

have that sum repaid them, nor any retention of their feu-duties on that account: on the contrary it was expressly provided, that they should be bound to pay their feu-duties annually as usual.

The king's letter in 1633 had not the least relation to the appellant's case; it was written in consequence of an act of parliament in that same year, annexing the superiorities of church-lands to the Crown, reserving the feu-duties to the Lords of Erection, redeemable by the Crown at certain rates, and concerned such vassals of church-lands, as, after the date of that letter, should advance money for redemption of their feu-duties to the use of the Crown; but this letter never took effect. And supposing (which cannot be admitted) that this letter had relation to the appellant's case, yet no agreement having been made with the Exchequer, as was by that letter directed, the letter could give the appellant no power of retention. For the appellant never could have had a retention, supposing it had been covenanted to him, as it was not, until once the earl's wadset was totally redeemed, which never was done, and cannot now be done, after the said act of parliament (1707, c. 11.) and grant from her late majesty, renouncing the right of reversion.

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed, and that the several interlocutory sentences or decrees therein complained of be affirmed.* Judgment, 5 May 1720.

For Appellant,     *Rob. Raymond.*     *Pat. Turnbull.*  
 For Respondent,   *Rob. Dundas.*     *Will. Hamilton.*

The Commissioners and Trustees of the  
 Forfeited Estates,                     -                     -                     -     *Appellants; Case 67.*  
 Sir James Macdonald of Slate, Bart.     -     *Respondent.*

11 May 1720.

*Forfeiture for Treason* — An act of parliament, passed on the 7th of May 1716, enacts that the persons therein mentioned, should, under pain of attainder, surrender themselves to a justice of the peace by a day certain. A person, who had surrendered by letter to the commander in chief, before the passing of the act, and was directed to proceed to a place appointed, but who, it was alleged, was prevented by indisposition; and who never surrendered to a justice in terms of the act, was nevertheless attainted of treason.

*Proof* — The Court having allowed a party to repeat a proof led in the same matter at issue, but in a cause at the instance of another party, in which his present opponents "*did compare*," the judgment is reversed.

**BY** the act of Parliament 1 G. 1. c. 42. intituled, "an Act for  
 " the attainder of George, Earl of Marischall," &c. " of high  
 " treason, unless they shall render themselves to justice by a day  
 " certain therein mentioned," it was enacted that if, among  
 others, Sir Donald Macdonald of Slate, should not render himself

to one of his majesty's justices of the peace, on or before the last day of June 1716, then he should from and after the 13th of November 1715, stand and be adjudged attainted of high treason, to all intents and purposes whatsoever, and should suffer and forfeit as a person attainted of high treason, by the laws of the land, ought to suffer and forfeit. And by the said act, "Every of the said justices of the peace is thereby required to commit every of them," the said Sir Donald Macdonald and others so surrendering himself to prison for the said high treason, there to remain till he should be discharged by due course of law, and thereof immediately to give notice to one of his majesty's principal secretaries of state.

This act received the royal assent on the 7th of May 1716. Previous to that date, on the 20th of April 1716, Sir Donald Macdonald wrote a letter to General Cadogan, then commander in chief in Scotland, dated from the island of Uist, of the following tenor. "Sir, understanding you were coming to Inverlochy  
 " I thought I was bound (to save you more trouble) to acquaint you  
 " by these, that I have ordered my friends and men in the isle of  
 " Sky, to go with their full arms, and deliver them to any having  
 " your orders. In the same manner I'll send over, as soon as possible,  
 " all the arms that are in this barony, and without any delay  
 " will do myself the honor to wait on you at Inverlochy; but my  
 " state of health being so very bad of a long time, and my infirmity  
 " continuing, I entreat the favour to be allowed to go by sea  
 " to Inverlochy; which having once your allowance, I promise  
 " upon honour to do without any loss of time. Thus expecting  
 " a favourable answer and passports, I am, &c. Donald Macdonald." And Sir Donald wrote a second letter to General Cadogan, on the 25th of April to the like purport. General Cadogan sent Sir Donald an answer dated the 29th of April, consenting to his request of coming to Inverlochy by sea. Sir Donald however never came to Inverlochy, nor surrendered himself to a justice of the peace, but died in the isle of Sky, on the 1st of March 1718.

The appellants seized and surveyed the estate of Sir Donald Macdonald as vested in them by virtue of several acts of parliament respecting the estates of persons attainted, and Donald Macdonald, the son of the said Sir Donald, in terms of the act 5 G. 1. c. 22. "for enlarging the time to determine claims on the  
 " forfeited estates" presented his exceptions to the Court of Session against the seizure and survey made by the appellants. He insisted that Sir Donald having surrendered himself within the time prescribed by the act of attainder, the said estate was not forfeited; and he insisted further that Sir Donald was only an heir of entail, under strict irritant and prohibitory clauses, and if he had forfeited could only forfeit during his life (a). The appellants having given in answers, the said Donald Macdonald craved leave to repeat a proof taken in an action at the instance of the Laird of

(a) This is nowhere else mentioned or insisted on in either of the appeal cases. It afterwards received determination in the well-known case of *Gordon of Park*.

