Mor. 4737.

1754.

GORDON v. HIS MAJESTY'S ADVOCATE.

JOHN GORDON, Esq., second son of Sir James Gordon of Park; - - *Appellant.*
HIS MAJESTY'S ADVOCATE, - - *Respondent.*

House of Lords, *4th February* 1754.

ENTAIL—FORFEITURE, ALIENS.—After a party was attainted for high treason, two sons were born to him abroad. And the forfeiture of his estate was declared to endure during the life-time of the attainted person and his issue male. A claim was lodged by a substitute heir of entail, after the death of the attainted person, but while his sons were still alive, for possession of the estate, on the ground that as the attainted person was now dead, and his sons aliens, and so incapable of succeeding, he was entitled to the estate. Held on a question of law raised by the judges in England, that as the sons were aliens, and so incapable of succeeding, the interest of the Crown had determined—reversing the judgment of the Court of Session.

SIR JAMES GORDON of Park made a settlement of his estate in the form of an entail, with a destination on himself, and after his decease on William Gordon, his eldest son, and the heirs-male of his body; and failing such heirs male, on the heirs male of Sir James' own body, with several other substitutions.

Upon Sir James Gordon's death, his eldest son William succeeded to his title and estate, but was attainted of high treason, and his estate forfeited to the Crown 1746.

The appellant preferred a claim to the estate as the next substitute called after the heirs-male of Sir William Gordon's body, and having no issue at the time of his attainder, the Lords of Session held that the barony of Park was forfeited to the Crown during Sir William's life only, and after his decease, that it goes to the appellant.

This judgment was appealed to the House of Lords, and so far altered as to hold that the estate remained forfeited to the Crown not only during Sir William's life, but so long as there remained any male issue of his body, and that then the estate devolved on the appellant, reserving his right to apply to the Court of Session for such order or direction in the premises as might seem just, on such right emerging. In applying this judgment of the House of Lords, it was afterwards discovered that Sir William Gordon, a colonel in the French service, died in Douay in France, without leaving any issue male of his body, except two sons born in France after his attainder; and the appellant, holding that as Sir William was now dead, and these sons were aliens, and so not entitled to inherit, that he was now entitled to possession of the estate as substitute. Accordingly, he petitioned the Court to that effect. Upon considering which with answers, the Lords pronounced the following interlocutor:—"The Lords having con-" sidered the petition of Captain John Gordon of " Park, with his Majesty's Advocate's answers there-" to, judgment of the House of Peers, and heard " parties, procurators thereon, they find, that Captain " John Gordon, the petitioner, has no right to enter " upon the possession of the estate of Park, during " the natural life of the sons of Sir William Gordon, " attainted; and that the estates belonging to Sir " William Gordon and his sons, being entirely for-" feited by Sir William's attainder, the after existence " of a son or sons, though insisted on to be alien, cannot " cut off the Crown's right to make place for Captain " Gordon, so long as the sons live, who would have " succeeded to Sir William if he had not been attainted, " and thereupon dismiss the petition, and decern."

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Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant:—The sons of Sir William Gordon, though born abroad, would have been entitled to succeed by virtue of the statute 7 Anne, c. 5, as the children of a natural-born subject; but the father being attainted of high treason at the time of their birth, they must be considered by the statute 4 Geo. II. c. 21, as aliens to all intents and purposes. And as an alien, by the law of Scotland, is incapable of inheriting by descent, the children of Sir William Gordon being aliens have no right under the settlement made by their grandfather in 1713, and are therefore incapable of succeeding. It has been adjudged that by the forfeiture the estate is in the Crown only during Sir William Gordon's natural life and that of his issue male, and as he is now dead without leaving any male issue who can inherit, the appellant is entitled to succeed. Nor can the act 7 Anne, c. 5, benefit these two sons, because the act 4 Geo. II. c. 21 has declared that the act of Queen Anne should not naturalize any children born out of the legiance of the Crown, "whose fathers at "the time of the birth of such children were liable to "the penalties of high treason or felony." And as by 4 Geo. II. c. 30, those who enlist in foreign service are declared to be guilty of felony, their father was guilty both of high treason and of felony at the time of their birth, he having died in the service of a foreign state.

