

No. 40. of entail, was prohibited from acts of alienation. It was answered for Sir Thomas, That the heirs whatsoever, being put upon the same footing with voluntary assignees, were evidently added with no other view but to prevent the estate from falling to the fisk as *ultimus hæres*: That the clauses in the entail were not contrived for their benefit, but for the benefit of the heirs of entail, in order that each of them might enjoy the estate: That it could never be the intention of the entailer to limit any of his heirs of entail for the benefit of the heirs whatsoever, who themselves were not to be limited; and, *lastly*, That the deed challenged, so far from being contradictory to the will of the donor, is done in the very spirit of the original entail, and pursues most accurately the views and purposes of the entailer.

“ The defender accordingly was assoilzied from the reduction.”

*Sel. Dec. No. 162. p. 222.*

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1762. February 16.

SIR PETER HALKET of Pitfirran and his CURATOR AD LITEM, *against* WEDDERBURN of St. Germain's.

No. 41.

Where the eldest son of a tenant in tail happens to be an idiot, can his father set him aside?

In the entail of Pitfirran, the heirs of entail are laid under no prohibition to alienate or contract debt. They are only prohibited to alter the order of succession under the following irritancy, “ That the contravener, for himself and the heirs of his body, shall forfeit all right to the estate, which shall devolve upon the next substitute.”

Sir Peter Halket of Pitfirran, having the misfortune of an idiot for his eldest son, settled the estate upon his second son, and the subsequent heirs called to the succession by the deed of entail. The disponee survived his father, but died young, without issue. After his death, a process was brought, in name of the idiot, for reducing the said settlement, which barred him from the succession; and the deed was accordingly reduced, by the narrowest plurality.

To clear the reasons that occur against this judgment, it must be premised, that, in our entails, every tenant in tail, being proprietor, is empowered *qua* such to exercise every act of property; and that the restraints he is under proceed not from any limitation in his right of property, but from the personal prohibitions contained in the entail, to which he ought to submit, because he accepted the succession under that condition; which holds more especially in the present entail, authorising, in express terms, every act of property, except that of altering the order of succession.

Keeping this in view, the question is, Whether Sir Peter Halket, proprietor of the estate, was barred, by the prohibition above-mentioned, from exheridating his eldest son, upon the account of idiocy? And that he was not barred, may appear from the following reason: The entailer, prohibiting an alteration in the order of succession, had only in view to secure the estate to the heirs of entail named by him.

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.

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 resolute 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 resolute, 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.

When an entailed estate falls to the Crown by forfeiture, the debts of the forfeiting person become effectual against the Crown.