M'Leod, against him in relation to the appropriation of a minister's stipend, in which the appellants were parties, to shew that Sir Donald had been incapable of surrendering himself to a justice of the peace, from the state of his health and otherwise. The question had been, in that action with the Laird of Macleod, whether Sir Donald Macdonald had been attainted or not; and several witnesses had been examined thereon. The appellants insisted, that the then exceptant could not have the benefit of the depositions made in the other cause, but that he ought to prove his exceptions in the ordinary way, that the appellants might have an opportunity to cross-examine the witnesses. The exceptant pleaded, that the proof in the former action ought to be admitted, for though there were other parties, yet the appellants were likewise parties, and the only parties who had any real interest: that the proof was taken by one of the Judges in presence of the appellants' counsel, the witnesses were cross examined and the case fully debated by them: and that as the judges were limited to determine all exceptions in so short a time, it might be impracticable, considering the distance of the place where the witnesses lived, to have them re-examined; and they were people of such character as took off any presumption, that they would swear contrary to what they had sworn formerly.

The Court on the 21st of August 1719, "allowed the appellants to prove the facts set forth in their answers and confession, and found that the exceptant might repeat in this process the probation already adduced by him in the process between the Laird of Macleod and him, wherein the appellants did compear, and allowed him to adduce what further probation he should think proper for clearing or fortifying the several allegiances." On the 2d of September 1719, the Court granted a commission to the appellants to examine witnesses in England. And on the 28th of October 1719, the Court "found it proven that the deceased Sir Donald Macdonald, did surrender himself to the General Cadogan commander in chief by a missive letter dated the 25th day of April 1716, and that General Cadogan did accept of his surrender, and ordained him to go to the garrison of Inverlochy, and gave directions for the officers commanding there to receive him, which the general notified to the Lord Townshend, then secretary of state; and found it proven, that the said deceased Sir Donald Macdonald, was, by reason of indisposition, in no capacity to travel, without the hazard of his life, to deliver himself personally; and found it proven that he made several attempts to go to Inverlochy, but was not able to make out the voyage by reason of his indisposition, and that he continued under that incapacity of travelling to Inverlochy, till the 30th day of June 1716, and thereafter till his death; and found that several certificates of the continuance of his indisposition were from time to time sent to the governor of Inverlochy, and others in the government, and that the verity of the same is deponed upon by the grantors: and found and declared, that the said deceased Sir Donald Macdonald did

“ not fly to avoid his being apprehended and prosecuted accord-  
 “ ing to law : and in regard the act of attainder *primo Georgii*  
 “ against the said Sir Donald Macdonald and the other persons  
 “ therein named, doth only attaint such of them as should not ren-  
 “ der themselves on, or before the last day of June 1716, found and  
 “ declared, that the deceased Sir Donald Macdonald, having  
 “ surrendered himself as above, was not attainted by the said act,  
 “ and that the publick has no right to his estate and therefore  
 “ sustained the exception.”

Entered,  
 21 Dec.  
 1719.

The appeal was brought from “ several interlocutory sentences  
 “ or decrees of the Lords of Session of the 21st of August, the  
 “ 2d of September, and 28th of October, 1719.”

Donald Macdonald, son of Sir Donald, was first called as a party, but he dying the appeal was revived against Sir James Macdonald his uncle.

*Heads of the Appellants' Argument.*

The words of the act of parliament are plain, that if Sir Donald Macdonald and others therein particularly named, should not render themselves to one of his majesty's justices of the peace, on or before the day, therein mentioned for that purpose, they should stand attainted of high treason. The act therefore did require a rendering of Sir Donald's person to a justice of the peace, which he never did; and a submitting by letter to the commander in chief could never be called a rendering of his person. Even this pretended submission by a letter was before the act of parliament; and so was not a rendering of Sir Donald's person in obedience to that act.

Supposing it were true, that Sir Donald's indisposition was such as made him unable to take a journey in order to render his person to a justice of the peace; yet no judges of the law were empowered by any decree of theirs to supply the law, or rather alter it, by adjudging that Sir Donald's indisposition and inability to travel must stop the act of attainder from having its effect; or where the law required one thing to be done, could adjudge that the doing of another thing was equipollent.

