(In this appeal the appellants' caſe only was found; it ſtated ſome of the circumſtances on which the allegation of truſt was founded, but too indiſtinctly to be here detailed.)

Judgment, 18 Jan. 1720-1.

After hearing counſel, *It is ordered and adjudged that the ſaid petition and appeal be diſmiſſed, and that the interlocutory ſentence or decree therein complained of be affirmed.*

Caſe 76. The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants;* Sir George Stewart of Balcaſky, Bart. *Reſpondent.*

20 *Jan.* 1720-21.

Fiar — Forfeiture for Treaſon — A crown vaſſal in 1707 ſells and diſpones his eſtate to an onerous purchaſer, with procuratory of reſignation, and other uſual clauſes, and the price is paid: the crown vaſſal in 1715 is attainted for treaſon, and the purchaſer, who had not completed his title by infeftment, makes reſignation, and takes ſaſine on a charter from the crown: The eſtate was not forfeited by the attainder of the ſeller.

BY an act of parliament 1 Geo. 1. c. 42. intituled "an act for "the attainder of George Earl of Mariſchall and others," John Stewart of Invernytie was attainted of high treaſon. The appellants thereupon cauſed what they deemed to be his eſtate, particularly the lands of Gaſkinhall, and others in the pariſh of Kilſpindy and ſhire of Perth, to ſeized and ſurveyed for the uſe of the publick.

John Stewart of Grantully in purſuance of the act 5 Geo. 1. c. 22. preſented his exceptions to the Court of Seſſion againſt the ſaid ſeizure and ſurvey, ſetting forth, that in May 1707, the ſaid John Stewart of Invernytie by a mutual agreement entered into with John Stewart of Grantully, obliged himſelf to convey the ſaid lands of Gaſkinhall, and others to Grantully, and his heirs, ſubject to the jointure of Invernytie's mother; in conſideration whereof John Stewart of Grantully obliged himſelf to pay at the rate of thirteen years' purchaſe of the rent payable in kind, and eleven years' purchaſe of the rent payable in money: and in purſuance of this agreement, John Stewart of Invernytie, with conſent of Mary his wife, on the 11th of Auguſt 1709, executed a diſpoſition of the premiſes in favour of John Stewart of Grantully, which was judicially ratified by the wife; and the purchaſe money, 30,000*l.* Scots, was paid to the diſponer on the day of executing the diſpoſition, and a receipt granted for the ſame:

That on the 30th of September 1712, Invernytie's mother, for an onerous conſideration, conveyed her jointure iſſuing ont of the premiſes to James Baird, Merchant in Edinburgh; and on the 7th of October 1712, Mr. Baird conveyed the ſame to John Stewart

Stewart of Grantully, who immediately after entered into poſſeſſion of the premiſes and continued therein, and received the rents and profits, till his death: and that Grantully on the procuratory of reſignation contained in the diſpoſition by Invernytie, in his favour, after Invernytie's attainder, obtained a charter from the crown, the ſuperior in February 1718, upon which he was duly infeft.

To theſe exceptions the appellants made anſwers that, as Invernytie alone was infeft, at the time of the attainder, the eſtate was thereby forfeited. The Court of Seſſion on the 16th of September 1719, "found that on or before the 24th of June 1715, "the exceptant was in poſſeſſion of the lands and others men- "tioned in the exceptions, by virtue of a diſpoſition and deed of "conveyance of the property thereof, made and executed before "the 1ſt day of Auguſt 1714, and that in virtue of the ſaid "rights and poſſeſſion, the exceptant has good right to the pro- "perty of the ſaid lands and others mentioned in the exceptions, "and to the rents, iſſues and profits, ſince the ſaid 24th of June "1715, and in time coming."

The appeal was brought from an interlocutory ſentence or de- Entered cree of the Lords of Seſſion, of the 16th of September 1719. 21 Dec. 1719.

John Stewart of Grantully, the original reſpondent, having died, the appeal was revived againſt Sir George Stewart, his heir, the now reſpondent.

Heads of the Appellants' Argument.

The Court of Seſſion had no manner of juriſdiction in this caſe (*a*), ſince the attainted perſon was ſo far intereſted in the lands claimed by the reſpondent, that he was the only perſon who ſtood infeft in them as the vaſſal of the crown: a ſecond deed of conveyance to any other perſon, with infeftment taken upon it, would have been preferable to the reſpondent's right, and would have veſted the property in the ſecond diſponee.

The attainted perſon being the proprietor of the lands, the ſame became forfeited by his treaſon and attainder, without regard to any perſonal right or diſpoſition upon which no infeftment had followed; and there is no law in Scotland, to ſupport ſuch a perſonal right againſt the effect of a forfeiture. The law has no regard to covenants made between the attained perſon and any third party, concerning ſuch lands, if ſuch third party have not completed his right before the treaſon or attainder: and if in any caſe a purchaſer ſuffer, it is by his own neglect, ſince when he made a purchaſe, he ought to take care to complete his right in a legal way.

