in question as to whether they did belong to the bishop or not. Then it is to be observed, that these rentals include all the great benefices. They were not the rentals merely of those which belonged to the bishop for his own use. But they were the rentals of all the great benefices, whether belonging to the bishops or abbots, or the great houses, or to other parties. Then the rental specifies four parishes of which the teinds were in Montrose, but of two of these, Maritoun and another, teinds certainly did not belong to the bishop for his own use. So that to deduce as an inference from this document that the teinds which were not mentioned in it were teinds which had been appropriated to the bishop for his own personal use, is a very loose inference, which I think can receive scarcely any support. It is a theory, but nothing more. Then the other documents to which I alluded, which comprehend the four parcels I have mentioned, the Lord Ordinary considers to be documents of no value, and I have stated my reasons for concurring in that opinion. Then there is one document which shews, that the stipend was made up by some arrangement, the origin of which is not now known, but to which the bishop contributed. Now that hardly affords sufficient ground to say, that that shews that the teinds were the bishop's for his own personal use, because we see that an effort was being made to bring together the stipends of ministers from various sources, and we see that teinds in other places which clearly were not within the bishopric of Brechin were from time to time appropriated to the minister. There remain certain other documents which have been referred to, and which I shall merely notice, because I think that, compared with the negative evidence, they have very little weight. I refer, in the first place, to the presentation of Mr. Lamb in 1607, from which it appears that the rights of the chapter were annexed to the bishopric. That does not shew that these teinds belonged to the bishopric, and it does not shew what title or what kind of interest the bishop had in them. Teinds that belonged to a canon church or chapter were not bishops' teinds, and they were granted only for the purpose of providing stipends, and were no part of the bishop's patrimony at all. Then there is an Act obtained by the Magistrates of Montrose in 1690 describing Montrose as a mensal church. Now the narrative by the Magistrates of Montrose in an Act which they obtained with the object of procuring from the Crown a grant of these teinds was of little consequence. It mattered little to them in what character the Crown possessed them, or how the Crown got them, provided they obtained their object. And we have no evidence to support the allegation which they made, that they belonged to the Crown in the character represented by the appellant, so that, upon the whole, I think that although the documents referred to contain scraps of entries here and there which might go to make out a case, if there were nothing to set up against it, any inference that might be drawn from them is so completely overpowered in this case by the usage which has taken place, and the manner in which these teinds have been dealt with upon repeated occasions of localities, that I cannot think that they afford evidence sufficient to enable us to say, that the Crown has discharged the *onus* which is incumbent upon it of establishing that these teinds are of a character which entitles them to the privilege that is claimed. I therefore think that the judgment appealed from ought to be affirmed.

Interlocutors complained of affirmed, and appeal dismissed with costs.

Appellant's Agents, Warren H. Sands, W.S. ; Loch and Maclaurin, Westminster.—*Respondents' Agents*, Mackenzie and Kermack, W.S. ; Connell and Hope, Westminster.

JUNE 19, 1871.

GEORGE EARL OF PERTH, *Appellant*, *v.* WILLIAM LORD ELPHINSTONE, and Others, Trustees, *Respondents*.

Treason—Attainder—Heir of Entail—Forfeiture—Restoration Act, 24 Geo. III. c. 57—*In* 1746, *James was the heir of entail infeft in certain estates held under an unrecorded deed of entail, and James and John his brother were attainted, and the estates became forfeited for high treason after James's death at a time when John, the apparent heir of James, was in possession. The estates were thereupon seized by the Crown and held by the Commissioners of Forfeited Estates until* 1785, *when Lord Perth, on proving himself the heir male of John, the Crown conveyed the estates to Lord Perth, and his heirs and assigns, under the Restoration Act,* 24 *Geo.* III. *c.* 57. *In* 1868 *the Earl of Perth, who served himself the nearest lawful heir male of James, sought to reduce the titles of Lord Perth's heirs:*

HELD (affirming judgment), (1) *That on the forfeiture of the estates of John, the deed of entail being unrecorded, the fee of the estates passed to the Crown;* (2) *that the Crown, under the Restoration Act, rightly conveyed the estates in fee to Lord Perth in* 1785, *he being then the heir male of John.*[1]

The Earl of Perth raised an action of reduction and declarator against Lord Elphinstone, Mr. Baillie Cochrane, and Lord Colville, the trustees of the late Lady Willoughby de Eresby, seeking to have it declared, that the titles to the Perth estates should be reduced, and that the pursuer had the only good and undoubted right and title to the lands, and that he had the only right to make up titles to the said lands as nearest and lawful heir male of the deceased James Drummond, the third Duke of Perth, and that the defenders should exhibit and produce the titles. The Second Division, recalling the Lord Ordinary's interlocutor, found, that the pursuer had no right or title to insist in the conclusions of the present action. The pursuer now appealed against that interlocutor.

The pursuer in his *printed case* stated the following reasons for reversing the interlocutor :— 1. Because the appellant has libelled a *primâ facie* case and a sufficient title and interest to insist in the conclusions of the action. 2. Because the said James Drummond, styled third Duke of Perth, held the Drummond and Perth estates, conform to the terms of the charter of *novodamus* of 17th of November 1687, granted to his father, James Lord Drummond, by whom they were propelled to him in 1713, with the exception of the proviso in the said *novodamus* enabling James Lord Drummond to sell lands, and pay debts of the family,—a proviso which was personal to himself, and which he therefore could not propel. 3. Because the said James Drummond, styled third Duke of Perth, could not, according to law, affect the right or title of the subsequent substitutes deriving title under the said charter of *novodamus*. 4. Because the radical right to the estates in question was not taken out of the *hæreditas jacens* of James Drummond, styled third Duke of Perth, by the attainder of his brother John Drummond, and the said estates still are in *hæreditate jacente* of the said James Drummond, styled third Duke of Perth, to whom the appellant has been duly served nearest lawful heir male in general. 5. Because, having regard to the provisions in the Crown charter of *novodamus* of 17th of November 1687, and the tenure under which the lands were held, John Drummond could not by his attainder vest anything in the Crown beyond the estate for the life of himself, and the heirs male of his body. 6. Because, even if the assumption could be supported, which the appellant denies, that the Crown, by the attainder of John Drummond, became vested with the absolute right to the estates in question, the appellant, as the heir male to whom the succession has opened under the prior investitures, is, according to the true construction of the Restoration Act (24 Geo. III. c. 57), the person entitled to the estates. 7. Because there are no sufficient grounds for dismissing the action *in hoc statu*, and the respondents should be ordered to satisfy the production with a view to the discussion of the whole merits of the cause. 8. Because the judgment appealed from proceeds upon an imperfect consideration of the merits of the case, and in the circumstances it was inexpedient and premature to dismiss the action at this preliminary stage before seeing any of the deeds and documents called for.

The respondents in their *printed case* stated the following reasons for affirming the interlocutor :—1. Because the appellant sues the action in virtue of his service as heir male of James Drummond, third Duke of Perth, and because nothing remained in the *hæreditas jacens* of the said James Drummond which was, or could be, taken up by the appellant's service as such heir. 2. Because the estates in question were forfeited to the Crown through the attainder of John Drummond, brother of the said James Drummond, and because they were, by reason of such attainder and forfeiture, taken out of the *hæreditas jacens* of the said James Drummond. 3. Because the claim of the appellant is excluded by the provisions of the Vesting Act, 20 Geo. II. c. 41, which followed on the attainder of John Drummond, brother of James Drummond, above mentioned, whereby the estates were vested in the Crown. 4. Because the claim of the appellant is excluded by the provisions of the Act of Annexation, 25 Geo. II. c. 41, by which the estates were annexed to the Imperial Crown of the realm, and declared to remain inalienable from the same. 5. Because the claim of the appellant is excluded by the Restoration Act, 24 Geo. III. c. 57, which provided, that the estates should be restored to the heir male of John Drummond, and to the heirs and assigns of such heir male. 6. Because the claim of the appellant is excluded by the provisions of the said Acts of Parliament, or of one or other of them, and by the possession of the Crown, and of the respondents' predecessors as deriving right from the Crown under these Acts, of the estates for a period greatly beyond the long prescription of the law of Scotland. 7. Because the Acts above mentioned confer no right on the appellant to the estates. 8. Because the appellant has no title to sue, (1) in respect that he is not the heir male of James Drummond, third Duke of Perth, and (2) in respect that his claim to succeed to heritable estates as such heir

[1] See previous report 7 Macph. 642; 41 Sc. Jur. 413. S. C. L. R. 2 Sc. Ap. 139; 9 Macph. H. L. 83; 43 Sc. Jur. 394.

is barred by the attainder of John Earl of Melfort in 1695, and *separatim* by the attainder of James Lord Drummond in 1715.

