

1749. June 8. COUNT LESLIE *against* LADY FORBES.

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A foreigner cannot succeed to lands in Scotland without being naturalized.

THE succession to the estate of Balquhain being open by the death of Ernest Leslie, who died without heirs of his body, Count Antonius Leslie was preferred as heir of entail; and he, after getting into possession, having brought a reduction of a deed of alienation of part of the entailed estate made by Ernest, was opposed by the defenders with the following objection to his title, that he was a German born, and incapable, as being an alien, to hold lands in Scotland, or to pursue any action depending upon the property of land. To support this objection, the defenders appealed to the Roman law, and that of all modern nations, the English in particular. And to show that our law is the same, letters of denization were mentioned, of which great numbers are upon record; some of them bearing the following express clause, 'Non obstante quod extraneus existit, et quod bona mobilia et immobilia quorumcunque extraneorum, infra regnum nostrum decedentium, ad nostrum dispositionem pertinent.'

It was *answered* for the pursuer; That there is nothing in the feudal law to bar an alien from succeeding to land in Scotland, even though the alien should enjoy a feu in his own country; nothing more common than the same man holding feus of different superiors; and, which is more, nothing more common than to find one Sovereign Prince holding a feu of another. The laws which bar foreigners from holding land are altogether political; and accordingly we find them very different in different countries: in Germany and Italy no foreigner can hold land, whether by succession or purchase; the Princes there are jealous of having subjects more addicted to a foreign Prince by nativity, than to them by vassalage; in France, a powerful kingdom, and consequently less jealous of private enemies, a different political rule prevails, foreigners are allowed to purchase in France, but they neither have the power of making testaments, nor do their heirs succeed to them either in land or in moveables; the King is legal heir to all strangers. In Scotland no law nor instance can be given of foreigners being prohibited to acquire land, or to succeed; though, from the customs of other nations, the point has been doubted of by our lawyers; and it would require a very express law, or a very precise custom, to exclude the succession of foreigners. It is no hardship to debar them from acquiring; but it would need a very strong argument from utility to overbalance natural justice, by depriving an innocent man of his birth-right.

But whatever might be the opinion of lawyers in ancient times, all the political considerations that introduced this custom are now at an end. It might be proper to exclude foreigners from succeeding to land, while war was carried on by military vassals; and while there was little commerce among nations, there was little inconveniency felt. But now that commerce is become universal, and war carried on in a different manner, this constitution has run pretty

universally into desuetude. And if ever it was doubted in Scotland, there ought to be no doubt now, that foreigners may succeed.

As for letters of denization empowering foreigners to succeed, the most that can be made of these is, that the matter has been called in doubt; and they scarce amount to so much; for, in many of these letters, a privilege is granted to foreigners to dispose of their moveables at their death; and yet that foreigners always enjoyed this privilege was never doubted. But the case of all such grants is this; the letters were at any rate necessary to entitle foreigners to enjoy offices and dignities, and to entitle them to remain in the kingdom, which strangers may be expelled from at pleasure; and it was natural to throw in every privilege, whether competent to them before or not.

A hearing in presence being appointed, the pleadings took up three days. The Judges at last pronounced their opinion unanimously, that an alien or foreigner cannot succeed to land in Scotland; and, therefore, that the pursuer Count Leslie cannot insist in the present action. The many acts of naturalization of foreigners inclined them to be of opinion, that our practice did not differ from that of other countries. But what principally moved them was, the law of England, and the union. The English are jealous of communicating their privileges to foreigners, who are incapable to succeed to land in England; and it was thought hard, that, by the union, a door should be opened to foreigners, which is shut against them by the laws of England. But it may be doubted whether this argument be solid. A stranger purchasing or succeeding to an estate here, must be the King's subject *qua* vassal; but his holding that estate does not entitle him to all the privileges of a native; it entitles him only to the privileges consequent upon his property, such as holding courts, or levying rents; it entitles him not to be a member of Parliament, nor to vote for a member of Parliament; nor in general to any privilege which may be called personal, though limited to those who possess land.

Fol. Dic. v. 3. p. 231. Rem. Dec. v. 2. No 106. p. 201.

