Case 65. The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants;*
Sir Robert Grierſon, of Lagg, Bart. - *Reſpondent.*

30th *March* 1720.

Forfeiture—Tailzie.—A father executes an entail in favour of his ſon; the ſon incurs an irritancy, but before declarator is attainted of treaſon: the Court of Seſſion found that the eſtate returned to the father, though there was no declarator of the irritancy, and that the irritancy was not purgeable:—upon appeal, the judgment was found *null, the Court not having juriſdiction.*

The eſtate being held by the ſon upon a baſe infeſtment from the father, the procuratory of reſignation in the hands of the Crown not having been executed, and an act of parliament having declared, that the eſtates of *vaſſals* attainted were to go to *ſuperiors* continuing loyal; the Court upon this act adjudged the eſtate to the father; but their judgment was reverſed upon appeal.

IN October 1713, the reſpondent executed a voluntary ſettlement of his eſtate, in favour of his eldeſt ſon William Grierſon, whereby he conveyed his eſtate of Lagg, to the ſaid William, and the heirs male of his body, whom failing to the reſpondent's ſecond, third, and fourth ſons reſpectively and the heirs male of their bodies, with ſeveral other ſubſtitutions, the laſt of which was to the heirs whatſoever of the reſpondent. By this deed the reſpondent reſerved his own life-rent, and his ſon William, and the other heirs ſubſtituted, were by acceptation obliged to relieve the reſpondent of all his debts: for this latter purpoſe the deed contained a proviſo, that if at any time the reſpondent ſhould be diſtreſſed with horning, or other diligence for payment of debt, upon notice or intimation given thereof to William Grierſon, or the perſon ſucceeding to him, they ſhould be obliged to relieve the reſpondent within ſix months after ſuch notice; and the reſpondent reſerved a power to himſelf to ſell any part of the eſtate for payment of ſuch debt, as he ſhould be diſtreſſed for, to which ſale the ſaid William Grierſon and his ſucceſſors were obliged to conſent; and if they failed therein, ſo that the reſpondent ſhould not be relieved within ſix months after the date of the intimation or notice given, and after the ſigneting of a caption upon a regiſtered horning againſt him, the ſaid William Grierſon and his ſucceſſors were to forfeit their intereſt in the eſtate, and the diſpoſition was to become void, and the reſpondent to return to the right and poſſeſſion of the eſtate with power to diſpoſe thereof as if the deed had never been executed. This diſpoſition contained a procuratory of reſignation for the purpoſe of obtaining new inveſtitures from the crown, the ſuperior, and a precept of ſaſine; in virtue of which precept William Grierſon was infeft on the 29th and 30th of October 1713, and entered to poſſeſſion; but he made no reſignation in the hands of the crown.

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The reſpondent on the 27th of April 1714, gave notice to his ſon William, that he was liable to be diſtreſſed for debt, and required him to concur in the ſale of part of the eſtate, with certification in terms of the before mentioned proviſo: and the reſpondent continuing to be diſtreſſed by hornings, captions, and otherwiſe, on the 12th of January 1715, renewed the ſaid intimation and requiſition; and on theſe ſeveral occaſions, he took proteſts in the hands of a notary publick.

William Grierſon, having been engaged in the rebellion 1715, was on the 31ſt of May, 1716 convicted and attainted of high treaſon. The appellants thereupon cauſed ſeize and ſurvey his eſtate, as veſted in them for the uſe of the publick from the 24th of June 1715.

Againſt this ſeizure and ſurvey the reſpondent in terms of the act 5 G. 1. c. 22. preſented two exceptions to the Court of Seſſion. The firſt was, that the forfeiting perſon was not on the 24th of June 1715, nor at any time ſince, veſted, in poſſeſſion of, or intereſted in the ſaid eſtate, becauſe his right thereto became void before that time, by neglecting to relieve the reſpondent at the periods when he made requiſition as before mentioned. And that before the 24th of June 1715, the reſpondent was veſted in the abſolute right of the ſaid eſtate by virtue of the conditions in the ſaid diſpoſition. The ſecond was, that ſuppoſing the forfeiting perſon's right to the eſtate to have ſtood good, yet he was infeft therein as vaſſal to the reſpondent; and conſequently by his conviction and attainder the property which was lodged in his perſon was conſolidated with the ſuperiority in the perſon of the reſpondent, by virtue of the act 1 G. 1. c. 20. for "encouraging all ſuperiors" &c.; and that, purſuant to that act the reſpondent had on the 22d of October 1716, obtained himſelf infeft in the lands in queſtion, within ſix months of the attainder.

