Simon Lord Lovat, - - *Appellant*; Caſe 101.
Hugh, the Son of Alexander Mackenzie of Fraſerdale, ſtiling himſelf Hugh Maſter of Lovat, - - - *Reſpondent.*

22 *May* 1723.

Life-rent Eſcheat.—Aliment of the Fiar.—An eſtate being ſettled by entail, upon a perſon in life-rent, and a certain ſeries of heirs in fee, with the burden of an aliment to the firſt ſubſtitute: the life-renter forfeits his life-rent eſcheat for treaſon; and the Court of Seſſion having, in a competition with the donator, granted an aliment to the fiar, their judgment is reverſed.

AFTER the determination in the two former appeals, a new queſtion aroſe between the appellant, the grantee of the life-rent eſcheat of Alexander Mackenzie of Fraſerdale, the forfeiting perſon, and the reſpondent, the eldeſt ſon of this Alexander Mackenzie, and of Emilia, the heir female of the family of Lovat, who ſtiled herſelf Baroneſs of Lovat.

By the deed of entail executed by Lord Preſtonhall in 1706, in the laſt appeal mentioned, he ſettled the eſtate of Lovat upon Alexander Mackenzie, the forfeiting perſon, his ſon, in life-rent, and upon his grandſon the reſpondent, and the heirs male of his body, in fee, with ſeveral other ſubſtitutions of heirs: and the deed contained this condition and proviſo, *inter alia*, That the life-rent of the ſaid Alexander ſhould "be ſubject to and with the "burden always of alimenting and educating the ſaid Hugh "Maſter of Lovat" (the reſpondent) "and other heirs of tailzie "above mentioned, according to their rank and quality." And in the charter and ſaſine ſubſequently obtained, the ſaid proviſions and conditions are repeated.

In April 1721, the reſpondent Hugh, by his father and curator Alexander Mackenzie of Fraſerdale, who had then received his majeſty's pardon, brought his action againſt the appellant before the Lords of Seſſion in Scotland, inſiſting that the life-rent of the ſaid Alexander Mackenzie had been burdened with the alimenting of the reſpondent; and the appellant having come in the place of the ſaid Alexander, the reſpondent ought to be alimented by him.

The appellant made defences, and after a hearing of the cauſe, the Court, on the 6th of February 1722, "Found that the re-"ſpondent is entitled to an aliment out of the eſtate of Lovat, "whereof he is fiar." The appellant having reclaimed, after anſwers for the reſpondent, the Court, on the 24th of February 1722 "found that the reſpondent the fiar of the eſtate of Lovat "is entitled to have an aliment out of the rents of the eſtate of "Lovat, which was life-rented by the ſaid Alexander Mackenzie, "and whereto the appellant had right as donator of the ſaid "Alexander Mackenzie's life rent eſcheat; and allowed to either

" party a conjunct probation to prove the yearly rent of the ſaid " life-rented lands and deductions, and granted warrant for let- " ters of diligence to that effect."

Accordingly a proof was taken, by which it appeared that the appellant was in poſſeſſion of the eſtate of Lovat, the yearly rent of which amounted to 10,000 merks, free of all burdens; and on the 11th of December 1722, the Court modified 2000 merks of " yearly aliment to the reſpondent, to commence from the " date of the ſummons of aliment, on the 12th day of April " 1721; and remitted to the Ordinary on the bills to allocate " lands, out of which the ſame ſhould be uplifted by the purſuer " himſelf, free of all public burdens."

In purſuance of this remit, the Lord Ordinary on the bills, on the 26th of the ſame month of December, allocated to the reſpondent the lands of Ingliſton, Kirkton, Grolin, Fingaſk, and the mains of Lovat, to be poſſeſſed by him during his father's life, in payment of the ſaid aliment.

Entered, 17 Jan. 1722-3.

The appeal was brought from " two interlocutory ſentences or " decrees of the Lords of Seſſion of the 24th of February 1722, " and 11th of December thereafter."

Heads of the Appellant's Argument.

There is no colour or pretence in the law or practice of Scotland, for compelling the ſuperior or his grantee, in whoſe hands lands are, by the forfeiture of his vaſſal's life-rent eſcheat, to allow any aliment to ſuch vaſſal's heir, or to the fiar, where the forfeiting perſon is tenant for life only; no caſualty of ſuperiority is more frequent in Scotland than that of life-rent eſcheat, and yet no ſingle inſtance can be produced, where a claim of this nature was ever inſiſted on, or ſuſtained.

The obligation which lay upon the forfeiting perſon to aliment the reſpondent was purely perſonal, and could not have afforded any real action againſt the eſtate of the forfeiting perſon prior to the forfeiture; wherefore by the law of Scotland, it cannot affect the appellant's gift, which is preferable to every claim that did not afford a real action againſt the eſtate prior to the forfeiture.

