

1735. July 24.

SIR GEORGE MAXWELL of Orchardton *against* EDWARD CUTLER.

No 12.

A BOND of L. 5000 granted for the balance of an agents' accounts, and also a bond of provision to the agent for life, being challenged by reduction at the instance of the granter's heirs, upon this footing, That the accounts were false and extravagant, many gross articles being stated never given out, it was *answered*, That these accounts being ratified and approved of by the defunct, cannot now be challenged by his heir, seeing facility is not alleged.—*Replied*, Subscribing or corroborating of accounts bars all challenge with respect to articles presumed to fall within the obligant's knowledge, but can signify nothing with respect to articles alleged advanced or given out by the agent, and acquiesced in upon his sole faith; for if these afterwards be redargued and found false, the bond of corroboration, which evidently goes upon the supposition that the accounts were just and true, will never support such articles; and if the pursuer prevail in the proof, the consequence must be not only to restrict the bond to the just balance, but also to void the bond of provision *in toto*, which goes upon the narrative of good and faithful service.—THE LORDS, before answer, allowed both parties a proof with regard to the verity and reasonableness of the accounts. See APPENDIX.

*Fol. Dic. v. 1. p. 332.*

1749. July 18.

DRUMMOND of Logie-Almond *against* The KING'S ADVOCATE.

No 13.

A disposition not delivered, had no clause of dispensation. It contained several clauses said to infer simulation. The disponent was afterwards attainted. The disposition was not sustained.

JAMES DRUMMOND, commonly called Duke of Perth, disposed his estate, 11th June 1743, in trust, for uses mentioned, to Thomas Drummond of Logie-Almond, and died 11th May 1746.

An act of Parliament past 19th Geo. II. attainting the said James Drummond of high treason, from and after the 18th of April 1746, if he did not surrender himself to justice on or before the 12th of July that year.

His estate was surveyed by the Barons of Exchequer, and claimed by Logie upon the disposition; for that he not having lived till the day appointed for surrendering, when the attainder was to take place, never was attainted, and consequently his deed effectual for carrying it.

*Answered, 1st*, The disposition was never delivered, nor contained any clause dispensing with delivery, and was conceived in terms conveying the estate immediately, not on the death of the granter, and is therefore not a valid deed, but the estate, if James was not attainted, past from him to his brother John, and is forfeited by his attainder contained in the same act.

2dly, James was attainted, from the 18th of April, if he did not surrender, which he did not; and this resolute condition being fixed upon by the statute, cannot be supplied by any equivalent. It will not be pretended, that captivity or grievous sickness during the time limited, would have barred the effect of the attainder; and yet these, as well as death, would have made his surrender impossible.

*Replied,* The condition was suspensive of the attainder, which was to take place on the 12th of July, if he did not then surrender, as from and after the 18th of April; all attainders drawing back to the date of the treason whereon they proceed, which for that reason is laid in the indictment, whatever be the time of pronouncing the sentence; and here the statute has fixed upon that day as the date of the treason.

THE LORDS found, That James Drummond having died on the 11th day of May before the 12th of July 1746, on or before which day he was allowed by the said act of attainder to surrender himself, and submit to justice, he the said James Drummond was not attainted by the said act; and therefore found that the Court had no jurisdiction to proceed further in judging of the validity or effect of the disposition from James Drummond to Thomas Drummond the claimant *in hoc statu*; leaving the claimant to follow forth his right thereupon as accorded.

December 1. 1750.—It having been found, as is observed 18th July 1749, That James Drummond of Perth was not attainted; and therefore the Court had no jurisdiction to proceed further in judging of the validity, or the effect of the disposition from him to Thomas Drummond of Logie-almond the claimant, in that state, leaving him to follow forth his right as did accord; the Barons of the Exchequer caused the estate to be surveyed, as having fallen by the death of James to his brother, commonly called Lord John Drummond, and so forfeited by his attainder, in the same act of Parliament.

Drummond of Logie-almond claimed again on the disposition made, 16th June 1743, to him for the uses therein-mentioned.

*Answered,* The disposition was not delivered, but left in the hand of Mr James Graham of Airth the disponent's lawyer. The claimant had acknowledged he never saw it, though the disponent had told him, in the year 1745, as he thought, that he had either granted, or was to grant such a disposition; and Mr Graham told him there was a disposition in his name. That a copy was sent him in 1747, as he thought, by Lady Mary Drummond, the disponent's sister, and it was proposed to him, that an exhibition should be used in his name, which he agreed to. By this exhibition the deed was recovered. It contained no clause dispensing with delivery. It assigned the mails and duties from the Martinmas following; so that, of its nature, it needed delivery for its completion, and was ineffectual without it.

