

Case 64. The Commissioners and Trustees of the
 Forfeited Estates, - - - - *Appellants* ;
 James Drummond, Son of James late Lord
 Drummond, and his Trustees, - *Respondents.*

22d March 1719-20.

Forfeiture.—Fiar or Life-renter.—A disposition is made by a father, in 1713, to a son, then a few months old, of his estate, reserving power to sell or incumber part for debts already contracted, &c. with concurrence of trustees ; and reserving the grantor's life rent: in 1714, the father renounced this life-rent. By his attainder for treason the estate was not forfeited, being vested in the son.

Papist.—A child, a few months old, though born of Popish parents, might take an estate by disposition from his father.

Husband and Wife.—A life-rent or jointure granted to a wife by her son, could not be restricted by a missive letter executed by her without her husband's consent, on which a decree of declarator in absence had been taken.

ON the 28th of August 1713, James late Lord Drummond executed in favour of his son James, the respondent, who was then only a few months old, a disposition of the lands of Drummond, Stobhall, &c. heritably and irredeemably ; reserving to himself a life-rent, subject to the payment of the annual-rent of the debts and other burdens, of a rent-charge of 500*l.* per annum for life to the Earl of Perth, and a jointure of the like annual sum to the Countess of Perth for life after the Earl's death. Upon this disposition investment was taken and duly recorded upon the 13th of December 1713.

By this deed a power was reserved to the Lord Drummond to sell any part of the lands for payment of debt, or to grant heritable securities to former creditors, and to sell any part of the lands that did not lie commodious for the family, for purchasing others more convenient, subject to the same uses: but this power and faculty was not to be exercised without the consent of certain trustees named in the deed for behoof of the respondent. A list or schedule of all the debts affecting the estate was annexed to this disposition ; and the Lord Drummond likewise reserved a power to give portions to younger children not exceeding a limited sum, and to settle a jointure on a second wife not exceeding 5000*l.* Scots yearly.

By a subsequent deed made in the nature of an agreement between the Earl of Perth and his son the Lord Drummond, executed upon the 11th of February and 23d of April 1714, the Lord Drummond, in consideration of an annuity or rent charge of 500*l.* per annum, granted to him during the lives of the Earl and Countess of Perth, and 1000*l.* per annum after their decease, so long as he should live, parted with his life-rent in the said estates, excepting the life-rent use of the houses and yards of Drummond and Stobhall, &c. ; and the Lord Drummond became thereby obliged to
 cause

cause the factors on the estate to grant bonds to the trustees named in the first deed for the respondent's behoof, to apply the rents and profits of the estate towards payment of the debts, and of the annuities before mentioned, and of the rent charge to Lord Drummond; and, accordingly, such bonds were executed by the factors to the trustees.

The Countess of Perth had by a missive letter under her hand, dated the 15th of November 1694, restricted her jointure of 500*l.* payable to her after her husband's decease to the sum of 222*l.* 4*s.* 5½*d.* and the Lord Drummond having brought an action to confirm this missive letter, in 1714, obtained a decree of the Court of Session confirming the same, in absence of the Earl and Countess of Perth, who were then out of the kingdom.

By the Act 1 G. 1. c. 32. James Lord Drummond was attainted of high treason. The appellants thereupon caused the whole foresaid estates to be seized and surveyed. The respondents in virtue of the act 5 G. 1. c. 22. presented their exceptions to the Court of Session, setting forth that by the several deeds before mentioned, the late Lord Drummond the forfeiting person was not on the 24th of June 1715, (from which the forfeiture was to take place,) possessed of, interested in, or entitled unto the said estate, but that the respondent was vested in and entitled to the same, at the time aforesaid, subject to the annuity of 1000*l.* to the Lord Drummond, out of which was payable the 500*l.* jointure, to the Countess of Perth, the earl being now dead, and subject also to his life-rent in the houses, and parks of Drummond and Stobhall, &c. and consequently that no more could be forfeited. The respondents made answers that the conveyance to the respondent was only a seeming, not a real conveyance; that the respondent was disqualified to take the same by being a papist; and that the jointure to the Countess Dowager was by her said missive letter and decree of declarator thereon restricted to the said sum of 222*l.* 4*s.* 5½*d.*

The Court on the 13th of August (a) 1719, “ found that the
 “ late Lord Drummond was by the foresaid disposition of the
 “ 28th of August 1713 years, infestment following thereon,
 “ registered as said is, and articles of agreement betwixt the Earl
 “ of Perth, and the late Lord Drummond his son, dated the 11th
 “ day of February and 3d of April 1714 years, and by the bonds
 “ granted by the Chamberlains, and by the other writs produced
 “ by the respondent and his trustees divested of the fee of the
 “ said estates of Perth and Drummond, and others therein
 “ mentioned, and that the right of fee, property, and possession of
 “ the several estates, and others in the said deeds mentioned, was
 “ before the 24th of June 1715 years vested and established in
 “ the person of the respondent with the burdens of the annuities,
 “ life-rents, and debts therein mentioned, and find that the said con-
 “ veyance in favour of the respondent is not voided nor annulled,
 “ by the 3d act of Parliament 1700, intituled ‘ act for preventing

(a) This is the only date specified in the Cases, though in the Journal it is mentioned that there was also an interlocutor of the 11th of August.