Dean of Faculty (Gordon), *Pearson* Q.C., *F. Turner*, and *J. S. Will*, for the appellant.—The interlocutor was wrong. When Lord John Drummond died the estates were held under the deed of entail of 1687, incorporated in a Crown charter of *novodamus*, but he had not been served heir to his brother, James Drummond, the last heir who had completed a title. It was decided in 1750, that the estates of James, which devolved upon Lord John Drummond, were forfeited to the Crown—2 Elchies, 149, Forfeiture, No. 15; 1 Paton, App. C. 503. But the extent of that forfeiture was not determined. Nothing was in effect forfeited except the interest of the attainted person. Such was the effect of the Statute of 7 Anne, c. 21, which assimilated the Scotch law of forfeiture for treason to the law of England—*Gordon* v. *Lord Advocate*, M. 4728; 1 Paton, Ap. 508, 558. Before that Statute, the Act 1685, c. 22, and 1690, c. 33, regulated the subject, and protected the substitutes in the entail against the treason of the heir in possession, if the deed of entail was registered. But the Act of Anne was intended to put Scotch entails on the same footing as English entails, and it must have repealed the prior Scotch Acts *pro tanto*. Its effect was to put substitutes in a Scotch entail on the same footing as remaindermen in an English entail. When, therefore, Lord John Drummond was attainted, nothing but the life interest of himself (seeing that he had no issue) passed to the Crown, and the interest of the substitutes remained unaffected. The fact of the entail being unrecorded is immaterial. The object of a register is to satisfy and give facilities to creditors, but cannot have anything to do with attainder for treason, and so it was said by the Chief Baron in *Gordon of Park's case*, 1 Paton, Ap. 565. Though the entail was unrecorded, it was nevertheless binding among the heirs of entail. The interest of a remainderman may be cut off in England by the heir in possession by a mere formal disentailing deed executed without any consideration, but not so the interest of a substitute in a Scotch deed of entail, and yet to hold, that the forfeiture of the heir in possession cuts off the interest of all the substitutes would be carrying the law of treason in Scotland far beyond its effects in England. The *dicta* in 1 Hume, Com. 547, and Sandford on Entails, 178, to the effect that the substitutes are only now protected, if the deed of entail has been recorded, are founded on misapprehension. Moreover, as Lord John Drummond was only an apparent heir, and could not have altered the order of succession by any voluntary deed (*Buchanan* v. *Angus*, 4 Macq. Ap. 386; *ante*, p. 1126), so, the entire fee not being in him, he could not forfeit it to the Crown. The Vesting Act 20 Geo. II. c. 41, and Annexing Act 25 Geo. II. c. 41, passed to the Crown nothing more than what was vested in the attainted person. The Restoration Act 24 Geo. III. c. 57, even if the extent of the interest forfeited to the Crown be deemed doubtful, expressly recognized the existence of the investiture of the Perth estates, for the estates are to be conveyed "to the heirs male of Lord John Drummond." That means the heirs male in the order set forth in the destination of the deed of entail of 1687. The conveyance is to be "to the heirs male and the heirs and assigns of such heir male." That means in reality "to the heirs male, whom failing, to the heirs and assigns of the heirs male"—*Polwarth Peerage*, 1840, 36 F. C. App. It is said, that the word "heirs male" is misprinted for heir male in the Statute, but though the Statute roll contains the word "heir male," there has been evidently an obliteration of the letter "s" at the end of heir, which letter must have been erased without authority. The Crown therefore ought to have reconveyed the estates on the same destination as in the deed of entail, and had no power to convey them in fee to Captain Drummond (the father of Lady Willoughby de Eresby) in 1785, and that being so, the appellant is the party entitled to the estates, or at least to the production of titles which he now seeks, and no prescription can be set up against his claim, for prescription must rest on a *primâ facie* written title, which is here wanting.

The Lord Advocate (Young), *Sir R. Palmer* Q.C., and *A. B. Shand*, for the respondents.—(Their arguments being adopted by the House, are sufficiently noticed in the judgment below.)

Cur. adv. vult.

LORD CHANCELLOR HATHERLEY.—My Lords, in this case the present appellant, the Earl of Perth and Melfort, had taken proceedings in Scotland for the purpose of reducing the titles under the instruments under which the respondents in the case claim title to the large estates of Drummond in Scotland, and for the purpose, in the course of that process of reduction, of having the production of writs, as incidental to the necessary inquiry which was to be had, as he contended, in the action itself. The course of proceeding which the case has taken in Scotland has occasioned the present appeal to be brought on an interlocutor of the Inner House, which refused the production of the writs, the ground of that refusal being, that the claimant, the appellant, has not made out any case by which he has qualified in himself a title justifying him in demanding this production. The case therefore stands thus, that we must assume the allegations of the appellant to be true for the purpose of ascertaining whether or not he has made out a case requiring the production of the writs, and so doing we shall not be involved in many questions, which might otherwise hereafter possibly cause some difficulty with regard to the exact condition and nature of the title.

Now the claimant, the appellant, the Earl of Perth, commenced his title in this manner. I will describe presently the instruments under which he claims title, but he commenced qualifying himself as a person entitled to sue by procuring himself to be served heir of James Drummond, who was called the third Duke of Perth, a title which has never been recognized here, but which the Earls of Perth had taken upon themselves in the course of the various proceedings which occurred during the succession first of all of William III., and afterwards of the House of Brunswick, to the throne.

Now, this James, third Duke of Perth, I may for brevity's sake at once describe as a person standing in this position. I think it is not necessary to go through the previous instruments which had placed him in that position, because the exact position which he occupied at the time of his decease is not a matter in question on either side. James Drummond, this third Duke of Perth, was, under two or three instruments which had been executed for the purpose of creating entails of these Drummond estates, the person who, if he had had issue, would have been entitled to an estate to him and the heirs male of his body, by virtue of certain instruments of tailzie, whom failing, to his heirs male, whom failing, to the heirs general. That being the position of the case, I have only to add, that the instruments creating this tailzie were not instruments protected by the Act of 1685. The first, I think, dated from a very early period, viz. the year 1687, and there was another instrument in 1713, and another still later, but none of them were registered in the manner directed by the Act of 1685, and although it was argued before us, that there was no need of registration on account of the instruments themselves being followed by charters of the Crown, including one charter said to be a charter of *novodamus*, yet I apprehend, that it is not necessary to enter into any elaborate discussion to shew, that those estates which were formerly held in Scotland of the Crown (which is already of itself not bound by the Act of 1685 as such) could not escape from the necessity of being registered as directed by the Act of 1685. I apprehend, that there is nothing whatever in that Act to exempt the charter from the necessity of such a course being taken.

Therefore we arrive at this, that according to the Scotch law the estates were at the disposal of James Drummond, the third Duke of Perth, as soon as they became vested in him, unfettered by those provisions which would otherwise bind an estate in tailzie duly registered. The consequence of this is, that he would have been absolute master, not only of the estate to him and the heirs male of his body, but absolute master of the estate created also on behalf of his heirs male, the heirs of his body, and (which was a still wider limitation) his heirs general.