* * D. Falconer reports the same case :

PATRICK COUNT LESLY of Balquhain tailzied his estate 1696 to himself in life-rent, and George his second son, and the heirs male of his body, in fee, whom failing, to James his eldest son, and the heirs male of his body; providing that, upon the succession of any of the heirs to an estate possess by his brother Count Lesly in Germany, of which they had a prospect, the Scots estate should devolve on the succeeding substitute in the tailzie; and this settlement was renewed by a deed in the year 1700.

Ernest Lesly of Balquhain, descended of George, settled (1735) his lands of Inch and Bottom on himself and heirs of his body; whom failing, on James Gordon of Cowbairdy his brother uterine; and dying without heirs of that branch, left the estate to be taken up by the elder; whereupon a competition

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The question was decided, by judgment of the House of Peers, in favour of Count Antonius, who thereupon was served heir, and brought a reduction of the disposition to Cowbairdy, and infeftment taken upon it, as in fraud of the tailzie 1700, in which these lands were comprehended, though the investitures thereof had not been taken accordingly, but they remained a fee simple in Ernest Lesly.

Pleaded in exclusion of the action ; The pursuer is an alien, incapable of succeeding to, or taking lands in Scotland, or of pursuing any real action ; so that the defender is not bound to answer. This arises from the nature of civil society, by which the Sovereign has the *dominium eminens* over all the lands within his territory, and none is capable of private property therein without being his subject. Hence, by the Roman law, only citizens were capable of property, and the rule of the feudal law is *nemo potest esse ligius vassallus duorum dominorum* ; nor can any but a native subject be capable of holding a feu, Craig, l. 1., D. 14. l. 2. D. 18. § 14. & *sequentibus*, where he condescends on several nations where this is held to be law. In France foreigners are allowed to acquire, but cannot be succeeded to, unless by natives, nor succeed. In England so strictly are aliens excluded, that there was necessity for a statute, 25th Edward III. to enable the children of Englishmen born accidentally beyond seas to succeed to their fathers, Littleton, Sect. 198. and there Coke, as also in his Institutes, c. 1. and the case of Calvin, 6to James I. when Scotsmen born after the King's accession, as being born under the same allegiance, had allowed them the privileges of natives. Scotland has received the feudal law, and no instance can be given of any foreigner holding land there, without being naturalized ; of which there are many examples, both by letters patent from the King, and acts of Parliament : And King Charles I. 1629, gave to Heriot's Hospital the estate within the town of Edinburgh of William Adamson, an alien dead without heirs within the kingdom, which is still possess'd by them. The French nation were naturalized by act 65th, Parl. 1558, in regard that the King of France had naturalized the Scots. And the act of Parliament 1607, approving the articles of union then agreed on betwixt the Commissioners of England and Scotland, declares the English born since the death of Queen Elizabeth to be natural subjects of Scotland, agreeably to the English decision in Calvin's case ; and naturalizes those born before, on condition of the Parliament of England's ratifying the

articles, and granting the like freedom to Scotsmen. In 1633, several English gentlemen were naturalized by statute; as were others in 1707, just before the union; and since it, Agatha Vanderbent, wife of John Drummond, was naturalized *octavo Georgii*, and afterwards infeft in conjunct-fee with her husband in the estate of Quarrell. And, by the charters granted by K. Ja. VI. to the Earl of Stirling, and the other adventurers in the intended plantation of Nova Scotia, it is declared that persons to be born there should have the privileges of natives of Scotland.

Supposing that, by the law of Scotland, aliens were capable of acquiring lands, and becoming thereby subjects of Scotland; the case is changed by the union, by the fourth article whereof a communication of all privileges is granted to the subjects of the united kingdom; so that no person from thenceforth can be a Scotsman without being entitled to all the privileges of a native of England; which that people have been so tender of, as to leave several incapacities upon such as should be naturalized by act of Parliament.

