

<p>1753.</p> <hr/> <p>MERCER</p> <p>v.</p> <p>HIS MAJESTY'S ADVOCATE.</p>	<p>CHARLES MERCER, second son of Sir Lawrence Mercer,</p> <p>HIS MAJESTY'S ADVOCATE,</p>	}	<p><i>Appellant;</i></p> <p><i>Respondent.</i></p>
---	--	---	--

House of Lords, 14th May, 1753.

ENTAIL.—FORFEITURE.—Held that the appellant was not entitled to claim his brother's forfeited estate, he not being an heir-substitute, but an heir-male, of the marriage under the investitures. And that the deed he founded on not containing prohibitory, irritant, and resolute clauses, nor recorded, could not support his claim.

No. 100. SIR LAWRENCE MERCER of Lethindy was attainted for high treason in 1746, and the estate forfeited to the Crown.

The appellant, his brother, made his claim to the estate in terms of the vesting act, on the ground that the attainder could not affect him, or bar his rights as substitute, under the investitures of the estate.

The investitures stood thus:—Their father, Sir Lawrence, the elder, by contract of marriage entered into by him and his wife, became bound to resign his lands and his estate of Lethindy in favour of himself and the heirs male to be procreated betwixt him and his said wife, and the heirs of their bodies, &c., which failing, to his other heirs of tailzie and provision specified in a writ to be granted.

April 20,
1722.

May 24, 1722. In implement of this obligation, and of this date, he executed a deed of entail containing a destination “in favour of himself and the heirs male or female of the second marriage,” the eldest heir female always succeeding without division, whom failing, the issue male, and failing them, the issue female of Jean Mercer, his own eldest daughter of his first marriage,

with several substitutions over. And of this date he granted a procuratory for resigning the estate of Le-thindy, and the other entailed lands, for new infeftments to be granted thereof “to himself and Lawrence Mercer, his eldest son, procreated of the said marriage betwixt him and dame Christian Kinlock, and the longest liver of them two, in conjunct fee; and failing the longest liver of them by decease, to the heirs of the said Lawrence Mercer’s body, whom failing, to Charles Mercer his second son, and the heirs of his body.” This deed bore to be granted under the limitations of the previous entail. It did not specially enumerate the prohibitory, irritant, and resolute clauses thereof, but only bore a reference to them. Infeftment followed, and the infeftment was recorded. Of this marriage with Lady Kinloch there were three sons, Lawrence, afterwards Sir Lawrence the attainted person, Charles the claimant, and Robert.

The appellant, Charles Mercer, on his elder brother’s attainder, pleaded, that, by the last mentioned deed, there was a distinct and independent substitution or limitation over, of the succession to the entailed estate, after failure of his elder brother Lawrence Mercer, and the issue male of his body, to the appellant by name; and as Lawrence died without issue, the estate tail, which was vested in him, devolved by that destination on him as substitute, and therefore the attainder of his brother could not affect the right so conferred. To this it was answered, that, by the act 1685 concerning entails, “It is declared that such tailzie shall only be allowed, in which the *irritant* and *resolute clauses* are insert in the *procuratories* of *resignation*, charters, precepts and instruments of sasine;” and the original tailzie

1753.

MERCER

v.

HIS MAJESTY’S
ADVOCATE.

Jan. 26, 1725.

1753.

MERCER
v.
HIS MAJESTY'S
ADVOCATE.

itself recorded. But as the latter deed of 1725, under which the appellant claims, neither contained the irritant or resolute clauses of a strict entail, nor was recorded, both of which the said act required, the appellant could not claim.

July 1, 1752. The Court pronounced this interlocutor:—"Find, " that the deed of entail in the year 1725, under " which the claimant, Charles Mercer, claims the " lands and barony of Lethindy, and others mention- " ed in the claim, not having been recorded in terms " of the Act of Parliament 1685, is therefore void " and null, and no claim can be sustained thereon; " and therefore dismiss the said claim, and decern."

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant:—The two deeds of 1722 and 1725 make but one settlement, the latter being only explanatory of the former, and the same lines of heirs to take in both. Although, therefore, there be no prohibitive, irritant, and resolute clauses in the latter deed, yet, as it is made with reference to the former, the prohibitive, irritant, and resolute clauses must be held as incorporated therein. And if this result be conceded, it will be found that all the directions of the Act 1685 have been complied with, namely, that the entail contains the usual prohibitive and irritant and resolute clauses, and that it has been registered as the Act requires. Nor was the varying of the general limitation to Sir Lawrence Mercer, and the heirs male of the marriage in the *first* deed, to that of conjunct fee in him and his eldest son, Lawrence Mercer, with a substitution over to the appellant, in the *second* deed, such an alteration, as made a second registration necessary. This right of substitution conferred on him by his father,

could not be cut off by the attainder of his brother. That this forfeiture could only affect his brother and the heirs of his body, but not the substitutes.

1753.

MERCER
v.
HIS MAJESTY'S
ADVOCATE.

Pleaded for the Respondent:—By the entail 1722, the estate claimed by the appellant is settled upon Sir Lawrence Mercer, and the heirs male procreate, or to be procreate, between him and Christian Kinloch, his wife, and the heirs of their bodies, with several substitutions over. And Lawrence Mercer, the attainted person, having taken the estate under the limitation to the heirs male of the marriage, he was seized of the estate tail; and that whole estate being by his attainder forfeited to his Majesty, the appellant, who cannot claim as a substitute, because he is not such, but only an heir male of the marriage, is excluded; and the whole estate, therefore, having been vested in Lawrence Mercer as heir male of the marriage, has now been forfeited by his attainder. Besides, the deed on which the appellant founds that he is substitute, is void and null as an entail, because it does not contain irritant and resolute clauses, nor was it produced judicially before the Lords of Session, nor recorded.

After hearing counsel, it was

Ordered and adjudged, that the said appeal be dismissed, and that the said interlocutors therein complained of be, and the same are hereby, affirmed.

For the Appellant, *Alex. Lockhart, Al. Forrester.*

For the Respondent, *Sir D. Ryder, Attorney-General, Wm. Grant, W. Murray, Solicitor-General of England.*

Note.—Vide Elchie's Notes, p. 461. The case of Gordon of Park was chiefly relied on by the appellant. Vide p. 508, Craigie and Stewart's Reports.