In this state of things James, the third Duke of Perth, being thus entitled in the year 1745, both he and his brother Lord John Drummond became involved in the acts which occasioned so many forfeitures in Scotland on the part of persons who took part with the then pretender. In consequence of this, in the then situation of the family, James Drummond himself, the third Duke of Perth, having no heir male of his body, the Lord John Drummond being his only heir male, there being neither any other brother or any other sister of the family, in 1746 both James and John were attainted by Act of Parliament, and forfeiture declared of their property unless they surrendered within a given period. James died before the expiration of that period of surrender, leaving Lord John his nearest heir male him surviving, and not leaving any issue of his body.

Upon that several questions have arisen from time to time which have been determined by the Courts in Scotland. First, there was a claim on the part of one Thomas Drummond with reference to an alleged disposition made by James Drummond, the third Duke. It was ultimately held, that that was a disposition only in trust for the party himself, and that no effect could be given to the disposition, and it was held, that such a claim could not be sustained. At first it was thought that the estate of James Drummond was forfeited by those acts of attainder and forfeiture of which I have spoken, but it was ultimately held not to be so in consequence of his having died within the period allowed for surrender, so that the estates remained in him until his death.

The consequence of that was, that the estates so remaining in him passed to his brother Lord John, by virtue of the tailzie which had been executed as I have described. The disposition to Thomas having been set aside, the estates came to Lord John Drummond. Now the estates coming to Lord John Drummond, and he not surrendering within the time specified, it was conceived, at about the period when all these transactions took place, that is to say, soon after the year 1746, that the estates vested in Lord John Drummond were by the acts of attainder and forfeiture forfeited to the Crown. By an Act to which I shall have presently to refer as the Vesting Act, which is an Act of the 20th Geo. II. passed in 1747, the estates became vested in the Crown, and by a Restoring Act to which I shall have also occasion afterwards to refer, those estates were given back by a course of proceeding which purported (whether correctly or not is the question in the present case) to be a grant pursuant to the Act called the Restoring Act, which granted the property to a certain Captain James Drummond under a direction contained in the Act to convey the estates to the heir male of Lord John and his heirs and assigns.

In this state of things, the only points which appear to me to raise any substantial question are

these: True it is, it is conceded on all sides, that up to the year 1690 the forfeiture of an estate tailzie in Scotland included all those which we call limitations to heirs male, or to heirs general, or indeed to third persons not connected in blood continuing in the same tailzie, and being substitutes coming after the original institute. All those estates down to the year 1690, under any circumstances, whether the tailzie was registered or not, would be forfeited by the attainder of the actual holder. But an Act was passed in 1690 by which it was enacted, that in the case of an estate tail only the interest of the holder himself, if the estate were forfeited, should be dealt with, and that the estate tail should not be swept away *in toto*, but should pass on according to the destination originally declared of the estate, subject only to forfeiture of the interest of the first taker during his life. That was the Act of 1690, but there was a proviso to that Act, that it was only to apply to the case of an estate tail duly registered, and the Act in its recitals professed to deal with the matter on this ground, viz. that the estates were not within the control or disposition, nor intended to be within the control or disposition, (pursuant to the Act of 1685,) of the first taker, and that therefore it was right, expedient, and proper that he should not have this species of control over the estates which he could not have by any other act of his own, viz. the capacity of forfeiting the whole estate for his own delict as against those who might otherwise have claimed under any other species of alienation on his part, by virtue of the registration of the deed. That being so, the matter would appear to be sufficiently clear upon the facts as I have already stated them, that as regards Lord John Drummond, as to whom no tailzie had ever been registered, his case would be entirely out of the Act of 1690, and the estates vested in him would be forfeited, as has been held to be the law with regard to an estate tailzie as against the Crown.

However, the case has now been mainly rested in the present controversy upon the Act of the English Parliament after the Union, the Act of the 7th of Anne. That Act of Parliament recites the expediency of conforming and making uniform the law of treason and forfeiture on treason in the two countries. And accordingly in its preamble it thus sets forth: "Whereas nothing can more conduce to the improving the union of the two kingdoms, which by her Majesty's great wisdom and goodness hath been happily effected, than that the laws of both parts of Great Britain should agree as near as may be, especially those laws which relate to high treason, and the proceedings thereupon as to the nature of the crime, the method of prosecution and trial, and also the forfeitures and punishments of that offence which are of the greatest concern both to the Crown and the subject. To the end, therefore, that the said union may be more effectually proved, it is enacted, that from and after the 1st of July 1709, such crimes and offences as are high treason or misprision of high treason in England shall be construed to be so in Scotland, and none other." Then by the 3d section it is enacted, that "all persons convicted or attainted of high treason, or misprision of high treason, in Scotland, shall be subject and liable to the same corruption of blood, pains, penalties, and forfeitures, as persons convicted or attainted of high treason or misprision of high treason in England." Then the 4th section says, "provided always that where any person now is, or shall be before the 1st day of July, seised of any messuages, lands, etc., in Scotland of an estate tail (that is to say, an estate tailzie) affected with irritant and resolutive or prohibitory clauses, and is, or before the said 1st day of July shall be, married, if any issue of that marriage be living, or there be possibility of such issue at the time of the treason committed, that then in such case the said messuages, lands, etc., shall not be forfeited upon the attainder of such person for high treason, (but during the life of the person so attainted only,) so that the issue and heirs in tail of such marriage shall inherit the same, the said attainder notwithstanding."

The result of this Act thus requiring the two laws to be assimilated came to be this: The case of *Gordon of Park*, which was the case mainly relied upon by the appellant in this case which is now before your Lordships, was brought before your Lordships' House under circumstances which rendered it necessary to apply the Act of Anne, directing, that in the case of forfeiture for treason the laws of the two countries should be assimilated. In that instance the estate stood limited to a Sir William Gordon as tenant, and to the heir male of his body, whom failing, not to his next heir male, but to the heirs of the body of the original settlor, a Sir James Gordon, who made the original disposition. And the Courts in Scotland had held, that, by virtue of the Statute 1690, the estate of Sir William Gordon, which had undoubtedly and unquestionably been forfeited, would have passed over at once to his issue if he had had any, and that those failing, it would go over as in remainder to the remainderman, who was then claiming as the heir of Sir William, the original settlor. What the Court there said was this: Notwithstanding that the Act of 1690 provides, that the estate and interest shall only be forfeited for the life of the person who himself has committed the treason, yet we find a subsequent Act, viz. the Act of Anne, which provides, that the law shall be assimilated in the two countries, and the law as it stands in the two countries is this: By the English law of treason until the Statute of Henry VIII., the interest of the issue in the estate tail could not have been forfeited. By the Statute of Henry VIII. the issue of the first taker in tail on the forfeiture for treason of the tenant in tail were barred and the estate was forfeited. Estates in remainder, however, were not forfeited by the forfeiture of the first taker of

the estate tail, but upon the whole of his issue being spent and gone, the limitation in remainder would take effect, and the property would be so far secured to those who came in remainder. All, that the Judges determined in the case of *Gordon of Park*, in fact was this, that they determined adversely to the Act of 1690 by saying, that, since the law had been assimilated in the two countries, it was necessary that the forfeiture should embrace the whole interest until the estate tail should be completely spent—in other words, according to our English phraseology, they preserved the base fee during the continuance of the issue of the first taker. And then the argument, as I understand it, is this : Here you have a case where, the estate being limited to the heirs of the body in the first instance, whom failing, to the heirs male, in the Scottish law every substitute comes in the capacity of a remainderman, and in one sense he does where the tailzie is registered, viz. in the sense that the estate cannot be disposed of as against him ; but if the taillie be not registered, he fills the character of an heir, using that word in a somewhat different sense from that in which we use it in the English law, because the heir represents every person coming after the first taker in the destination, who takes as the institute by virtue of the instrument creating the estate. That being so, the question is really brought to this very simple point, whether or not, according to the decision in *Gordon of Park's case* which proceeds upon the ground of the English law, having forfeited the whole estate tail, the Act of 1690 must *pro tanto* give way to it. I do not think that anything more than that purported to be done by the Act of Anne, or that anything more was said by your Lordships' House when deciding the case of *Gordon of Park*, than that the Act of 1690 was held to be affected and altered by the Statute of Anne as far as that went. I think nothing more was said about that Statute but that the law must be assimilated, and the estate destroyed *in toto* as regards the estate to the heirs male of the body, which is as it were an enlargement of the right of the Crown as against the Statute of 1690. Therefore, by virtue of the same Act of Anne, there must be a corresponding diminution of the right of the Crown with reference to the estate to the heirs male after the heirs male of the body of the first taker shall have been spent.

