

Case 60. The Commissioners and Trustees of the Forfeited Estates, - - - *Appellants*;  
 1 Peere Williams, 612. Alexander Gordon of Auchintoule, - *Respondent*.  
 Foster's Crown Law, p. 81.

25th. Feb. 1719-20.

*Falsa demonstratio.—Misnomer.—Forfeiture under 1 Geo. 1. c. 42.*—Major General Thomas Gordon is attainted by act of parliament; and the commissioners seize the estate of Alexander Gordon, whose description agreed with the attainted person's in every thing but the christian name: but upon exceptions taken the seizure is annulled.

ALEXANDER GORDON, the respondent, was, on the 25th of February 1681, infest and seised in fee in the lands of Auchintoule and others in the shire of Banff, in Scotland: and one Peter Gordon was, on the 11th of November 1713, infest and seised in the lands of Leathers and others in the shires of Banff and Aberdeen, and, on the 12th of November 1713, in the lands of Thomas-town and Smallburn, in trust for the respondent.

By an act of parliament, 1 G. 1. c. 42., intituled "An act for the attainder of George Earl of Marischall," &c. it was enacted, that if, amongst others, Major General Thomas Gordon, Laird of Auchintoule, should not render himself to one of his majesty's justices of the peace, on or before the last day of June 1716, he should stand attainted of high treason from the 12th of November 1715. By virtue of two other acts of parliament, 1 G. 1. c. 50. and 4 G. 1. c. 8., vesting the forfeited estates in the appellants, they seized and surveyed the said lands of Auchintoule and others, before mentioned, as vested in them by the attainder of Major General Thomas Gordon, Laird of Auchintoule.

Against this seizure and survey, Katherine Gordon, the respondent's wife, by virtue of a factory from her husband, bearing date in July 1715, in terms of the act 5 G. 1. c. 22., presented exceptions to the Court of Session, setting forth the respondent's title to the lands before mentioned; and contending, that he was not attainted by the said act of parliament 1 G. 1. c. 42., there being no such name to be found in that act as Major General Alexander Gordon, but only Major General Thomas Gordon: and she therefore prayed, that the premises might be found to belong to him, exclusive of the appellants.

The appellants made answers; and the Court, upon the 20th of August 1719, "Found that the exceptant Major General Alexander Gordon, of Auchintoule, was seised and possessed of the lands of Auchintoule and others mentioned in his exception, in his own right; and that he the said Major General Alexander Gordon did not stand attainted by the said act attainting George Earl of Marischall, &c. and that Major General Thomas Gordon, of Auchintoule, mentioned in the said act of attainder, was not seised or possessed of, or interested in,

" or

“ or entitled unto the said estate of Major General Alexander  
 “ Gordon in his own right, or to his own use, or any other per-  
 “ son in trust for him, on the 24th day of June 1715, or at any  
 “ time since; and that the public, by the attainder of Major  
 “ General Thomas Gordon, had no right or interest in the said  
 “ estate of Major General Alexander Gordon of Auchintoule;  
 “ and therefore sustained the exception for the said Major Gene-  
 “ ral Alexander Gordon of Auchintoule.”

The appeal was brought from “ a decree of the Lords of Session  
 “ of the 20th of August 1719.”

Entered,  
 1 Feb.  
 1719-20.

*Heads of the Appellants' Argument.*

Major General Gordon, Laird of Auchintoule, was attainted by the aforesaid act, who is the respondent; and although there may be an error, as to the name of *Thomas* in place of *Alexander*, yet the other additions of *Major General* and *Laird of Auchintoule*, do sufficiently describe the respondent to be the person by that act attainted, and cannot be applied to any other person alive but to him; and the misnomer, in such a case, where the person is otherwise fully described, cannot make void an act of attainder in parliament.

*Heads of the Respondent's Argument.*

It is plain by the act of attainder in the present case, that Thomas Gordon, Laird of Auchintoule, and not Alexander, was attainted; and it does not concern the respondent to shew, that there was one Thomas Gordon, Laird of Auchintoule, who might be by that act attainted. Since Thomas Gordon is attainted, it seems impossible for any Court to transfer that attainder of Thomas to the respondent, whose name is Alexander. And since that act proceeds only to attain persons as a penalty for their not appearing at a day by the act limited, how could the respondent think himself concerned to appear in obedience to that act, where he did not find his name mentioned.

Whatsoever might be said in case the christian name had been omitted, and if Major General *Gordon of Auchintoule* had been attainted, cannot concern this case; because there the difficulty might be whether the person was sufficiently described without mentioning the christian name. The case is totally different, when the christian name is added, for then the designation is full, and denotes a person as different from the respondent as thereby described, as Thomas is from Alexander. The mistake here cannot be rectified by alleging *quod constat de persona*, because such allegation is directly contrary to the act of attainder, and by the same reason Alexander might be executed upon a judgment against Thomas; and consequently one man might lose his life, estate, and honour by a prosecution carried on against a person to him unknown.

After hearing counsel, “ it is ordered that the further considera-  
 “ tion of this cause be adjourned till to-morrow, and that all the  
 “ judges do then attend.”

Journal,  
 24 Feb.  
 1719-20.

25 Feb.

The judges accordingly attending, they were directed to deliver their opinions in relation to the following matter as stated to them, viz.

“ The act of parliament for the attainder of George Earl of Marischall, and others, having enacted, ‘ That unless Major General *Thomas Gordon*, Laird of Auchintoule, should render himself to one of his majesty’s justices of peace by a day therein specified,’ and no such render being made; and all the said additions belonging to the respondent, but that his christian name is Alexander, and not Thomas, ‘ whether if the respondent Major General *Alexander Gordon*, Laird of Auchintoule, had been brought into the King’s Bench, and execution prayed against him, that Court would have awarded execution against him?’ ”

And having conferred together, the Lord Chief Justice of the Court of King’s Bench delivered their opinion, “ That the said Court could not award execution on the act against *Alexander*; because in awarding of execution, they must pursue the act of parliament, which is the judgment on which it is to be founded.”

Judgment. It is thereupon *ordered and adjudged, that the said petition and appeal be dismissed, and that the decree therein complained of be affirmed.*

For Appellants, *Ro. Dundas.* *Tho. Bootle.*  
For Respondent, *Will. Peere Williams.* *Will. Hamilton.*

Case 61.  
Vide No. 57  
of this Col-  
lection.

The Commissioners and Trustees of the Forfeited Estates, - - - *Appellants*;  
Kenneth Mackenzie of Assint, a Minor,  
by Colonel Alexander Mackenzie, his  
Curator, - - - *Respondent.*

1st March 1719-20.

*Act of Parliament 5 Geo. 1. c. 22.—Popish—Trust—Estates forfeited by vassals were acquired by the trustees for a Papist superior, but were forfeited again by the Papist’s treason.*

THE respondent, the minor, had obtained the judgment of the Court of Session, decerning to him in his character of protestant heir, the estate of Seaforth, upon the attainder of the late earl for high treason, but that judgment was reversed upon appeal (No. 57 of this Collection.) He had also made a claim before the Court of Session, founded upon a clause in the act 1 Geo. 1. c. 20. “ for encouraging all superiors,” &c. for the estates of six of the vassals of the late Earl of Seaforth, who were attainted of high treason, viz. John Earl of Mar, Sir John Mackenzie