As this is the undoubted law of Scotland, ſo it has been declared by the judgments on the two former appeals; the firſt of which decreed, that the eſtate in the appellant's poſſeſſion ſhould be chargeable with ſuch debts only as were real, and did by the law of Scotland affect the ſame at the time of the forefeiture; and the ſecond adjudged, that the debt due to Alexander Mackenzie of Garloch, though made a burden on the forfeiting perſon by the conditions of the ſettlement of the eſtate, as being a debt of the grantor's, was not real, ſo as to be preferable to the appellant, becauſe it yielded no real action againſt the eſtate at the time of the forfeiture. Now if real debts only in this ſenſe can affect the eſtate, it is impoſſible that the reſpondent's claim, which was no more than an illiquid demand upon his father, and

did

did not at all affect the eſtate, can be preferred to the appellant's right.

The reſpondent's claim prior to the forfeiture was ſo unſettled and weak, that even the perſonal creditors of Roderick Mackenzie, the maker of the ſettlement, muſt, by the law of Scotland, have been preferred to it: Now the appellant's right having already been found by the Houſe of Lords effectual to exclude thoſe perſonal creditors, who have the very ſame proviſion made in their favour by the ſettlement of the eſtate as the reſpondent has, it cannot well be imagined for what reaſon the reſpondent's claim, which is leſs effectual than that of thoſe other creditors, ſhould be preferred to the appellant's grant.

Suppoſing an aliment had been due, which it is conceived was not, the moſt the Court could have done, was to have decreed the appellant to have paid the ſum modified, upon which proper proceſs might have iſſued. But, before the appellant was in contempt, to have turned him out of poſſeſſion, and to have decreed that the reſpondent ſhould be put in poſſeſſion of lands, ſuch as he thought fit to name, lying in the neighbourhood of the appellant's dwelling-houſe, appears to be an act in itſelf unreaſonable, and very greivous to the appellant; tending like the other decrees already reverſed, to render his majeſty's grant altogether ineffectual to him.

Heads of the Reſpondent's Argument.

The aliment and maintenance of the reſpondent the minor was, by the expreſs appointment of the donor, who gave the life-rent of this very eſtate to the forfeiting perſon, charged upon that life-rent, and was an inſeparable condition upon which it was granted; conſequently the grantee could not have that life-rent but with its burden, viz. the aliment of the reſpondent the minor. And this is the ſtronger, ſince the life-rent of Mr. Mackenzie, was not a reſerved life-rent, but a life-rent conſtituted by the voluntary deed of ſettlement of the reſpondent's predeceſſor, to whom he muſt have been heir. Nor can this be looked upon to be only a perſonal obligation upon Mr. Mackenzie to maintain his heir; becauſe the grantor of that very life-rent to Mr. Mackenzie, has charged that life-rent with this aliment, and it was a condition upon which his life-rent was to ſubſiſt.

The reaſon for preferring the appellant to the creditors was, that their debts not being particulary mentioned, and ſpecified in the deed of ſettlement, did not infer any real charge upon the eſtate in prejudice of the grantee, as they were not made real by diligence before the grant was made: but this does not meet the caſe in queſtion, becauſe the burden of the aliment of the reſpondent is particularly mentioned, and the life-rent ſubjected to it Beſides the aliment could never be made more real upon the life-rent than it was; it being both a condition, and a burden, upon the life-rent eſtate, and conſequently upon the profits of that eſtate in the hands of the grantee.

Judgment, 22 May 1723.

After hearing counsel, *It is ordered and adjudged, that the interlocutory sentences or decrees complained of in the said appeal be reversed.*

For Appellant, *Rob. Raymond, Dun. Forbes.*
For Respondent, *C. Talbot. Will. Hamilton.*

Case 102. Alexander Mill of Hatton, William Ross, and David Butter, Baillies of the Town of Montrose, for themselves and other Magistrates of the said Town, - - *Appellants;*

Colonel Robert Reid and Others, Members of the Town Council of the said Burgh, *Respondents.*

23d *May* 1723.

Member of Parliament.—In an action to reduce the election of certain magistrates of a royal burgh, on account of the imprisonment of certain of the electors by the provost, who was a member of parliament: the provost's privilege of parliament could not be pleaded to stop the declarator against the other defenders, as not elected by a sufficient quorum:

And the provost's privilege of parliament could not stop the pursuers from insisting upon the reason of reduction, that some of the electors were unwarrantably imprisoned by the provost.

Burgh Royal.—It was relevant to annul the election of magistrates, that the provost had unwarrantably imprisoned some of the electors, during the time of the election, with an intention to prevent their giving their votes at that election.

THE town of Montrose, by the set or constitution of the burgh, was governed by a town council, consisting of 19 members, viz., a provost, three baillies, a dean of guild, a treasurer, a master of the hospital, 10 common council-men, who are merchants, and two other common council-men, who are tradesmen. This town council was elected annually about Michaelmas by the old council; seven of them being continued for the year following, and 12 new ones being chosen.

On Wednesday preceding Michaelmas day 1722, an election was held for the said burgh, at which James Scott, Esq. of Logie, a member of parliament was chosen provost, the appellants baillies, and certain other persons, councillors of the said burgh; but the respondents, who were aggrieved by the election thus made, soon after brought an action of reduction and declarator against the same before the Court of Session. The circumstances of the case as stated by the respondents were;

That the method of election was that, upon the day of election, all the magistrates and councillors should meet in the town-house, or at least a majority of the whole, being 10, and there the old council elected the new, the provost, the 3 baillies, the dean of guild,