SECT. IV.

Clauses contrary to Law, or otherwise extraordinary.

1750. *June* 30. STEWART *against* His MAJESTY'S ADVOCATE.

No. 102.
Clause, that the estate shall not be forfeited on account of treason, ineffectual.

Charles Stewart of Ardshiel had, in his contract of marriage, in 1732, obliged himself to secure his lands of Ardshiel and others to himself in life-rent, and to the heirs-male of the marriage in fee; and the contract proceeds thus: "And it is hereby expressly provided, That albeit it should happen the said Charles Stewart at any time to be convicted or attainted of high treason, or any other crime, whereby he might come to forfeit or lose the lands foresaid hereby provided to the heirs of the marriage, yet the said heirs shall not be thereby prejudged, but succeed to the fee thereof immediately after such attainder, in the same manner as if the said Charles Stewart were naturally dead, upon which express condition and qualification these presents are entered into. And the said Charles Stewart bound and obliged, &c. as he hereby binds and obliges himself, to grant disposition in favour of the said heirs-male *nominatim* at any time he shall be required."

In September, 1742, John Haldane of Lanark, the bride's father, and at whose instance execution was provided to pass, having required the said Charles Stewart to denude in favour of Alexander his son, he complied; and, on the narrative of the said obligation in the contract of marriage, did, in implement thereof, dispone to Alexander Stewart, his eldest son of the marriage, the said lands, with the burden of his debts contracted or to be contracted; whereupon infeftment was taken, in August, 1745, when the Rebellion was broken out.

The said Charles being attainted of high treason, his son, Alexander Stewart, entered a claim, on the foresaid disposition granted to him in implement of the obligation in the contract of marriage, as divesting the forfeiting person of the fee, in consequence of a previous lawful obligation; and this was applauded as a proper expedient, in a contract of marriage, to vest a fee in the heir of the marriage, which cannot be done in the contract itself, the heir *nasciturus* not being capable of a fee.

To this several answers were made: 1*st*, That supposing an obligation to vest the fee in the heir of the marriage to have been given honestly, and with a fair intent, yet it could not have saved from the forfeiture, as it did not appear to have been delivered till the infeftment was taken, in August, 1745, after the Rebellion

No. 102. was broken out, when it was too late; *2dly*, That the disposition granted did not denude the granter of the fee, as it reserved a power to the granter to burden with debts to an unlimited extent, which might have amounted to twenty times the value, whereby the fee, however nominally in the son, the claimant, yet substantially remained in the father. And though it was admitted, that a power reserved to contract debt to a limited extent was consistent with the alienation of the fee, and that such faculty did not devolve to the Crown by a forfeiture, which was the case of Perth and Nithsdale, in 1715, yet an absolute power of contracting debt was said to be really *dominium*. See FORFEITURE.

But there happened to be no occasion to give judgment upon either of these, the Lords having taken up the case upon a *third* answer made to the claim, That the obligation in the contract to denude, the terms whereof are above set down, was no other than to denude in execution of the immediately preceding absurd and unlawful clause, that the lands should not forfeit by his commission of treason.

And so the Lords " found, and dismissed the claim."

Nothing can be more idle than that clause which is to be met with in every tailzie, that the lands shall not fall under forfeiture in case of the heir's committing treason; a clause, which is a *non obstante* to the law.—*Nemo potest cavere ne leges in testamento locum habeant.* Where an heir of tailzie committed treason, by the law of Scotland, he forfeited for his life only; and that was what no precaution by any clause whatever could prevent. How the law of England stands, which is now the law of Scotland in treason, is at present *sub judice* in the cases of Sir William Gordon and the Lord Lovat's forfeitures.

Kilkerran, No. 8. p. 547.

*** D. Falconer reports this case:

Alexander Stewart claimed the estate of Ardshiel, surveyed by order of the Barons of Exchequer, as forfeited by the attainder of his father, Charles Stewart; for that he, by his contract of marriage, 10th November, 1732, with Elizabeth Haldane, daughter of John Haldane of Lanark, " did provide his said estate in favours of himself, and the heirs-male of the marriage;" and, by a subsequent clause, bound himself to grant a full and ample disposition in favour of the said heirs-male *nominatim*, at any time he should be required to do the same; and that John Haldane of Lanark, at whose instance execution upon the contract was provided to pass, did grant a procuratory, 15th July, 1742, in virtue whereof Ardshiel was required, in September that year, to grant the said disposition; and, 28th of that month, disponed his estate, with the burden of his life-rent, and his own just and lawful debts, contracted and to be contracted, to the claimant; who was infeft 24th August, 1745.

