No 73. as personal as the conditions in the alleged cases; and particularly this settlement is precisely the same with that made by Simon Main, who putting the estate out of him, reserved *potestatem disponendi*. If the estate might have been adjudged for his debt, it proceeded from the contractions being an exercise of the power, which might afterwards have been made effectual by diligence.

*Duplied*, So long as there was no infeftment, the estate remained in Lord Lovat, and came to the Crown by his forfeiture, and was rightly surveyed; and the claimants could only pretend as creditors to take it again from the Crown; this was a personal, or, as an English lawyer would express it, an equitable right; but, on the other hand, there was in Lord Lovat an equitable right of disposing of the estate at his pleasure, which rendered it ineffectual; and there was no equity that the claimants should now take from the Crown an estate forfeited by the Lord Lovat, over which the disponees never had any effectual right.

"THE LORDS found the feudal and real right to the estate being in the person of Simon Lord Lovat, and he vassal to the Crown therein, at the time of his treason and attainder, and that notwithstanding of the personal right made to Simon Fraser his son, full power was reserved to Simon the father, to charge the estate with debts at pleasure, to alienate the same, by granting feu-rights and wadsets of the whole or part thereof, as he thought fit, and to apply the same to what uses he thought proper during his life, without being accountable; that the infeftment of property did remain in him for all these ends and purposes; and that the real and substantial estate of fee and inheritance, did continue and subsist in the said Simon Lord Lovat; and therefore was forfeitable for his treason, and was by his attainder forfeitable accordingly; and therefore dismist the claim."

Act. *R. Craigie, Ferguson* et alii. Alt. *The King's Counsel.* Clerk, *Forbes.*

*D. Falconer, v. 2, No 166. p. 192.*

---

1750. *December* 21.

No 74. The annuitants of the York-Buildings Company had right to annuities to the extent of a certain sum, and security, by infeftment for a smaller sum. Whether as the sum

The DUKE of NORFOLK *against* The ANNUITANTS of the YORK-BUILDINGS COMPANY.

IT is enacted 6*to* Geo. I. for enabling such corporations as should purchase estates forfeited by the Rebellion in 1715, to grant annuities forth thereof, 'That it should be lawful for bodies politic and corporate, as had purchased or 'should purchase any part of the said estates, to grant or settle rent-changes 'or annuities forth thereof:' And it is enacted, 7*mo* Geo. I. to enable the York Buildings Company, who had purchased several of these estates, to sell annuities by way of lottery, 'That it should be lawful to the said Company to grant

No 74.
due was reduced by death of the proprietors within the sum secured, the infeftment was a security for the arrears?

'rent-charges and annuities, to the full extent and value of such of the estates 'as were or should be at any time by them purchased, by the way of lottery; 'and for any person or body politick or corporate, by that method, to purchase, 'annuities of the said Company.'

The Company having granted several annuities by the way of lottery, disponed, 13th October 1727, their estates to certain persons, 'for the use and behoof of the annuitants and their assignees; and for their further security, and 'more sure payment of their respective annuities belonging to them, as the 'same were particularly specified in a list or schedule under their common seal, 'of the date of that disposition; which was holden as therein repeated *brevitatis causa*;' and declared that it should not be in the power of the trustees, or any of them, nor of the annuitants or any of them, to enter to the possession of the lands, or to uplift mails and duties, unless upon default of punctual payment of the said annuities in terms of the bonds granted to the said annuitants. The schedule referred to, and which was annexed to this disposition, contained a list of annuities extending to L. 10,453 Sterling, though both the disposition and infeftment thereon, and the schedule itself, mentioned the total sum as only amounting to L. 10,067.

The Duke of Norfolk and other postponed creditors of the Company, insisted in a reduction of the annuitants' right; wherein the Lord Ordinary pronounced the following interlocutors, 28th February 1749, finding "That the infeftment in favour of the Trustees of the York-Buildings Company, was good and effectual to the extent of the sum of L. 10,067 therein mentioned, and no more, for the security of the whole nominees proportionally mentioned in the schedule annexed to the disposition; and therein, and in the sasine taken thereon referred to; and further, that the said infeftment was good and effectual, to secure the annuities of such of the several nominees or annuitants aforesaid, as from time to time survived those who deceased, since the granting thereof, and until they should recover full payment of their annuities." And 30th June, finding, "That the said infeftment was good, and subsisted in the persons of the said trustees, for the behoof of the said annuitants, for securing to them their several respective annuities, until they and each of them should recover payment respectively."

By these interlocutors, though it was found the whole had only right to draw out of the estates the annual sum of L. 10,067, yet by as the death of the annuitants, this sum came to exceed the annuities due to the annuitants surviving, it was determined that the said sum might still be drawn, till payment of the arrears incurred on the full sum of L. 10,453, to which the severals in the schedule amounted, though erroneously calculated to less.

*Pleaded* in a reclaiming bill, Though this right is granted to a few in name of the whole annuitants, yet no powers are granted to them; it is only a right executed in this form, to save the inserting a catalogue of names; and is not like as when an estate is disponed to trustees to be sold for the common bene-

No 74.

fit; each of the annuitants has a separate real right, for a sum proportioned to his bond, as 10,067 bears to 10,453, and this is at an end by his death, and cannot encrease the real right of any other which was originally fixt by the same proportion.

*Answered*, The annuitants have right by their bonds, to L. 10,453 in security whereof they are infeft in L. 10,067, and though there can no more be drawn annually out of the estates, yet this sum remains payable while any part of the debt secured is due.

" The Lords found that the annuitants had a real right upon the estates disponed, for an annuity extending to L. 10,067, and no more; and found them preferable on the said estates for payment thereof; and found the subsequent creditors had not access to recover their payment, till after payment of the said annuity, and all arrears incurred thereon; and that then they had access."

Act. *H. Home.* Alt. *Lockhart.* Clerk, *Gibson.*

*D. Falconer, v. 2. No 174. p. 208.*

---

1753. *November* 21.

The Creditors of Carleton *against* William Gordon.

No 75.
While an entail remains a personal deed, and is made the title of possessing the estate, it will affect the creditors of the heir in possession, although it has not been recorded, and although the provisions and irritant clauses have not been repeated in the title deeds of such heir.

In April 1684, James Gordon executed a tailzie of his estate of Carleton, holograph. By this tailzie, he disponed the estate, and granted procuratory for resigning it in favours of the heirs-male of his own body; whom failing, to John Gordon, third son to Gordon of Earlston; whom failing, to Nathaniel Gordon of Gordonston, and their respective heirs-male; whom failing, to his own heirs-male whatsoever, &c.; under prohibitory, irritant, and resolutive clauses, against altering the order of succession, &c. selling, &c. and against contracting debts, or doing any other deeds, directly or indirectly, above the half of the value of the estate.

The procuratory was not executed by the maker of the entail; neither was the entail recorded. The first substitute died before the maker of the entail; and both died without issue male. In 1702, Nathaniel Gordon the next substitute made up his title to the procuratory in the deed of tailzie, as heir male and of provision to the maker of the entail; and his retour contained the prohibitory, irritant, and resolutive clauses; but he took no infeftment.

In the contract of marriage of Alexander his son, without taking notice of the tailzie, Nathaniel disponed, as absolute proprietor, the estate of Carleton to his said son, with the burden of his debts, &c.; but the son was never infeft.

The father and son having contracted debts above the value of the estate, and adjudications being led, and the legals thereof expired, the creditors brought a process of ranking and sale of the estate. William Gordon the defender, a