It is to be observed in this act, that all oaths of merchants, masters, or mariners, concerning customable goods, are prohibited.