Pleaded for the Respondent:—The judgment on the appellant's former claim has settled the duration of the forfeiture to be "during the life of Sir William "Gordon, and the continuance of such issue male of "his body as would have been inheritable to the

"said estate tailzie in case he had not been attaint-"ed;" and as it seems admitted, that if he had not been attainted, these sons would have succeeded, the appellant is not entitled to succeed so long as there is issue male of Sir William's body. They are still alive, and not prevented from inheriting, by the mere fact of their birth in a foreign country after their father's attainder. In other words, they are not cut off from inheriting on the ground of their being aliens, but solely because of their father's attainder. Under the latter they lose their right to inherit, but the former circumstance could not deprive them of the benefit of the Act 7 Anne, c. 5, which expressly allows children born abroad, of natural-born subjects, to enjoy the right of natural-born subjects to all intents and purposes whatsoever.

After hearing counsel, the following question of law being stated and proposed to the judges, viz:—

"Tenant in tail male of the lands in England, with remainder over, is attainted of high treason, and the estate tail thereby forfeited to the Crown. After the attainder, tenant in tail has issue male, born in foreign parts out of the legiance of the Crown of Great Britain, and dies leaving such issue male."

Question:—"Is the estate or interest in the lands which was forfeited to the Crown as aforesaid, continued or determined?"

The Lord Chief Baron of the Court of Exchequer delivered the unanimous opinion of the judges present:—"That the estate or interest in the lands so forfeited to the Crown as aforesaid, is determined."

Whereupon, and upon due consideration had of what was offered on either side of this cause, it is

Ordered and adjudged that the said interlocutors

complained of in the said appeal be, and the same are hereby, reversed. *And it is hereby declared and adjudged, that, in the event which has happened, the appellant has right to the estate and Barony of Park according to the substitution to the heirs male of the said Sir James Gordon's body, mentioned in the judgment of this House of the* 21*st of May* 1751. *And it is hereby ordered, that he be allowed the benefit of such rights, and that it be remitted to the Court of Session in Scotland to make such order, and to proceed in such manner for putting the appellant in possession of the premises, and also concerning the profits thereof, accrued since the death of the late Sir William Gordon, the person attainted.*

For Appellant, *A. Hume Campbell, C. Yorke.*
For Respondent, *D. Ryder, William Grant, William Murray.*

Note.—Vide first branch of this case, Craigie *v.* Stewart, p. 508. As the grounds of the decision in that branch of it are not given, they are here inserted.

Lord Chancellor (Hardwicke),—" I am sorry to be obliged to differ from the unanimous decree of the Supreme Court in Scotland, so much entitled to our respect. But the learned senators of the College of Justice are not very familiar with our law of treason which has been introduced into their country, and they may unconsciously be inclined to adhere to the law which they had to administer before the Union. I do not see how the attainder of the heir of tailzie in possession can be considered as equivalent to his death without issue. He is not a mere tenant for life; he is the 'fiar:' the fee is in him, and our doctrine of remainders and reversions does not strictly apply;—so that, on a rigid construction of the 7 Anne, c. 21, on his attainder, there is room for contending that there ought to be an absolute forfeiture to the Crown of the entailed lands, to the entire extinction of the rights of all substitutes in the entail. But the milder interpretation of the act will be to hold that the heir of tailzie has in him,

and forfeits by his attainder, the same interest as tenant in tail in England—so that upon his attainder the Crown takes the lands during his lifetime, and while there exists issue who would take by descent through him—leaving other substitutes in the entail unaffected. I would, therefore, advise your Lordships, reversing the interlocutor appealed against, to declare that the barony of Park is forfeited to the Crown during the life of Sir William Gordon, and during the existence of issue male, who through him would be inheritable thereto—but that upon his death and the extinction of such issue, the remainder in favour of the respondent, Captain James Gordon, will take effect."*