Answered, The right of succeeding to ancestors is a consequence of property, which was granted to mankind in Paradise, before the constitution of civil society. From property flows the power of disposal; by express deed, or by presumption of the will to the nearest relations, whether of the same society or not. The Romans were in a continual state of war, they considered other nations as their enemies, and thence excluded them from property: and the nations who formed their constitutions upon the feudal law, looked upon their landholders as a standing military force; and upon that founded the maxim, that none could be a liege vassal of two Lords; and yet it must be admitted this is not impossible; since there is no doubt a foreigner may be made capable by a naturalization; and therefore the laws of any country may supersede that form, and admit them indiscriminately. Nations differ very much in their laws in this respect; so that it cannot be considered as a point of the law of nations, nor argued for as such, in a country which does not appear to have received it in practice; for it could not be determined which of the various constitutions of their neighbours ought to be received. In Italy foreigners cannot hold lands; in France they can take them, but cannot be succeeded to. The very maxim so much insisted on does not affect this case; for the pursuer is no liege vassal any where else, and is not so bound by his birth but that he may renounce his allegiance, and become wholly a Scotsman; *Huber de jure civitatis*, l. 2. § 2. c. 1. But indeed there is no need of this, since the feudal homage may be performed without his becoming a subject; so there is no danger of a foreigner by this means surreptitiously gaining the privileges of an Englishman, contrary to the English law; or if it shall be held, that holding lands in Scotland makes a man a Scotsman, then notwithstanding the objection, he must be a Briton, as the laws relating to private rights and succession were reserved to the Scots, by the articles of the union. All nations have softened the rigour of their ge-

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neral maxim against foreigners: The kings of England held great territories in France, and the Kings of Scotland in England, and many great families in this country have been notoriously of foreign origin. Circumstances are every where altered since the rule was framed; no nation depends on its landholders for defence, and the great intercourse that has been introduced by trade, requires the allowing strangers to acquire, especially in a country where they have not been hitherto excluded, as Craig testifies they have not, except the English, who were excluded from land by a statute, first enacted in the time of Robert I. in retaliation of a statute made by them, excluding the Scots; which being an exception, confirms the rule: But he mentions the case of an English bookseller who was succeeded to in moveables; and Mackenzie in his Observations on act 65, Parliament 8. of Queen Mary, says it was decided, 13th January 1575, in the case of Richardson, that strangers were admitted to succession; and the like upon act 7th, Parliament 2. Charles II. 13th January 1675; and Lord Stair, in writing a system of our law, takes no notice of this incapacity.

The letters and acts of Parliament prove nothing, being obtained for greater caution, or containing only a compliment; for they evidently grant powers competent to aliens without them, as the power of testing on their moveables.

Replied, Craig, as cited above, proves this point to be of the law of nations, and more expressly in his treatise of the succession to the Crown of England, Tit. of Foreign Birth; where, amongst others, he affirms this to be the law of Scotland; and the doubt he expresses in his book *de feudis*, of its being practised, has arisen from mistaking the act 7. Parliament 1. James III. excluding Englishmen from secular and religious benefices; for this relates only to ecclesiastical benefices secular and regular, which were every where given to foreigners by the Pope, and they therefore held capable of suing a real action in right of their benefice; so that this was a stronger step than excluding them from feus, which if it had not obtained by common law, would not have been omitted. Craig's testimony is, that lands have been taken from Englishmen; and as it appears there was no statute for that purpose, this proves the point in question. The two seeming decisions from Mackenzie are the same, the printer having by mistake put 1675 for 1575; and must have been concerning moveables, as lands had been taken from Englishmen, which this Richardson, by his name, appears to have been, and probably was Craig's bookseller. It is true that in France foreigners have been allowed to acquire, but the defender knows not if this can be without consent of the Crown, and apprehends it to have taken its origin from all real acquisitions being in the form of a grant: And the foreigners who have founded families in our own country, have either been naturalized, or got their estates by gift from the King, which has been held as a virtual naturalization.

Homage simply feudal cannot be due to a sovereign, who is entitled to liege homage from all his vassals; and therefore an alien is incapable of being a vassal,

otherwise than by becoming a liege man, which will entitle him to all the privileges of a subject; and though some Dutch lawyers have held, that a person can renounce his former allegiance, this has not been received by other nations, particularly the English; amongst whom Doctor Story, an Englishman born, who had never sworn allegiance, but was naturalized in Spain, having engaged in a conspiracy against Queen Elizabeth, was brought forcibly into England, and executed for high treason. Notwithstanding the exclusion of aliens, an exception has been received of foreign sovereigns, who nevertheless are capable of holding feus, as they owe no allegiance to any else; Craig on the said title of Foreign Birth: And it has always been received, that their superior, though a sovereign, shall be content with feudal homage from them, they being incapable of any other.

