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DRUMMOND v. LORD ADVOCATE.

Judgment, 30 April 1751.

'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, - - *Appellant.*
JOHN GORDON, Esq. *et è contra* *Respondent.*

21 *May* 1751.

TAILZIE.—FORFEITURE.—ACT 7 ANNÆ, c. 21.—An entail prohibiting, under strict irritant and resolutive 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 contravener'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

found not competent to bring a declaration of irritancy on the ground of an act of contravention committed some time prior to the attainder.

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. [Elchies, *voce* Tailzie, No. 39. Falc. Mor. 4728.]

No. 97.

THE estate of Park was settled by Sir James Gordon in 1713 under the fetters of a strict entail, the heirs under which were prohibited *inter alia* "to grant infeftments of annualrent out of the "same, or any other right and security redeemable "or irredeemable, nor to contract debt, or do any "other deeds of omission or commission, civil or "criminal, or even treasonable, (as God forbid) "whereby the lands may be anywise burdened, "adjudged, evicted, or become caduciary, escheat, "confiscated, or forfeited." It is further declared, that such debts "or crimes shall only irritate "and make void the contravener's right, but no-"ways burden, affect, or forfeit the said lands, to "the prejudice of the next heir of tailzie," &c.

In 1746, Sir William Gordon of Park was attainted of high treason, and his estate being surveyed by the Exchequer, a claim was entered by his younger brother (the respondent) on the following grounds, viz. 1st, That Sir William having in 1738, granted an heritable bond over part of the estate whereon infeftment followed, an irritancy was thereby incurred, and consequently the estate did *ipso facto* fall and accresce to the claimant as next heir of entail. 2d, That by committing the crime of treason, Sir William did contravene the prohibitive and irritant clauses above recited, whereupon the estate devolved on the claim-

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ant; and, *lastly*, that at all events, Sir William could forfeit by his attainder only his own liferent interest in the entailed estate, which upon his death must belong to the claimant.

In *answer* to the first ground of claim, it was disputed that any part of the entailed lands was included in the bond; and at any rate the irritancy might have been purged by payment of the debt. But further, even if the claim upon this irritancy had been competent, it came too late, when brought for the first time against the crown, after the estates had been vested in it by the attainder; there having been sufficient time between the date of the bond in 1738 and the rebellion, to declare the irritancy. *Craig de Feudis*, L. 3. D. 6. sect. 17.

Replied—Ignorance or inadvertence would not save Sir William from the irritancy. The claimant was not *in mora* in not declaring the irritancy sooner, having been abroad during the whole interval. His *jus actionis* subsisted for forty years; and in the statute, whence the crown derives its right, there is an express saving of "all rights, &c. "which were binding on the forfeited persons, "and might have affected the estate before the "respective days and times whereon the same was "vested in his majesty."

To the remaining grounds of claim, it was *answered*, 1st, that by 7 Annæ, c. 21. all persons convicted of high treason in Scotland, are made "subject and liable to the same corruption of "blood, pains, penalties, and forfeitures as persons "convicted or attainted of high treason in Eng-"land." And by 26 Hen. VIII. c. 13. all persons so convicted, forfeit to the king "all such

" lands, tenements, and hereditaments, which they " shall have, of any estate of inheritance in use or " possession, by any right, title, or means, within " this realm of England, or elsewhere within any " of the king's dominions, at the time of such " treason committed, or any time after." The estate in question was beyond doubt an estate of inheritance, belonging to Sir William, and consequently forfeited to the king by his attainder. It was a real estate vested in his person and descendable to heirs; he was the sole vassal of the crown in it, and if he had died at the faith and peace of the king, the next heir must have made up his title by service upon the brief of mort ancestry as nearest heir of tailzie to him, dying last vest and seized in the estate. The act 1685, proves that every possessor of an entailed estate is " infeft in " the fee thereof," and this fee, like that of other " estates of inheritance," must be transmitted from the dead to the living by service.

2. The act 7 Annæ, in regard to the forfeiture of entailed estates, excepts the issue of marriages contracted by the attainted person before a specified day; plainly establishing that in any case not falling under the exception, the descendants of the attainted person are equally affected by the forfeiture; and the children of Sir William (who must exclude the claimant's pretensions as next heir of entail) would be in this situation.

Replied—By the general spirit of the law of England, no man forfeited by his crime what he could not alienate when of full age. In this way, although estates in fee simple conditional, were forfeitable for high treason at common law, yet when by the statute of Westminster (2 and 13 Edw.