Now observe what would be the effect of coming to such a conclusion ? It would be singular enough. The argument wholly arises from the attempt to make a full and complete analogy between cases which really do not admit of that full and complete analogy, regard being had to the difference between the two laws. But as far as the analogy can really in any way be pursued, the argument is wholly the other way from that in which it has been put on behalf of the appellant, because the estate vested in Lord John upon the failure of his issue male was really a larger estate, and one more completely vested in him and giving him more complete control. If the English law allowed any such limitation, which it does not—and hence arises the difficulty in making a comparison—it would be a full and complete fee simple, with the choice of heirs, which the law does not admit.

Now I take it, that the whole principle of the English law—the whole principle of the Act of Henry VIII.—was, that those who claim *qua* heirs from the taker should be affected by the forfeiture, and that although it be an estate in tail, and although by the Statute *de donis* the property seems to be secured to the heir, yet, on the other hand, those who take as inheriting through the first taker as his issue in tail by a qualified heirship—who take as his issue directly next in blood to him, shall be held to be affected by the forfeiture which has accrued to the ancestor. Therefore, finding, that there is nothing in the Scottish law in any way to limit it, and that the whole question must depend (as was expressly admitted at the bar) upon the construction of the Statute of Anne, it appears to me, that we should be straining the case of *Gordon of Park* most unwarrantably, if we were to hold, that the effect of that judgment was to make the Statute of 1690 more restrictive in its effect than by the Scottish law it could possibly at any previous time have been. Because it is now sought to apply to a case not even within the purview of the Statute of 1690, viz. the case of an entail not registered, and it is sought, by virtue of the judgment in the case of *Gordon of Park*, to extend a protection to persons who stand in this position in relation to the first taker, that is to say, that they are his representatives in their representative capacity as heirs of a larger estate and interest than his children, if he had had any, would have been, as representing him as heirs male of his body, they being his heirs male general, and the estate being by the Scottish law allowed gradually to expand through that process from the heirs male of the body to the next heirs male, and so on, from the next heirs male to the heirs general. In other words, you have in the Scottish law what the English law will not admit of, viz. you have to make a step toward the fee simple, to which there is nothing similar in the English law, and having advanced a step further toward the fee simple, you are now to say, that when those who take the estate take an interest giving them a larger right of disposition, then, in that state of things, in order to assimilate the law of the two countries, you are to hold, that the larger estate must not be looked upon as really the larger estate, but must be looked upon as a remainder.

Now, what was the principle of protecting the remainder ? The principle of protecting the remainder undoubtedly was a limitation which, except by virtue of a fictitious process which the English Judges actually gave sanction to, would have been destroyed under the Statute *de donis*

in the first taker, and therefore, the first person taking by remainder was supposed to hold by the grant made to him by the author of the settlement, whereas the heirs taking through the medium of the first tenant in tail, with remainder to the issue of his body, were no doubt, by the words of the Statute of Henry VIII., placed in a position in which they were held liable to all the consequences of the forfeiture of the first taker, inasmuch as they could only take by representation through him. Here are persons taking by a larger and wider representation, and representing a larger and wider power over the estate. Are they to be held, by virtue of the construction in the case of *Gordon of Park*, to be exempt from the consequences of the first taker's treason? Undoubtedly the English law, if it had allowed of such an estate being in itself created, would have struck at it as being a step in advance towards the fee simple, and not a step towards an estate of a more restricted character and interest than that which it declared in the case of *Gordon of Park* to be forfeited. It appears to me, that it would be a total misapprehension of that case to give any such construction to the limitation in the present case. It appears to me, that the full right of the Crown to the forfeiture which existed by the Statute of 1690 continued to exist after the Act of 1690 with regard to this particular estate, because the entail of the property was not registered. It appears to me, that the full right of the Crown to the forfeiture is in no way struck at by the Act of Queen Anne, and that, in order to affect it, you would have to shew, that by the English law such an estate as we have before us here would not have been forfeited. But the difficulty is this, that no such estate exists in the English law, and if no such estate exists in the English law, I apprehend, that the Scottish law would prevail where the object is to make the two laws of forfeiture coincident as far as possible. You find, that the English law forfeits an estate which is less than this, and that it forfeits the fee simple of an estate which is greater than this. Here is an intermediate estate in Scotland, and I think that it involves no clashing between anything that is done by the law of Scotland and by the law of England, to say, that the law of England, which strikes at an estate of a more limited nature, and an estate of a more extended nature, cannot be so applied as to prevent the law of Scotland from operating upon an intermediate estate which is permitted by the law of Scotland. The Act of Queen Anne does not attempt to assimilate the dispositions in Scotland and the dispositions in England with reference to the destination of estates, but it says, whenever punishment is to fall, let the principle be equality of punishment in the two countries. It cannot, I apprehend, be said to militate in any way against that law, if you say that finding a lesser estate forfeited in Scotland, and finding a greater estate forfeited in England, the intermediate estate, which is something more than that smaller estate which would be forfeited, though it is something less than the larger estate which gives a complete disposition of the property, is also forfeited. That would appear to be on the principle of the Act of Queen Anne, and not to be extending the law of forfeiture in one country beyond the law of forfeiture in the other.

Then, if the estate was forfeited, there is no doubt that it was vested in the Crown. If it was vested in the Crown, there is no doubt that there was a power in the Crown to deal with it in the manner provided by the Restoring Act. That Restoring Act appears to have been an Act for the express purpose of giving back forfeited estates, even where they had been (what we should call) settled by deeds creating tailzies, or in any other way. The object of the Act was to restore the estate to the person who filled at the time of the passing of the Act of Restoration the character of the person who would be entitled under the destination. But in restoring it to that person, it seems to me to have been clearly and distinctly the principle of the Act to give it to him in fee. If you look at the different sections, they are very singular in applying themselves to the variety of cases which existed. You find a case in § 9, which I need not comment upon, in which the estates have been dealt with as if they had been forfeited to the Crown, but which estates were only held in wadset, and provisions were made as to the restoration of those estates.

Before going to § 10, which we have to deal with, as it regards the Drummond estates, I prefer referring first to § 11. There it is recited, that Francis Buchanan, late of Arnpryor, another of the forfeited persons, also died without lawful issue of his body, possessed of or entitled to the following lands and estates, *videlicet*, the estate of Arnpryor, and the lands of Stank and Kerinock, which were devised to heirs general, and the estate of Strathyre, and certain parts of the lands of Arnfinlay, which were devised to heirs male. "Be it therefore enacted, that it shall and may be lawful to his Majesty to grant and dispone to Mistress Jean Buchanan, widow of the deceased John M'Nab of M'Nab, Esquire, sister and heir general of the said Francis Buchanan, her heirs and assigns, the said estate of Arnpryor, and the said lands of Stank and Kerinock, and to John Buchanan of Auchlessie, Esquire, the heir male of the said Francis Buchanan, and his heirs and assigns, the said estate of Strathyre." That is to say, that one estate, which was limited in what we should probably call a fee simple, they handed over to the heir general. In the case of another estate limited to heirs male, they find out the person then being the heir male, and they do not say, Hand that over to him and his heirs male, but they say, Hand it over to him, his heirs and assigns. It appears to me plainly, that was the course of the Statute throughout. As to the other sections, except § 10, which I

shall presently refer to, I think that in all of them the persons appear to have been known, and they are pointed out, and the limitation is directed to be to them and their heirs and assigns, and we are not told in those sections, whether or not estates stood limited in any other way. In the case of Buchanan it became necessary to tell the story, because there were two representatives of the original forfeitor, the one taken under one limitation, and the other taking under another limitation. They found out the person entitled as the heir general at that moment, and they found out the person entitled as the heir male at that moment, and they handed the estate over to them in fee.