Lord Chief Baron (Parker,)—" My Lords, At common law estates in fee simple, whether absolute or conditional, were forfeited for treason. By the statute of the 13 Edw. I., (commonly called the statute of De Donis,) the forfeiture of lands entailed even in case of treason was taken away; the reason of which will be best collected from the words of the statute, 'Quod 'voluntas donatoris, secundum formam in charta doni sui, de 'cetero observetur; ita quod non habeant illi, quibus tenemen-'tum sic fuerit datum sub conditione, potestatem alienandi tene-'mentum sic datum, quo minus ad exitum illorum quibus te-'nementum sic fuerit datum, remaneat post eorum obitum, vel 'ad donatorem, vel ad ejus heredem (si exitus deficiat) rever-'tatur.'

" Therefore, my Lords, the will of the donor, according to the form expressed in the deed of gift, was to be observed; so that they to whom the land was given under such conditions, should have no power to alien it, but that it should remain to their issue after their death, or should revert to the donor for want of issue.

" By the express words of the statute they could not alien, by construction they could not forfeit or charge; and the express and constructive restraints stood upon one and the same reason, which was, That either alienation, forfeiture, or charge, was inconsistent with, and would have defeated, the provision and intent of the statute.

" And the reason given by the counsel for the respondents, in the original appeal, That entailed lands were not forfeitable for treason, because they were unalienable is not well founded; because they were alienable when they were not forfeitable for treason.

" For notwithstanding the strong words in the statute De Donis,

* Lord Campbell's *Chancellors*, vol. v. p. 61.

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in Taltarum's case, in the 12 Edw. IV. an alienation of entailed lands by a common recovery obtained judicial allowance, and has been so practised ever since; and by the 4 Henry VII. they might be aliened by fine with proclamations; and yet the statute De Donis protected them from forfeiture for treason till the making of the statute of the 26 Henry VIII. c. 13.

"By that statute, lands entailed became forfeited for treason under these words, *all such lands, tenements, and hereditaments, which any such offender shall have of any estate of inheritance;* and the reason was, because this statute, being subsequent to the statute De Donis, repealed it in this case: and the construction that these words should operate upon entails, was extremely right, as they otherwise could have no operation at all, because all other estates of inheritance (as I have shown already) were forfeited for treason by the common law.

"I will now show your Lordships that entailed lands, though unalienable beyond all question, were yet forfeited to the Crown for treason. If the king made a gift in tail, saving the reversion to himself, the attainder of treason of such tenant in tail did not bar his issue; because the statute of 34 Henry VIII. c. 20, enacts, That the heir of entail in such case shall have the lands; any recovery, or any other thing or things hereafter to be had, done or suffered by or against such tenant in tail, to the contrary notwithstanding.

"Which act coming after the 26 Henry VIII. that gave the forfeiture of lands entailed, was a repeal of that statute, and a restitution of the statute De Donis in this special case.

"But the statute of the 5 & 6 Edw. VI. cap. 11, enacts, That every offender being lawfully convicted of any manner of high treason according to the course and custom of the common law, shall lose, and forfeit to the King's Highness, his heirs and successors, all such lands, tenements, and hereditaments, which any such offender or offenders shall have of any estate of inheritance, in his own right, in use or possession, within this realm of England, or elsewhere within the King's dominions, at the time of such treason committed, or at any time after.

"This act coming after 34 Henry VIII., has repealed it *pro tanto,* and made lands of the gift of the Crown in tail, subject to forfeiture for treason as well as other lands entailed. This has been taken to be law from the time of making the act; and there is no colour for the observation made at the bar, That it depended singly on Lord Hales' opinion; though if it had done so the authority would have been very great. I now proceed

to the most material act for your Lordships' consideration on this occasion, the Act of the 7 Queen Anne, cap. 21, for improving the Union of the two kingdoms.