“ the growth of popery’: and likewise found that the missive let-
 “ ter mentioned by the Countess of Perth to the late Lord Drum-
 “ mond, the respondent’s father, dated the 15th day of November
 “ 1694 years, being granted *stante matrimonio*, without her hus-
 “ band’s consent is void and null; and the decree of declarator fol-
 “ lowing thereon being in absence, reponed the Countess against
 “ the same: and therefore found and declared, that there only falls
 “ under the forfeiture of the said late Lord Drummond, an annuity
 “ of 1000*l.* sterling yearly, and the life-rent use of the houses and
 “ yards of Drummond and Stobhall, and the grafs in the parks,
 “ about the said houses, when the woods were not under hayn-
 “ ing; and as many of the flying customs and carriages, pay-
 “ able out of the said hails estate, as shall be necessary for the use
 “ of the family; with the burden of the said Countess Dowager’s
 “ life-rent of 500*l.* sterling yearly.”

Entered,
 18 Dec.
 1719.

The appeal was brought from “ two interlocutory sentences or
 “ decrees of the Lords of Session, pronounced the 11th and 13th
 “ days of August 1719.”

Heads of the Appellants’ Argument.

The said disposition was voluntary and only a seeming; not a real conveyance of the fee and inheritance of the said estate, contrived to evade the forfeiture; in so far as by virtue of several claims contained in the said disposition, there were reserved to the late Lord Drummond attainted, as many and as extensive powers, faculties, and interests as he enjoyed by virtue of the fee and inheritance before the making of the said disposition, and such as have by several decrees of the Court of Session in other cases been found to establish an absolute right of property or fee simple. In the said disposition there is reserved to him, besides his life-rent, a power of providing for younger children, and of making a settlement on a second wife, a power of charging the estate with debts, and of selling the same or any part thereof irredeemably. There is a clause, too, whereby the rights of purchasers of lands from the said late Lord Drummond, and of creditors who accept of securities upon the estate for money lent, are secured against any objections that might arise from a want of a due application of the money advanced by such purchasers or creditors to the uses in the disposition mentioned, which renders void the limitation of the exercise of the said powers to certain uses, viz. for payment of debts, &c. and makes the said powers absolute.

Though the consent of trustees was necessary to the application of the money, yet the necessity of the consent of the trustees did not vest the property in them, nor divest the late Lord Drummond of the same, and consequently did not bar the forfeiture upon his attainder. For though a person under age cannot sell lands, or charge his estate with debts, without consent of his guardian, nor an interdicted person without consent of his interdictors, yet as both of them by remaining proprietors would forfeit their estates for high treason, so likewise the late Lord Drummond, notwith-
 standing

standing the limitation of exercising the said power with consent of trustees remained vested in the fee and inheritance of the said estate, and thereby could and did forfeit the same for high treason.

The respondent being a papist, descended of and educated by popish parents, was by the act of Parliament 1700, c. 3. "*for preventing the Growth of Popery*," incapable of taking an estate by virtue of any voluntary disposition or deed, and the attainted person was by the same act disabled from making any voluntary or gratuitous conveyance of any part of his heritage, in prejudice of his heirs, and consequently he was thereby disabled from making any deed of conveyance in bar of forfeiture, that being a title preferable to, and exclusive of heirs. And though the respondent be under 15 years of age, the clause enacting the disability of taking an estate by virtue of a voluntary or gratuitous disposition makes no distinction between those who are under, and those who are past the age of 15; and there is another clause in the said act, declaring that a pupil heir shall be reckoned popish, if he be under the education of papists, as the respondent is. So that the said disability takes place as to the respondent, either by admitting, or not admitting the distinction of age to take place in the said disabling clause.

The said disposition either conveys a better a right and larger estate to the respondent than would have descended to him after the death of the disponer, and in that case it is null by virtue of the said clause disabling papists to take lands by disposition, and it does not devolve to the protestant heirs: or it conveys no better right nor other estate to the respondent and protestant heir than a right of succession as heir to the estate after the death of the disponer; and in that case it is subject to all his debts, deeds, and delicts, and therefore it is not sufficient to prevent forfeiture; the right of succession of all heirs, protestant as well as papist, being barred and excluded by forfeiture for high treason. The said disposition would have been void in virtue of the second clause, if the father, the disponer, had lived without committing treason till his son the disponee had passed the age of fifteen, and continued papist: for the protestant heir could claim nothing as heir during the life of the disponer; and it were absurd to say, that a disposition which would become void on the disponer's not committing of treason, should become valid by his attainder for high treason.

