SECT. VII.

Effect of Attainder of the Institute, or Heir of Entail.

No 59.
An heir of entail was declared to be attainted, if he should not surrender within a certain time. During the currency of that time, the Lords, on a petition for a substitute, ordained the entail to be recorded.

1746. *June* 25. EBENEZER OLIPHANT Supplicant.

JAMES OLIPHANT of Gask, with consent of Laurence Oliphant his eldest son, in the year 1719, made a tailzie of the estate of Gask.

Ebenezer Oliphant, goldsmith in Edinburgh, one of the substitutes, gave in a petition on the 4th instant to have it recorded, which was ordered to be intimated to the first institute and substitutes prior to the petitioner.

This was done to Gask at his dwelling-house; but before the report of the intimation, an act of attainder was past, in which he was comprehended.

The petition was ordered to be intimated to the Crown Lawyers, who objected to the recording, for the Crown had gained a *jus quæsitum* by the act, in consequence whereof Gask stood attainted from the passing thereof, if he should not deliver himself up within the time prescribed.

THE COURT were of opinion, That as it might happen the attainder might never take effect by his surrender, and either being acquitted on trial, or dying without trial, in either of which cases the recording would certainly be effectual to save the estate to the heirs against posterior contractions, the tailzies ought to be recorded, and ordered accordingly.

Pet. *D. Græme.* Alt. *Sollicitores.*

Fol. Dic. v. 3. p. 233. D. Falconer, v. 1. No 123. p. 151.

No 60.
An heir of entail who was prohibited from alienating, contracting debt, or altering the succession in prejudice of the substitute heirs, being attainted for high treason, it was found, that the estate

1750. *November* 16. CAPTAIN GORDON *against* The KING'S ADVOCATE.

SIR JAMES GORDON tailzied his barony of Park to himself; and after his decease, to William Gordon his eldest lawful son, and the heirs male of his body; which failing, to the heirs male of his own body; with other substitutions, and the ordinary clauses.

Sir William Gordon the first heir granted an annualrent out of the lands of Tilliernoch, and sasine thereon; after which, engaging in the rebellion, he was attainted.

Captain John Gordon, his brother, claimed the estate, for that he, being only an heir of tailzie, without power of alienation, could forfeit no more than was in him, an estate for life; and besides for that, by charging the estate with an heritable debt, contrary to the prohibitions of the tailzie, he had before his

forfeiture, irritated his right; which it was competent to the claimant now to declare; the rather as he was abroad in the King's service when the irritancy was incurred, where he continued without knowing it till after Sir William's forfeiture.

Pleaded for the Claimant; Tailzies, with irritant and resolutive clauses, were introduced by practice into the law of Scotland, and found effectual by judgment in the case of Stormonth, 26th Feb. 1662, *voce* TAILZIE, after which they were confirmed by act 22d, Parl. 1685, with a saving however to the King of confiscations and fines; afterwards, in consequence of the declaration of the Estates at the Revolution, it was enacted by act 23d, Parl. 1690, That no heir of tailzie should be prejudged by the forfeiture of his predecessor; and thus the law stood, till 7mo Annæ it was enacted, That persons convicted or attainted of high treason in Scotland, should be liable to the same forfeitures as such persons in England.

As there is not in England any estate descendible to a series of heirs, without their power of alienating, but subject to an irritancy of their right, upon their doing any deed, which, were it not for that irritancy, would import an alienation, such as the tailzied estates in Scotland, there can be no statute forfeiting any such estate, nor any precedent regarding it; and the question must necessarily be determined by the analogy of law. By the law of England, all estates were anciently held in fee-simple, pure or conditional, alienable and subject to forfeiture; that is, an estate granted to a man and his heirs, was but in him an estate for life, revertible to the donor, till he had heirs, and then he could alienate and forfeit, Coke, 1. Inst. F. 18. B. 19. A. And in like manner an estate to a man and his wife and their heirs, after possibility of issue extinct, could not be alienated nor forfeited, IBIDEM, F. 27. B. Littleton says, 'tenant 'in tail is by force of the statute, Westminister, 2. c. 1.; for before the said sta- 'tute all the inheritances were fee-simple; for all the gifts which be specified 'in the said statute, were fee-simple conditional at the common law.' On which Coke says 'here fee-simple is taken in its large sense, including as well 'conditional or qualified, as absolute, to distinguish them from estates in tail, 'since the said statute; before which statute, if land had been given to a man, 'and the heirs-male of his body, the having of an issue-female had been no 'performance of the condition; but if he had issue-male-and died, and the issue- 'male had inherited, yet he had not had a fee-simple absolute; for if he had 'died without issue-male, the donor should have entered, as on his reversion. 'By having of issue, the condition was performed for three purposes; 1*st*, To 'alien; 2*dly*, To forfeit; 3*dly*, To charge with rent.' Estates tail were introduced by the said statute Westminster, 2. *de donis conditionalibus*, whereby a tenant in tail was deprived of the power of alienating, in prejudice of his own issue, and of the donor's implied reversion; and thereupon it has been always held that he could not forfeit. Coke, 2. Inst. F. 224 B. says, 'but the tenant 'in tail had not only *potestatem alienandi*, but *foris faciendi*, &c.; for, if after

