not to expire, it resolved into a security for the sums in the bonds; and so was no sufficient title to the adjudger, to enter vassals. It is true that these legals expire in one year after the right comes into the person of a protestant; and this adjudication may be said to have come into the person of Duke Cosmo, who was apparent heir to his father the leader; but, then the diligence carried the estate; and he could take nothing by his service to his grandfather, consequently is not yet validly infeft.

No 6.

Observed; That without having recourse to the act for preventing the growth of popery, the titles were complete on both sides: When the right of an incumbrance upon an estate, comes into the person of one that can make up the proper title, he may make up his title, and neglect the incumbrance, which flies off; though he will be obliged to acknowledge the rights of third parties under that incumbrance.

The Lords sustained the claim.

Act. *R. Craigie, Ferguson, & H. Home.* Alt. *The King's Council, A. Macdowal, & A Pringle.* Clerk, *Kirkpatrick.*

D. Fac. v. 2. No. 130. p. 146.

1750. *December* 13.

Lundin of that Ilk, *against* The King's Advocate.

No 7.
An irritancy not declared before forfeiture is not proponable to evict the claim of the protestant heir not anteriorly insisted in.

James Lundin of that ilk claimed the estate of Perth, surveyed as forfeited by the attainder of John Drummond, brother and apparent heir to James Drummond of Perth, for that the said John Drummond being a papist, was by act 3. ses. 9. Parl. King William, rendered incapable to succeed as heir to any person whatever; and the claimant was protestant heir to the said James Drummond in the said estate, which had been granted by charter under the Great Seal, 17th November 1687, to James Earl of Perth in liferent, and to James Lord Drummond his son in fee, and the heirs-male of his body; whom failing, to his other heirs-male; and disponed by the Lord Drummond, 28th August 1713, to James his son, and the heirs-male of his body; whom failing, to his other heirs-male whatsoever; upon which title, it was found by the Court of Session, and affirmed by the House of Peers, that the estate belonged to the late James, and was not forfeited by the attainder, which the Lord Drummond afterwards incurred on account of the rebellion in 1715. The claimant being grandson to John Drummond Earl of Melfort, brother to the Earl of Perth, was nearest male heir professing the protestant religion to James Drummond, who died last vest and seised in the estate of Perth; notwithstanding that the Earl of Melfort stood attainted of high treason, by judgment of the Parliament of Scotland, 2d July 1695; for that it had been resolved by the Parliament, pending that process, that no doom to be pronounced therein,

No 7.

should corrupt the blood of the children procreate betwixt him and Sophia Lundin, heiress of Lundin the claimant's grandmother.

Answered; The estate was claimed by Drummond of Logiealmond, whose claim was dismissed 17th December; but this claimant did not think proper to appear in that cause for his interest, though the sustaining of Logie's claim would have been exclusive of his; it was also competent to him, supposing him protestant heir, to have taken the estate from James Drummond who was also papist, and possessed it long; instead of which he suffered him to continue his possession, and only now makes his claim when it is already forfeited. The act of Parliament does not directly take the right out of the popish heir, and vest it in the protestant, but it is necessary some legal step be taken for that purpose; it enacts, That if the protestant heir do not prosecute his right, by service or other legal mean, to affect the succession, within two years after the irritancy is incurred, there shall be access to the next protestant heir, to whom the like space is allowed; and if he fail, to the remoter heir, on the like conditions, ay and while the right be effectually established in a protestant heir, who, by owning and establishing his title, shall have right to the profits, after incurring the irritancy. The second protestant heir does not declare any irritancy against the first, but insist against the popish heir, who consequently is owned to have been in the right; in the mean time his onerous deeds are effectual, and he may recover the estate within ten years, by becoming protestant; and therefore, if all the protestant heirs lie off, till the papist, by committing treason, has incurred a forfeiture, it is then too late for them to claim the estate. The act was intended for the discouragement of popery; but if the claim is good, it will be the greatest encouragement to it; the papist shall possess by the indulgence of his protestant relation, and if he is forfeited, the estate only goes to his relation. The question was decided in 1719-20 by the House of Peers, who dismissed the exception of Assint against the survey of the estate of Seaforth, which he claimed as protestant heir; and the Lords of Session, 16th November last, disallowed the claim of Captain Gordon to the estate of Park, which he made upon an irritancy of a tailzie incurred, but not declared, before forfeiture. If John Drummond were alive, and free to compete with the claimant, it behoved to be shewn he was papist, and that cannot operate *ipso jure* to transfer a right, which must necessarily be the subject of a proof; neither can it be made appear, now after his death, whether he was papist or not, since it cannot be known whether he would have purged himself of popery, to have enabled him to hold the estate.

