It did not occur to him that one of these heirs might be an out-law, might be a professed Papist, might be forfeited for high treason, or might be an idiot. These cases are not provided for, because they were not foreseen; and therefore they are left to be governed by reason and equity, which dictate that the solid way of determining this point is to consider what would have been the will of the entailer had he foreseen these events. Of this there can be little doubt; for he never could intend that any person should succeed who would put an end to the entail, and convey the estate to the Crown as escheat. Neither could he intend that a professed Papist should succeed him, who is barred by express statute. Neither is it presumable that he could intend his estate for an idiot, incapable of enjoying it. There is therefore no good foundation for voiding Sir Peter's settlement; for, supposing it contrary to the words of the prohibition, it is evidently conformable to its spirit and intendment. No. 41.

Sel. Dec. No. 188. *p.* 252.

1762. *February* 25.

CREDITORS of CROMARTY *against* The KING'S ADVOCATE.

No. 42.
When an entailed estate falls to the Crown by forfeiture, the debts of the forfeiting person become effectual against the Crown.

The Earl of Cromarty being attainted of high treason for joining in the rebellion 1745, claims were entered before the Court of Session by his creditors; against which the following general objection was made, That the Earl, now attainted, possessed the estate of Cromarty under a regular entail made by his grandfather, with strict prohibitory, irritant, and resolutive clauses, against alienation and contraction; and that, as the debts contracted by him could not affect the estate as against him and his heirs of entail, as little can they affect the estate now that it is devolved to the Crown by the Earl's attainder.

In answer to this objection, after premising that the estate of Cromarty stands entailed in the usual style of entails, prohibiting the contracting of debts, &c. "in prejudice and defraud of the subsequent heirs of tailzie, and provision above mentioned," it was argued, That, from the nature of Scots entails, the full property is vested in the proprietor, as much as in the proprietor of a fee-simple: That clauses prohibitory, irritant, and resolutive, do not limit the property, but only bestow a privilege upon the substitutes to challenge the deeds of the tenant in tail. If they use their privilege, it has the effect to deprive him of his estate. If they forbear, his deeds, whether of alienation or contraction, are good against third parties. And if the substitutes neglect to bring their challenge within forty years, such deeds come to be effectual against them also.

The consequence is clear.—The estate is vested in the Crown by the forfeiture, which deprives the substitutes of their hope of succession. They cannot challenge the Earl's deeds, because they have no interest; and the Crown cannot challenge them, because the privilege of challenge is given to the substitutes only.

No. 42. Suppose a tenant in tail should alienate his estate gratuitously, and no challenge is brought for forty years, the purchaser is secure, and enjoys the estate as a fee-simple. What then will become of the disponer's debts, such of them as are preserved alive from the negative prescription? The purchaser is liable, as having acquired the estate gratuitously, in prejudice of these debts. This supposed case has a strong analogy to the present.

To shew that a tenant in tail is complete proprietor, a case may be put of an heritable bond granted by a tenant in tail, standing unchallenged forty years after infeftment is taken. The substitutes are barred from their declarator of irritancy, both by the negative and positive prescriptions; and the infeftment must stand good till it be extinguished by payment. This could not be if the full property were not vested in the tenant in tail; for if he were barred by any limitation in his right from granting such deeds, the maxim would be applicable *quod ab initio vitiosum nullo tractu temporis convalescit;* and the objection to a deed as flowing *a non habente potestatum*, can never prescribe.

The following interlocutor was pronounced: "In repect that, by the attainder of the late Earl of Cromarty, his estate, now vested in the Crown, is freed and discharged of all limitations, substitutions, and remainders, Find it not competent to the Crown to found upon clauses prohibitory, irritant, and resolutive, which are intended for the benefit of heirs of entail, and for them only; and therefore sustain the claim."

Sel. Dec. No. 191. *p.* 255.

1762. *March* 3. LIVINGSTONE *against* LORD NAPIER.

No. 43. The Countess of Callander disponed the estate of Westquarter, "to and in favour of herself and her husband, James Earl of Findlater, and the longest liver of them, in life-rent and conjunct fee, and for the said Earl's life-rent use allenarly, and to James Livingstone, and the heirs-male of his body; whom failing, such persons as the said Countess should name, by a writing under her hand; and failing said nomination, to the said James Livingstone's heirs and assignees whomsoever;" all under the usual prohibitory, irritant, and resolutive clauses. The Countess died without ever having been infeft in the lands. James Livingstone, in his minority, was infeft on an unexecuted precept in a deed granted to the Countess, which was assigned to him in the deed of entail, and which contained all the conditions of the entail; and his father put the entail on record; but, on coming of age, James Livingstone resigned the estate in the hands of the superior, and obtained a charter free of all the restrictions of the entail; whereupon he soon after sold the lands, which came by progress into the possession of Lord Napier. Several years after the death of James Livingstone, his brother served heir of tailzie and provision to the Countess of Callander, under the last substitution of nearest lawful heir whatsoever to James, and brought an action to set aside the