

“ the treason therein mentioned? 3d, Whether the disposition
 “ 1732 was onerous or not? He thought the discussion of the
 “ first point might rather be reserved for some other cases that
 “ might come before them; but I am told that by his way of
 “ reasoning he seemed to think it temporary. The second he
 “ thought unnecessary, because that objection had not been
 “ made for the claimant before us; and as to the third, he
 “ thought the disposition onerous: and if the House was of that
 “ opinion, he proposed that the judgment should be, to declare
 “ that the debts chargeable on the estate, and on the respondents
 “ to pay, being equal or thereabouts to the value of the estate
 “ at the time that the disposition was executed, the disposition
 “ was therefore onerous, and the interlocutor complained of
 “ should therefore be affirmed; which the House agreed to.”
 —(*Elchies.*)

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LORD ADVOCATE
v.
LORD BOYD,
&c.

THOMAS DRUMMOND of Logie Almond, - - - - } *Appellant*;
The LORD ADVOCATE, - - - - } *Respondent.*

30 April 1751.

FORFEITURE.—ACT 19, GEO. II. c. 26.—A person being attainted by virtue of the act, which declared that if he did not surrender himself before the 12 July following, he should stand attainted of treason from the 18 April preceding;—it was found that the forfeiture did not operate *retro* to the effect of incapacitating him to succeed to property in the interval.

WRIT.—Circumstances under which a deed was not considered a delivered evident.

[*Elchies voce* Forfeiture, No. 15.—*Falc.*—*Mor.* 4875.]

By the act 19 Geo. II. it is enacted, That if No. 96. certain persons therein mentioned, and among

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others James Drummond, (commonly called Duke of Perth,) and John Drummond his brother, should not respectively surrender themselves to justice, on or before the 12 July 1746, they should stand attainted of high treason from and after the 18 April 1746.

By the vesting act of the 20th of Geo. II. all lands, &c. which any person, attainted of high treason within the time therein limited, was possessed of or interested in on the 24th June 1745 or at any time afterwards, were forfeited to the crown. In pursuance of this act, the estates of the said James Drummond being surveyed by order of the Court of Exchequer, a claim to them was given in upon the part of Mr. Drummond of Logie Almond, (the appellant) in virtue of a trust-disposition executed by James Drummond in his favour in June 1743. Objections (to be noticed immediately) were stated to this deed; but it being proved that James Drummond had died on the 11th May 1746, the Court (July 29, 1746) found, “ that
 “ James Drummond (taking upon himself the title
 “ of Duke of Perth) having died upon the 11th
 “ May 1746, before 11th July 1746, on or before
 “ which day he was allowed by the said act of at-
 “ tainder to render himself and submit to justice,
 “ he, the said James Drummond, was not attainted
 “ by the said act; and therefore find, that this
 “ Court has no jurisdiction to proceed further in
 “ judging of the validity or effect of the disposi-
 “ tion from the said James Drummond to Thomas
 “ Drummond, the claimant, *in hoc statu*, leaving
 “ the claimant to follow forth his right thereon as
 “ accords.”*

* Elchies *voce* Forfeiture, No. 7. Mor. 4874.

This judgment was acquiesced in ; but a second survey was made of the estate as forfeited by the attainder of John Drummond, to whom it was alleged that it had devolved upon the death of James, his brother, without issue ; the said John Drummond being included in the act of attainder, and having failed to surrender himself before the specified day. The appellant then anew entered his claim, founding on the above disposition in 1743 by James Drummond in his favour, and maintained that in consequence thereof John Drummond was not possessed of the estate, nor in any way entitled to it on the 24th June 1745, or at any time afterwards. Although the deed had never been in the actual possession of the claimant, it had been put by the granter into the hands of Mr. Graham of Airth, advocate, for the purposes of in- feftment and registration.

Answered—1st, That the deed in question not dispensing with delivery, and never having been delivered, was void and ineffectual. Mr. Graham was the ordinary legal adviser of the granter, and therefore the deed must be held to be still in his custody while in the hands of Mr. Graham. 2dly, That even if it had dispensed with delivery, yet from its terms, from the whole circumstances of the case, and particularly the fact that the possession of the estates had been always retained by James Drummond, it was evidently the sole intention of this latent personal deed to evade the eventual forfeiture of the granter and his brother ; and therefore that it could not be effectual to frustrate the claim of the crown.

The appellant further maintained,—That John Drummond, upon his failure to surrender himself

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in terms of the act, became attainted of high treason from and after the 18th April 1746, and therefore on the 11th of May, when his brother died, he was incapable to take the estate as his heir, or consequently to forfeit the same to the king. But, that in respect of his attainder, it fell to the superior or overlord, as an escheat *propter defectum hæredis*; so that the survey of the lands, as being forfeited by John's attainder, was erroneous.

