cannot be done, no action can be maintained on the statute, to forfeit a person for not doing what is not in his power. No 5.

To the *1st*, it was *answered*, in point of fact, That there was no delay, as the pursuer's father set on foot his claim immediately after the Colonel's death, by a declarator of his propinquity, the prosecution of which was staid by his death; *2dly*, In point of law, That the delay of two years gives access to the second protestant heir to claim the succession, but is not an irritancy upon the first protestant heir to bar him from prosecuting his claim, though the second protestant heir do not appear.

To the *2d*, That a service is necessary to complete the title of the protestant heir; but that this excludes not a previous declarator to remove all objections to the service. If a protestant be entitled to serve heir, by the incapacity of the popish heir, he must be entitled to bring a declarator of his right upon the principles of common law.

It was *answered* to the *3d*, That it proceeds upon a misapprehension of the statute; the sense of which is, that, if a succession open to a papist after his age of 15, which is the present case, the right of succession shall devolve *ipso facto* to the next protestant heir, who is allowed to serve heir to the predecessor, and to possess until the popish heir thus excluded purge himself of popery. The pursuer is therefore entitled to serve, and to bring a declarator to that effect. It is the popish heir's business, if he would claim the estate, to purge himself of popery in the terms prescribed by the statute; and, in the mean time, the pursuer is entitled to hold the estate until the papist fulfil the law. And if alteration of circumstances, by the abolition of the Privy Council, should even have the effect to make it impracticable to purge himself of popery, in the terms prescribed by the statute, this cannot effect the pursuer's right. At the same time, the difficulty is affected. If Mr Grant return to his native country, he may take the *formula* before any presbytery where he chuses to reside, which will purge his incapacity. It will not affect his right, that the same cannot now be reported to the Privy Council, more than the neglect of reporting when the Privy Council subsisted.

The Lords, before answer, allowed a proof to be taken to lie *in retentis*, which was what the pursuer chiefly aimed at.

Rem. Dec. v. 2. *No* 69. *p.* 107.

1750. *February* 15. Duke of Gordon *against* The Crown.

No 6.
A superior who was a papist was infeft on adjudication against his predeces-

George Duke of Gordon, who was infeft *anno* 1684, upon a charter under the great seal, executed in the year 1711, a gratuitous bond for a great sum of money to his eldest son Alexander Marquis of Huntly, upon which the Marquis adjudged the family estate, took a charter of adjudication from the Crown, and

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sors estate. He had infeft his vassal, who was attainted. The superior's heir being infeft on a service to his remoter predecessor neglecting the adjudication, was found to have the benefit granted by the clan act.

When a papist is served and infeft, what is the nature of his right?

was infeft *anno* 1712. Alexander the Marquis, afterwards Duke of Gordon, having died in the year 1729, his son Cosmo George, made up titles to the estate, by a special service as heir to George Duke of Gordon his grandfather, neglecting the title that was in his father Duke Alexander; and he was infeft in the year 1731.

Sir Evan Cameron was infeft *anno* 1688, in the twenty merk land of Mamore, held feu of the Duke of Gordon. Sir Evan disponed the said land to Donald Cameron his grandson, with procuratory and precept; who, in the year 1724, obtained from Alexander Duke of Gordon a charter of resignation, upon which he was infeft.

Donald Cameron being attainted of high treason for joining in the rebellion 1745, the present Duke of Gordon, as superior of the land of Mamore, claimed the same upon the clan act.

The objection made against this claim in behalf of the Crown was, that the titles of the forfeiting person, and of the claimant, are inconsistent with each other; that if the superiority was in Duke Alexander, which must be supposed to validate Donald Cameron's infeftment as vassal, the present Duke can have no claim to the superiority, not having served to his father but to his grandfather; that, on the other hand, supposing the claimant to be regularly infeft in the superiority, Duke Alexander's right was null and void; and consequently the charter granted by him to Donald Cameron was *a non habente potestatem.*