The agreement, made between the late Lord Drummond attainted and his father, can neither supply any of the said defects in the conveyance of the fee and inheritance of the said lands to the respondent, nor extinguish the life-rent reserved by it to the disponer, and much less alter any thing with relation to the powers of charging the estate with debts and selling lands; these not being so much as mentioned in the said agreement. It is evident by the tenor of this agreement, and the bonds, mentioned in the decree appealed from, to have been granted by the factors appointed by the said late Lord Drummond, that the right of

levying the rents and profits of the said estates, or of appointing factors for that purpose, remained in the said Lord Drummond attainted: and consequently the same is so far from releasing the life-rent, that it proceeds upon the supposition of his continuing to enjoy it, by laying him and his factors under obligations to apply the rents and profits to the payment of debts and other uses in the said indenture mentioned; and that only under the forfeiture of 200*l.* per annum, yielded in the said agreement by his said father out of the annuity due to him, in consideration of an exact application of the said rents and profits to the uses aforesaid.

The missive letter under the hand of the Countess Dowager, and decree following thereon, restricted her annuity to 222*l.* 4*s.* 5*d.*; and the life-rent of the Lord Drummond ought to be charged with no more than the said restricted sum. This letter having related to a jointure, which was to take place only after the death of her husband, and not to any thing in which the husband could have an interest *jure mariti*, his consent was not necessary. And the husband, as well as she, having been called in the action for obtaining the said decree, and having thereby had an opportunity of appearing by himself or attorney, and to declare his dissent from the said letter, his silence must be construed to import his consent, especially since he had restricted his own annuity. Though the said decree might, because of its having been passed in absence of the countess, be reduced and voided by a proper process at her suit, in case she should prove any thing unjust or iniquitous in it; yet till such suit be commenced, and judgment given upon it in her favour, it is a binding and valid decree, especially since she is no party in this cause.

Heads of the Respondents' Argument.

The late Lord Drummond having charged his estate with great debts, which increased daily by his mismanagement, a few months after the birth of the respondent was prevailed upon by his father and other friends, in order to prevent the utter ruin of the family, to divest himself of the fee of his estates, by the said disposition in favour of the respondent. But although by this deed the late Lord Drummond was fully divested of the fee of the estate, and the same vested in the respondent, if not from the date of the deed, at least from the date of the investment thereon; yet the late lord having a life-rent subject to the interest of the debts and other annual burdens, and not being careful in paying those burdens, and having the estate released of them, but misapplying the rents to other uses, the respondent's estate was still in hazard of being swallowed up and entirely exhausted by the growing interest of the debts and arrears of the other annual burdens which the late lord should have paid: and therefore the said agreement was entered into in 1714 between him and the Earl of Perth, restricting the life-rent to an annuity.

The powers which the late Lord Drummond reserved in the deed of 1713, of charging the estate with debt, and even of alienating

ating it, were purely personal faculties in the forfeiting person, which cannot be forfeited or vested in the Crown for his attainder. These powers, too, were in the person of the late Lord Drummond limited to particular ends and purposes; such as the providing for younger children and a second wife, and for discharging the debts of the estate, and purchasing lands more convenient for the advantage and profit of the respondent: and as these powers could not have been executed to any other purposes by the forfeiting person, so the Crown in virtue of his attainder can claim no benefit from them. And those powers were also limited not to be executed but in a peculiar manner; that is, with the consent of the trustees named in the deed: and therefore though all the powers that stood in the forfeiting person were deemed vested in his majesty, such powers could not be executed but with the consent of the trustees for the advantage of the respondent.

For the appellants it was contended, that though the deed of 1713 should be deemed effectual to convey the fee and property of the estate, yet the forfeiting person remained possessed of the lands in virtue of the reserved life-rent; and that the subsequent deed of 1714 being but a personal deed, not perfected by infeftment, the forfeiting person was not thereby divested of his life-rent: and that the respondent too, not being a party thereto, could take no advantage from it. But though for creating a life-rent, an infeftment be necessary; yet by the law of Scotland, infeftment is not necessary for divesting a person of a life-rent, which may be accomplished by a simple release, surrender, or personal deed; and by the law of Scotland a life-renter cannot convey his life-rent by an infeftment. By the law of Scotland, rights, obligations, releases, &c. may accrue to one person by the deed of another, without the privity or consent of the person in whose favour such deed is made; and in the present case the benefit devolved to the respondent by a formal indenture betwixt his father and grandfather. In order to extinguish the late lord's life-rent, there needed no other party to the deed than himself; any writing under his hand declaring that he parted with his life-rent would have been sufficient.