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was forfeited during the life of the attainted person only.

It was maintained by the heirs substitute, that the attainted person having incurred an irritancy previous to his forfeiture, the Crown had no right even to a liferent.

The Lords found, that this alleged irritancy not having been declared before the forfeiture, it could not be pleaded to exclude the forfeiture.

Upon appeal to the House of Lords it was found, that the estate was forfeited during the life of the person attainted, and of such of his issue male as would have been entitled to possess if he had not been attainted.

The attainted person having thereafter died, leaving two sons born abroad, it was pleaded for the heir substitute, that these sons being aliens, and so incapable of succeeding to the estate, he ought to be put in possession.

No 60.
The Lords found, that the estate having been entirely forfeited, the after existence of a son or sons, insisted on to be aliens, could not cut off the Crown's right, so long as these sons lived who would have succeeded if their father had not been attainted. This last judgment was reversed on appeal.

'issue had, he had been attainted of treason, the land entailed had been for-'feited; and thereby the donor barred of the possibility of reversion; and *foris* '*facere* is *alienum facere*; and therefore in this act is included in these words, '*potestatem alienandi*.' The same author, explaining the act 25th Edward III. and the forfeiture of the offenders lands and tenements thereby enacted, says, 'it extends not to lands in tail, saving only for the life of the tenant in tail,' 3. Inst. p. 19. A. And the like on the statute 27th Edward I. of *præmunire*. Hales, H. P. C. v. 1. c. 23. fol. 240. agrees, That forfeiture of estates in tail was taken away by the statute *de donis*; and that the general words in the 25th Ed. III. did not repeal it; and c. 24 § 3. f. 284. gives his opinion, That a person disabled to alienate is disabled to forfeit: For whereas by the laws made by Henry VIII. a bishop attainted, forfeited the lands of his church, though he held them *en autre droit*, he says, That to his day such attainder does not forfeit the lands of any sole ecclesiastical coporation, because the statutes of the 1st and 13th Elizabeth, disabling them to alien their possessions, disable them to forfeit: From all which it appears, that as an heir of tailzie by the Scots law cannot alienate his estate, so neither can he forfeit it; and so was found several times on occasion of the rebellion in 1715, particularly 25th October 1721, by the Commissioners with regard to the estate of Coul; and by the Court of Delegates, on the claim of Mr Henry Maul to the lands of Ballumby.

Pleaded for the King's Advocate; All estates were once fee-simple, and forfeitable; fees-simple conditional, before existence of the condition, and after possibility of issue extinct, being considered only as estates for life; so that there could be no question concerning the donee's power over them. The statute *de donis* introduced estates in tail, prohibiting alienation; and these have been held not forfeitable, not as any consequence of their being unalienable, or of any general rule established, but by interpretation of the statute, which prohibiting alienation, to forfeit was said to be to alien, and comprehended: Which interpretation was not approven of by Lord Hobart, who, in his Reports, 340, Shefield *versus* Radcliff, when the hardship of construing the general words of the 26th Henry VIII. was objected, said, 'If a man would recriminate, judge whe-'ther the statute of entails itself, did not gain upon the King an exemption 'from forfeitures for treason; for there is not a word of treason, nor of any kind 'of forfeiture, only *non habeant potestatem alienandi*, as if they had sought only 'to save estates tail from grants or sales; for Edward I. was too wise and mag-'nanimous a Prince to have given assent to a plain statute, that the estates 'that then were subject to forfeiture for treason, should be exempted by a new 'name of entail, though in effect the same estate as was before, that is, a fee-'simple conditional.' That there was no consequence from alienation to forfeiture, appears from this, that when estates tail become alienable, by the device of recoveries, approven of by resolution of the Judges, 12th Edward IV. and by the act 4th Henry VII. concerning fines, yet these estates, being once reckoned not subject to forfeiture, continued so, till it was enacted 26th Henry