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1.) they were entailed and unalienable, they were not deemed forfeitable by the treason of the donee, except during his own life, although in the statute there is no express exemption of them from such forfeiture. It was not until the policy of law had rendered them alienable, by the method of docking the entail, that such estates were subjected to forfeiture by authority of Parliament. But there is no instance in the law of England where a person could forfeit a greater estate for his crime than he could actually convey by his deed; excepting only under the acts 26 and 33 Hen. VIII. specially designed to curb and reduce the power of the clergy, and which were afterwards modified by 5th and 6th of Edw. VI. c. 11. whereby the forfeiture of an ecclesiastic was restricted to his own life without prejudice to his successor. It is evident that estates in Scotland tailzied under the act 1685, are unalienable, and consequently under the spirit of the English law, are forfeitable only for the life of the attainted person: which is agreeable likewise to the recital of the act 1690, c. 33. The term "estate of inheritance" being unknown to the Scotch law, ought not to be strained to infer a forfeiture. Entailed estates in Scotland are no more "estates of inheritance" within the provision of the 26 Henry VIII. than estates in England limited to a man for life with remainder to his sons in succession in tail, the possession of each being equally limited and the right of the son in each case to succeed, equally indefeasible; and the Court of Chancery held them to be the same in the case of Colonel Charteris of Amisfield.*

* A general reference was also made to several cases determined after the Rebellion in 1715.

The Court, (16th Nov. 1750,) "find, that Sir "William Gordon, the person attainted, being by "the entail disabled from alienating the estate, "charging the same with debts, or altering the "course of succession in prejudice of the claimant, 'and the other heirs of tailzie, or from otherwise 'hurting or impairing their right or title to the 'said estate after his death, in any manner of way 'whatsoever; that, therefore, the estate and ba- 'rony of Park is, by Sir William's attainder, for- 'feited to the crown only during his life; and find 'that the said John Gordon, the claimant, hath 'right to the estate after the death of the said Sir 'William Gordon. And also find that the irritan- 'cy alleged to have been incurred by Sir William 'Gordon, the attainted person, not having been de- 'clared nor any advantage taken of it before the 'forfeiting, that the forfeiture cannot be over- 'reached or excluded on pretence of that irritan- 'cy; and decern and declare accordingly."

An appeal was brought by the Lord Advocate, from this interlocutor, so far as it finds that the estate is forfeited only during the life of Sir William Gordon. Entered, 31 Jan. 1751.

A cross appeal was brought by John Gordon, from the above interlocutor, so far as it finds that the forfeiture could not be excluded by the alleged irritancy committed in 1738. Entered 13 Feb. 75

Pleaded for the Lord Advocate,—1. The law of England concerning treason, (which is now the law of Scotland also,) makes every estate of inheritance forfeitable for high treason, without distinguishing whether it was or was not alienable by the consent or deed of the proprietor; and, as before the act of the 7 Queen Anne making the laws of treason

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the same in both countries, every estate, except entailed estates, was in Scotland already subject to forfeiture for high treason, this act, unless it did also subject tailzied estates, operated nothing new in respect to such forfeitures.

2. Supposing the irritancy had been incurred, (which has not yet been proved,) the property did not thereby *ipso facto* pass from Sir William Gordon and vest in the claimant. To operate such transmission, a decree of declarator was necessary, and no such decree having been obtained, nor even action brought before the attainder, the estate remained in Sir William, and therefore being by the attainder forfeited to the crown, it is not now subject to be carried off on pretence of an irritancy so long neglected to be enforced.

The claimant would derive no benefit from the irritancy, even if it were declared, there being issue male existing of the body of Sir William.

Pleaded for Mr. Gordon:—The legal effect of an entail containing the necessary clauses, is to prevent every heir of entail from selling, charging, or encumbering the estate; and all deeds to the contrary are void.

Although by the act of Queen Anne forfeitures for high treason in England are extended to Scotland, yet as no estates can now be created in England, analogous to the *jus crediti* of heirs of entail under the act 1685 in Scotland, such rights must, in applying to them the law of England, be considered as a limitation of particular estates, independent of each other, and consequently forfeitable only as bare freeholds or liferents, and not affected by the acts of any of the other heirs. Entailed estates in England, when they were first

made unalienable by the statute *de donis*, were thereby held not to be forfeitable for high treason; and they continued so until the statute of the 26th of Henry VIII. which made them forfeitable after they had become alienable.

It is agreeable to the principles of natural justice, that no man by his crime should forfeit the right of an innocent person, and this is consonant both to the spirit of the law of England, which never allows a party to forfeit what he cannot alienate, and to the maxims of the law of Scotland declared at the revolution, and embodied in the statute book in 1690.