"This act recites the benefit that would accrue to the United Kingdom from the provisions of it. Enacts, That such crimes and offences which are high treason or misprison of high treason within England, shall be the same in Scotland, and no other.

"And that the offenders shall be indicted and tried in the same manner as in England; and that all persons convicted or attainted of high treason or misprison of high treason in Scotland, shall be subject and liable to the same corruption of blood, pains, penalties, and *forfeitures*, as persons convicted or attainted of high treason, or misprison of high treason, in England: provided always that where any person now is, or shall be before the 1st of July 1709, seised of any lands, &c., in Scotland of an estate tail that is to say, an estate tailzie affected with irritant and resolutive or prohibitive clauses, and is or before the 1st day of July shall be married, if any issue of that marriage be living, or there be possibility of such issue at the time of the high treason committed; that then, and in such case, the said lands, &c., shall not be forfeited upon the attainder of such person for high treason, but during the life of the person so attainted only; so that the issue and heirs in tail of such marriage shall inherit the same, the said attainder notwithstanding.

"This act, by reference, re-enacted, and extended to Scotland, all the laws of England concerning treason which were then in force as strongly and effectually as if they had been transcribed into the body of it; and as at the time of making the act, all the estates of inheritance were and still are forfeited for treason, we think upon the supposition in your question, that an estate tailzie, with prohibitive, irritant, and resolutive clauses, is an estate of inheritance, and that such an estate of inheritance is forfeited; for otherwise the forfeitures in England and Scotland would not be the same, though the act expressly requires they should be so.

"But it was objected by the learned counsel for the respondent, That by the Scotch Act, 1685, estates tailzie, with prohibitive, irritant, and resolutive clauses, were unalienable; and by the Scotch Act of 1690, it is provided, That no forfeiture should prejudge the heirs of entail therein mentioned, provided the right of entail was duly registered: from whence it was inferred that Sir William Gordon could only forfeit for his life.

"But, my Lords, we are humbly of opinion that the Act 7

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Anne being subsequent to these Scotch Acts, has repealed them *pro tanto,* in the same manner as the 5 & 6 of Edw. VI. repealed 34 Henry VIII. which made lands of the gift of the Crown in tail unalienable; and that this estate tailzie is therefore subjected to forfeiture, that the forfeitures throughout the United Kingdom may be the same.

"But it was objected by one of the learned gentlemen, That the third clause which gives the forfeiture would not have induced a forfeiture of this estate-tailzie, without the aid of the proviso; and that the proviso, which only imports an exception, ought not to extend the construction of the foregoing clause.

"But, my Lords, we are humbly of opinion that the clause which gives the forfeiture, would have induced a forfeiture of this estate tailzie, though the proviso had been omitted out of the act; and we agree, that the proviso ought not to extend the construction of the foregoing clause.

"But as the proviso is in the act, and the respondent's case is not the case described in the proviso, *exceptio firmat regulam in casibus non exceptis,* and greatly strengthens the construction we put upon the act.

"As to the reversion in fee, or clause of return, supposing that by the law of Scotland it was in Sir William Gordon at the time of his attainder, we think that to be so clearly forfeited, that it would be wasting your Lordships' time to attempt to prove it. But as to the substitution or limitation to the heirs male of Sir James Gordon, and the intermediate substitutions or limitations between that and the reversion in fee, upon the supposition in your Lordships' question, that no estate or interest was thereby vested in Sir William Gordon, we are humbly of opinion that no estate or interest derived under any of these intermediate substitutions or limitations is forfeited to the Crown by the attainder of Sir William Gordon; because the substitutes claim as persons described, and their estate or interest successively is to be considered as a new acquisition, which can be no more forfeited by the attainder of Sir William Gordon than a remainder limited after an estate tail in England can be forfeited by the attainder of the tenant in tail for treason.