VIII. That offenders in treason should forfeit all lands, &c. which they had of any estate of inheritance; by which law, Hales says, H. P. C. v. 1. f. 240. & 241. lands entailed are forfeited: And not only so, but what shows the inconclusiveness of the claimant's arguing, lands held *en autre droit*, as by beneficiaries, and by husbands in right of their wives, were forfeitable in virtue of this act, till it was otherwise determined by statute 5th and 6th Edward, Hales, f. 252. & 253. And there is yet an example, to wit, of an estate tail, with reversion to the Crown, created in virtue of an act 34th Henry VIII. which is unalienable; and yet by the act 5th and 6th Edward VI. c. 11. lands in the gift of the King in tail are forfeitable, Hales, f. 243. & 244. The same forfeitures are introduced by the act *7mo Annæ* in Scotland as in England, and tailzied estates are estates of inheritance, taken up by service and retour, wherein the possessor has an interest, considerably greater than in an estate for life; and indeed every thing competent to a proprietor, except in so far as he is limited by the entail, which may be more or less; and this act provides, that if any person then possessed of a tailzied estate, should be married at the time of the commencement thereof, he should not forfeit in prejudice of the issue of the said marriage; whence it follows, that in other cases tailzied estates are forfeitable. No 60.

Replied, The observation, that estates tail were not immediately looked upon as forfeitable, upon their becoming alienable, till made so by act of Parliament, only shows the English were tender in subjecting estates to forfeiture, that had once been looked upon as exempted; but it was in consequence of the power of alienation that the statute subjected them; and so when the general words of that statute seemed to comprehend certain unalienable estates, this was soon remedied by subsequent acts, and the analogy of the law preserved; neither is there, at present, any estate which can be forfeited and not alienated. And Hales is single in his opinion touching estates with reversion to the Crown; he says, That these being estates of inheritance, were made forfeitable by 26th Henry VIII., but that 34th Henry VIII. making them unalienable, was, in so far as regarded them, a restitution of the statute *de donis*, and exemption of them from forfeiture; to which they were again subjected by 5th & 6th Edward VI. comprehending all estates of inheritance; now as the exemption by the act 34th Henry was made by implication, in as much as they hereby were made unalienable, so the same implication ought to exempt them from the general words of the subsequent law; and thus the general words in 25th Edward III. were held not to derogate from the statute *de donis*. Hales here cites a report from Dyer, where such an estate was found forfeitable; but it proceeded on an attainder 20th Henry VIII. confirmed in Parliament 30th of that King; and these estates were only made alienable by an act in the 34th; before which they were forfeitable by 26th, on which the Judges laid their opinions, Dyer, f. 332. B. 16. Elizabeth. Besides, these estates, if forfeitable, are particular in their nature, being unalienable, to save the reversion to the Crown, and the forfeiture is to the Crown. Tailzied estates, after the Scots form, are

No 60. not comprehended under the general word, estate of inheritance; which could not signify an estate of which there was none, nor none could be created in England. It was equivalent as if all particular estates had been reckoned up, which would not have taken in tailzied estates. This is a technical term of the English law, not of the Scots, and is not applicable to any Scots estate; and the exception of tailzies in favour of the issue of marriages then subsisting, does not conclude that other tailzied estates are not exempt, if they otherwise are; and whether they are or not, must be determined by analogy, and applying the general rule.

Observed on the Bench, That though estates of inheritance did comprehend tailzied estates, yet that 33d c. 2. Hen. VIII, making them forfeitable, contained a salvo for all such remainders, which any person other than the person attainted, should have had in the estate of inheritance so forfeited. This claimant being called to the estate after Sir William and his heirs-male, had in him what in England was called the right of remainder, which was salved to him by this statute.

Answered, Substitute heirs of entail are entirely different from those, who, by the English law, have the remainder of an estate; they are heirs of the first institute, to whom they must serve; and this topic would reach too far, as it would secure an estate to substitutes in a simple destination.

