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

stood upon the roll was safe, and every regulation for security of the constitution in that point would signify nothing: *Dissent.* Elchies *tantum*; President not judging.

1751. *June* 4. WILLIAM WILSON *against* ———.

THE Lords found, that a nearest of kin having recovered a decreet of constitution against a debtor of the defunct, and thereupon adjudged, but without confirmation, the adjudication was good, though objected to by the creditors of that debtor, as proceeding upon a decreet of constitution that was null, being without confirmation.

N.B. Here the question was with the creditors of the debtor; but, *quære*, What would have been the law if the question had been with the creditors of the defunct, confirming this debt?

1751. *June* 11. LORD DALMENIE *against* CRESSAU.

THE Earl of Roseberry having contracted considerable debts, and being proprietor of an entailed estate, his creditors got his estate sequestrated by the Lords of Session, who at the same time allowed him an aliment out of it of L.100 sterling a-year. Thereafter, Roseberry, having got a considerable accession to his fortune by the death of the late Lord Primrose, lived extravagantly, and in the space of some months, over and above his aliment, spent betwixt L.700 and L.800 sterling, for which he granted three bonds to Cressau, the defender: two of these bonds were supported by accounts produced by the pursuer and recovered out of the hands of Lord Roseberry, by which it appeared that these bonds were made up partly of money advanced and partly of furnishings to my Lord's profusion, several of which furnishings were charged much above the real value. It appeared further, by parole evidence, that Cressau had no intention to deal with my Lord, but that he was forced in some manner thereto, partly by the violence of Lord Roseberry and partly by the solicitation of his wife; also that he kept accounts of these furnishings, though no regular books, which accounts my Lord examined carefully, and made alterations in them before he signed the bonds, and had them delivered up to him. The witnesses also proved the furnishings, as far as the nature of the thing would admit; as also they proved that Roseberry was very cunning, and much more apt to deceive than to be deceived. Of these three bonds,—two of them supported by the accounts foresaid, the third resting wholly upon the parole evidence first mentioned,—Lord Dalmenie, having bound himself to pay all Roseberry's debts, so far as they were just and lawful, brought a reduction upon