Replied; The estate could not be forfeited by the attainder of John Drummond; as, by act of Parliament, he stands attainted from the 18th of April 1746, and the succession only opened on the 11th of May that year; but, on this topic, it may be sufficient to refer to Logie's case; neither can it be held as escheat, which arises from the defect of an heir, whereas not John Drummond, but the claimant was entitled to succeed. It would have been improper

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for the claimant to have appeared, and pleaded his title in the process upon Logie's claim, as if that disposition had been sustained, it would have been exclusive of any heir; but then it would have been competent to him to have insisted, as protestant heir, to the uses for which that disposition was in trust *. If he did not insist to take the estate from James Drummond, he can truly say he was ignorant of his right, imagining his own blood was corrupted, by the attainder of his grandfather, till he lately discovered the saving in his favour; neither does he apprehend that he could have taken the estate from him, as he possessed by disposition, the right of which did not go to his heir; and though, by the act, the protestant heir has right to an estate, to which a papist succeeds, or possesses by disposition from his predecessor to whom he might have succeeded; yet, as Lord Drummond was attainted before his death, his son James never could have succeeded to him, and Lundin never could have served to him, which was the only way for him to have come at the estate; but supposing he did suffer him to possess, this does not exclude him from claiming as his heir; the protestant heir's right does not require any declarator of irritancy, but the papist is declared incapable to succeed, and the protestant needs only to serve, and if both were seeking to serve, would be preferred; this would have been the case, if the claimant were competing with John Drummond, which might have been if he had surrendered in terms of the act; and Lundin cannot be blamed that he did not insist in that form before the attainder was fixed by his contumacy, since, in the mean time, the estate was by statute vested in the King, and he could only afterwards proceed by claim. Captain Gordon claimed on an irritancy, which could only be made effectual by being declared; and there was no decision of the present question in Assint's case, who presented his exception as protestant heir to the Countess of Seaforth; but it being found she was only a trustee for the family, he replied he was protestant heir to the use of the trust; this the LORDS sustained. It appears by the cases, that the whole question was argued before the House of Peers, who reversed the judgment; but the ground of their sentence does not appear; and the judgment was well reversed on this ground, that there was no exception timeously presented as protestant heir to the family of Seaforth, for whom the Countess was trustee.

Observed; The judgment was reversed upon the question now before the Court; and would have been ill reversed upon any other ground, for the excepter being heir to the Countess, carried the estate; and being heir in the uses, the trust was for his own use; so the reply was rightly sustained.

Answered; 2*dly*, Lundin cannot claim as heir; he connects his relation through the Lord Drummond, father to the last in the fee, who was attainted; and so the bridge was broken down, as it is expressed by Hales, H. P. C. vol. 1. c. 18.

* The disposition, failing the heir of the disponer's uncle and sister, was in trust for the use of Logie himself, so Lundin was not protestant heir to the uses of that deed.

No 7.

Replied; This obtains, as is declared in the same chapter, in fees-simple, but not in fees-tail; for there the blood is entailed, and therefore if a son commit treason, and die before his father, the grandson shall have the fee-tail, 3. Coke's Reports ,Dowtie's case, 10. B. This estate being destined to heirs-male, is an estate in tail-male; and by the authority cited, goes to the heirs in tail, notwithstanding the corruption of blood.

Duplied; A destination to heirs-male makes with us a fee-simple, the estate being entirely at the disposal of the fiars, and not like an estate tail, which is unalienable except by the device of fine and recovery; and that estates pass, notwithstanding of corruption of blood, is entirely a consequence drawn by the lawyers from their being unalienable.

Triplied; This destination ought to carry the estate, notwithstanding the Lord Drummond's attainder; it does not import that it was forfeitable; for, by the case in the authority, that estate might have been forfeited, and would have been escheat if the son had lived; but it went to the grandson, for this reason, that he was not called by the law in virtue of his relation, but by the donor; and, though the legal relation was cut off, was sufficiently pointed out by the description of the natural relation which subsisted.

The Lords found that James Lundin, the claimant, could not be served heir-male to James Drummond deceased, the person who stood last infeft, in respect that he behoved to connect his title through the person of James Drummond, formerly Lord Drummond, whose blood was corrupted by the astainder; and further found, that the said James Lundin not having claimed as protestant heir before the estate was forfeited by the attainder of John Drummond, commonly called Lord Drummond, he could not over-reach the forfeiture, and draw back the estate from the Crown, on pretence of his being the nearest protestant heir. See Forfeiture.

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

D. Falconer, *v.* 2. *No* 171. *p.* 204.

No 8.
A lady who professed herself a nun, was found not to have forfeited her right to claim her share of a personal bond in favour of the children of a marriage.

1755. *July* 2.

Mary Collins and Her Trustees, *against* Lord Boyd.

William Earl of Kilmarnock, grandfather to the defender, by his bond dated in the 1714, proceeding upon the narrative of love and favour, obliged himself 'to pay to his uncle Captain Charles Boyd, and Katharine Van Reest his spouse, and longest liver of them, the ordinary annualrent of 6000 merks, 'and to the children procreated or to be procreated between the said Captain 'Charles Boyd and his spouse, the principal sum of 6000 merks, at the first term 'after the death of the longest liver of the said Charles and his spouse, *proviso*, 'That if there should be no children surviving at the same term of payment,