Replied, It is not here to be considered how titles are made up, (in England, taking up estates by services, or inquisitions *post mortem*, is gone into disuse) but what an heir substitute is. He takes an estate after failure of the institute and his heirs; and so does he who is in the remainder; neither would this profit the substitute in a naked destination; for the institute there differs from a tenant in tail, in that the substitute is liable for all his deeds; but the tenant in tail has in him an estate, of its own nature unalienable, although he has it in his power to reduce it to a fee simple.

Pleaded for the Claimant, The act 20th of the King, vesting in his Majesty the forfeited estates, that no person having any estate, right, title or interest in law or equity, into or out of any of them, might be in any respect prejudiced, enacts, That all persons having any estate, &c. right, &c. remainder, &c. affecting, or which was binding on the forfeiting persons, and might have affected their estate, should claim and have redress as directed by the act; Sir William Gordon had incurred an irritancy by the terms of the tailzie, whereby the estate belonged to the claimant; and this right was binding on the forfeiting person, and might have affected his estate; and so was found by the Lords of Session, in the case of Cassie of Kirkhouse, and Grier of Lag, *voce* Irritancy; which judgment being reversed for want of jurisdiction, the like was pronounced by the Commissioners of Enquiry; and the like by the Court of Delegates on the claim of the Earl of Kinnoul to the estate of Cromlix.

Pleaded for the Advocate, It does not appear that the lands of Tilliernock were any part of the tailzied estate; but supposing they were, irritancies by the

law of Scotland do not *ipso jure* annul the incurrer's right, but must be made effectual by declarators; and therefore all deeds by the irritator, which by the tailzie were in his power, done after the irritancy, and before declarator remain good, Stair, b. 4. t. 18. § 6. and 7. Craig, l. 3. d. 6. § 17, puts the case of a declarator of recognition, obtained before conviction of treason, for a fact committed before the declarator, and prefers the fisk: And an exception being presented by Assint, for evicting the estate of Seaforth, after the forfeiture, for that it had belonged to him as protestant heir, and not to Seaforth a papist, which was sustained by the Lords of Session; the judgment was reversed by the House of Peers. Kirkhouse was entitled to the estate in virtue of the salvo in the act *7mo Annæ*, in favour of the issue of marriages then subsisting, though the judgment was wrong in some respects; and there were many circumstances in the case of Grier of Lag, which would have made the declarator of irritancy a favourable plea, if pursued against the incurrer: If this plea were to be sustained, the benefit would not accrue to this claimant, but the son of the late Sir William Gordon. No 60.

Replied, The claimant's delay in raising this action, ought not to be objected, considering his circumstances before mentioned; and the act reserves his right. Craig wrote when the laws concerning forfeiture were very severe. Assint could not prevail in his claim, being protestant heir to the Countess of Seaforth, who held in trust for the forfeiting person; the claimant was nearest heir when the irritancy was incurred, and his claim entered; and there is yet no evidence Sir William has any son.

'THE LORDS found that Sir William Gordon, the person attainted, being, by the entail, disabled from alienating the estate, charging the same with debts, or altering the course of succession in prejudice of the claimant, and of the other heirs of tailzie, or from otherwise hurting or impairing their right or title to the said estate after his death, in any way or manner whatsomever; that therefore the estate and barony of Park was, by Sir William's attainder, forfeited to the crown, only during his life; and found that the said claimant had right to the said estate and barony of Park, after the death of the said Sir William Gordon. And also found, that the irritancy alleged to have been incurred by Sir William Gordon the attainted person, not having been declared, nor no advantage taken of it before the forfeiture, that the forfeiture could not be over-reached, or excluded on pretence of that irritancy.'

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

'1751. *Dec.* 6.—CAPT. JOHN GORDON, on the attainder of Sir William his brother, claimed his estate of Park, as in that case falling to him, in virtue of the entail made by Sir James Gordon their father, and the LORDS having thereon found, as is fully related in observing the decision in that case, 16th November 1750, both parties appealed; and the judgment of the House of Peers was *verbatim* as follows, "*Die Martis* 21st *Maii* 1751, The order of the day being read, for taking

