

Ex parte

The Commssioners and Trustees of the Forfeited Estates, - - - - *Appellants*; Case 71.
 George Ogilvie of Lunan, and Mr. John Ogilvie of Balbegno, Advocate, - - *Respondents*.

14th December 1720.

*Forfeiture for Treason.—Kirk Patrimony.—1 G. 1. c. 20.—*This act for the encouragement of vassals continuing loyal, gave them a right to hold their lands, &c. of the Crown, in the same manner as they were held by the superior forfeited for treason: but vassals in church-lands, who had not claimed the benefit of the acts 1633 and 1661, annexing the superiorities of church-lands to the Crown, and had paid their feu-duties to a subject superior, without receiving any new investiture from him, were not on his attainder entitled to the benefit of the said act, 1 G. 1. c. 20., but found to have right to hold of the Crown on payment of the same feu-duties, &c. as paid to the forfeiting person.

THE lands of Lunan, belonging to the respondents, were, before the reformation, holden of the abbot and abbey of Aberbrothock. After the reformation, the lands, superiorities, and other rights, belonging to that abbey, devolved upon the crown, and were by the king erected into a temporal lordship in favour of the Marquis of Hamilton, who in virtue of the grant to him, became superior to the vassals of the abbey, and particularly to one Guthrie of Lunan under whom the respondents claim. The Marquis of Hamilton conveyed his right to the premises to the then Earl of Panmuire.

By an act of parliament, 1633, c. 14. intituled “ Act anent 1633, c. 14.
 “ superiorities of Kirklands,” the superiority of all lands, baronies, &c. erected into temporal lordships or livings, as also the whole feu-farms and other rents of the said superiorities for all years after the day therein mentioned, were annexed to the crown, reserving to the Lords of Erektion the feu-farm rents of their said superiorities until they should be redeemed by the crown by payment of a certain price as fixed by that act. This act is ratified by another act of parliament 1661, c. 53. intituled “ Act 1661, c. 53.
 “ ratifying the act of parliament 1633, anent the annexation of
 “ his majesty’s property, &c.” In consequence of these acts, the vassals who before the reformation held their lands of religious houses, and who after the reformation and before the said act 1633 held their lands of the Lords of Erektion, after the said act 1633 became vassals, and have been entitled from that time to hold their lands of the crown.

James late Earl of Panmuire being by act of parliament attainted of high treason, and his estate surveyed by the appellants, as vested in them for the use of the publick, the respondents by virtue of a clause in the act 5 G. 1. c. 22. intituled, “ *An Act* 5 G. 1. c. 22.
 “ *for enlarging the time to determine the claims on the forfeited estates,*”
 presented

presented their exceptions to the Court of Session in Scotland, 1 G. 1. c. 20. setting forth “ that by an act 1 G. 1. c. 20. intituled ‘ *An Act for encouraging all superiors, vassals*, &c. it is enacted, that if any of his majesty’s subjects of Great Britain, having lands or tenements in Scotland, in property or superiority, should be guilty of the high treasons therein described, every such offender, who should be thereof duly convicted and attainted, should be liable to the pains, penalties, and forfeitures for high treason; and that every vassal and vassals in Scotland, who should continue peaceable and in dutiful allegiance to his majesty, holding lands or tenements of any such offender, who held such lands or tenements immediately of the crown, should be vested and seized, and are thereby ordained to hold the said lands or tenements of his majesty, his heirs, and successors in fee and heritage for ever, by such manner of holding as any such offender held such lands or tenements of the crown at the time of the attainder of such offender. And also stating, that the respondents held the lands of Lunan of the late Earl of Panmuire as their superior; and that the said late earl held the said lands immediately of the crown; and that therefore the respondents were entitled to hold the lands immediately of the crown, by such manner of holding as the late Earl of Panmuire held them of the crown at the time of his attainder.

The Court of Session thereupon (a) found “ that on the 24th day of June, 1715, the property of the said lands of Lunan, and others mentioned and described in the said exceptions and writs foresaid, produced for the exceptants, did belong to the exceptants George and Mr. John Ogilvies; and that the same were held of the late Earl of Panmuire, attainted as their superior thereof; and find that the said exceptants did do diligence in terms of the act of parliament, anno 1 Geo. intituled ‘ *An Act for encouraging all superiors*,’ &c.: and therefore found and declared in virtue of the said act, that the exceptants George and Mr. John Ogilvies had the only right, title, and interest, to the property or *dominium utile* of the said lands, and have right to hold the same now immediately of the crown, with the burthen of a proportion of the debts in terms of the late act of parliament, Anno 5 Georgii, intituled ‘ *An Act for enlarging the time to determine claims on the forfeited estates*,’ after the form and tenor of the above exception, acts of parliament above and therein mentioned, and writs foresaid produced for the exceptants, in all points.”

