

THE LORDS sustained the objection against Colonel Dalrymple's sasine as to all lands not specially named in the precept.

No 36.

C. Home, No 198. p. 330.

1753. August 3. TRUSTEES of Graham's Creditors *against* HYSLOP:

No 37.

THE LORDS were all of opinion, that a precept to give infestment in lands described in general to belong to the granter of the precept, is a sufficient warrant to give infestment in every particular tenement, which by production of the granter's infestment is vouched to come under the general description.

Sel. Dec.

* * * This case is No 11. p. 49, *voce* ADJUDICATION.

1756. July 27. CAPTAIN JOHN GORDON of Park, Supplicant.

No 38.

SIR JAMES GORDON of Park, *anno* 1713, executed an entail of his estate in favour of himself, and after his decease to William Gordon his eldest son, and the heirs-male of his body; whom failing, to the heirs-male of Sir James's body, of the then present or any subsequent marriage, &c. Upon this entail he expedite a charter under the Great Seal; and in this charter, with the sasine following upon it, the prohibitory and irritant clauses were engrossed. After Sir James's death, his son, then Sir William, succeeded; and, by his attainder for high treason, the estate was surveyed in terms of the vesting act. Captain John Gordon, Sir James's second son, and next heir of entail, Sir William as yet having no children, entered a claim for the estate before the Court of Session, upon this medium, That the estate being entailed could not be forfeited for Sir William's treason. The cause being given for the claimant here, and appealed to the House of Lords, it was Adjudged and Declared, ' That Sir William Gordon; the person attainted, being, under the settlement made by his father Sir James, seised of an estate-tailzie in the barony and estate of Park; notwithstanding such tailzie was affected with prohibitive, irritant, and resolute clauses, the said barony and estate of Park did, by virtue of the statute of the 7th year of Queen Anne, cap. 21, become forfeited to the crown, by the said Sir William Gordon's attainder, during his life, and the continuance of such issue-male of his body as would have been inheritable to the said estate-tailzie in case he had not been attainted, &c.; and that, by virtue of the substitution to the heirs-male of the said Sir James Gordon's body of his then present marriage, the respondent, John Gordon, hath right to succeed to the said barony and estate of Park, after the death of the said Sir William Gordon, and failure of such issue-male of his body as aforesaid.'

The form of giving infestment to a remainder-man, or conditional institute in an entail where the former heirs are exhausted by attainder, is by the director of the chancery issuing a precept for that effect, if the lands hold of the crown; or by letters of horning against the superior if they hold of a subject.

No 38. And liberty is thereby reserved to the crown, as also to the petitioner, to apply to the Court of Session for further orders and directions in the premises, as often as any new right shall accrue to them respectively, in consequence of the foresaid entail.

Sir William Gordon died at Doway in Flanders June 1751, leaving issue two sons, born abroad after his attainder, and out of the liegeance of the crown of Great Britain. Captain Gordon upon this event, being advised that Sir William's sons were aliens, incapable to take lands in this kingdom either by purchase or inheritance, and that the estate belonged to him in consequence of the foresaid judgment of the House of Lords, applied to the Court of Session to be put in possession. The Court considering that it was Sir William's attainder which made his children aliens, and that the attainder could not be pleaded against the crown, refused to put the petitioner in possession. But upon a second appeal, it was declared and adjudged, 'That, in the event which has happened, the appellant hath right to the estate and barony of Park;' and he was put in possession accordingly. Thereafter, desiring to complete his titles, he applied to the Court of Session, in terms of the first judgment of the House of Lords, for orders and direction about his being infest.

This case was singular. The law of England and Scotland being made the same as to the punishment of treason, an entail in Scotland cannot save from forfeiture more than it does in England. But then, on the other hand, as a remainder in England is not affected by forfeiture, it was thought hard that high treason, which in England forfeits the estate as to the attainted person and his heirs only, without hurting the remainder men, should have the effect in Scotland to forfeit an entailed estate totally; which it must do upon that plan, because every substitute with us is considered as an heir. To remedy this inequality, Captain Gordon was considered as remainder man, and the forfeiture was extended no farther than to Sir William and his issue-male. Being then, by the judgment of the House of Lords, established as a remainder man, who is in effect not an heir but a conditional institute, and who takes the estate as a second institute, failing the first institute and his heirs; it seemed to be no easy question in what manner the Captain was to be infest. And the Court were resolved to lay down some plan that might be a rule in time coming.

It was suggested in the Captain's petition, that the Court should grant warrant to the director of the Chancery, to issue a precept to the Sheriff for infesting the petitioner. And it was observed, that this had been done formerly, where there was no place for a service, and no necessity for a charter; particularly, in the case of wadsets held of the crown, when letters of regress were in fashion. Sir Thomas Hope, in his *Minor Practics*, Tit. *Wadsets*, § 1, says, 'That when the order of redemption is used and declared, the user of the redemption is immediately seised, upon the sight of the regress and supplication made to the Lords thereon, who will command the director to give furth precepts for that effect, if the land be held of the King; and if held of a sub-

'ject, will direct letters of horning, to charge the superior to receive for his
'vassal the user of the redemption.'

No 38.

The President gave his opinion, that the proper method for making up titles was, That the Captain should serve heir in special to Sir James Gordon his father. I objected to this for the two following reasons; *imo*, That the estate did not remain *in hæreditate jacente* of Sir James, but had been vested in the crown, and stood vested in the crown at this very time; and, therefore, that the estate could not be taken by the Captain as representing his father; but that some method must be devised by which the crown may be divested; that by the act 1685, cap. 22. upon a contravention of the irritant clauses, the next substitute may indeed serve to the predecessor who did not contravene; but that this clause of the statute does not apply to the present case, which differs in every circumstance. *2do*, The Captain in this case must not be held to be an heir, but a remainder-man or conditional institute; and to him, under this character, a service does not at any rate apply. After full deliberation, the interlocutor was pronounced in terms of the petition, from analogy of what is delivered by Sir Thomas Hope. My doubt at first was, whether a charter from the crown might not be necessary in this case. But I got clear of the doubt by the following consideration; property is transferred by consent with delivery. By the charter under the Great Seal to Sir James, the crown will not only to give Sir James the property, but also to give it to the Captain as a conditional institute, after Sir William and his male-issue are exhausted. Therefore, to establish the property in the Captain, nothing remains but to make delivery to him, which is done by a precept out of the chancery.

Sel. Dec. No 127. p. 181.

*** See No 60. p. 4728, *voce* FORFEITURE.

1766. *January 29.*

JOHN MURDOCH, Merchant in Glasgow, *against* SAMUEL CHESLIE, Merchant in Glasgow.

By contract of marriage, in 1688, between John Herbertson, the eldest son of George Herbertson, merchant in Glasgow, and Janet Bell, George Herbertson the father, disposed certain tenements in Glasgow, to his said son and spouse in conjunct fee and liferent, and to the heirs and bairns of the marriage in fee.

Upon the procuratory of resignation contained in this marriage contract, John and his wife were infest in 1694; and, upon this title, John, after his father's death, possessed these tenements till his own death, which happened in 1722.

John Herbertson, of his marriage with Janet Bell, had a son named John, and several younger children. Upon the death of John the father, John, the son,

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Infestment taken on a procuratory of resignation which had formerly been executed, null.