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into further consideration the case upon the original appeal of his Majesty's advocate for Scotland, complaining of the former part of an interlocutor of the Lords of Session in Scotland, of the 16th November 1750, to which appeal John Gordon, Esq; second son of Sir James Gordon of Park deceased, is respondent; as likewise of the cross appeal of the said John Gordon, complaining of the latter part of the said interlocutor, to which appeal his Majesty's said advocate is respondent; and for the Judges to deliver their opinion on the following question, viz. supposing that by the law of Scotland an estate tailzie, with prohibitive, irritant and resolutive clauses, is an estate of inheritance; and supposing also that, by the law of Scotland, no estate or interest was vested in Sir William Gordon, by virtue of the limitations in the settlement of 19th October 1713, to the heirs-male of the body of Sir James Gordon; what estate and interest in the barony and lands in question was forfeited to the Crown, under the limitations of the said settlement, by the attainder of Sir William Gordon? Whereupon the Lord Chief Baron in the Court of Exchequer accordingly delivered the unanimous opinion of the Judges, as follows, viz. That the estate and interest in the barony and lands in question, which was forfeited to the crown, under the limitations of the said settlement, by the attainder of Sir William Gordon, was not only during the life of Sir William Gordon, but so long as there shall be any issue male of his body, which would be inheritable to the estate tailzie, in case he had not been attainted; and that the reversionary interest in the fee thereof, limited by the settlement to the heirs and assignees whatsoever of the said Sir James Gordon, on failure of the heirs-male of the body of Sir James Gordon, was also forfeited; supposing that, by the law of Scotland, such reversionary interest was in Sir William Gordon at the time of his attainder.'

'And after debate, and due consideration had on what was offered by the counsel on both sides in this case, at the bar, on Tuesday, Wednesday and Thursday last, it is ORDERED and ADJUDGED by the Lords Spiritual and Temporal in Parliament assembled, that the first part of the said interlocutor, whereby the LORDS of Session found, 'That Sir William Gordon, the person attainted, being by the entail disabled from alienating the estate, charging the same with debts, or altering the course of succession in prejudice of the claimant, and the other heirs of tailzie, or from otherways hurting or impairing their right or title to the said estate after his death, in any manner of way whatsoever; that therefore the estate and barony of Park is, by Sir William's attainder, forfeited to the Crown only during his life; and found that the said John Gordon the claimant hath right to the said estate and barony of Park, after the death of the said Sir William Gordon,' be, and the same is hereby reversed. And it is further ORDERED and ADJUDGED, that the latter part of the said interlocutor, whereby the LORDS of Session found, 'That the irritancy alleged to be incurred by Sir William Gordon the attainted person, not having been declared, nor any advantage taken of it before the forfeiture cannot be over-reached or excluded, on pretence of that irritancy;' be, and the same is hereby affirmed: And it is

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also hereby ADJUDGED and DECLARED, that Sir William Gordon the person attainted, being under the settlement made by his father Sir James Gordon, dated 19th October 1713, seized of an estate tailzie, in the barony and estate of Park, notwithstanding such tailzie was affected with prohibitive, irritant and resolutive clauses, the said barony and estate of Park did, by virtue of the statute of the 7th year of the reign of Queen Anne, chap. 21, become forfeited to the Crown by the said Sir William Gordon's attainder, during his life; and the continuance of such issue male as would have been inheritable to the said estate tailzie, in case he had not been attainted; and also for such estate and interest as was vested in, or might have been claimed by, the said Sir William Gordon, by virtue of the last limitation in the said settlement, to the heirs and assignees whatsoever of the said Sir James Gordon, after all the substitutions therein contained shall be expired and determined; and that by virtue of the substitution to the heirs-male of the said Sir James Gordon's body, of his then present marriage, the respondent John Gordon hath right to succeed to the said barony and estate of Park, after the death of the said Sir William Gordon, and failure of such issue male of his body as aforesaid, according to the limitations in the said settlement; and it is further ORDERED that liberty be reserved to the Crown, and also to the said John Gordon, and any other person that may become entitled to the said barony and estate of Park, by virtue of any of the said substitutions, to apply to the Court of Session for such further order and direction in the premises as shall be just, as often as any new right shall accrue to them respectively, in consequence of any of the substitutions or limitations of the said settlement.'

Sir William died, leaving two sons born after his attainder, in foreign parts; and Captain Gordon gave in a petition, praying to be put in possession of the estate, as his brother's children, being aliens, were not capable to succeed thereto; so that he, by his right of remainder, came now to be tenant in tail.

