

1795.

The Hon. ARCHIBALD FRAZER, . . . . . *Appellant* ;  
 His MAJESTY'S ADVOCATE, on behalf of the  
 Public ; and  
 SIMON FRAZER, Esq., and Others, as trus-  
 tees of the estates of the late Major  
 General Frazer, . . . . . } *Respondents.*

FRAZER  
 v.  
 HIS MAJESTY'S  
 ADVOCATE, &c.

House of Lords, 23d Nov. 1795.

ENTAIL—FEE OR LIFERENT—COMPETENCY OF APPEAL.—Circumstances in which, by the terms of a destination in an entail, with certain powers reserved, that the entailer still held the fee simple of the estate, and on his attainder was forfeited to the crown. An appeal having been brought against this judgment of the Court of Session, and having been afterwards withdrawn, and the judgment affirmed, a second appeal of the same judgment was brought, more than thirty years thereafter. Held, that this appeal was incompetent, both under the vesting act, and also under the orders of the House of Lords, of 25th March 1725, making appeals incompetent after the lapse of five years.

Simon Lord Lovat was attainted for high treason, and his estates forfeited to the crown in 1747.

He had three sons, Simon, afterwards General Frazer, Alexander and Archibald, the appellant. His eldest son Simon was also attainted. Alexander afterwards died. But Simon Frazer, the son, having many years thereafter, on the outbreak of the war in America, formed the plan of raising from among his clan a regiment of Highlanders for the service of the government, he went to Canada, and performed such important services for the government, as soon to raise him to the rank of General.

His father, the attainted Lord, previous to his forfeiture, had executed a deed of entail, whereby he disposed his estates to his eldest son, Simon, stiled Master of Lovat, and the heirs male of his body ; whom failing, to Alexander Frazer, his second son, and the heirs male of his body ; whom failing, to Archibald Frazer (the appellant), his third son, and the heirs male of his body, &c. He reserved to himself “ full power and liberty of administration and intro-  
 “ mission over the whole estate during my life, and to con-  
 “ tract debt, and grant security therefor, real and personal,  
 “ and to grant feu rights and wadset rights of the same,

1741.

1795.  
 ———  
 FRAZER  
 v  
 HIS MAJESTY'S  
 ADVOCATE, &C.

“ and tacks long or short, and to make such appointments  
 “ regarding the rents falling due, even after my death, for  
 “ the payment of my debts, as I shall think fit, and to be  
 “ sole factor and curator to the heirs of tailzie above men-  
 “ tioned, during my life, in the means and estate belonging  
 “ to me, in virtue hereof.”

In 1749 the appellant's eldest brother, being then attainted, and Alexander dead, the appellant lodged a claim, which was entered in the Court of Session, praying, “ That the life-  
 “ rent, and other powers reserved to the said Simon, Lord  
 “ Frazer, did determine and expire by his death ; and that  
 “ their Lordships would find that no greater estate than an  
 “ estate for the life of the said Simon Frazer, Esq., elder  
 “ brother of the claimant, was vested in his Majesty by the  
 “ attainder of the said Simon Frazer.”

Nov. 21, 1750. After hearing counsel argue the case, the Court, of this date, pronounced this interlocutor:—“ The Lords having con-  
 “ sidered the claim given in for Alexander (since dead) and  
 “ Archibald Frazers, to the estate of Lovat, with the an-  
 “ swers for his Majesty's Advocate on behalf of the crown,  
 “ they find the real feudal right to the estate being in the  
 “ person of Simon Lord Lovat, and the vassal to the crown  
 “ therein at the time of his treason and attainder, and not-  
 “ withstanding of the personal right made to Simon Frazer,  
 “ the son, full powers were reserved to Simon the father to  
 “ charge the estate with debt at pleasure, to alienate the  
 “ same by granting feu rights and wadsets of the whole, or  
 “ part thereof, as he thought fit, and to uplift the rents, and  
 “ to apply the same to what uses he thought proper, during  
 “ his life, without being accountable ; that the infestment of  
 “ property did remain in him for all these ends and pur-  
 “ poses ; and that the real and substantial estate of fee and  
 “ inheritance, did continue and subsist in the said Simon  
 “ Lord Lovat, therefore was forfeited for his treason, and is  
 “ by his attainder forfeited accordingly, and therefore dis-  
 “ misses the claim.”