The decree being extracted, the appellants brought an action for reduction thereof, setting forth that the decree was erroneous, for that the respondents never were vassals to the late earl of Panmuire, nor was the said late earl, nor any of his predecessors, superiors of the lands of Lunan since the said act of parliament, 1633, c. 14. annexing the superiorities of all church lands to the crown; but that since that time the crown was superior of the lands of Lunan, and that consequently

(a) No date to this interlocutor is given in the Appeal Case.

the respondents were not within the provisions of the Act for encouraging all superiors, vassals, &c: And that the respondents had not obtained themselves infeft within the time limited by the act of parliament.

The respondents made defences, contending that though by the act 1633, the superiorities of church-lands were annexed to the crown, and that act was ratified by another act in 1661, yet there is a proviso in the last recited act in these words, "It is always declared, that notwithstanding of this act, any who have gotten or shall get any new infeftment of superiority of Kirklands the same shall stand good as to such vassals, who have given their consents to the said right of superiority," and that the case of the respondents was comprehended under this proviso: for one Guthrie under whom they claim, in the year 1614 consented to the Marquis of Hamilton's right of superiority (in whose place the late Earl of Panmuire came) by accepting a charter from the said marquis and being infeft thereon (a). And, that although the respondents did not obtain themselves infeft within six months after the attainder, yet they offered a charter in the exchequer to be passed in the ordinary form within six months after the attainder of the late Earls of Panmuire which was proved by two witnesses; and that this was *doing diligence to attain possession, in terms of the act of parliament.*

The Court thereupon, on the 31st of October, 1719, found, "that there was no ground for a reduction."

The appeal was brought from "an interlocutory sentence or decree of the Lords of Session pronounced the 31st of October 1719."

Entered,
18 Dec.
1719.

Heads of the Appellants' Argument.

The respondents did not hold the lands of Lunan of the late Earl of Panmuire, they having never been infeft as vassals to him; and therefore they can claim no benefit from the clause in the act 1 Georgii, which is only in favour of vassals, holding lands of a subject superior attainted for treason.

After the act 1633, neither the ancestors of the late Earl of Panmuire, nor himself, were superiors of the lands of Lunan, but the crown was superior, and continues so to this day.

With regard to the proviso in the act 1661, that proviso has a plain relation to new infeftments of superiority, granted by the crown, with consent of the vassals, to the Lords of Erection after the year 1633, but hath no manner of relation to infeftments granted before the year 1633, those, so far as concerns the superiorities being entirely made void by that act. The respondents did prove that Guthrie, in whose right they claim, was infeft by a charter from the Marquis of Hamilton in the year 1614: but they do not prove that the late Earl of Panmuire, or any to whom he succeeded, did obtain a new infeftment from the crown of the superiority of Lunan, with consent of the vassal;

(a) It does not appear that any charter or precept subsequent to this had been received by the vassals.

and

and except that had been done, the late Earl could not be superior, or have any benefit by the aforefaid proviso.

With regard to the respondent's having offered a charter to the exchequer, the act of parliament requires, that a vassal should obtain himself infeft within six months after the attainder of his superior, which the respondents have not done: and the presenting a charter in the exchequer was not obtaining themselves infeft, nor a doing diligence to attain possession. Nor have those words in the act of parliament, *do diligence for attaining possession*, any relation to vassals, but to superiors: vassals were to obtain themselves infeft: superiors to do diligence for attaining possession.

But if the respondents did present a charter to be passed in the exchequer within six months after the late Earl of Panmuire's attainder, no reason can be given why that charter was not passed, and the respondents infeft thereon, other than this that the Court of Exchequer refused to pass it, in regard the respondents are not in the case provided for by the act of parliament *for encouraging all superiors, vassals, &c.*, as they were not vassals to the said late earl, nor he their superior. And it is certain in fact that the exchequer did refuse to pass charters upon that act of parliament to others, who were in the same circumstances with the respondents, judging them not entitled to such charter, and their case not comprehended within the act of parliament.

The appellants therefore conceive, that the respondents are only entitled to hold the lands of the crown in the same manner as they were holden before the attainder of the late Earl of Panmuire, and that the respondents ought to pay the same feu-duties to the appellants for the use of the publick, that they were obliged and used to pay to the late Earl of Panmuire before his attainder.

Judgment,
14 Dec.
1720.

Whereas this day was appointed for hearing counsel upon this petition and appeal, as also upon the answer of the respondents; counsel appeared for the appellants, and were heard (none attending for the respondents), and being withdrawn; after due consideration had of what was offered in this case, it is ordered and adjudged, that the interlocutory sentence or decree complained of in the said appeal be reversed; and it is declared that the respondents are entitled to hold the lands in their exceptions mentioned of the Crown, in the same manner as they were holden before the attainder, of the late Earl of Panmuire; and that the respondents ought to pay the same feu-duties to the appellants for the use of the public, that they were obliged and used to pay to the late Earl of Panmuire before his attainder.

For Appellants, *Phi. Yorke. Ro. Dundas.*