"Besides, there is a saving in the Act of 26th Henry VIII. to all persons (other than the offenders, their heirs and successors, nd such persons as claim to any of their uses) of all such *right,* title, interest, &c., as they might have had if the act had not been made.

"And in the vesting act of the 20th of his Majesty's reign, there is a saving to all persons (except the forfeiting persons, their heirs, executors, administrators, and assigns, and persons claiming to their use, or in trust for them) of their estate, right, title, interest, trust, possession, reversion, remainder, and so on.

"And we are humbly of opinion that the saving words in these acts, and particularly the word *right,* are sufficient to preserve the several estates or interests of the substitutes in this settlement from forfeiture."

Lord Chancellor (Hardwicke) further explains the reasons of the judgment in a letter to Lord Kames as follows:—"That you may the more clearly see the grounds whereupon the House of Lords proceeded, I take the liberty to inclose a copy of my Lord Chief Baron Parker's argument in delivering the opinion of the Judges in the House of Lords upon the question proposed to them, together with a copy of their Lordships' order taken from the journal. I found some difficulty in stating my question, so as to avoid making the English Judges judges of the Scotch law, (which would have been highly improper,) and simply to refer to them the main point arising from the construction of the Act 7 Anne. For this reason I was forced to frame the question hypothetically, and to insert two suppositions of points merely of your law, reserved for the determination of the House, and which were determined by the opinion of the Lords, given in the debate, after the Judges had been heard. All the Lords concurred, that, by the law of Scotland, an estate tailzie with prohibitive, irritant, and resolutive clauses, is an estate of inheritance; and that by the same law no estate or interest in the lands was vested in Sir William Gordon by virtue of the limitation in the settlement of 19th October 1713, to the heirs male of the body of Sir James Gordon; though that would have been clearly otherwise by the rules of the law of England. The question put to the English Judges was reduced purely and simply to the construction of a statute of the Parliament of Great Britain, which it is equally the office of the King's Courts in both parts of the United Kingdom to expound; and every thing that could make a point in the Scotch law, was kept apart for the decision of the Lords, the proper Judges of it.

"To repeat the several reasons of the judgment in the cause of Park would swell my letter too much; but I will fling out two or three ideas.

"1. My foundation was the express declaration of the legisla-

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ture in the preamble of the Act 7 Anne, which is the basis of the subsequent enacting clause, 'That nothing can more con-'duce to improving the union of the two kingdoms, than that 'the laws of both parts of Great Britain should agree *as near as 'may be,* especially those laws which relate to high treason, 'and the proceedings thereupon, as to the nature of the crime, 'the method of proceeding and trial, *and also the forfeitures and 'punishment for that offence,* which are of the greatest concern, 'both to the Crown and to the subjects.'

"2. The enacting clause relative to this subject, is penned in words still more general, and therefore the question must be a question of construction and exposition, wherein, though the proviso immediately following cannot extend or superadd to the enacting clause, it must be allowed to explain and illustrate the meaning of the words.

"3. That judges are obliged to make that construction which will best attain the declared intent of the legislators, provided the words of the law will bear it; and therefore that such a construction as would produce the greatest equality between England and Scotland, in forfeitures for treason, must be the true construction.

"4. In this I felt the force of the difficulty arising from the difference between the nature of your strict Scotch entails with substitutions, and our English entails with remainders over, which you have so clearly explained, viz., That in the former every person called to the succession is considered as an heir, and has the fee in him; in the latter, the fee or estate in the land is broken and divided into distinct parts. But then I considered what was to be allowed as the consequence of this diversity between the two laws. Was a tenant in tail, although admitted to have an estate of inheritance descendible to his issue, to forfeit only for his life? or was every tenant in tail, by reason of being invested in the ideal fee, to forfeit not only for himself and his issue, but also for all the substitutes?

