

Now it appears, that the late vesting act is copied from the former of the statutes now mentioned. The real estates are not vested in his Majesty more than the personal, before the actual forfeiture; for the statute has no retrospect. And, to prevent collusive conveyances of real estates, every such conveyance is deemed fraudulent that is granted after the 24th of June 1745; unless the onerous cause be proved. But not a single word of debts, which are left to the provision of the common law. And indeed, had it been the purpose of the statute, to vest in the Crown the real estates *retro*, from the 24th of June 1745, there must have been a clause saving such debts contracted thereafter, as should be proved to be *bona fide* contracted.

THE COURT was of opinion, that, by the late vesting act, the real estates were vested in the Crown upon the 24th June 1745; and their reason was, *imo*, That it is expressly declared, that every subject belonging to a forfeiting person, 24th June 1745, or that afterwards did belong, should be vested in his Majesty; which must mean, that they were vested in his Majesty, as upon the 24th June 1745. They observed that the first vesting act in the time of George I. was in the precise same terms with the present; and that the second vesting act *4to* *Georgii* I. understood it to have the same meaning that is now given to the present vesting act.

‘And upon this ground they cut down Baron’s claim, as being a debt contracted by Tarpersy after his estate was vested in the Crown.’

If this was the intendment of the statute, it ought to have provided for debts contracted after the 24th June 1745, by giving access to prove the true cause, as in the second vesting act of George I. above mentioued. But this was an omission, which no doubt would have been corrected, had there been an application to Parliament. But so few creditors were in the same case with Baron, that it was not thought necessary to make the application.

Rem. Dec. v. 2. No 119. p. 244.

1753. February 9.

ELIZABETH FARQUHAR *against* His MAJESTY’S ADVOCATE.

ELIZABETH FARQUHAR laid out the price of her own estate in purchasing the lands of Pitscandle, and took the disposition in favours of herself in liferent, for her liferent use allenary; and, in the case of her predecease, to James Stormont her husband in liferent, for payment of an annuity of 500 merks Scots; and to Francis Stormont their son, and the heirs-male of his body in fee. James Stormont the husband, being attainted of high-treason in January 1747, was transported to the plantations in America, in pursuance of a condition inserted in his Majesty’s pardon to that purpose. And this banishment was confirmed by act of Parliament passed in the 20th year of his Majesty’s

No 19.

A husband’s forfeiture does not transfer to the Crown the rents of his wife’s land estate.

The *ratio decidendi* of this case was, that the husband having been banished for life, the wife was to be considered as a *femme sole*.

No 19.

reign, entitled, ' Act to prevent the return of such traitors and rebels concerned in the late rebellion, as have been or shall be pardoned on condition of transportation ;' where it is enacted, That if any of those persons shall return or come into any part of Great Britain or Ireland, he shall be guilty of felony, and shall suffer death without benefit of clergy.

The lands of Pitscandlie being surveyed by the Barons of Exchequer in pursuance of the late vesting act, a claim was entered in the Court of Session by Elizabeth Farquhar to the liferent, and by her son to the fee of the lands. The son's claim was admitted to be good ; but to Elizabeth Farquhar's claim to the liferent, it was *objected*, That the liferent provided to her, could not entitle her to the possession of the lands during her husband's life, in respect of his *jus mariti* which is forfeited to the Crown. In support of this objection it was *urged*, That the husband gains a freehold of his wife's estate during the coverture, and may dispose of the profits as he pleases. New Abridgment of the Law, vol. 1. p. 286 ; and that upon the husband's attainder, the King has the freehold during the coverture ; for which several authorities were appealed to. Hales, Placit. Cor. 8vo. edit. vol. 2. p. 251. Hawkins, P. C. vol. 2. p. 449. § 6. Coke's Instit. vol. 3. fol. 19.

It was *answered, 1mo*, That the only case where a husband is said to gain a freehold in right of his wife, and that freehold forfeitable by his attainder, is where the wife is seized in the fee of lands. But the claimant has discovered no authority from the English law-books, that supposes that the husband is possessed of a freehold because his wife has a life-estate, or that his attainder vests any right in the king with respect to such estate. It was *answered, 2do*, That a person who is banished the realm for life, is considered as dead with regard to every benefit he enjoys by the municipal law of his country ; and his wife is considered as a *femme sole*, and entitled to her jointure.

' THE LORDS sustained the claim upon the *medium* of the husband's banishment.'

Sel. Dec. No 40. p. 45.

* * * This case is reported in the Faculty Collection :

ELIZABETH FARQUHAR purchased the lands of Pitscandly, and took the conveyance to herself in liferent ; and in case of her predecease, to John Stormont her husband in liferent, for his security and payment of an annuity of 500 merks, and to Francis Stormont, their second son, in fee.

James Stormont was attainted of high-treason in the month of January 1746-7, by judges appointed by commission of oyer and terminer, and was afterwards pardoned under the condition of transportation for life. By an act passed in the session of Parliament then sitting, it was enacted, That if any person to whom his Majesty had, or should thereafter grant his most gracious pardon, on condition of their being transported, should return or come into any part of

Great Britain or Ireland; he should be guilty of felony, and suffer death without benefit of clergy.

No 19.

The lands of Pitscandly having been surveyed by the Barons of Exchequer, and Elizabeth Farquhar having entered a claim to the liferent of these lands, provided to her by the conveyance above-mentioned, the question came to be; Whether by the law of England the husband's right, in consequence of the marriage, to receive the profits of the lands liferented by his wife, accrues to the Crown by forfeiture, when the husband is attainted of high-treason, and thereafter pardoned as to his life, with condition of being transported for life, and that transportation confirmed by act of Parliament.

Pleaded for the claimant; By the law of England the civil death of the husband, to which the consent of the wife was not necessary, was either by his abjuring the realm on his confession to the coroner of a crime of felony or murder for which he had taken sanctuary, or by his being sentenced to perpetual banishment on a legal conviction, or upon his submitting to banishment in order to avoid a heavier sentence; in all these cases he was said *perdere patriam*, and from that moment his wife was considered as *femme sole*, qualified to sue or be sued, and invested with every right in point of fortune, which would have been competent to her on the natural death of her husband. For this there is an authority in point, in the case of Margery de Mose, wife of Thomas of Weiland, 19th Edward I. which case is fully narrated by Lord Coke, 1. Instit. fol. 133. To apply these principles to the present case; by the conviction of James Stormont, and by the condition under which he took his pardon, there is as effectual a banishment as could formerly have been established by any abjuration before the coroner; and the act 20th George II. c. 46, brings this banishment under the description of a banishment by act of Parliament. The claimant is therefore to be considered as a *femme sole*, is qualified to sue and to be sued as such, and is entitled to enter into all those rights which would be competent to her were her husband naturally dead.

Answered for his Majesty's Advocate; The forfeiture incurred by James Stormont's attainder for high-treason, can no way be altered or affected by the subsequent conditional pardon, or act of Parliament relative thereto. This condition is not to be compared to banishment by sentence, in cases where by the old law such a sentence could be given, or to banishment by act of Parliament. In consequence of such a banishment, no forfeiture of real estates ensued; the land must be enjoyed by somebody; and therefore it might be reasonable to consider the civil incapacity of the person banished, as equivalent to natural death in respect of the wife.

'THE LORDS sustained the claim of Elizabeth Farquhar for her liferent of the lands mentioned in the claim, during all the days of her lifetime, for her own sole use, and that as well during the natural life of James Stormont her husband attainted, as after his decease before her the said Elizabeth.'

For the Claimant, *Ferguson*.

Att. The Crown Lawyers.

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Fac. Col. No 64. p. 99.