The reſpondent alſo inſiſted upon the act 1 Geo. c. 20. "for "encouraging all ſuperiors," &c., by which the rights of lawful creditors are ſalved; and upon the act appointing commiſſioners

(*a*) See the caſe, Commiſſioners of Forfeitures v. Drummond, No. 64 of this Collection for an explanation of this argument. It is obvious, however, that the Court had juriſdiction in this caſe.

to inquire of the eſtates of certain traitors, by a clauſe in which, diſpoſitions made even after the 24th of June 1715 are declared to be as good in law, as if they had been granted before that day, the valuable conſideration being proved otherwiſe than by the narrative of the deed. But when he puts his caſe upon theſe acts, he muſt admit that the Court of Seſſion had no juriſdiction, becauſe theſe acts and clauſes of them made uſe of by the reſpondent, do all concern claims that were to be tried before the appellants, to or upon lands, where the legal eſtate was veſted in the forfeiting perſon. The act firſt mentioned hath relation only to creditors for payment of juſt debts, which is not at all the reſpondent's caſe. Although the other act does declare diſpoſitions made after the 24th of June 1715, to be as good in law as if they had been executed before that time, it determines nothing as to the import or effect of diſpoſitions without ſaſine, which were executed before that day, but leaves them to the ſame effect they would have had, if this act had not been made; and therefore if before this law a diſpoſition without infeftment could not be ſet up in bar of a forfeiture this act makes no alteration of the former law.

Heads of the Reſpondent's Argument.

It muſt at firſt ſight appear inconſiſtent with every known principle of law and equity, that a purchaſer for an onerous conſideration, or in poſſeſſion of an eſtate purchaſed for about ten or twelve years, and receiving the rents and profits during that time ſhould forfeit that very eſtate by the attainder of the vendor ſo many years after the ſale.

Though a ſubſequent diſpoſition for a valuable conſideration without notice, with infeftment recorded before that to the reſpondent, might be preferred to his, yet ſuch preference can only be given to ſuch purchaſer, who firſt recorded his infeftment. But the grantor was nevertheleſs legally diveſted by the firſt conveyance; and the ſecond conveyance, though good to the purchaſer without notice, would be a wrongful act in the grantor, for which he might be puniſhable criminally, and any other eſtate he might have would be liable to make ſatisfaction to the firſt purchaſer. As to the grantor, therefore, the deed, under which the reſpondent claims, diveſted him of the property, and the reſpondent might at any time, without any further conveyance or authority from the grantor have had infeſtment, and has now actually obtained ſuch infeftment, without any other right from the grantor; nor has the grantor made any ſubſequent conveyance to give occaſion for any competition.

If the grantor were not wholly diveſted, yet by the act of parliament 1690, c. 33. "for ſecurity of creditors, vaſſals, and heirs "of entail of perſons forfeited," it is expreſsly enacted, that all eſtates forfeited ſhall be ſubject to all real actions and claims againſt the ſame; and by this act the reſpondent's caſe would be within the proviſions of that act, ſince his is a real claim upon, rather of, an eſtate.

By

By a clauſe in the act "for appointing commiſſioners to inquire," &c. all conveyances made by the forfeiting perſon, even after the 24th of June 1715, are declared to be good, if the onerous conſideration be proved; much more ought this which was made in 1707, and the price admitted by the appellants to have been paid. As this act has provided for every demand in equity as well as in law, though it ſhould, for argument's ſake, be admitted, that the property of the eſtate was not abſolutely or finally veſted in the reſpondent, yet certainly in equity he had the only title to it, and the grantor had no title in equity, nor could he forfeit any equitable intereſt, which was not in him, but in the reſpondent.

After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the interlocutory ſentence or decree therein complained of be affirmed.* Judgment, 20 Jan. 1720-21.

For Appellants, *Ro. Dundas. John Willes.*
For Reſpondent, *C. Talbot. Will. Hamilton.*

The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants*; Caſe 77.
Sir George Stewart of Balcaſky, Bart. *Reſpondent.*

23d *Jan.* 1720-21.

Fiar.—Forfeiture for Treaſon.

ANOTHER queſtion of the ſame nature as in the laſt appeal, aroſe between the ſame parties, in regard to the lands of Waterſtown. The titles of the reſpondent to theſe lands ſtood in the ſame ſituation, as his titles to the lands of Gaſkinhall. No caſes have been found on the preſent appeal. That the queſtions were the ſame in this and the laſt appeal, appears from the report of the Engliſh Judges on the point of juriſdiction in the Court of Seſſion, (Journal, 11 March 1719-20,) which they left undecided.

The judgment of the Court of Seſſion, in favour of the reſpondent's predeceſſor, was pronounced on the 10th of September 1719.

The appeal was brought "from an interlocutory ſentence or "decree of the Lords of Seſſion, of the 10th of September 1719." Entered, 21 Dec. 1719.

After hearing counſel, *It is ordered and adjudged that the ſaid petition and appeal be diſmiſſed, and that the interlocutory ſentence or decree therein complained of be affirmed.* Judgment, 23 Jan. 1720-21.