Nov. 26, 1751. From this judgment an appeal was taken to the House of Lords, but the parties having petitioned the House to withdraw it, the appeal was dismissed.

General Simon Frazer having returned to this country from America, stood so high in the favour of the government, that, on presenting his petition, claiming the estates of Lovat, his Majesty was pleased to grant the same, as freely and fully as they had been vested in the late Lord Lovat, previous to his attainder.

It was stated by the appellant, that by the above entail, General Frazer's interest could only extend to a liferent. But the General contended that the full fee of the estate had been vested in him by the conception of the entail.

1795.  


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 FRAZER  
 v.  
 HIS MAJESTY'S  
 ADVOCATE, &c

General Frazer conveyed the estates in trust to the respondents, his trustees, for certain purposes, and having died without altering the said conveyance, the respondents, since his death, have been in possession, executing the trusts committed to them.

The appellant in 1784, thought proper again to appeal from the said decree of the Court of Session, of 21st Nov. 1750.

*Pleaded for the Appellant.*—The trustees of General Frazer can have no right but in consequence of the act of parliament, vesting the estate of Lovat in General Frazer, and as that act expressly saves the right that was in the appellant, the right of the trustees cannot overrule that act. 2. If the objection to the competency of this appeal be well founded, it is *jus tertii* to General Frazer's trustees to state it. They are *third* parties, who have no right or interest in the decree, or in the appeal from it; the objection was only competent to his Majesty's Advocate, as he was the only party to the suit in the Court of Session, and it was the crown only that was interested in the finality of the judgment, after a certain limited time. But even supposing that there were some grounds for the objection, it ought not to bar the present appeal. The appellant, at the time of the former appeal, was a minor. He was, besides, *non valens agere cum effectu*. He knew nothing of the former appeal, and therefore ought to be restored thereagainst.

*Pleaded for the Respondents.*—The decree of the Court of Session was affirmed by your Lordships, upon appeal regularly entered as far back as the year 1751. Even if that proceeding could be got over, still the present appeal would be barred by the act of his late Majesty, whereby the decrees of the Court of Session are declared to be final and binding upon all parties concerned, after the elapse of thirty days without any appeal being taken. Instead of thirty days, more than thirty years have elapsed in the present case. The appeal is farther barred by your Lordships' standing order of 25th March 1725, whereby no appeal can be received after five years from the date of the decree. 2. Besides, the fee and inheritance of the estate were in the late Lord Lovat, and, in this state, became forfeited to the crown.

1795.  


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 GORDON  
 v.  
 DOUGLAS,  
 HERON & CO.

The grant to General Frazer was of that estate, as so vested in the crown, as fully and freely as if it had been in Lord Lovat, and therefore the appellant has no right to challenge the conveyance of General Frazer to the trustees.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutor therein complained of be affirmed.

For Appellant, *W. Grant, R. M<sup>c</sup>Intosh.*

For Respondents, *W. Adam.*

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( Fac. Col.)

ALEX. GORDON of Culvenan, Esq.,	.	<i>Appellant ;</i>
DOUGLAS, HERON & Co., Bankers, Ayr, and	}	<i>Respondents.</i>
GEORGE HOME, their Factor,		

House of Lords, 24th Dec. 1795.

**PARTNERSHIP — DISSOLUTION OF — TITLE TO SUE.**—The Douglas, Heron & Co. Banking Company stopped payment, and having resolved to wind up the concern, they, in conformity with an article in their contract, held a general meeting of the Company, and appointed a committee with full powers to wind up the concern, and authorized the committee, or their quorum, to do so. The quorum of the committee, by commission, delegated their powers on George Home. It was found that a large deficiency required to be made up by the individual partners in proportion to their shares. The appellant, as a partner, refused to pay his share, and action being raised, in name of Douglas, Heron & Co., late bankers in Ayr, and George Home, Esq., their factor and manager; and objection being stated to this title to sue, on the ground that action was not competent in the Company's social name, without also naming the individual partners, the Company being dissolved: Held, that every copartnery must from its nature subsist after its dissolution to the effect of winding up its affairs, supposing there were no provision in the contract to this effect; but, in the present case, there was in the contract a special provision for this purpose, and therefore that the title to sue was unexceptionable.

The appellant was a partner, holding two shares of £500 each, in Douglas, Heron & Co.'s banking concern. The Company proving unfortunate in business, was obliged to