As regards these particular estates forfeited by Lord John Drummond, it was not known at that moment who the heir male was. I believe it was in controversy. He therefore not being known, the course taken is this: that as to those estates of Perth which had been forfeited, and which stood devised before the forfeiture to heirs male, they deal exactly as they dealt in *Buchanan's case*, and "whereas the said John Drummond died without leaving issue lawful of his body, and it is not yet ascertained who is his nearest collateral heir male, be it enacted, that it shall and may be lawful for the Crown to give, grant, and dispone to the heir male of the said John Drummond, who would have been entitled to succeed by the investitures of the said estate had it not been forfeited, and to the heirs and assigns of such heir male, all and every the lands," and so on. There is a little controversy, whether the words are "heir male" or "heirs male." We decided, that we must take the Parliament Roll as representing the Act of Parliament correctly, but I do not think that it makes much difference in this particular case whether you read it in the one way or the other, because it is quite clear, looking at the whole tenor of the Act, that the object was to find out the people to whom the destination is to be made; to ascertain who was the person occupying that position at the period of the passing of the Act, and when you have ascertained that point, to hand over the estate to him, his heirs and assigns in fee. That seems to have been the proper and regular course. And the consequence of it was, that the Crown passed this property over to Captain James Drummond, who to its satisfaction made himself out to be the particular heir male ascertained by that inquiry. Accordingly the estate was passed over to him, and I need not say more about that, because as to the subsequent devolution of the title we are not to inquire into it. The object of the application made to the Court below was for the production of titles which the appellant said he was entitled to reduce if they were brought forward. But here we must take for granted all that the appellant has chosen to allege with reference to his position. The result of it all is this, that he claims right as having served himself heir of Lord James, the brother of Lord John, the estates having by the law of Scotland passed to Lord John, in consequence of their not having been actually forfeited by Lord James. Then it follows that the *hæreditas jacens* having been in James, and that *hæreditas jacens* having passed over to John, it appears to me that, in consonance with the Statute of Anne, it passed into the possession of the Crown. That possession of the Crown was afterwards divested by the Act of the Crown itself (as is stated upon these proceedings) by making the grant to Captain James Drummond. And I apprehend, upon two grounds, the claimant, the appellant, cannot succeed—*first*, that as claiming his property as part of the *hæreditas jacens* he could not succeed in consequence of its passing over to John; and *secondly*, inasmuch as of course this would not be a procedure by which a grant actually made by the Crown could be repealed and recalled, but some different sort of process being necessary (whatever might be the proper course) for recalling this grant already made, when we once find, that the estates really passed to John, and from John to the Crown, the case alleged to be made out by the appellant is, that he is entitled to recover in this suit, and as a consequence of that recovery to have production of the titles in order that he may further proceed by leading evidence; but his right to that production has not been established before us, and therefore I am of opinion, that the interlocutor of the Court below should be affirmed, and that this appeal must be dismissed with costs.

LORD CHELMSFORD.—My Lords, in this action, which claims the production of certain writs for the purpose of having them reduced, the pursuer is bound to shew a sufficient title before he can call upon the defenders to satisfy the production. It is a preliminary proceeding which can be met only by an objection to the pursuer's title, as stated by him upon the record, or by some other valid preliminary defence. If a sufficient *primâ facie* title to the production is shewn by the pursuer, the defender can urge nothing in answer which may thereafter prove to be a complete defence to the pursuer's claim to the lands and estates, which it is his ultimate object to recover.

The appellant's right to the production claimed is asserted on the ground, that he has the sole legal right and title to make up titles to the lands *habili modo* as nearest and lawful heir male of the deceased James Drummond of Perth, who took upon himself the style and title of the third Duke of Perth. The appellant's summons contains a general conclusion, that the pursuer has the only good and undoubted right and title to the lands, etc., of Perth, but unless he has shewn upon his pleadings that he sustains the special character which he claims, of heir male of James Drummond, his general conclusion will be of no avail.

The Lord Ordinary was of opinion, that the pursuer had libelled at least a *primâ facie* title to sue the action; the service as heir male to James Drummond founded upon being the proper and conclusive legal evidence that he possessed the character which he claimed. But upon a reclaiming note to the Second Division of the Court of Session, the interlocutor of the Lord Ordinary was recalled, and the interlocutor appealed from was pronounced, whereby it was found, that the pursuer had no right or title to insist on the conclusions in the action; for that the lands and estates claimed by the pursuer, and all rights connected therewith, were taken out of the *hæreditas jacens* of James Drummond (designed third Duke of Perth) by means of the attainder of John Drummond, apparent heir of the said James Drummond, and that the same became vested in the Crown.

The foundation of the appellant's title is laid in a deed of entail dated the 11th of October 1687, executed by James, the fourth Earl of Perth, Chancellor of Scotland, fenced by prohibitory, irritant, and resolutive clauses, whereby, under a reservation of his own liferent (to which the fetters imposed did not apply) he disponed his lands and estates of Perth to and in favour of his eldest son, James Lord Drummond, and the heirs male of his body, whom failing, to his other heirs male whatsoever, whom failing, to his own heirs and assignees.

Under this entail a title was completed upon a procuratory of resignation, executed by the institute, by a Crown charter of resignation and novodamus, upon which infeftment followed in his favour. But the deed of entail was never recorded in the Register of Tailzies.

In 1713 James, the institute in the entail of 1687, executed a disposition (reserving his own liferent) in favour of his eldest son, James Lord Drummond, and the heirs male of his body, whom failing, to his other heirs whatsoever.

In 1713, James Lord Drummond, styled third Duke of Perth, expede a Crown charter of resignation and confirmation in favour of himself and the heirs male of his body, whom failing, to his other heirs male whatsoever, whom failing, to his heirs and assignees. Thus stood the title at the death of James Lord Drummond, in May 1746, and at the time of the attainder of his brother and heir, Lord John Drummond, on the 12th of July 1746, which by the Act of Attainder, 19 George II. cap. 26, took effect from the previous 18th of April. Whatever estate and interest Lord John Drummond had in the Perth estates at the time of his attainder, was vested in the Crown by the Vesting Act of 20th George II. cap. 41, passed in 1746, and annexed inalienably to the Crown by the Annexing Act of 25th George II. cap. 41, passed in 1752. Lord John Drummond, on the 12th July 1746, had not made up his titles as heir to his brother James, but there is no doubt, (and this was admitted by the appellant,) that whatever estate and interest Lord John Drummond possessed in the Perth estates as heir apparent was forfeited in the same manner or to the same extent as if he had completed his feudal title. James Lord Drummond undoubtedly died vested with the fee of the estates, and if Lord John had made up his titles as heir to his brother, which he must have done, as he was the last person infeft, the service would have carried everything which was in *hæreditate jacente* of James, and consequently, by the attainder of Lord John, the fee must have been forfeited to the Crown.