Answered, By the judgment of the House of Peers, he has no right, so long as there remains any such male issue of his brother as would have been inheritable to the said estate tailzie, in case he had not been attainted; if Sir William had not been attainted, his children, though born abroad, would have been no aliens, by the general act of naturalization *septimo Annæ*, and the act explanatory of it, 4th Geo. II, consequently they would have been inheritable to the estate; and the estate being forfeited, so long as any such exist, the Captain's petition ought to be refused.

Pleaded for the Claimant, The judgment finds the estate forfeited during the subsistence of such issue male, &c. supposing there might be issue that would not exclude the claimant; and yet, by the sense put upon it by the respondent, there could be no issue male that would not exclude him; by the law of England he is inheritable or has inheritable blood, for the terms are synonimous, who can succeed to any estate, which an alien cannot; but the son of an attainted person, as such is inheritable, for he succeeds to his mother's relations; if a man attainted have a son, and being pardoned, have another, the first, if

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no alien, bars the succession of the second, because he has inheritable blood, though he cannot succeed to his father, his blood being corrupted by the attainder, and so the succession is escheat; but if he is an alien, he has no inheritable blood, is not reckoned upon in the succession, which is open to the second son, whose blood is not corrupted, Coke 1. Inst. f. 8. Levinx 2. Reports, p. 59. Before the act *7mo Annæ*, the children of natural subjects, born without the liegiance of the King were aliens; by that statute it is enacted, That all such children should be deemed and taken to be natural born subjects of this kingdom; and by 4th Geo. II, that nothing in that statute should extend to make any children natural born subjects, whose fathers at the time of the birth were attainted of high treason; it is not then their father's attainder makes them aliens, but the condition of their birth, and that only bereaves them of the benefit of the act, whereby they would have been naturalized. By the act 4th Geo. II, not only the children of persons attainted, but of persons in the service of the King's enemies, if born abroad, are aliens, and not inheritable; it is not the same thing to be uninheritable from alienage, arising from a father's attainder, and to be excluded from an estate because he forfeited it; for in the first case, the alienage is the immediate cause, and there is place to the next in succession; in the second the estate is gone. As here the estate in Sir William Gordon was only forfeited; the remainder being saved, there is immediate access to the person having right thereto; for this being the law, the judgment of the Lords, finding the estate was forfeited during the continuance of such issue as would have been inheritable to the said estate tailzie, in case Sir William had not been attainted, is to be understood such as would have been inheritable, in case there had been an estate to have been inherited; an estate was to be supposed in the supposal of issue inheritable, though by the attainder there was really none.

Pleaded for the respondent, The claimant argues in direct contradiction to the words of the judgment; Sir William's children would have been inheritable if he had not been attainted; and it is no matter whether their incapacity proceeds directly from his attainder, or from alienage, and that from the attainder; it may be true that, by the law of England, aliens cannot succeed, and that before the statute, persons born abroad were aliens, and that such made way for the succession of the remoter relations, who were natives; but it will not follow from these maxims, that, in the special case of an attainted person, whose children born abroad are deprived of the benefit of being held as native subjects, granted to others by these statutes, the estate tail vested in that person and his issue male, will be held to be spent or exhausted by the alienage of such issue, so as to give place to the remainder, and make the person having right thereto profit by the attainder of the tenant in tail. Whether the issue of Sir William Gordon were inheritable to this estate, is to be judged by the law of Scotland, by which they were not aliens, there being no example that the son of a Scotsman born abroad, was ever excluded from succeeding to any estate; and the decision in Lesly's case, 8th June 1749, No 2. p. 4636.;

comes not up to this, regarding a person whose ancestors had been long settled in a foreign country; if Sir William's children should be naturalised, or should have children born in this country, these would be inheritable issue of Sir William Gordon; and while such exist, the estate is forfeited. No 60.

Replied, The question is to be determined by the law of Scotland, and by it the children were aliens, and so was found in Lesly's case; there can be no distinction betwixt children and remoter posterity; and Count Antonius Lesly, was no very remote descendent; for if children born abroad were natural subjects, their children, and so to infinity must have the same right; but the case is different on the statute; for by it the children are only naturalized. The estate tail in Sir William being once spent by the failure of his inheritable issue, the remainder must immediately take place; and there can be no mean, though there may be a possibility, that there will afterwards exist issue inheritable of Sir William Gordon.

