The Commiſſioners and Truſtees of the forfeited Eſtates, - - - *Appellants*; Caſe 57.

Kenneth Mackenzie of Aſſint, a minor, by Colonel Alexander Mackenzie, his Curator. - - - - - *Reſpondent.*

10 *February* 1719-20.

Act of Parliament, 5 *Geo.* 1 *c.* 22. *Papiſt attainted of Treaſon.*—The Act 5 Geo. 1 c. 22. having limited a certain time for preſenting exceptions, againſt a forfeiture, a perſon who preſented his exceptions as proteſtant heir of a truſtee could not, after expiration of the time limited reply as proteſtant heir of thoſe for whom the truſt was created.

Truſt Eſtate held for a Papiſt.—An eſtate held in truſt for the Earl of Seaforth, a papiſt, was forfeited to the public by his attainder, and could not be taken up, by the proteſtant heir.

ABOUT the year 1650, George, then Earl of Seaforth, having contracted very large debts, many of his creditors obtained appriſings againſt his eſtates. Afterwards George Earl of Cromarty, and other friends of the family compounded with ſome of the creditors who had recovered the appriſings that were prior and preferable; and theſe appriſings were transferred to them in truſt for the family. Theſe appriſings not being redeemed within ten years, the abſolute property of the eſtate became thereby veſted in them, and many of the creditors were excluded. And the appriſings in the perſons of the Earl of Cromarty and others were conveyed to one Kenneth Mackenzie, and by him again made over to Iſabel Counteſs of Seaforth, as truſtee for the family. This Iſabel afterwards made a conveyance thereof to Kenneth Mackenzie of Grunziard, and died in 1715.

Iſabel Counteſs of Seaforth, had three ſons, Kenneth Earl of Seaforth, who died before her in 1701, father of William late Earl of Seaforth, John, father of the reſpondent Kenneth, and Colonel Alexander Mackenzie, Kenneth's curator. William Earl of Seaforth was a profeſſed papiſt; the reſpondent was next proteſtant heir of the family.

By act of Parliament 1 G. 1. c. 42. the ſaid William, Earl of Seaforth, was among others attainted of high treaſon, from the 24th of June 1715; and by an act 1 G. 1. c. 50. the eſtates whereof any perſon attainted was ſeiſed or poſſeſſed on the 24th of June 1715, were veſted in his majeſty for the uſe of the publick; and theſe eſtates were afterwards veſted in the appellants, to be ſold for the uſe of the publick by the act, 4 G. 1. c 8. 1 G. 1. c. 42. 1 G. 1. c. 50. 4 G. 1. c. 8.

The appellants cauſed the eſtate of Seaforth to be ſurveyed as one of the eſtates forfeited, and veſted in them; but in this they were oppoſed by the reſpondent. After the attainder of Earl William, the reſpondent, Kenneth Mackenzie of Aſſint, was, by his curator Colonel Alexander Mackenzie, ſerved neareſt proteſtant heir to the ſaid Iſabel Counteſs of Seaforth, on the ground of

the attainted Earl's being a papiſt; and claimed the eſtate of Seaforth as belonging to him in property upon that right, excluſive of the right of the ſaid William late Earl of Seaforth attainted.

5 G. 4. c. 22 It being enacted by the act 5 G. 1. c. 22. that it ſhould be lawful to every perſon pretending right to any eſtate ſurveyed by the ſaid truſtees in Scotland, for the uſe of the publick to preſent their exceptions on or before the 1ſt of Auguſt 1719, to the Court of Seſſion in Scotland, two ſeveral exceptions were preſented to that Court againſt the ſurvey of the eſtate of Seaforth. The firſt of theſe was in the name of the reſpondent and his curator, ſetting forth that the eſtate belonged to him in property as proteſtant heir to Iſabel Counteſs of Seaforth; and that William the attainted earl had no manner of title to it. In ſupport of this exception he founded upon the act of Parliament 1700, c. 3., intituled 1700. c. 3. "Act for preventing the growth of popery"; by which it is inter alia enacted, "that no perſon or perſons, profeſſing the popiſh "religion, paſt the age of 15 years ſhall hereafter be capable to ſuc- "ceed as heirs to any perſon whatſomever," &c. And if any perſon or perſons educated in the popiſh religion ſhall happen to ſucceed as heirs to their predeceſſors before the ſaid age of 15 years, they ſhall be obliged to purge themſelves of popery by taking the formula by the act directed before they attain to the ſaid age. And, "if the "ſucceſſion devolve to any papiſt after the age of 15 years; or any "conveyance ſhall happen to be made in their favours to any per- "ſon, whom they might have ſucceeded, or the right be devolved "to them by ſucceſſion or other conveyance before that age, and "they neglect or omit to renounce popery as aforeſaid; then and "immediately thereafter, their right and intereſt in, or by the "aforeſaid ſucceſſion or conveyance ſhall become void and null, "and ſhall devolve and belong to the next proteſtant heir or "heirs, who would ſucceed, if they and all the intervening popiſh "heirs were naturally dead," &c.