Answered: The parties in this contract, one of whom is attainted, and against the other a bill is found, for being concerned in the late Rebellion, have made a

fraudulent attempt to evade the forfeiture that might be incurred on the commission of high treason by Ardshiel, to which it is plain he was sufficiently disposed. He secured his estate to himself and the heirs-male of the marriage; and so far there can be no doubt he remained fiar; nor was there ever any intention to divest him, while he should be capable to hold the estate; for, by a subsequent clause, "it was agreed upon, at the instance of the said John Haldane of Lanark, that albeit it should happen the said Charles Stewart at any time to be convicted or attainted of high treason, or any other crime, whereby he might come to forfeit or lose the lands foresaid, thereby provided in fee to his heir-male, in manner above written, yet they should not be thereby prejudged, but succeed to the fee of the said lands, immediately after such conviction or attainder, in the same manner as if the said Charles Stewart had been naturally dead; upon which express condition and qualification these presents were entered into; and the said Charles Stewart bound and obliged, as he thereby bound and obliged him, &c. to grant a full and ample disposition in favours of the said heirs-male *nominatim*, at any time he should be required to do the same; under the penalty of 20,000 merks, by and attour performance." This is one continued clause and provision, That his heirs should succeed to the estate on his attainder, and that he should thereupon allenarly dispone. It is no objection, that this is an absurd interpretation of the clause; as the disponing would then be out of his power: For it was as absurd to stipulate the devolution of the estate in that event; which is done, and both by the ignorance of the parties. It would be absurd, on the other hand, to suppose him obliged to dispone the estate so long as he was capable to hold it; for there is no life-rent stipulated to be reserved; and therefore, as he was under no obligation to make the disposition when he did it, it was purely a voluntary deed, and ineffectual, as falling within the time annulling the deeds of traitors; but supposing it had not so fallen, it was, as conceived, no real alienation; but being subject to his debts, contracted and to be contracted, he remained the true owner, and the estate forfeitable by his rebellion. No. 102.

Replied: That deeds were to be so interpreted as not to infer absurdities: That there was nothing from whence to conclude the disposition was only to be made in the case of Ardshiel's attainder, except the order of the clauses; the obligation to dispone following that clause providing a devolution: That if it had been provided the devolution should take place on his being attainted, and suffering for his crimes, and then had followed, that he should denude on demand, no man would pretend the writer imagined he should denude after his death; and it was impossible after his attainder. The clause of the devolution was indeed ineffectual in law; but not, like the other, so absurd, as that the writer and parties might not have imagined it good. It was a frequent clause in tailzies; and the parties might apprehend it would have its effect; but could not dream of an attainted man's disponing. The claim was laid on the obligation to dispone, which was to be on demand, that is a pure obligation on the existence of an heir; and it is

No. 102. sufficiently clear that it was with reservation of the life-rent, since the fee of the estate was to be disponed. There was no need of having recourse to the actual disposition; nor did it affect the claim, that it was made with burden of debts to be contracted, as Ardshiel ought to have disponed without this burden. Suppose the quality in the obligation itself, yet it was only a faculty which did not hinder the fee being transmitted; nor could it be taken up by the Crown, as was found in the cases of Perth, and Nithsdale, where the proprietors had vested their estates in their sons, with power of charging them with debts; and cases of the same nature had been decided in England, as the Duke of Norfolk's case, 11. Elizabethæ, Coke, v. 7. f. 13. and Wheeler *versus* Smith, in Jekyll's Reports.

Duplied: A power to contract debt, to a limited extent, may be considered only as a faculty; but an unlimited power is the estate retained in effect, when it is given away in figure; and must subject it to the forfeiture of him who retains it; and this power must be held as retained, in conformity to the obligation to dispone, if this obligation shall not be limited to the event insisted on for the respondent; for the obligation can only be inferred to have been, reserving the life-rent, by referring it to the first clause, which binds him to take the estate to himself and his heir, which of consequence carries it to the heir, under the burden of debts contracted and to be contracted. Besides, he is not bound to dispone the fee, but to dispone to his heir *nominatim;* that is, to himself, and, failing him, *nominatim* to his heir.

Observed: That there might be a distinction of faculties; and they considered either merely as such, or as a mark of the property being in him who was possessed of such a faculty; and also, that by the clause of the vesting act, allowing parties having interest in or out of forfeited estates to enter their claims, there was an exception of the forfeiting person and his heirs. To which it was answered, That the heir of the forfeiting person was no otherwise excepted than he was himself; and it was meant only that he could not claim by succession.

Pleaded further in evidence of the whole being a contrivance: That the procuratory, to require Ardshiel to dispone, did it only under the burden of his debts to be contracted: That it was writ by young Lanark, who was also in the Rebellion, and granted to Stewart of Aucharn: That Ardshiel wrote the disposition with his own hand, and Aucharn was witness to it: So that it appeared he was a confidant.

The Lords dismissed the claim.

Act. *R. Craigie. Ferguson & T. Hay.* Alt. *Advocatus, &c.*

D. Falconer, v. 2. No. 143. p. 167.