By the law of Scotland, not he who names the factor is deemed to be in possession, but he to whom such factor accounts for the rents and profits; otherwise a guardian who names a factor over the minor's estate would be deemed to be in possession, and not the minor. And, indeed, that was the respondent's case, he was an infant, his father was his legal guardian or administrator in law; and if the father as guardian named factors, it appears by the bonds given by them, that they were to account to the trustees appointed for managing the minor's estate for the rents and profits thereof.

The respondent on the 24th of June 1715 was an infant of two years of age, and consequently could not be a professed papist, nor could any formula or declaration by which he could purge himself of popery be legally tendered to, or refused by him.

Though by a subsequent clause in the act 1700, c. 3. a minor is to be deemed popish, when sprung of popish parents, if such minor be under the education of papists; yet this clause does not concern the case of infants receiving dispositions, which is to be governed by the clause enacting purgation to be made, but it relates merely to the case of minors, who are next in succession to popish persons excluded from the heritage of their ancestors, by neglecting to renounce the Romish religion; and therefore it cannot be applied to the present case.

The Countess Dowager appeared voluntarily by her counsel, in the Court of Session, and contended that the restriction made by her in the missive letter founded on by the appellants, by which her jointure was pretended to be restricted, was by the law of Scotland void and null, because it was made during the subsistence of her marriage without the consent of her husband. In such circumstances, obligations entered into by wives, or deeds done by them, are absolutely void. Nor was this deed of restriction strengthened by the decree referred to: that decree having been obtained in absence, when the countess and her husband were out of the kingdom.

The respondents do admit, that the Court of Session had no jurisdiction, in so far as concerns the houses of Drummond and Stobhall, parks and grays thereof, in consequence of judgments given in other the like cases by the House of Lords.

Counsel being first heard on the point of the jurisdiction, it is resolved and decreed that the Lords of Session had no jurisdiction to determine in so much of this cause as relates to the houses of Drummond and Stobhall, parks, grays thereof, and flying customs; but that they had jurisdiction in the rest of this cause.

Counsel being heard upon the merits, *It is ordered and adjudged that the petition and appeal be dismissed; and that so much of the interlocutory sentences or decrees of the Lords of Session complained of, in which this House were of opinion the said Lords of Session had jurisdiction in determining in this cause, be affirmed.*

For Appellants, *Spencer Cowper. Sam. Mead.*

For Respondent, *Rob. Raymond. Dun. Forbes. Will. Hamilton.*

With regard to the question of jurisdiction, mentioned in this appeal, it appears that in relation to the forfeited estates the Court of Session had determined many questions, which they had no title to take cognizance of. By the act of parliament 1 Geo. 1. c. 50. appointing commissioners to enquire into and seize and survey the estates, which the traitors had been "seized or possessed of, interested in, or entitled unto," of a certain date, all persons claiming any estate, or interest of, into, or out of such estates, were directed to enter their claims or demands before the commissioners for forfeitures on or before the 24th of June 1717. By another act, 5 Geo. 1. c. 22. all persons pretending right to estates which had been seized, and that the forfeiting persons were not "seized or possessed of, interested in, or entitled to" the same, were to present their exceptions to the Court of Session before

Journal,
18 March
1719-20.

Judgment,
22 March

before the 1st of August 1719, which Court was to determine the same in a summary way before the 1st of November 1719.

From misunderstanding, these acts, or from some other cause, the Court of Session allowed exceptions to be brought before them in many cases, where the forfeiting persons had been "seised, or possessed of, interested in, or entitled to" the estates forfeited, whereas all claims relative to such estates should have been determined by the commissioners of forfeitures. The commissioners presented appeals against these judgments, and in 25 cases of appeal, in the present session, the House of Lords, found that the Court of Session had no jurisdiction, and therefore found their judgments null and void. In every one of these appeals counsel were called to the bar; but it is probable that cases were printed in very few of them; the nullity in most of them having been acknowledged, and a good many decided at once. Though none of the cases in question require to be reported as decisions of the High Court of Parliament on the merits, it appears that some of the judgments of the Court below are upon curious points, and all of them little known: they are further noticed at the end of this volume.

On the 15th of February 1719-20, the House of Lords ordered the Court of Session to account for their conduct for judging in causes where they had no jurisdiction; and the commissioners of forfeitures were ordered to state why they had not pleaded such want of jurisdiction. A report from the Court of Session was presented to the House of Lords on the 7th of March 1719-20, which at various different times was ordered to be taken into consideration; but it does not appear from the Journals that any thing was finally done thereon. This report is not mentioned in the acts of sederunt; but it appears that the Court of Session had great jealousy of the new court which had been erected, and of the powers granted to the commissioners of inquiry.

Acts of se-
derunt, 25th
June 1717.