5 Geo. 1. c. 22.

1 G. 1. c. 20.

The appellants put in anſwers to theſe exceptions, and the reſpondent having produced four ſeveral inſtruments taken by a notary in the matter of the requiſitions and intimations to his ſon, upon which alſo a proof by witneſſes was had, the Court on the 28th of Auguſt 1719, "found it proved that the four inſtru-
"ments produced are true in their dates, tenors, and contents,
"and that the things in the ſaid inſtruments affirmed to have
"been ſaid and done were truly ſaid and done as therein ex-
"preſſed; and found that by the facts ſet forth and affirmed by
"the ſaid inſtruments, the right of the exceptant's ſon William
"was irritated and made void, and that the right and property of
"the ſaid lands and eſtate of Lagg and others, deſcribed in the
"exceptions and writs to which they refer, had returned to the
"exceptant before the term at and from which the eſtates of
"traitors were by the act 1 *Georgii* veſted in his majeſty, and
"though there was no declarator of the irritancy, and found that
"the irritancy was not purgeable: and found that the except-
"ant's ſon William was vaſſal to the exceptant, holding the ſaid
"lands and others of his father as ſuperior thereof in 1713, and
"that the ſaid holding was not changed before his rebellion: and

"found

" found that in virtue of the act referred to in the exceptions, in-
" tituled ' an act for encouraging all superiors,' &c. if the said
" William's right of the property of the said lands and others
" had not been irritated and voided as above, the same would
" have been consolidated with the superiority in the same manner
" as if it had been by the said William resigned in the exceptant's
" hands *ad perpetuam remanentiam:* and therefore decerned and
" declared the full right and property of the said whole lands
" and estate of Lagg mentioned in the exceptions and writs pro-
" duced, with the whole rents, profits, and issues thereof, to per-
" tain and belong to the said Sir Robert Grierson, the exceptant,
" in all time coming."

Entered, 28 Dec. 1719.

The appeal was brought from " an interlocutory sentence or
" decree pronounced by the Lords of Session the 28th day of Au-
" gust," 1719.

Heads of the Appellants' Argument.

In so far as the said decree has relation to the first ground on which the respondent claims, the appellants conceive the Lords of Session had no jurisdiction to determine in the case, the respondent's claim being founded upon a right expectant upon a tailzied estate in the person attainted, to arise upon the breach of a condition: and therefore the decree so far as it is founded on that position, should be annulled (*a*).

The appellants conceive, that that part of the decree which has relation to the respondent's claim as superior is erroneous, for the following reasons:

The respondent was not superior to the forfeiting person, nor the forfeiting person his vassal, according to the meaning and natural understanding of the act above recited; since by the disposition executed by the respondent, the estate was fully made over to the son, the forfeiting person, to be holden of the Crown; and although the son, for his own conveniency for a time, did possess the estate by infeftment upon a precept or warrant from the respondent, and had not actually made a resignation of the estate into the hands of the Crown, yet since he had it in his power to make that resignation when he pleased, and to hold it of the Crown, the respondent's claim to the superiority is but an empty name. He was denuded of it at least by a personal right which was good against him the grantor; and this personal right was by William Grierson's treason forfeited to the Crown, and is vested in the appellants for the use of the public.

The act of parliament being intended for encouragement to superiors and vassals who should continue dutiful and loyal to his majesty, by giving the vassals a power to hold of the Crown, which they could not have had without the benefit of this act, and giving to the superior the right of property of the vassal's estate, who should commit treason, to be consolidated with the superiority; it is plain the act has relation to such superiors as had a fixed cer-

(*a*) *Vide* note at the end of last case (No. 64.) on this point of the jurisdiction.

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tain title to the ſuperiority, and, in conſequence of it, an influence upon his vaſſals, and to ſuch vaſſals as were tied to hold of a ſubject ſuperior, and could not otherwiſe hold of the Crown. And, conſequently, the act has no relation to the preſent caſe, where the forfeiting perſon was no longer tied to hold of the reſpondent than he pleaſed, and where the reſpondent had no right or influence as ſuperior over the forfeiting perſon, longer than he thought fit, and was actually diveſted in the forfeiting perſon's favour by a deed under his own hand, though ſuch deed remained perſonal.