'THE LORDS, 22d November, found that Captain John Gordon the petitioner had 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 estate belonging to Sir William Gordon and his sons being entirely forfeited by Sir William's attainder, the after-existence of a son or sons, though insisted on to be aliens, could not cut off the Crown's right, or make place for Captain Gordon, so long as these sons lived, who would have succeeded to Sir William, if he had not been attainted; and this day refused a bill and adhered.'

N. B. Another petition was presented, insisting on this separate topic, That Sir William's children would have been aliens, though he had not been attainted; for that by the act 4th Geo. II, such children were aliens, whose fathers at the time of their birth, were or should be liable to the penalties of high treason, or felony, in case of their returning into the kingdom without licence; that Sir William was liable in the pains of felony by an act 9th Geo. II, having enlisted himself as a soldier in foreign service, without the King's leave obtained; which was refused; for that the felony of which Sir William was alleged to have been guilty, was not suspended upon his returning or not into the kingdom; which was the case of the act. But the fuller narration of this case falls not under this collection.

Fol. Dic. v. 3. *p.* 234. *D. Falconer, v.* 2. *No* 165 *p.* 187. & *No* 245. *p.* 297.

*** The later part of this case is reported in the Faculty Collection:

1752. *February* 18.—IN this case, upon an appeal taken by his Majesty's Advocate, the decree of the Court of Session, dated the 16th November 1750, was reversed, and in part varied by judgment of the House of Lords; whereby it was *inter alia* adjudged, "That Sir William Gordon (the person attainted) being, under the settlement made by his father Sir James Gordon, seised of an estate tailzie in the barony and estate of Park; notwithstanding such tailzie

No 60. was affected with prohibitive, irritant, and resolutive clauses, the said barony and estate did, by virtue of 7th Anne, cap. 21. become forfeited to the Crown by the said Sir William Gordon's attainder, during his life, and 'the continu-'ance of such issue-male of his body as would have been inheritable to the 'said estate-tailzie in case he had not been attainted;' as also for such estate and interest as was vested in, or might have been claimed by, the said Sir William Gordon, by virtue of the last limitation in the said settlement, to the heirs and assigns whatsoever of the said Sir James Gordon, after all the substitutions therein contained shall be expired and determined; and that, by virtue of the substitution to the heirs-male of the said Sir James Gordon's body, of his then present marriage, the respondent, John Gordon, hath right to succeed to the said barony and estate of Park after the death of the said Sir William Gordon, and 'failure of such issue-male of his body as aforesaid,' according to the limitations in the said settlement; and that liberty be reserved to the Crown, and also to the said John Gordon, and any other person that may become entitled to the said barony and estate of Park, by virtue of any of the said substitutions, to apply to the Court of Session for such further order and direction in the premises as shall be just, as often as any new right shall accrue to them respectively, in consequence of any of the substitutions or limitations in the said settlement."

Soon after this decree, Sir William Gordon died in France, leaving issue-male two sons born out of the legiance of his Majesty. Whereupon John Gordon applied to the Court of Session, and *contended*, That the said sons were aliens at common law, and were not naturalized by 7th Anne, cap. 5. (which naturalizes all the children of natural born subjects, born out of the legiance of his Majesty), because, by 4th Geo. II. cap. 21. the children of persons attainted of high treason are expressly excluded from the benefit of the said act, 7th Anne, that therefore these children were not inheritable to the estate-tailzie; and, in terms of the said decree, the Crown's right was determined, and the succession was open to him.

Answered for his Majesty's Advocate, That even supposing these children were aliens at common law, yet they were naturalized by 7th Anne, cap. 5.; and, as to this case, did not fall under the exception of 4th Geo. II. cap. 21. seeing the decree of the House of Lords expressly declares, that the Crown's right shall continue 'during the continuance of such issue-male of Sir William's 'body as would have been inheritable to the said estate-tailzie in case he had 'not been attainted.' Now, in case he had not been attainted, the exception of 4th Geo. II. could have had no place; so neither can it have place, if the case is to be considered as if he had not been attainted.

Upon this debate, the LORDS, on the 22d November 1751, found, "That John Gordon 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 estate belonging to Sir William Gordon and his sons being entirely forfeited by Sir William's attainder, the after-existence of a son or sons, though insisted

on to be aliens, cannot cut off the Crown's right, or make place for Captain Gordon, so long as these sons live, who would have succeeded to Sir William if he had not been attainted; and therefore dismiss the petition." No 60.