"Either of these would plainly destroy the equality in forfeitures professed to be established by the Legislature, and not only contradict the intent of the act, but also the express words of the preamble.

"The knot lay here. To avoid forfeiting the whole fee—for as your law places that fee in every tenant in tail, and don't admit of a division of it into particular estates and remainders, there was more colour from legal reasoning to carry it to *that large extent,* than to make a man who had a fee in him to forfeit

for his life only. But I could not satisfy my own mind that this *large extent* was either agreeable to the intention of the Legislature, or a just and equitable measure between the two nations.

"5. How was this to be avoided? By expounding the act by *analogy*. And if you will apply your usual penetration to this point, you will find that there is often no other possible way of making a consistent sensible construction upon statutes conceived in *general words*, which are to have their operation upon the respective laws of two countries, the rules and forms whereof are different.

"These general words will probably always be taken from the language or style of one of these countries, more than from the other, and not correspond equally with the genius or terms of both laws. You must then, as in other sciences, reason by *analogy*, or leave at least one half of the statute without effect. This head of the argument from *analogy* is not unknown in the law of England. It was long since established upon the statute, *De donis conditionalibus*, 13 Ed. I., which enacts, that a fine levied by tenant in tail shall be *ipso jure nullus*. Stronger words could not be found in the concise words of those ancient laws, to render such a fine an absolute nullity. But what said the Judges when they came to construe this act? They said, it should be construed by the reason of the common law, (i. e. by *analogy* to that law.) That the question was to create a disability in some persons, to alien to the prejudice of others, and the common law took notice of such disabilities; and, for that reason, a tenant in tail ought to be ranked with ecclesiastical persons seized in right of their churches, or husbands seized in right of their wives, who, by the common law, were disabled to alien to the prejudice of their successors or their wives. That therefore the fine should not be a nullity, and merely void, but should work a discontinuance, take away the entry of the issue, and drive him to his proper action to recover the land.

"There are other instances of the like nature in our law; but I am aware that to these it might be objected, that it was reasoning by *analogy* from one part of the law of England to another part of the law of the same country, which is not the present case. I think that doth not weaken the example.

"The rules of construction upon acts of Parliament are, in many respects, the same with those upon wills; and by the construction made in the case of Park, the words of the preamble of the Act 7 Anne, which is the key to the meaning of the legis-

lators, are strictly complied with, viz., 'That the laws of both 'parts of Great Britain should (as to forfeitures for treason) 'agree as near as may be." And the world must allow that the favourable side for Scotland was chosen."

"But though by this decision the like force is given to such substitutions in your tailzies as to English remainders, yet they are by no means turned into remainders to any other purpose, but are to be governed by the rules of the law of Scotland to every other effect; and therefore you express yourself with strict propriety when you say, that *by this judgment a remainder is introduced into our law with respect to forfeiture only*."—Letter dated 12th July 1757. Kames, El. p. 381.

[M. 14431.]

MRS KATHERINE MAITLAND, - *Appellant.*
MAJOR FORBES, (*et e. contra*,) - *Respondent.*

House of Lords, 12*th February* 1754.

ENTAIL—HEIR-FEMALE—SERVICE.—1. Held restrictions of entail only to apply to the heirs-female. 2. Also held, that a retour of service bearing that the party was served nearest heir of tailzie in general was good, though it did not mention to what estate, or by virtue of what deed of tailzie, and carried right to every subject in that character.

No. 105.

20th Jan. 1700.

SIR CHARLES MAITLAND of Pitrichie being seized of the lands of Pitrichie in fee-simple, descendable to heirs-general, executed an entail of this estate. By this deed of entail he resigned his lands in favour of himself in liferent, and to Charles Maitland, his only son, in fee, and the heirs-male to be lawfully procreated of his body, and the heirs-male of their bodies; which failing, to any other heir-male to be procreated of his own body; which failing, to the heirs-female to be lawfully procreate of the said Charles Maitland's body, and the heirs-male of