Even ſuppoſing the forfeiting perſon's title or vaſſalage was, in virtue of the clauſe in the act of parliament above recited, ſunk into the perſon of the reſpondent, and conſolidated with his pretended right of ſuperiority, that could ſignify nothing; for ſtill the perſonal right to the ſuperiority, and the power of ſurrendering the eſtate into the hands of the Crown, which was in the forfeiting perſon, would remain entire and be forfeited to the Crown; and, ſo in virtue of that perſonal right, the appellants would be entitled to the eſtate, and could by law compel the reſpondent to diveſt himſelf of the eſtate in their favours, for the uſe of the public.

It was objected, that by the act every ſuperior is to have the eſtate as if reſigned into his hands *ad remanentiam*: and that if the forfeiting perſon in this caſe had ſo reſigned into the reſpondent's hands, ſuch reſignation would have given the reſpondent full right to the eſtate. But this is founded on a miſunderſtanding of the clauſe: the act does not ſay that the ſuperior ſhall have the ſame right as if the vaſſal had made a voluntary ſurrender *ad remanentiam* into his hands; but that the lands or tenements holden of the ſubject ſuperior, ſhall recognoſce and return into the hands of the ſuperior; and then it deſcribes the effects of that return and recognoſcing, that it ſhall make the property be conſolidated with the ſuperiority, as if the ſaid lands or tenements had been reſigned *ad perpetuam remanentiam*. And the difference lies in this, that if the vaſſal made a voluntary ſurrender, ſuch ſurrender might by interpretation be conſtrued to be a conveyance or renunciation of all right the vaſſal had to that ſubject, ſuppoſing him to have a title diſtinct from the right of vaſſalage derived from the ſuperior. But in virtue of this clauſe in the act of Parliament, the tenement being to recognoſce as holden of the ſuperior, no more does return but the fee or right of vaſſalage: and if the vaſſal had any ſeparate right diſtinct from it, that is not transferred to the ſuperior. And ſo in the preſent caſe, ſuppoſing the forfeiting perſon's right of vaſſalage was ſunk into, and conſolidated with the right of ſuperiority, yet his perſonal right or diſpoſition to that very ſuperiority, would remain entire, forfeited by his treaſon, and would draw along with it the full right to the eſtate.

Heads of the Reſpondent's Argument.

(The reſpondent is ſilent in his caſe with regard to the allegation of the appellants that the Court of Seſſion had no juriſdiction to determine on the firſt ground of his exceptions, but enters into an argument in ſupport of the interlocutor of the Court

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founded thereon: but this it is unneceſſary to detail, as it was admitted by his counſel at the bar, and found by the Houſe that the Court in fact had no juriſdiction thereon.

On the ſecond ground of the exceptions the reſpondent proceeds.)

The act founded on provides its benefits to all ſuperiors and vaſſals in the moſt extenſive words: and William Grierſon being vaſſal in the legal ſenſe of the word, it does not alter the caſe that William Grierſon had a power of changing his ſuperior and holding his lands of the crown: for ſince he choſe originally to hold them of the reſpondent, ſo long as he continued to hold them by that tenure, he was to all intents the reſpondent's vaſſal, and would by the law of Scotland have forfeited to him his life-rent eſcheat, &c.

It is true, that William Grierſon might in virtue of the procuratory of reſignation have made himſelf vaſſal to the crown, and it is equally true, that if he had been ſeiſed of the eſtate by no other title, this procuratory by his attainder being forfeited to the Crown, and by ſtatute now veſted in the appellants, would have empowered them to have made reſignation as is aboye mentioned, and would have entitled them to the eſtate. But then it muſt be obſerved, that William Grierſon was actually ſeiſed of the eſtate as vaſſal to the reſpondent; and that by the act "for encouraging all ſuperiors" &c. made anterior to the forfeiture, the king grants the eſtates of vaſſals attainted to their ſuperiors; and it enacts, that the property upon the vaſſal's attainder ſhall be conſolidated with the ſuperiority. This being the caſe, the very act which tranſmitted the procuratory of reſignation to the crown viz. the attainder of the vaſſal, did by force of the ſtatute "*for encouraging all ſuperiors*" &c. conſolidate the property with the ſuperiority, and of courſe barred the crown, and the appellants who claim under a grant from the crown, from aſſerting any right or intereſt in the procuratory of reſignation.

