

and next day, 26th, the charger consented to suspend *simpliciter* all execution except, against the entailed estate.

No. 35. 1748, Nov. 19. CASE OF CAMPBELL of Skirvane.

THESE heirs applied for recording an entail in the register of tailzies, being already registrate in the books of Session, which we granted *periculo petentis*. But the President moved a doubt, Whether an entail not recorded during the life of the maker in the register of entails can be binding as to the irritant and resolute clauses, since the act 1685, which makes the production and recording a condition of the maker's power to make the entail, which therefore ought to be done during his life.

No. 36. 1749, Nov. 8. CAPTAIN SINCLAIR *against* HEIRS OF ENTAIL OF CARLOWRIE.

HENRY SINCLAIR of Carlowrie entailed his estate to certain heirs (which is now devolved to the pursuer) under limitations, irritant and resolute clauses, "not to alter, innovate, or infringe the tailzie, or order of succession, or to contract or take on any debts, or sums of money, or grant any right or wadset rights of annualrent, or to do any other fact or deed that may any wise affect, burden, or evict the lands or others." The subjects are the estate of Carlowrie, a house in Edinburgh, and a debt of 20,000 merks on Langtown. But it contains no express prohibition to sell; therefore Captain Sinclair pursues declarator of his power to sell, wherein he called his next heir-male and of tailzie, and the granter's heirs whatsoever, who were last called. These heirs whatsoever, who were four grand-nieces of the maker, raised a counter declarator; and the purpose of the heir's declarator was said to be to clear a sale he has made of Carlowrie. The President said it was in the same case with that of Hepburn of Keith, adjudged both here and in the House of Lords, that he might sell, and he was of opinion that so might the pursuer, and argued from all our decisions in other cases, and argued full. We all agreed, and decerned in Captain Sinclair's declarator, and assoilzied from the other, and found the letters orderly proceeded against the purchaser.

No. 37. 1749, Nov. 14. CREDITORS OF GORDON *against* GORDON.

JAMES GORDON of Carleton, in 1688, entailed his estate to the heirs-male of his body, whom failing to John Gordon, son of William Gordon of Earlston, whom failing Nathaniel Gordon of Gordonstown, whom failing to one Maitland, he assuming the name of Gordon, and the heirs-male of their bodies, and their heirs-male *successive*, with irritant and resolute clauses, declaring all acts of contravention to be not only null without declarator, but also "the person or persons so contravening, each of them, and their heirs above said, shall from thenceforth lose and amit my lands and estate, and be totally secluded therefrom, sicklike as if they were naturally dead, or never had been tailzied or provided thereto, and the same shall fall and accresce to the next substitute person and heir of tailzie to succeed therein, in whose favours and their heirs-male *successive*, the said persons contraveners are hereby holden to denude." Nathaniel Gordon succeeded,

and conveyed it to his son in his contract of marriage, who died before; and they two contracted large debts, so that a ranking and sale was pursued; and at last after Nathaniel's death, compearance was made for his grandson Alexander, by Alexander his son, who insisted that his grandfather had incurred the irritancies, and therefore the estate should be declared to belong to him free of the contraventions. Answered, That in case of contravention, the estate was not to descend to him but to the next substitute, for Nathaniel forfeited for himself and all the heirs of his body. Replied; only the person contravening forfeited, for the meaning of the clause was that the persons contravening, and their heirs contravening, shall lose and amit, &c. The Lords, on report of Kilkerran, found that Nathaniel forfeited for himself and the heirs of his body, and therefore that Alexander cannot quarrel the creditors' debts. 21st June 1749. This case was on a reclaiming bill heard in presence, 14th November 1749, where the questions were two, 1st, Whether Nathaniel Gordon forfeited for himself and the heirs of his body? 2dly, Whether that is competent to the creditors? William Gordon, a remote substitute, compeared and said he had an interest to compear and oppose the sale. Adhere to the first, and find that he, (Alexander Gordon) cannot object to the creditors, but remit William's claim to the Ordinary,—(*quod vide* No. 51.)

No. 38. 1749, Nov. 24. **BRODIE against FOUR SISTERS OF GORDON.**

Find the heirs of line have right to the estate of Pitgaveny, and not the heirs-male, and prefer them,—unanimous.

No. 39. 1750, Nov. 13. **CLAIMS OF CAPTAIN GORDON ON THE ESTATE OF PARK.**

THE questions were two, 1st, Whether one of our strict entails duly executed, recorded, and infestment on it, forfeited by the attainder of Sir William, the heir of entail? 2dly, Whether an irritancy incurred by him, by granting infestment on a part of the estate, (but which probably he knew not to be part of the entailed estate) before his attainder, but not declared, made the estate to go immediately to the next heir, so as to bar the forfeiture? The President stated a third point, that though entails are not sufficient to bar the forfeiture as to the descendants of Sir William, yet that the claimants claim may be good as a remainder-man. (I think it is rather, speaking properly, agreeably to the English law, a reversion.) First we found that Sir William forfeited only for his own life; *Renit.* President, Justice-Clerk, and Leven. Then found 2dly, he had good claim as a remainder-man, after failure of issue of Sir William Gordon, *nemine contradicente*; but it was agreed that in extending the interlocutor this second point should be the first part. 3dly, We disallowed the claim as founded on the irritancy already incurred. *Renit. tantum* President. *Vide* full copy of the interlocutor on Lord Advocate's information *in fine*. But reversed in Parliament 21st May 1751. (*Vide* the judgment in the the text.) —13th November 1750.

In consequence of the judgment of the House of Peers reversing our sentence marked 13th November 1750, in Captain Gordon's favours, he presented a new claim of the estate, for that Sir William Gordon is now dead, and though he has left issue-male two