Before any Statute existed on the subject a substitute in a Scotch entail had no protection against a forfeiture of the estates of a tenant in tail for high treason. The prohibitions in the Act of 1685, cap. 22, merely protected a substitute against the voluntary deeds of the tenant in tail, and had no effect in securing him against the forfeiture of the estate to the Crown. Indeed it expressly declares, that nothing in the Act shall pre-judge his Majesty as to confiscations or other fines as the punishment of crimes. This latter clause was repealed by the Act of 1690, which enacted, that no deeds of entail in infeftments or other deeds affected with prohibitive or irritant clauses shall be prejudged by the forfeiture of his predecessor, provided the right of tailzie be registrate conform to the Act of Parliament in the year 1685. But the appellant contends, that the Statute of Anne, cap. 20, which virtually repealed the Act of 1690, and made the crime and offence of high treason, and the liability to forfeitures consequent upon it, the same in Scotland as in England, placed the substitute in a Scotch entail in an analogous position to a remainderman in an estate tail in England, and therefore secured him against the forfeiture of the estates by the tenant in tail, and that this analogy existed whether the entail was recorded or not in the Registers of Tailzies. It is to be observed, that the Statute of Anne says nothing as to the forfeiture except as it affects the persons convicted or attainted of treason, and the exception of heirs of entail committing treason before the 1st July 1709 is only to save them the benefit of the Act of 1690.

There can be no perfect analogy between a substitute in a Scotch entail and a remainderman in an English entail, but to assimilate the substitute as near as may be to the remainderman, the Scotch entail must be a strict entail within the Act of 1685, and consequently one that is recorded in the Register of Tailzies. The appellant relied strongly upon the case of *Gordon of Park*, where Sir James Gordon executed a procuratory of resignation of his barony of Park for new infeftment to himself, and after his decease to William Gordon, his eldest son, and the heirs of his body, whom failing, to the heirs male of Sir James's own body of his then present, or of any subsequent, marriage, with other substitutions. A charter from the Crown and seisin proceeded

upon this procuratory, on which, as well as in the procuratory itself, prohibitory and irritant clauses were engrossed.

William succeeded his father, and was forfeited for his accession to the rebellion in 1745, and the estate was seized for the Crown. As Sir William Gordon had no children, the estate was claimed by his brother, Captain John Gordon, as the next heir of entail. The House of Lords, reversing a decree of the Court of Session, held, that by virtue of the Statute 7 Anne the estate became forfeited to the Crown by William Gordon's attainder during his life, and the continuance of such issue male of his body as would have been inheritable to the estate, in case he had not been attainted, and that by virtue of the substitution to the heirs male of Sir James Gordon's body, of his then present marriage, Captain Gordon had right to succeed to the barony of Park, after the death of William, and failure of the issue of his body, according to the limitations in the settlement. Lord Kaimes in his Elucidations (p. 371) observes, that by this judgment a remainder, with respect to forfeiture, is introduced into our law, hitherto unknown in Scotland. There can be no doubt that the tailzie in the case of *Gordon of Park* was a complete and registered tailzie according to the Act of 1685, because Baron Hume in his Commentaries, (pp. 546, 547,) after stating that by the judgment in this case, the interest of the next order, a class of substitutes was to be viewed as a new acquisition or separate estate from that of the offender and his issue male, adds these observations: "Even this limitation of the forfeiture does, however, only apply in the case of such tailzies as are duly completed by entry on record or terms of the Statute 1685. For this circumstance is an indispensable qualification for taking the estate out of the case of a fee simple, which, as the possessor may effectually alienate or encumber by his deed, so must it absolutely and entirely forfeit by his crime." In the case of *Kinloch* v. *The King's Advocate*, (M. 15,388,) which was decided only two months after that of Gordon of Park, on a substitute claiming the estate after the death of the heir who had been attainted for engaging in the rebellion of 1745, the Court found, that the tailzie upon the estate of Kinloch not being registered in terms of the Act of Parliament 1685, no claim could be sustained thereon. And the claim of the substitute after an attainder was again dismissed on the subsequent case of *Hay* v. *The King's Advocate*, (M. 15,602,) where the want of registration was one of the objections stated on behalf of the Crown.

As the deed of entail of 1687 was not registered, James Lord Drummond would have had a right to alienate the estate, and Lord John, upon the completion of his title as heir to his brother, would have succeeded to all that had been previously enjoyed, and would have had the same right of alienation. Therefore, on his attainder, the entire fee was forfeited to the Crown, and there was nothing left in the *hæreditas jacens* of James Lord Drummond, upon which the appellant's service as heir to him could operate.

I might end here, but perhaps it would not be right not to make some observations upon the *appellant's case* arising upon the Vesting and Restoring Acts. I may observe, that the objection to the service of the appellant as heir male to James Lord Drummond, on the ground, that he was compelled to derive title from two attainted persons, James, second Duke of Perth, attainted in 1715, and John Duc de Melfort, attainted in 1695, appears to me not to be competent to the respondents in the present proceedings. Whether it would be a ground for reduction of the service it is unnecessary to consider, but I apprehend in this action the service must be taken as a good service of the appellant as heir, and that the only question is, what title to enforce production it gave him.

The foundation of the appellant's claim is laid in the Act of the 7th Anne having placed a substitute in the position of a remainderman in an English entail, and so protected him against the forfeiture of the tenant in tail for treason. And he contends, that the Vesting Act, 20th George II. c. 41, vested only the lands and heritages which the attainted persons were seized or possessed of or interested in or entitled to according to their several and respective estates and interests; that Lord John Drummond had only the estate and interest of James Lord Dummond, which was distinct from that of the substitute in the entail of 1687, and that the Restoring Act of 24th George III. c. 57, gave the Crown the power to restore forfeited estates to the heirs and families of the attainted persons, and that the clause of the Act relating to the Estates of Perth must be understood as restoring them to the limitations of the settlement of 1687. The power given to the Crown by the 10th section of the Act is to give and dispone to the heir male of Lord John Drummond, and to the heirs and assigns of such heirs male. A good deal of discussion took place as to whether the words were "heirs male" in the plural or heir male in the singular, it appearing that there were copies of the Act in which the plural was found, and the Parliament Roll having apparently the final "s" erased. But whatever is the actual state of this Roll, it is the decisive authority upon this subject, and cannot be averred against. The appellant insisted that heir male was *nomen collectivum*, and therefore, that the clause would have the same effect if it read either way. But I think there can be no doubt that the intention was to give the estates to the person, who at the time was the heir male of Lord John Drummond, and to his heirs and assigns. It seems to me impossible to read the clause in any other way. It recites, that Lord Drummond died without leaving issue lawful of the body, and it is not yet ascertained who is his

collateral heir male, and it then gives and dispones to the heir male of the said John Drummond, (clearly as a *descriptio personæ*,) and to the heirs and assigns of such heir male, and the intention to give the fee to the heir male when found appears to be clear from the other sections of the Act, in which the forfeited estates are given, the son or the grandson of the attainted person and his heirs and assigns, and particularly from the 11th section, in which it is recited, that part of the forfeited estates were devised to heirs general, and part to heirs male, and the part devised to heirs male is given to the heir male by name of the forfeiting person, his heirs and assigns.

Of course the argument of the appellant has not the slightest foundation to rest upon, if (as has been already shewn) the fee of the Perth estates was forfeited by Lord John Drummond's attainder, and was vested in the Crown. But even if he were right in his view of the limited character of the forfeiture, he could not, in my opinion, be successful in his contention, that the Crown exceeded its powers by granting the forfeited estates in fee. The estates of the attainted person were, by the Act 20 George II. c. 41, vested in the Crown, and a register of the forfeited estates was to be kept, and to prevent any person having any estate, right, title or interest, in, to, or out of any of the forfeited estates being prejudiced, he was to be at liberty, within six months of the entry on the register, to enter a claim or demand, and in default every such estate, right, title, interest, use, possession, reversion or remainder, etc., was to be be null and void to all intents and purposes, and the estate was to be from thence freed, acquitted, and discharged of and from the same. No claim was made within the time prescribed, and therefore, by the 19th section, the estates in question were against all persons, and to all intents and purposes, vested absolutely in the Crown by virtue of the Act.