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*2do*, It was a simulate deed, to evade a forfeiture for the rebellion, which the disponent had then conspired to raise ; it proceeds on this narrative, that he was of a tender constitution, and had thoughts of retiring from the world, to prepare for a future state, and that his only brother was a soldier in a foreign service, whereby his capacity of succeeding might be uncertain ; and that he was owing considerable sums of money ; and disposes the estate for the payment of debts, which were or might be owing by him, or his predecessors ; providing that the disponent should pay to himself an annuity of L. 200 Sterling during his life, and after his death to his brother during his life ; the remainder after which is disposed for the use of his uncle, called Lord John Drummond, and his heirs ; whom failing, of his sister and her heirs ; whom failing, of the disponent ; provided that if he should alter his resolution, and marry, there should be paid to his Lady an annuity of 10,000 merks Scots, exclusive of his *jus mariti*, the estate redeemable by the heirs of his body, and the heirs of his brother's body for L. 200 Sterling. This deed was kept in his own power ; and the possession of the estate retained ; he continued by it proprietor of the estate, which was redeemable by his children, and the profits whereof were to be payable to his Lady, exclusive of his *jus mariti*, that they might not be affected by his forfeiture ; and as it was also redeemable by the children of his brother, whereby the succession was preserved in its order ; it was not a giving away, but retaining the estate.

*Pleaded* for the Claimant, *first*, in objection to the survey, it was without foundation, proceeding on the act vesting the forfeited estates in the King ; whereas, if the disposition were out of the question, and this the undoubted estate of John Drummond, it was not forfeited, though the King might claim it as escheat, which was a different title ; for he having failed to surrender, stood attainted from the 18th of April 1746 ; after which his brother dying, the estate, which never was his, was never forfeited ; but as he was incapable of holding it, became escheat ; for so the English lawyers distinguish, Coke 1. Inst. f. 13. and Hales H. P. C. part 1. c. 27. f. 356. New Abridgement of the Law of England, part 2. title Forfeiture, f. 585. This is more than a distinction of expression, the effects being different ; forfeiture accruing to the King, but escheat to the superior. If an estate should fall by descent to the children of an attainted person, after his death, there could be no forfeiture, but yet it would be escheat, as they could not succeed through him whose blood was corrupted ; but if the attainder was for a felony or treason, from which no corruption of blood did follow, they would be capable of succeeding, and there would be no escheat.

*Pleaded* for the Advocate, Whether this estate is forfeit or escheat, will not give the claimant any title ; he is pleading not only *super jure tertii* but *super jure adversarii*, for the King takes by both titles ; he is in this case superior, and may chuse which title he will use. Supposing the estate were held of a subject, and escheat, the property would fall to be determined by the law of

Scotland, as it is only with regard to forfeitures that the English law obtains ; and by the Scots law escheats likewise fall to the King ; but this estate is forfeited ; it being enacted 26th Hen. VIII. that all effects belonging to a person guilty of treason, at the time thereof, or any time after, should be forfeited ; and by many acts to the same purpose, particularly the late vesting act. *2dly*, John Drummond, according to what was pleaded and found, with regard to the attainder of James his brother, was not attainted till the 12th of July, before which it was competent to him to have surrendered.

*Replied*, The claimant is entitled to plead, that the estate was not forfeited ; for then the survey will be found to have been irregular ; and he will be left to avail himself of his disposition at common law ; and it will be his interest so to do ; as if it labour under any defect, it may be found sufficient to bar an escheat, though not a forfeiture ; for the Lord only takes escheat for want of a tenant ; and a deed will be sustained to entitle to take the estate, that would not exclude the complete right of another. If an infant grant a feoffment, the deed is not good against his heir, but will exclude the Lord claiming by escheat, Coke's Reports, part 4. f. 250. and 251. and part 8. f. 538. But in forfeiture the King takes in his own right, and will not be barred by a defective disposition. The act 26th Hen. VIII. makes several subjects fall under forfeiture, which before did not, but does not make an estate be considered as forfeited, which before was escheat ; and has not been so understood by any lawyer since. The mention of subjects that should belong to the attainted person at any time after his treason, is made with regard to the time intervening betwixt that and his attainder, and comprehends also subjects acquired by him after that, by singular titles ; for though succession falling to him is escheat, these are forfeit, Coke, 1st Instit. f. 2. A. & B. The vesting act regards future trials, and so vests in the King subjects that should fall to the persons that might be attainted before their respective attainders. James Drummond was rightly found not attainted, and yet John was attainted from the 18th of April ; for during the time allowed for surrender, it could not be said whether a man was attainted or not ; but when that was determined, the 18th of April was by the statute put for the date of the attainder.

*Duplied*, The Claimant's insisting that the date of the attainder was the 18th of April, does not agree with his interpretation of the 26th Hen. VIII. that subjects which should belong to a person at any time after, should be forfeit, was to be understood of the time intervening betwixt his treason and attainder, since attainders at common law draw back to the commission of treason ; and therefore, by his way of arguing, a succession opening after the treason, is after the attainder.

*Triplid*, A traitor forfeits his personal estate, from his being found guilty ; but his lands upon attainder, which is drawn back to the treason in the indictment ; and lands acquired by singular titles, even after attainder, are forfeited, as has been said.