Sir Donald was under the same indisposition when he was at Perth with the rebels, and was carried from Perth in a litter. A proof was attempted of Sir Donald's inability from indisposition to comply with the act; but yet he was able to travel to the isles to avoid his being seized, and might with much more ease have been transported some miles to have rendered his person, had he inclined to do it. When Colonel Cholmondely, and other officers of the army, were sent with troops into the isles to disarm the rebels, and were on the same island where Sir Donald was, he did not think fit to be seen by them. After the letter written to General Cadogan, he travelled through the islands of Uist and Sky, and instead of going to Inverlochy, went from Uist to Bèrnera and Dunholm, which are not in the way to Inverlochy, but rather the direct contrary.

*Heads*

*Heads of the Respondent's Argument.*

The reason of the act of attainder in the present case, and of all other similar acts, is to bring offenders to justice; and that by their flying and keeping out of the way, they might not avoid the punishment due to their crimes. Thus the recital of the act in question takes notice, that the persons therein named *had fled to avoid their being apprehended and prosecuted according to law for their offence of high treason.* This certainly can never be applied to the case in question, where the person supposed to fly from justice, and for that reason to be attainted, was so far from doing so, that he actually surrendered himself to the then commanding officer of the forces to whom, and to other officers under him, he from time to time gave an account where he was, having delivered up all his arms, and done every thing in his power to testify his submission to the government. The country was then entirely under the power of his majesty's troops; and had the commanding officer thought fit, or imagined this surrender not sufficient, he might have put him under actual custody, and the government might have brought him to trial when they pleased.

Sir Donald's case was still the more favourable, that he had made the surrender to the general, before he could know the particular directions of the act of attainder, nay, before it passed into a law: and as he was then the general's prisoner, he became disabled, though his health had been good, to surrender himself to another. Besides, there having been no justice of peace within 200 miles of him, had he attempted a journey to surrender to such justice at that distance, he might have been taken up and deprived of any benefit of his surrender, which had been accepted by the general, and in which he had reason to think himself secure. The naming of a justice of peace in the act to whom persons might surrender themselves, was certainly calculated as a favour or ease to the persons intending to surrender: for nobody can doubt that the commanding officer was as proper as a justice of peace; and General Cadogan himself was a justice of the peace.

Sir Donald never concealed himself from the officers of the army, as was alleged. On the contrary, they knew from time to time where he was. Colonel Cholmondely, who was in that country, knew where he was, had messages from him, knew of his surrender to General Cadogan, and therefore never went to take him; and he likewise at that time knew of his bad health.

The several places Sir Donald went to were directly in his way to Inverlochy; nor could he have gone any other way with safety. It was also proper for him to take the way he did, considering the state of his health, that if he grew worse, as he did, he might meet with some tolerable accommodation: but he could have had none had he gone the other way, and the method he took was the usual way of travelling in that country.

Judgment,  
11 May  
1720.

After hearing counsel, *It is ordered and adjudged, that the several interlocutory sentences or decrees complained of in the said appeal be reversed: and it is further ordered, that the respondent be removed from all possession of the estate in question, which he may have obtained (if he have obtained any) by virtue or colour of the said decree, and from the receipt of the rents and profits thereof; and that the commissioners and trustees for the forfeited estates take possession and receive the rents and profits thereof, and proceed to execute the powers and authorities in them vested with respect thereto, any right, title, or claim of the respondent notwithstanding.*

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

For Respondent, *Dun. Forbes. C. Talbot. Will. Hamilton.*

By the act 6 Geo. 1. c. 24. the king was enabled to grant the same provisions to the widow and daughters of Sir Donald Macdonald, as they would have had if he had not been attainted.

Case 68. Alexander Lord Saltoun, - - - *Appellant;*  
William Frazer Esq; his Brother, Guardian  
and Trustee for Alexander Frazer, the Ap-  
pellant's eldest Son, - - - *Respondent.*

16th May 1720.

*Parent and Child.—Tutor and Pupil.*—Lord Saltoun having left 4000*l.* payable at the first term after his decease, to the eldest son of the master of Saltoun, and failing him to the grantor's heirs of entail; and having appointed an uncle of the pupil to be his tutor and curator with a salary during nonage, with power to uplift the principal and interest, to employ the money in the purchase of lands, &c.: the pupil's father, the heir and executor of the grantor of the provision, was not obliged to pay over the money to the uncle without security, but to pay it to the Court of Session, who were ordered to lay it out in the manner directed by the grant.

**W**ILLIAM Lord Saltoun deceased, father of the appellant and respondent, settled his real estate, by way of entail on the appellant and the heirs male of his body, whom failing, to certain other heirs of entail therein mentioned. Having also a considerable personal estate, he executed bonds of provision in favour of his younger children, which he designed should be paid out of the personal estate.

On the 17th of May 1714, the late Lord Saltoun executed a bond for the sum of 4000*l.* sterling to Alexander Frazer his grandson, the appellant's eldest son, then and still under age, and the heirs male of his body; whom failing, to the appellant's second and third sons, and the heirs male of their bodies; whom failing, to any other heir male of the appellant's body; whom failing, to  
the