Answered—1st, That the objection was *jus tertii* to the appellant, who did not pretend to be the overlord of whom the estate was held; that in fact the king himself was in this case superior, and so having both titles, a twofold claim was competent to him; one by forfeiture, and the other by escheat; and he had the option of using either.* 2dly, That the survey of the estate as forfeited by John Drummond was proper, because on the 11 of May, when the succession opened to him, he was not attainted, (in the same way as it had been decided that his brother James was not then attainted,) and therefore there was nothing in law to have hindered him from entering into the possession of the lands, or from levying the half-year's rent payable at Whitsunday 1746, or from completing his title to the estate as heir to his brother; his conditional attainder not taking place for two months afterwards, viz. on the 12 July.

The Court (1 Dec. 1750) “ find, that John “ Drummond, (second son to the late Lord Drum-

* A claim was afterwards made, under the clan act, by the Duke of Atholl, who was superior of part of the lands. The claim was dismissed, (Nov. 26, 1760) on the ground that the rebel had not been vassal during the continuance of the treason, or prior to the attainder.—(*Fac. Col. Mor.* 4766.)

“mond,) now attainted of high treason, was upon
 “the 11 May 1746, when James Drummond, his
 “elder brother, died, capable to take by descent
 “from his said elder brother, and that the estate
 “of Drummond in question did then descend by
 “James’s death to John Drummond, now attaint-
 “ed, and was forfeitable, and forfeited by the trea-
 “son and attainder of the said John Drummond;
 “and that the trust-disposition to Thomas Drum-
 “mond of Logie Almond, now claimed upon, is
 “not sufficient to exclude the forfeiture of the said
 “John Drummond, and therefore find the estate
 “acclaimed, forfeited by his attainder; dismiss the
 “claim, and decern accordingly.”

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Entered,
 Feb. 1, 1751.

The appeal was brought from this interlocutor.

“After hearing counsel, the judges were direct-
 “ed to give their opinion on the following question,
 “*videlicet*, ‘Whether, by the law of England,
 ‘John Drummond, second son of the late Lord
 ‘Drummond, was on the 11th of May 1746, ca-
 ‘pable of taking lands by descent?’ and, whether,
 ‘by his not rendering himself to justice, on or be-
 ‘fore the 12th July 1746, according to the act of
 ‘the 19th year of his present majesty, such descent
 ‘became divested or avoided, so as to prevent the
 ‘forfeiture in prejudice of the crown?’ Whereup-
 “on, the Lord Chief Baron of the Court of Ex-
 “chequer, having conferred with the judges pre-
 “sent, acquainted the house, ‘that they were
 ‘unanimously of opinion, that the said John
 ‘Drummond was capable at that time of taking
 ‘lands by descent; and that, by his not rendering
 ‘himself to justice, on or before the 12th July
 ‘1746, according to the aforementioned act of the

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‘ 19th year of his present majesty, such descent did
 ‘ not become divested or avoided, so as to prevent
 ‘ the forfeiture in prejudice of the crown.’

“ And, upon due consideration had of what was
 “ offered on either side in this cause, it is ordered
 “ and adjudged, &c. that the said petition and ap-
 “ peal be, and is hereby dismissed, and that the
 “ said judgment be affirmed.”

For Appellant, *A. Hume Campbell, Alex. Lockhart, C. York.*

For Respondent, *D. Ryder, Wm. Grant, Wm. Murray.*

The LORD ADVOCATE,	-	-	<i>Appellant.</i>
JOHN GORDON, Esq. <i>et è contra</i>			<i>Respondent.</i>

21 May 1751.

TAILZIE.—FORFEITURE.—ACT 7 ANNÆ, c. 21.—An entail prohibiting, under strict irritant and resolute clauses, “ any deed civil or criminal, or even treasonable, whereby the estate may be in any way evicted, forfeited,” &c. ; and it being declared that any such deed “ should only irritate the right of the committer thereof, but should in no ways affect the right of the next heir, albeit descending of the contravenor’s body,—Found, that by the attainder of the heir in possession, the estate was forfeited to the crown, not only during his own life, but so long as there should survive any issue of his body who would have been entitled to succeed under the entail, had there been no attainder ; and further, that whatever interest might eventually arise to the attainted person under the substitution to “ the heirs and assignees” of the entailer, was also forfeited to the crown.

The heir possessing under an entail being attainted,—it was