The other exception was in the name of Kenneth Mackenzie of Grunziard, the diſponee of Counteſs Iſabel; the appellants made anſwer to this laſt exception, that the diſpoſition to this Kenneth Mackenzie could be of no avail; becauſe Counteſs Iſabel's own titles were truſt rights for the behoof of the family of Seaforth and of the late attainted Earl, as heir of the family, and that therefore ſhe could make no conveyance in prejudice of the family, or in breach of truſt; and that the appellants could now, as come in the right of the attainted Earl compel the heirs of Counteſs Iſabel, or her diſponee to diveſt themſelves of the eſtate, and of their titles which were in truſt only. On the 15th of Auguſt 1719, the Court found "that the right to the nine appriſings in "the perſon of the ſaid Counteſs Iſabel was a truſt for behoof of "the heir of the family of Seaforth; and that ſhe could not diſ- "pone in favour of a third party in prejudice of the ſaid truſt; "and therefore diſmiſſed the exception of the ſaid Kenneth Mac- "kenzie of Grunziard." So far the judgment of the Court was acquieſced in.

In

In the courſe of the debate upon the other exception preſented by the reſpondents, it was contended by the appellants that it now fell to be diſmiſſed being founded upon the ſervice as proteſtant heir to Counteſs Iſabel and that all further exception was barred after the firſt day of the then current month. The Court on the ſaid 15th day of Auguſt 1719, "found the right of "the nine appriſings in the perſon of Iſabel Counteſs of Seaforth "was a truſt for the behoof of the heir of the family of Sea-"forth, (*a*) and found that the exceptant's ſervice as proteſtant "heir to the ſaid Iſabel Counteſs of Seaforth, was a ſufficient "title to found his exception on, he being apparent proteſtant heir "to the family of Seaforth; and found that the exceptant might "reply on his right of apparency as proteſtant heir of the family of "Seaforth, though it were not expreſsly ſet forth in his excep-"tion."

And after ſubſequent proceedings, the Court, on the 18th of the ſame month of Auguſt 1715, "found it relevant and "proven, that William late Earl of Seaforth, was not ſeized or "poſſeſſed of, or intereſted in, or entitled unto the eſtate of Sea-"forth in his own right, or to his own uſe or any other perſon in "truſt for him on the 24th June 1715 years, or at any time "ſince; and that the publick, by his attainder, has no right nor "intereſt in the ſaid eſtate of Seaforth; and therefore ſuſtained "the exception preſented by the ſaid Kenneth Mackenzie of Aſſint "as proteſtant heir, and found, decerned, and declared accord-"ingly."

The appeal was brought from "part of an interlocutory ſen- Entered 15th
"tence or decree of the Lords of Seſſion of the 15th of Auguſt Dec. 1719.
"1719, and from the whole interlocutory ſentence of the ſaid
"Lords the 18th of the ſame month."

Heads of the Appellant's Argument.

The exception preſented for the pretended proteſtant heir ought to have been diſmiſſed, becauſe it was founded only upon that pretended title of proteſtant heir to Counteſs Iſabel the truſtee, not of proteſtant heir to any of the Earls of Seaforth, for whoſe benefit the Counteſs had undertaken the truſt. As heir to Counteſs Iſabel he could carry no more than the truſt eſtate, which was only a name or the office of truſtee, but he could not carry the right of property, which remained in the heir of the family, and ſo was forfeited by the treaſon of the late Earl William who was the heir of the family.

The ſervice of the reſpondent as neareſt proteſtant heir to Counteſs Iſabel was void, as not being warranted by the ſaid act 1700, in regard that, by that act a ſervice as proteſtant heir to the true proprietor is only allowed; but not a ſervice as proteſtant heir to a perſon veſted in an eſtate merely in truſt for the behoof of another.