Journal, 3 March 1719-20. It being referred to the judges to conſider whether the Court of Seſſion, had jurdiſdiction in this cauſe, they report, "that it appeared that the exceptant claimed by two rights: the one a right expectant upon an eſtate tail in the perſon attainted to ariſe upon the breach of a condition, whereof we conceive the Lords of Seſſion had no juriſdiction; the other claim is as ſuperior, whereof we conceive the Lord of Seſſion had juriſdiction."

30 March 1720. Counſel on both ſides agreeing with this opinion of the Judges, on the want of juriſdiction, and being heard on the merits as to the reſt of the cauſe, *It is reſolved and decreed, that the Lords of Seſſion had no juriſdiction to proceed and determine upon ſuch part of the ſaid exception as is above mentioned, and that their interlocutory ſentence or decree, ſo far as the ſame is founded thereupon, be therefore declared null and void: and it is ordered and adjudged, that as to the ſaid interlocutory ſentence or decree of the Lords of Seſſion, ſo far as the ſame is founded on that part of the exception whereby the reſpondent claims the ſaid eſtate as forfeited to him as ſuperior of his ſon William Grierſon, be reverſed: and it is further ordered, that the reſpondent be removed*

removed from all poſſeſſion of the eſtate in queſtion which he may have obtained, and from the receipt of the rents and profits thereof; and that the ſaid commiſſioners and truſtees of the forfeited eſtates, take poſſeſſion and receive the rents and profits thereof, and proceed to execute the powers and authorities in them veſted with reſpect thereto.

For Appellants, *Ro. Dundas. Rob. Raymond.*
For Reſpondent. *Dun. Forbes. Will. Hamilton.*

James Farquhar of Gilmillſcroft, - - *Appellant;* Caſe 66.
The Right Hon. Hugh Earl of Loudoun, - *Reſpondent.*

5th *May* 1720.

Kirk Patrimony.—In 1631, certain vaſſals in church lands advanced money to the Crown, to aſſiſt in redeeming a wadſet granted to the Earl of Loudoun, the lord of erection, upon condition that they ſhould hold of the Crown as ſuperior, and have certain other privileges: in 1633, the ſuperiorities of all church lands were gratuitouſly annexed to the Crown; and about ſame time vaſſals who ſhould advance money for redeeming their feu duties were allowed by his majeſty to treat with the treaſury for that purpoſe, and to retain their feu duties in proportion to the ſums advanced. In a queſtion between the wadſetter and the vaſſals, who advanced money in 1631, it is found that they were not allowed to retain their feu duties, though they had paid money for privileges, the greateſt part of which had been granted to other vaſſals gratuitouſly.

UPON the Reformation in Scotland, the lands, teinds, and ſuperiorities belonging to monaſteries and other religious houſes, devolved to the Crown; and the greateſt part of them were ſoon after erected into temporal lordſhips, in favour of certain perſons called Lords of Erection. In 1608, the lordſhips of Keilſmuir and Barmuir, which were part of the eſtate which belonged to the abbacy of Melroſe, was given to Hugh then Lord Loudoun, the reſpondent's predeceſſor. King Charles the Firſt made a general revocation of all thoſe grants as prejudicial to the Crown, which occaſioning diſcontents, the lords of erection afterwards ſubſcribed a deed called *The General Surrender*, whereby they ſubmitted to his majeſty (under certain reſtrictions) their ſeveral intereſts by thoſe grants; upon which ſurrender the king's decrees arbitral proceeded, which were confirmed in parliament.

After this, in 1630, a contract was entered into between his then majeſty and John then Earl of Loudoun, whereby the ſaid earl agreed to reſign and ſurrender to the Crown the right he then had to the lands, ſuperiorities, &c. of the lordſhips of Keilſmuir and Barmuir, and certain juriſdictions, for which the Crown engaged to pay him 32,000 merks, being ten years's purchaſe; whereof 14,000 merks, in conſideration of the juriſdiction of ſheriffſhip, were actually paid, and his majeſty granted a wadſet