John Gordon, after the dismissing of this claim, applied again to the Court upon a new footing, separate from any consideration of Sir William's attainder. He set forth, that the said Sir William Gordon, the attainted person, after the conclusion of the war with France, had, without leave of his Majesty, continued himself, and inlisted other subjects of Britain as soldiers, in the service of the French King; and that the said sons were born abroad after the conclusion of the war, during Sir William's continuance in the said service and practice of inlisting, and were still alive. Upon these facts he *argued*, That as, by the said act of the 4th Geo. II. cap. 21. it was provided, that the 7th Ann. cap. 5. should not naturalize any children born out of the legiance of the Crown, 'whose fathers, at time of the birth of such children, were liable to 'the penalties of high treason or felony, in case of returning into this kingdom 'without the licence of his Majesty;' and as it was provided by 9th Geo. II. cap. 30. 'That if any subject of Great Britain shall inlist himself, or procure 'any other subject to inlist to serve any foreign state as a soldier, without li-'cence of his Majesty, he should be guilty of felony without benefit of cler-'gy.' That therefore, Sir William being guilty of felony by the act last mentioned, his children, upon account of that felony, were excluded by the said act, 4th Geo. II. from the benefit of 7th Ann. cap. 5. that is, were continued aliens as they were born, and were not inheritable to the estate, even although Sir William, their father, had never been attainted.

Answered for his Majesty's Advocate, 1*mo*, That by the law of Scotland, as well as by the Roman law, which the law of Scotland follows, the children of natural born subjects, although such children were born abroad, were nevertheless held to be natural born subjects, and were not deemed to be aliens; so that if these sons had even fallen under any of the exceptions of 4th Geo. II. they might have been aliens in England, and incapable to succeed to lands there, yet they would not have been so in Scotland; seeing that act only excludes from the benefit of 7th Ann. cap. 5. but not from the benefit of the common law.

2*do*, But in fact the children do not fall under any of the exceptions of 4th Geo. II.; particularly they do not fall under that one which, by a sort of analogy, Captain Gordon would bring them under, viz. of being the children of one liable to the penalties of felony, in case of returning to Great Britain without licence. This was not Sir William's case. It may be true that he was guilty of felony on 9th Geo. II. but then it is neither the children of persons guilty of felony in general, far less of persons guilty of felony in 9th Geo. II. which are excepted by 4th Geo. II. from the benefit of 7th Ann. It is only the children of persons whose *returning* alone makes them felons. By many acts of Parliament, certain offenders, smugglers for instance, are banished from

No 60. Great Britain, under this condition, that, in case they return, they shall be liable to the penalties of felony. By the said act, 4th Geo. II. the children of such persons are excluded from the benefit of 7th Ann. cap. 5. but it follows not from thence, that this exclusion is added to the punishment of all felonies whatever.

3*tio*, After the estate devolved to the Crown by Sir William's attainder, no supervenient incapacity in him or his inheritable issue, particularly if such incapacity should arise from his or their after crimes, can avail to determine the Crown's right.

" The Lords rejected Captain Gordon's claim."

Act. *A. Lockhart.* Alt. *Solicitor Haldane, And. Pringle.* Clerk, *Gibson.*

S. *Fac. Col. No* 3. *p.* 5.

In an appeal from this judgment, the following proceedings took place in the House of Lords.

" Proposed, That the Judges be desired to deliver their opinion upon the following question, viz.

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

" Q. Is the estate or interest, which was forfeited to the Crown as aforesaid, continued or determined?

" Which being agreed to,

" The Lord Chief Baron of the Court of Exchequer, having conferred with the other Judges present, delivered their unanimous opinion, That the estate or interest in the lands as aforesaid is determined.

" Ordered and adjudged, That the interlocutors complained of be reversed."

" Proposed to declare, That, in the event which has happened, the appellant hath right to the estate and barony of Park, according to the substitution mentioned in the judgment of this House of the 21st of May 1751, and that he be allowed the benefit of such right; and that it be remitted to the Court of Session in Scotland to make such order, and to carry on such proceedings, for putting the appellant in possession of the premisses, and concerning the profits thereof, as are competent to the said Court, and agreeable to law and justice.

" Ordered accordingly."