(*a*) So far the interlocutor not appealed from.

Though

Though by the act 1700, a profeſſed papiſt is declared *incapable* of ſucceeding to an eſtate, yet that is not an abſolute incapacity taking place in all events, but is a benefit introduced only in favour of the proteſtant heir, upon the condition that he claim it by ſerving heir; and if ſuch proteſtant heir do not make uſe of the privilege, the full right to the eſtate remains in the perſon of the popiſh heir, who enjoys the profits, can charge it with debt, or alienate it at pleaſure. The reſpondent, the pretended proteſtant heir, never having claimed before the attainder, the right to the eſtate was on the 24th of June 1715, in the perſon of William late Earl of Seaforth, attainted, at leaſt of Counteſs Iſabel, her heir or aſſignee, in truſt for the ſaid late Earl, and ſo remained forfeited by his treaſon. And the reſpondents claiming the eſtate after the attainder was a direct fraud contrived to exclude the right of the publick; ſince if the late Earl of Seaforth had not been attainted he might have barred the pretenſions of the proteſtant heir by ſwearing the formula contained in the act 1700; but he being now attainted, cannot have an opportunity of ſwearing that oath, and ſo it muſt remain uncertain whether he would have ſworn it or not; and of conſequence whether or not he was incapacitated by the act 1700.

Admitting, but not granting that the reſpondents pretended title of proteſtant heir to the Earls of Seaforth were good, yet it is plain that theſe two titles of heir to Counteſs Iſabel, and heir to the Earls of Seaforth, were entirely ſeparate rights to ſeparate eſtates, the one a truſt eſtate, the other a right of property. The exceptant therefore was bound either to have laid his exception upon both titles as conſiſtent; or otherwiſe he could claim no more upon that title of heir to Counteſs Iſabel, but what ſhe herſelf was veſted with, and poſſeſſed of, which was nothing more than a nominal right of truſt; ſo the other right, which is the true right of property, muſt remain with the publick, ſince no exception was preſented on, or before the firſt day of Auguſt 1719, upon any title that could carry that property.

The pretended notoriety of the late Earl of Seaforth's being a papiſt is good for nothing in this caſe, ſince notwithſtanding of ſuch notoriety, it was in his power fully to have ſecured his own right, and to have excluded this proteſtant heir by ſwearing the oath recited in the act 1700; and therefore, it was not only neceſſary to adduce ſome other proof of his being a papiſt than a pretended notoriety: but even ſuch a proof cannot be ſufficient now that the late Earl is excluded from an opportunity of ſwearing the ſaid oath by his attainder, in as ſtrong a manner as if he were naturally dead.

If the exceptant's reaſoning be good, the act of parliament 1700, in place of being an *Act for preventing the Growth of Popery*, would prove the greateſt encouragement to papiſts, and the encreaſe of popery; for papiſts in a good correſpondence with their neareſt proteſtant kinſmen, might thereby enjoy their eſtates to the full extent, commit treaſon at pleaſure, without a poſſibility of forfeiting ſuch eſtates by their treaſons, but would always have a ſecurity

rity for them by the intervention of the pretended proteſtant kinſmen, and their claiming the eſtate though after an attainder.

Heads of the Reſpondent's Argument.

The act 1700 expreſsly declares, that if the popiſh heir do not renounce popery before his age of 15 years, his right and intereſt *ſhall become void and null, and ſhall devolve and belong to the next proteſtant heir*; to whom likewiſe the rents and profits of the eſtate from and after the popiſh heir's incurring the irritancy are declared to belong. So the very ſame clauſe which makes the popiſh heir's right void and null, at his age of 15 years, grants the rents and profits of the eſtate from that period to the proteſtant heir; and though the act declares that the proteſtant heir's right ſhall be burdened with the debts of the popiſh heir, yet that proviſo is to be underſtood only of ſuch debts of the popiſh heir as were contracted before his excluſion from the ſucceſſion that is before the 15th year of his age. Any other conſtruction muſt render the act of no uſe, for if the popiſh heir had a power to charge the eſtate with debts, after that period, the deſign of the act might be utterly avoided by the papiſt's contracting debts to the value of the eſtate.