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*Observed,* That the Court of Exchequer was supreme ; and the Court of Session had no jurisdiction to determine whether they had made an illegal survey ; that there was no need of finding it, for that the estate fell to John before his attainder, and was forfeited ; that if this estate were not forfeited, it might be doubted if the Crown could come at it at all ; for as escheats of this sort were not known in the law of Scotland, there was not consequently any method for taking them up ; that it had not been shewn the distinction of escheat and forfeiture obtained, when lands held of the Crown ; probably it did not ; as no examples appeared in the books, of estates being taken up after the removal of the incapable person ; which else probably would have occurred : That a personal right excluded not forfeiture, as no incomplete right did in England.

*Pleaded* for the Claimant, The deed needed not delivery ; it was of the nature of a settlement of succession ; it was delivered to Mr Graham, who was lawyer for all the parties benefited, and had the custody of no other of James Drummond's papers ; it can be proved a scroll of it was laid before him in 1742, so that there was no need of delivering it to him for his advice ; and the subsequent delivery could only be for the use of the disponees. It can also be proven, that when James Drummond wanted afterwards to borrow money, Mr Graham objected he could give no security after that deed, and other circumstances to shew the intent of the delivery.

*Answered,* The necessity of delivery to complete the deed, appears from the nature of it mentioned above ; and the claimant does not condescend on any thing relevant whence to infer it was delivered ; but if it had been, it cannot be effectual, from the marks it carries of simulation ; and even in 1742, it can be proved the disponent was in a conspiracy.

*Replied,* There ought to be a distinction betwixt a deed's being simulate or collusive, and done from a criminal motive ; the motive might be James Drummond's treasonable intentions ; but yet it was no simulation, when he really on that account gave away the estate ; which would have been good against his own forfeiture, if it had not been for the act annulling these deeds ; but he was not attainted, and so there can be no pleading on his treason ; and it was no criminal motive to take means that his estate should not be forfeited by any treason of his brother.

*Duplied,* If James had been loyal, he could have effectually provided that his brother's forfeiture should not carry his estate ; but when he was in the same conspiracy, the making this deed, with the clauses it contains, was one act of simulation, and cannot be effectual.

*Observed,* The question depended on the point of delivery, which by our law was necessary to give effect to a deed, but presumed, if it was out of the granter's possession ; that there might be presumptions from which the contrary would be inferred, and such there were in this case ; that the condescence offered to be proven was not relevant, as the intent of delivery to Mr Graham was not probable by witnesses.

THE LORDS found that John Drummond now attainted of high treason, was, upon the 11th day of May 1746, when James Drummond his elder brother died, capable to take by descent from his said elder brother; and that the estate of Drummond in question, did then descend by James's death to John Drummond now attainted, and was forfeitable and forfeited by the treason and attainder of the said John Drummond; and found that the trust disposition to Thomas Drummond of Logie-almund claimed upon, was not sufficient to exclude the forfeiture of the said John Drummond; and therefore found the estate acclaimed, forfeited by his attainder, and dismissed the claim.

Act. *R. Craigie, Ferguson, & alii.* Akt. *The King's Counsel.* Clerk, *Gibson.*

*D. Falconer, v. 2. No 87. p. 93. & No 169. p. 199.*

\* \* \* This judgment affirmed on appeal. See No 74. p. 4766. See APPENDIX--

1752. *January 18.* DUNLOP *against* CROOKSHANKS, JOP and FORBES.

THERE are frauds of different kinds, whereby one is induced to contract: The most ordinary kind among merchants is, where a person insolvent imposes upon another, ignorant of his condition, to deal with him, of which more hereafter. Another is, where a merchant is induced to sell his goods as to two in company, when in reality the correspondent alone was concerned in the commission; and an instance of both kinds occurred in the present case.

William Forbes and William Crookshanks in company had lately commissioned certain goods from John Dunlop merchant in Rotterdam; thereafter Forbes wrote to John Dunlop for another cargo, and he made his letter run in the plural, *We, &c.* by which Dunlop was led to think that he and Crookshanks were also in company in this commission.

Forbes recently thereafter failing in his circumstances and absconding, Dunlop brought an action against Crookshanks before the Admiral, for payment of the price of this last commission, and obtained decree against him as in company with Forbes; but Crookshanks having brought the case before the Lords by suspension, the LORDS, upon advising the proof which had been allowed to either party of their condescendences of facts, found it not proved that William Crookshanks was partner with William Forbes in the commission of the said goods, and suspended the letters.

With this suspension, there was conjoined a process of multiple poinding pursued by Crookshanks, Jop, and several others, who had bought the goods from Forbes, and in whose hands Dunlop had arrested; and in this it was argued for Dunlop, that as he had complied with the commission upon the faith of Crookshanks being bound, which he had, by Forbes' letter, been misled to believe; now that the Lords had found Crookshanks not bound, there was no bargain, nor any transference of his property; and that therefore, so far as his goods were

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A merchant who was in use to commission goods along with another who was his partner, wrote for a cargo, and made his letter run in the plural *we, &c.* by which his correspondent was induced to believe, that both partners were concerned in the transaction, and on the faith of that delivered the goods. The person who had commissioned the goods having become bankrupt, and his partner proving that he had no concern in the purchase, the Lords found, that the property of the goods had not been transferred from the furnisher, and preferred