3tio, Whether or not by the act 33 Hen. VIII., saving remainders from forfeiture, the claimant might not be entitled to this estate, as a remainder-man, upon the failure of the attainted person and his issue male?

This plea was not moved by the claimant, nor is it stated in his paper, but was suggested by the President, and given unanimously in his favour by the Court.*

N.B. A remainder-man in England was understood to be what we call a substitute in a new line of substitution, or an heir that comes in by a *which failing;* as in this case the estate was devised by Sir James, the tailyier, to Sir William, his son, (the forfeiting person,) and the heirs-male of his body, which failing to his own heirs-male. Now, Captain John Gordon, claiming as heir-male of Sir James, is what the English call a remainder-man.

1751. *January* 9. CLAIM, KINLOCHS *against* THE CROWN.

[Elch. No. 17, *Forfeiture.*]

SIR JAMES KINLOCH, the attainted person, was heir-apparent of an entail made by his father, and completed by infeftment, but not recorded, and he was likewise heir-at-law to his father. His son, the succeeding heir of entail, now claims the estate, upon these two grounds:—1*mo*, That supposing Sir James could have given away the estate to onerous creditors or purchasers, so far that such creditors or purchasers would have been secure, yet it would have been a fraudulent deed in Sir James, contrary to an obligation which the entail, though not recorded, laid him, the heir, under, and such a deed as he would have been liable to make reparation for out of any other estate he might have, to the succeeding heirs of entail; and in this respect Sir James's case is different from that of an heir-tail in England, who can alienate the estate by the device of fine and recovery, and is under no such obligation to the succeeding heirs. Now, this being the case, the Crown is not in use of taking advantage of such fraudulent deeds of forfeiting persons, but makes good all claims against the forfeiting person, though they be such as might have been disappointed by his fraudulent deed, as in the case of *Garntully*, in the 1715, where a minute of sale was sustained as a good claim against the Crown, though undoubtedly it might have been defeated by the forfeiting person selling again, and that second purchaser being first infeft. *2do*, The claimant here was secure even against onerous creditors; because Sir James's right, being merely a personal right, must be taken with all its qualities and conditions, as was decided in the case of *Denham* by the House of Peers.

To the *first*, it was ANSWERED, That the claimant had no better claim here than every heir of a marriage, whose father may sell and burden the estate

* This decree reversed by the House of Peers, so far as to find that Sir William had forfeited not only for himself but for his descendants, being heirs of entail.

provided to the issue of the marriage, but the heir will have an action against him to make the provisions good out of any other estate, and yet such heir will have no claim against the forfeiture, as was decided in the case of *John Hay's Son*, upon this principle, that the Crown by the forfeiture is in the case of an onerous creditor or purchaser; and the instance of Garntully does not prove that the Crown is not considered as an onerous purchaser, but only that it is not considered as a purchaser infeft, in prejudice of a prior purchaser. *2do*, As to the argument drawn from the case of Denham, it will not apply, because in that case the heir had no other title but his personal right upon the entail, whereas the heir here is likewise heir-at-law, and the entail not being recorded, a creditor was not obliged to mind it, but might have charged Sir James to enter heir, and so have adjudged; which the Lords sustained,—*dissent.* Dun.

The right, therefore, of the Crown by forfeiture, is of this kind,—the King by the rebellion and attainder is an onerous creditor, *quia delinquendo contrahitur*,—therefore he is preferable to an heir of a marriage,—a protestant heir,—an heir of entail declaring an irritancy after attainder,—an heir of an entail not recorded, as in this case;—but he is not considered a real creditor,—therefore he is not preferable to personal creditors; nay, by the benignity of the Crown, all personal creditors that are onerous are preferred to him.

1751. *February* 12. SUTHERLAND *against* SUTHERLAND.

[Elch. Nos. *52 and 53, Member of Parliament.*]

The Lords found, That commissioners acting without taking the oaths, their acts are null and void, though the act appoints a penalty, *et quando lex pœnam statuit pœna contenta est. Dissent.* Elchies.

This, it is thought, they determined, to avoid a more difficult question, viz. Whether the Court of Session has power to review a division of valuation made by the Commissioners of Supply? (*Vide* June 21, 1750.)

Elchies said he thought the Court had no jurisdiction, and the President declared the same opinion when the case came first before them; but, in a case which was determined the next day from the shire of Sutherland, the Lords found, That the Commissioners of Supply, their decreets of division of valuations may be reviewed by the Court of Session; for they considered a man's valuation as a matter of civil right and property, upon which not only his paying of cess and voting for a Commissioner to Parliament depended, but also his share in any commonty to which he had a right, as also his proportion of parish burdens, such as maintaining the poor, repairing kirks and manses; and they thought the Commissioners acted no more as a Committee of Parliament in the division of a valuation than in the choice of a collector; which last exercise of their power is undoubtedly subject to the review of this Court. They were much moved also by the consequences if it were otherwise, for, as the Commissioners could not only make new divisions, but rectify old, nobody that