The appellants contended that there was no evidence offered that the attainted perſon was a papiſt; but beſides the notoriety of the fact, the verdict of the jury, who ſerved the reſpondent proteſtant heir to his grandmother Counteſs Iſabel, is a legal proof that the late Earl was a papiſt otherwiſe ſuch verdict could not have been returned.

They alſo contended, that the reſpondent could not be ſerved proteſtant heir becauſe the late Earl had two children alive: but the act provides that infants, the iſſue of popiſh parents, ſhall be deemed popiſh; therefore the ſervice is ſtill good, for the children are infants, and under the education of popiſh parents, begotten and born after the rebellion, and their blood attainted.

With regard to the late Earl's power of taking the formula preſcribed by the act within 10 years, this could not be forfeited, it being a perſonal act, which nobody but he could perform.

Counteſs Iſabel was infeft, in this eſtate, her right was upon record, nor did there appear any truſt in the deeds under which ſhe claimed; ſince then, ſhe was the only apparent owner of the eſtate, the reſpondent muſt have ſerved heir to her in order to eſtabliſh his right. The truſt was only declared by the judges, after the exceptions were preſented; and though ſhe was but a truſtee, and though the reſpondent ſtood only in her right, yet that truſt could not be for the benefit of the late Earl of Seaforth; for, by the act 1700, he could not poſſibly have any right whatſoever in his perſon, and conſequently the appellants could have none. The truſt was only for the benefit of the heir of the family capable to take, which is the reſpondent; and as the late earl could not have compelled Counteſs Iſabel to diveſt herſelf of the truſt in his favour, ſo neither could the appellants: and as the truſt was not declared till after the exceptions were preſented, and conſequently could not be taken notice of therein, ſo that will not bar

bar him ſtill from inſiſting that though this was a truſt, yet it was a truſt for himſelf, and he was the only perſon who could claim the benefit of it.

With regard to the alleged colluſion, all ſervices are connected with the death of the party ſerved to, and drawn back accordingly; and the intervening attainder cannot alter the caſe, ſeeing before Earl William was attainted he was by the act 1700, diſabled from having any right whatſoever in his perſon; and all appearances of colluſion are excluded by the following facts: That the reſpondent's father had long ſince taken out briefs to ſerve himſelf neareſt proteſtant heir to Earl Kenneth, which were advocated to a higher judicatory by the late Earl William and afterwards dropt by reaſon of the death of the reſpondent's father, which happened ſoon after: that the reſpondent was a minor: that his curator was out of the country in the ſervice of government: that the minor's briefs were taken out ſhortly after the Counteſs's death: and that the ſervice could not be ſooner compleated, becauſe, before the attainder, the ſhire of Roſs, where the Eſtate lies was unacceſſible, being at that time the ſeat of the rebellion.

Judgment, 20 Feb. 1719-20.

After hearing counſel, *the queſtion was put whether the ſaid decrees ſhall be reverſed; it was reſolved in the affirmative. Ordered and adjudged, that ſo much of the decree or interlocutory ſentence of the Lords of Seſſion, of the 15th of Auguſt* 1719, *whereby they found "the reſpondent the exceptant's ſervice as proteſtant heir to "Iſabel late Counteſs of Seaforth a ſufficient title to found his exception on, and that the exceptant might reply on his right of apparency "as Proteſtant heir of the family of Seaforth, though it were not expreſsly ſet forth in his exception;" and alſo the whole interlocutory ſentence of the ſaid Lords of Seſſion of the* 18th *of Auguſt, whereby they "found it relevant and proven that William late Earl of Seaforth was not ſeiſed, or poſſeſſed of, or intereſted in, or entitled unto "the eſtate of Seaforth in his own right, or to his own uſe, or any "other perſon in truſt for him, on the* 24th *of June* 1715, *or at any "time ſince, and that the public by his attainder had no right or in-tereſt in the ſaid eſtate of Seaforth," be reverſed: and it is further ordered that the reſpondents be removed from all poſſeſſion of the eſtate in queſtion which they have obtained, and from the receipt of the rents and profits thereof; and that the ſaid commiſſioners and truſtees for the forfeited eſtates take poſſeſſion and receive the rents and profits thereof, and proceed to execute the powers and authorities in them veſted with reſpect thereto, any right, title, or claim of the reſpondents, or either of them, notwithſtanding.*

For Appellants, *Ro. Dundas*, *Tho. Reeve.*

For Reſpondents, *Robert Raymond. Dun. Forbes. Will. Hamilton.*