The appellant, to shew that the Court had exceeded its powers in granting the Perth estates in fee, relied upon the words of the preamble of the Restoring Act—"it is expedient that the estates be restored to the heirs and families of the former owners"—which he contended compelled the Crown to return the estates to the old limitations of the entail of 1687. Whatever restricting effect these words may have, a preamble can never control the enacting part of an Act of Parliament though it may sometimes serve to explain a doubtful enactment. But the 10th section of the Act so clearly empowers the Crown to grant the estates to the heir male of Lord John Drummond in fee, that it excludes all question about its meaning.

I have entered perhaps at unnecessary length into the question submitted to your Lordships upon this appeal. I have done so because I have felt the great importance of these questions, and I have been anxious to shew, that the conclusion to which I have arrived is the result of a careful consideration of the case from every point of view in which it has been presented.

I agree that the interlocutor appealed from must be affirmed, and the appeal dismissed with costs.

LORD WESTBURY.—My Lords, for the reason last stated by my noble and learned friend who has preceded me, I am also desirous of adding a few words. I quite agree, that on the present proceeding the title of the appellant, as heir male in general to James third Duke of Perth, cannot be contradicted; and I hold, that it is quite impossible to enter into any question of corruption of blood by attainder for the purpose of disputing the effect of the service. I also agree, that the appellant will be entitled to production of titles, unless it be clear from his own statement that he has no right to the estates, to which he alleges he would be entitled in respect of the service.

It is important, therefore, to consider what was the state of things at the time of the attainder of Lord John Drummond. Now James Drummond, who is styled third Duke of Perth, died on the 11th of May 1746. As that was before the day in July 1746 limited by the Act of 1746 for attainted persons to come in, James, third Duke of Perth, died before the attainder. And I think it is quite clear, that upon his death the succession was in favour of his brother, Lord John Drummond. But what was that succession? The estates at that time were held by James, third Duke of Perth, as heir of the body of his father James, under the deed of 1687. The destination in that deed was to the son of the settlor, James Lord Drummond, (the father of James, the third Duke of Perth,) and to the heirs male of his body, whom failing, to the other heirs male of James Lord Drummond. Now both James, the third Duke of Perth, and Lord John Drummond, his brother, were heirs male of the body of their father James; and on the death of James third Duke, the succession opened in favour of Lord John, his brother, who then became entitled as heir male of the body of James the father. Then Lord John Drummond, not having come in, became attainted by the operation of the Act of attainder and forfeiture.

Now the first and undoubtedly the most important question here is, What was the effect of the confiscation to the Crown consequent upon that attainder? I pass over the other instruments which were executed by James the father, and James the third Duke of Perth, the son. Although the deed of 1687 was never recorded, and therefore was not a strict entail, yet it was good *inter hæredes*, and the result therefore was, that on the death of James, John becomes entitled under and by virtue of the destination in the deed.

Now unquestionably the law of Scotland appears, from the authorities which have been adduced, to involve this consequence, that although John was entitled only in apparency as heir of the

body, yet upon John's death the whole fee simple of the property passed to the Crown. That was unquestionably the law of Scotland, as appears by the Statutes and by the institutional writers, anterior to the Act of 1690.

The Act of 1690 contains a statement of the law of Scotland by implication, because it preserves from forfeiture only estates of substitutes under a strict entail duly recorded. Consequently it is affirmed, that the Act of 1685 not being good against the Crown, the right of the Crown being reserved, the forfeiture incurred by an heir of tailzie under a deed of tailzie, not being a strict entail, was a forfeiture of the whole estate which that heir had power to part with, by reason of his alienation not being effectually prohibited.

But then it is said, on the part of the appellant, that the Crown never made up a title. It is, I think, clear beyond dispute that the Crown could not make up a title. It certainly was under no obligation to do so. The title of the Crown as the *summus imperii* became complete in the estate, and the Crown was equivalent to a person who became legally infeft by virtue of its paramount title and its right of superiority in that capacity. Then what was the consequence? If the Crown took the whole estate which John could part with, and if the whole estate which John could part with was the fee simple, the Crown took the fee simple, and the result was, that there was no *hæreditas jacens* in James at all.

I hardly think that the effect of the fact that both James and John died without issue (John having died without issue in 1747) has had the full force given to it to which it is entitled, because by that event the destination to the heirs male of the body of James, the institute in the deed of tailzie of 1687, became defunct, and the substitution to the other heirs male of James, the institute in the entail, would, if there had been no forfeiture, have taken effect.

Then I pass on to consider in a very few words the effect of the Statutes. It is impossible to hold the language of those Statutes to be consistent with any other conclusion than this, that the whole fee simple was by the Legislature, and by the framers of the Statute, treated as vested in the Crown. It is unnecessary to go through the language of the Vesting Act, or of the Annexing Act, but I cannot at all accept the argument at the bar, that they are controlled by the recitals, and that they in point of fact annexed to the Crown only that limited interest which, according to the appellant's contention, is divested by the forfeiture, and annexed to the Crown. Because the appellant admits, that there was taken out of the *hæreditas jacens* of James that which was legitimately forfeited; but he contends, that the forfeiture could not by any possibility extend beyond the estate of John, and the issue of his body, and that when that estate ceased by John dying without issue, the estate must be regarded as having come back to the Crown through its old channels under the deed of tailzie of 1687. That certainly is not the true construction of the Act, still less is it the construction which ought to be put upon the Act of Restoration.

The Act of Restoration has a special recital with reference to this estate, and it confers a power upon the Crown to give the estates, which it had obtained by forfeiture, to the collateral heir of Lord John Drummond, and to the heirs and assigns of that collateral heir. Says the appellant, The intention was to restore the estate to the former channel. If there had been any such intention the Crown would have been authorized to give the estate to the person who was entitled at that time under the limitation to the heirs male general of James, the institute in the deed of 1687. But instead of that the Crown is authorized, or directed if you please, to give the estate to the heir of Lord John Drummond, the person who was attainted. And it is indisputable that that proceeded on the notion, which was I think the correct notion, that Lord John had, by his attainder, forfeited the fee simple to the Crown, and therefore Lord John is considered as the stock of descent to whom the Crown alone is to look in the restoration of the estates to the heir of Lord John.

Now when the Act of 1690 was repealed by the Statute of the 7th of Anne, (as virtually it was if not directly,) I do not think that it had any other effect than that of leaving the old Scotch law of forfeiture, anterior to the Act of 1690, in its original and pristine force. And in reality the decision which was come to by the House in the case of *Gordon of Park* was little better than an act of legislation, because it proceeded upon an assumed analogy between the heir of tailzie in Scotland under a properly fenced deed of tailzie, and an heir taking under a deed of entail in England. It is difficult to draw any such analogy, and there are incorrect expressions even in the language of Lord Hardwicke with regard to the meaning of the word "substitutes." It must undoubtedly be understood, that when Lord Hardwicke meant to draw an analogy between the forfeiture of an estate tail in England and the forfeiture of an estate tail in Scotland, he referred only to an entail which would have answered the requisites of the Act of 1690, and which would have been a strict entail with proper irritant, resolutive, and prohibitory clauses, and duly recorded under the Act of 1685.

Upon these grounds I have not the least hesitation in concurring with the noble and learned Lords who have delivered their opinions in this case, and in the motion which has been made, that the judgment of the Court below be upheld, and that this appeal be dismissed with costs.

LORD COLONSAY.—My Lords, I think it is very unnecessary to trouble the House with almost

any observations on this case after the full exposition which has been made of it by my noble and learned friends who have preceded me. This case is insisted upon by the appellant on the title derived from his service as heir male in general of James Drummond. Now, I think that service is good to the effect of establishing the propinquity of the party to the person to whom he has served. I do not think, that in this action we can deal with it on any more unfavourable footing, because he having gone through the regular course of procedure to obtain the service, it would not do for us to raise up, or to listen to any objections raised up, which might have stopped the progress of that service or proved an impediment to the investigation in regard to that service. But it does not follow, that that service entitles the party to stand in the position of maintaining, that he has got an estate, or a right to an estate as having been vested in the *hæreditas jacens* of James Drummond. He may be served heir to a party in whom there was no such estate. And one question is, whether it appears on the statement of the party himself, on the record here, that there was such an estate in James Drummond at the time of that service. It appears to me very plain that there was not, and that there could not be any such estate. James Drummond died in May 1746, having been in possession of the estate, having had a title to it, and having been infeft in it. The estate then devolved, according to the destination of it, on his brother John. John never made up a title; he had only the right of apparency.