2. In the vesting act, (20th Geo. II.) there is an express saving of all rights which were binding on the forfeited persons, and might have affected the estate before the attainder. The right resulting from the irritancy was a right vested in the claimant at the time of the forfeiture, as the interlocutor itself admits. All then that the claimant omitted, was to follow out this right with possession, by a declarator. But as the right is preserved by the express words of the statute, so a remedy is likewise given by the statute for every right so preserved; and, consequently, it is directly repugnant to the plain words and meaning of the statute, to say that the right is barred, or the remedy taken away by the forfeiture of Sir William Gordon.

16 May 1751. After hearing counsel, the following question was put to the English judges for their opinion, viz. 'Supposing that, by the law of Scotland, an 'estate tailzie, with prohibitive irritant and resolu-'tive clauses, is an estate of inheritance; and sup-'posing also, that by the law of Scotland, no estate 'or interest was vested in Sir William Gordon, by

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'virtue of the limitations in the settlement of 19th 'October 1713, to the heirs-male of the body of 'Sir James Gordon; what estate or interest in the 'barony and lands in question was forfeited to the 'crown, under the limitations of the said settle-'ment, by the attainder of Sir William Gordon?'

21 May. "The Lord Chief Baron of the Court of Ex-"chequer, delivered the unanimous opinion of the "judges, as follows, viz.

'That the estate and interest in the barony and 'lands in question, which was forfeited to the 'crown, under the limitations of the said settle-'ment, by the attainder of Sir William Gordon, 'was not only during the life of Sir William Gor-'don, but so long as there shall be any issue male 'of his body which would be inheritable to the 'estate tailzie in case he had not been attainted; 'and that the reversionary interest in the fee 'thereof, limited by the settlement to the heirs 'and assigns whatsoever of Sir James Gordon, on 'failure of the heirs-male of the body of Sir James 'Gordon, and the determination of the several 'estates by the other substitutions therein con-'tained, was also forfeited; supposing that, by 'the laws of Scotland, such reversionary interest 'was in Sir William Gordon at the time of his at-'tainder.'

Judgment. "It is, after debate, ordered and adjudged, &c. "that the first part of the said interlocutor, where-"by the Lords of Session found, 'that Sir William 'Gordon, the person attainted, being, by the en-'tail, disabled from alienating the estate, charging 'the same with debts, or altering the course of 'succession in prejudice of the claimant and the 'other heirs of tailzie, or from otherwise hurting

'or impairing their right or title to the said estate 'after his death in any manner of way whatsoever; 'that, therefore, the estate and barony of Park is, 'by Sir William's attainder, forfeited to the crown 'only during his life;' and find, 'that the said 'John Gordon, the claimant, hath right to the 'said estate and barony of Park, after the death of 'the said Sir William Gordon, 'be, and the same "is hereby *reversed*: And it is further ordered "and adjudged, that the latter part of the said "interlocutor, whereby the Lords of Session found, 'that the irritancy alleged to be incurred by Sir 'William Gordon, the attainted person, not having 'been declared, nor no advantage taken of it be-'fore the forfeiture, the forfeiture cannot be over-'reached or excluded on pretence of that irri-'tancy,' be, and the same is hereby *affirmed*: "And it is also hereby declared and adjudged, "that Sir William Gordon, the person attainted, "being under the settlement made by his father "Sir James Gordon, in October 1713, seized of "an estate tailzie in the barony and estate of "Park, notwithstanding such tailzie was affect-"ed with prohibitive, irritant, and resolutive clauses, "the said barony and estate of Park did, by "virtue of the statute of the 7th of Queen "Anne, c. 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 in-"heritable to the said estate tailzie in case he "had not been attainted, and also for such estate "and interest as was vested in, or might have been "claimed by the said Sir William Gordon, by "virtue of the last limitation in the said settle-

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" ment, to the heirs and assignees whatsoever of " the said Sir James Gordon, after all the sub- " stitutions therein contained shall be expired " or determined; and that, by virtue of the sub- " stitution to the heir-male of the said Sir James " Gordon's body of his then present marriage, " the respondent, John Gordon, hath right to suc- " ceed to the said estate and barony of Park; " after the death of the said Sir William Gordon, " and failure of such issue male of his body as " aforesaid, according to the limitations in the " said settlement: And it is further ordered; " that liberty be reserved to the crown, and also " to the said John Gordon, and any other person " who may become entitled to the said barony and " estate of Park by virtue of any of the said sub- " stitutions, to apply to the Court of Session, for " such further order or direction in the premises " as shall be just, as often as any new right shall " accrue to them, respectively, in consequence of " any of the substitutions or limitations in the said " settlement."

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

For Respondent, *A. Hume Campbell, Robert Craigie, Alex. Lockhart.*

Vide case between the same parties, 4 Feb. 1754. *Infra.*