THE LORDS found, that by the law of Scotland an alien could not succeed to lands in that Kingdom without naturalization.

Reporter, *Drummore.* Act. *W. Grant, Ferguson, & R. Dundas.*
 Alt. *R. Craigie, Lockhart, & H. Home.* Clerk, *Clerk.*

D. Falconer, v. 2. No 66. p. 70.

** Kilkerran also reports the same case :

THE LORDS found That by the law of Scotland, an alien cannot succeed to lands, unless he be naturalized.

In no country whatever can an alien succeed to lands. In some countries an alien may hold, as in France, where he may acquire; but even there he can neither succeed nor be succeeded to: In England, and most other countries, he can neither hold nor succeed.

We have had no precedent in this country upon this point; but where we have neither statute nor custom to determine us we follow the feudal law, and, where that is silent, the civil law; and the judgment here given is agreeable to the one and the other. At the same time, though we have no direct statute, nor direct precedent to guide us, we have a strong evidence, even from statutes, to presume that such our law has always been understood to be, viz. The statutes naturalizing aliens, and giving them power to hold, succeed, &c. which suppose them capable of neither, till they are naturalized; and as naturalization was more frequently granted by charter and letters of naturalization by the Crown, whereof a great variety is upon record, they all concur to shew the sense of the nation. It may be true, that this would not be enough *per se*, as these statutes, charters, and letters of denization give at the same time a right to hold and dispose of moveables, which is competent to aliens, though not naturalized, by the custom of most nations, for the sake of commerce; and therefore the argument is not conclusive from naturalizations, especially as they have other effects, namely, to give the person the privilege of a subject, not to be ordered

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to depart out of the country, which, on some occasions, strangers are obliged to do; yet, so far they go, to presume the sense of the nation; and a variety of them were specified in this case.

The opinions of our lawyers also tend to support the same doctrine, particularly Craig, the only author who has *ex professo* wrote on the subject. It is true, that after he has laid down the doctrine of the feudal law, and civil law, and laws of most nations, as excluding aliens from succeeding or being succeeded to, he speaks with some uncertainty as to our custom. *Vide* Lib. 1. Dieg. 8. *De his qui feudum acquir. poss.* which can be no otherwise accounted for, but that being at that time a great advocate for the succession of the King of Scotland to the Crown of England, he appears unwilling to admit the law of Scotland to stand so, though according to his own general rules laid down in his Dieg. 6. Book 1. *Quo jure Scoti hodie utuntur*, he fell to have pronounced the law of Scotland to stand so. But having afterwards got a clearer light into that controversy, and become satisfied that the succession to kingdoms stood upon a different footing from that of the succession among subjects, and upon which distinction he puts his argument in his book, thereafter, *ex professo*, written upon the King of Scotland's right to succeed to the Crown of England, against Parsons the jesuit, who assumed the name of Dolman, he in plain and strong terms asserts, that with us, aliens neither do succeed, nor are succeeded to, L. 1. Cap. 2.

And *lastly*, Now that by the Union, communication of trade is granted to all the subjects of Scotland; and that by the law of England it is undoubted that an alien cannot succeed; it would be absurd, for the first time, to find he could succeed in Scotland; whereby an alien might, by possessing a bit of ground in Scotland, be entitled to the communication of trade as a British subject.

Kilkerran, (FOREIGN.) No 6. p. 207.

S E C T. II.

What Caution exigible from Foreigners in law suits.—How far their Attornies liable for them.

1716. *January 6.* EDWARD PEARSON *against* JAMES MAXWELL.

No 3.

A foreigner being arrested in jail on a caption, of-

MR EDWARD PEARSON being arrested in the tolbooth of Edinburgh, on a caption raised upon an accepted bill of exchange, he offered a bill of suspension on sufficient caution, which was passed; but thereafter offered a new bill upon