That being so, the next question which arises is—What became of that estate which had devolved upon John. John possessed it only in apparency; but John was attainted, and therefore I apprehend, that by John's attainder, unless the terms of the deed and writs under which he held it prevented such a result, the estate came to the Crown, albeit John's estate was only in apparency. The law is laid down to that effect by all the authorities, that an estate held in apparency is forfeited to the Crown in the case of treason. The Crown does not require the heir apparent to make up a title. He is in a position to make up a title if he chooses, but it is not necessary for the Crown to compel him to do so, as the forfeiture gives a title to the Crown, a supereminent title.

Then the estate being so vested in the Crown, unless the terms of the title were such as limited it to the forfeiture, the next question comes to be, whether, the estate being held under a deed of entail containing clauses prohibitory, irritant, and resolutive, but not recorded, the forfeiture carried more than the right of John himself, and of the heirs of his body. He had no heirs of his body, and therefore it becomes a question of the right of John himself.

Now it is undoubted and unquestionable, that the old law of Scotland was this: that the whole estate of a traitor was forfeited, out and out, to the Crown, by his act of treason. A limitation was put upon that by the Act of 1690, but the old law of Scotland was clear, and all the authorities concur, that nothing can be more clear than the law as laid down by a very eminent writer, Baron Hume, on that subject. That is an unquestionable position. Then what has altered that state of the law? The Act of 1690 has done so in certain cases. The Acts of the Scottish Parliament altered the law to this effect, that where there existed an estate tailzie duly recorded, the traitor did not forfeit more than his own estate. But undoubtedly that law has sustained an alteration by the Act of Anne. The measure of that alteration is a more difficult question. It is said, that by the judgment pronounced in the case of *Gordon of Park* a precedent is found for the contention now raised, that John Drummond could not forfeit anything beyond his own right and the right of his own immediate descendants; and that the decision in the case of *Gordon of Park* could not be influenced by the fact of the entail in that case being recorded. But here there was a species of tailzied deed containing prohibitory, irritant, and resolutive clauses which was operative among heirs, which prevented the owner of the estate disposing of it or burdening it without the liability to its being claimed and taken possession of by the next takers. Undoubtedly, in systematic treatises on the law by institutional writers, tailzies are divided into three classes, as was pointed out by the learned counsel at the bar; but, on the whole matter with which we are here dealing, the question is, what is to limit the rights of the parties, and what is to be regarded as an entailed estate? An entailed estate in ordinary language, even in very general deeds, means an estate with prohibitory, irritant, and resolutive clauses duly recorded. It has been so interpreted in deeds of trust, where parties have been directed to acquire property, and to entail it upon a certain series of heirs. It implies not merely a deed with prohibitory, irritant, and resolutive clauses, but a deed duly recorded to make it effectual. Then the fact being here, that the party holds the estate under an entail, which no doubt, as between heirs, is effectual, but in such a condition that it may be taken away from those heirs by his acts, by his contracting debt, or by an act of alienation, it is certainly not within the protection of the Act of 1690, and so it was determined in the case of *Gordon of Park*. The case of *Gordon of Park* must have been so decided, because in that case the entail was so recorded. Now what was the course taken in the case of *Gordon of Park?* The Court in Scotland had applied the Act of 1690, that is to say, they had decided in conformity with the provisions of that Act, as applicable to the descendants or relatives of Mr. Gordon, viz. his heirs. But the judgment in the House of Lords was a judgment denying such effect to the Act of 1690, and holding in the given circumstances, that notwithstanding that Act there was a forfeiture to that extent. Then how does that

support the proposition, that where there is an unrecorded entail the same rule must apply? The question is, how far the rule is to operate in a different direction. I think, that the principle upon which the judgment was pronounced in the case of *Gordon of Park* would lead me the other way.

I was very desirous to hear the views which were entertained by my noble and learned friends, who have spoken as to the analogy between the English entails and Scottish entails, especially when unrecorded, not having a full and operative effect under the Act of 1690. And as I understood the principle of English law in that respect as regards the effect and operation of entails, the analogy does not hold in the case of an unrecorded entail, as is contended for on the part of the appellant. On these grounds I think, that the service which the appellant has obtained cannot give him a title to insist in the production of these writs and titles.

But he may have a title to insist on other grounds, and he claims to have such a title to insist. He says, that by various Statutes, the Forfeiting Act, the Attainder, the Vesting Act, the Annexing Act, the Restoring Act, all taken together, it is clear, that the intention of the Legislature was, and that the true construction of the Restoring Act was, that the estate should be restored, not merely to the Earl of Perth and his heirs and assigns simply, but to the course of succession that was pointed out by the previous settlement of the estate.

So far as the argument is rested upon the proposition, that the forfeiture could not carry more than the right which was in John Drummond, I have already disposed of it. But as regards a right under the Statutes to get the estate upon the footing, that the grant to Lord Perth was not in terms within the power of the Crown, that is quite a different contention from the other. And I think it may be contended, that irrespectively of the question of the service carrying the *hæreditas jacens* of James Drummond, the fact of his having established his propinquity and his interest would give him a title to insist in reference to this view of the case. There are many instances in which the existence of the interest gives a title to insist, if it be so that the true construction of the Acts of Parliament is that the estate should have been given to Lord Perth, and to the heirs male in conformity with the original investiture, or if Lord Perth should have so made up his titles. But, in the first place, we must construe the Act of Parliament, and if the Act does not bear that construction, and if that is not the true meaning of the grant of the Crown, then I think it will require some other power to get rid of that Act of Parliament, and to get at this result. Now I have no doubt at all, seeing that the forfeiture was complete and vested all right to this estate in the Crown, that the Crown by the Restoring Act had a right to restore it to whomsoever the Act directed it to be restored to. And I have as little doubt as to the construction of that Act—that the authority given to the Crown was a direction to restore it at once to the person who should be found out to be the next heir male, (for there was a doubt who was the then next heir male,) and to his assigns in fee simple.

On these grounds I think the judgment of the Court below was correct, and that this appeal ought to be dismissed with costs.

LORD CAIRNS.—My Lords, every question which arises in this case has been so fully exhausted by the opinions delivered by my noble and learned friends, that I do not propose to do anything more than to say, that I concur in the judgment proposed.

Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Agents, J. & J. Turnbull, W.S.; Connell and Hope, Westminster.—*Respondents' Agents*, Dundas and Wilson, C.S.; Travers Smith and De Gex, London; Loch and Maclaurin, Westminster.

JUNE 22, 1871.

REV. W. PAUL, D.D., *Appellant*, *v.* JAMES DYCE NICOL, and Others, *Respondents.*

Teinds—Valuation—Old Decreet—Parcel or no Parcel—Moss Lands—*In a process of augmentation of stipend by the minister, the* onus *is upon him to prove, that there are unvalued teinds out of which the augmentation may be paid. Where, therefore, P., the minister, alleged, that a certain moss was not included in a valuation of* 1682, *such moss being then a pertinent of other lands, which alone were valued, and failed to prove this:—*

HELD (affirming judgment), *That the decreet must be taken to have included the moss in question.*[1]

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[1] See previous report 7 Macph. 967: 39 Sc. Jur. 417: 41 Sc. Jur. 628. S. C. 9 Macph. H. L. 121: 43 Sc. Jur. 428. See also *ante*, p. 1458.