Answered, 1*mo*, Supposing the inconsistency, and that either Lochiel must be considered as heir-apparent in the property, or the claimant heir-apparent in the superiority, the claim is, notwithstanding, good upon the clan-act. For, 1*mo*, The benefits given by this act, being intended as an encouragement for loyalty, must take place with regard to heirs-apparent, as well as with regard to those who are infeft. In this statute, the Highland chieftains were principally in view, who have the same power over their clan infeft or not infeft. 2*do*, In law language, and in all our acts of Parliament, the terms *superior* and *vassal* are applicable to heirs-apparent, as well as to those who are entered. A lord may demand subsidy from his vassal for making his eldest son a knight, and for marrying his daughter, *Stat.* 2. Rob. I. *cap.* 18. The King cannot interpose any other superior betwixt him and his vassal. Stat. Rob. III. cap. 4. Here, by vassal, is meant one not infeft, as well as one infeft. By act 57. Parl. 1474, the over-lord, or superior, not entering to the superiority in order to infeft his vassal, shall tine the superiority for life. Here the heir-apparent in the superiority has the name of over-lord, and the heir-apparent in the property, the name of vassal. 3*tio*, The treasons in that statute are evidently applicable to heirs-apparent, and therefore the benefits, which are commensurate with the treasons, must also be applicable. 4*to*, Where the superiority is forfeited to the Crown by the forfeiture of the superior infeft, it seems undoubted, that the heir-apparent in the property, is intitled to demand a charter from the Crown in terms of

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the clan-act, and the privilege must be reciprocal; and if it be competent to the heir-apparent of the vassal, it must also be competent to the heir-apparent of the superior.

Answered, 2*do*, The claimant's infeftment as superior, is perfectly consistent with Lochiel's infeftment as vassal; and to make out this, it shall *first* be shown, that Lochiel was regularly infeft in the property; and *next*, that the claimant stands regularly infeft in the superiority; to which ends, it will be necessary to give the analysis of the Popish act 1700.

By this statute it is enacted, That if a succession devolve to a papist, "his right and interest in or by the foresaid succession, shall become void and null, and shall devolve and belong to the next Protestant heir." To clear the meaning of this clause, we shall suppose Duke Alexander had been served heir to his father, and been regularly infeft. And the question is, Whether this feudal title to the estate was intrinsically null and void, so as to put the Duke upon no better footing than an heir-apparent? *Answered*; Such infeftment is not declared to be null and void to all intents and purposes, but only as to the right and interest of the Protestant heir. And, that it is not intrinsically void and null, will be evident from the following considerations; 1*mo*, Upon that supposition, it would not be competent to the Popish heir to pursue a declarator of non-entry; 2*do*, If the Papist does thereafter purge himself of popery, his prior infeftment is good to all intents and purposes; And, 3*tio*, His creditors by this very statute are declared to be secure, if their debts be contracted before their debtor is excluded from the estate by the protestant heir. They are considered as debts contracted by a proprietor infeft, and execution will be competent upon them accordingly.

But, though such infeftment is not *ipso facto* null and void, yet it is declared to be null and void with regard to the heir's own right and interest in the estate, in order to make way for the protestant heir: It is null *quoad* the papist himself, so as to bar him from taking any benefit by the succession. Therefore, it is not a good title in a declarator of property, nor in a removing, nor in mails and duties, nor in any real action that is for behoof of the papist himself. It does not bar the protestant heir from serving to the remoter predecessor, it being declared his privilege to be so served without regard to the papist. But, there is nothing in the statute to hinder the infeftment of the popish heir to be a good passive title against him, so as to oblige him to pay his predecessor's debts, to infeft a purchaser who has bought land from the predecessor by a minute of sale; and, in general, to perform all deeds which an heir served can be compelled to by process. For this nullity was never intended to hurt third parties, his Majesty's protestant subjects, but only to bar the papist himself from enjoying the estate, or reaping any benefit by it. In short, such infeftment is a good passive title to subject the papist entered heir, in the same manner that a protestant would be subjected; but is not a good active title: It was not meant to relieve the papist from burdens, but only to exclude him from

No 6. benefits. And this regulation is extremely rational: a popish heir, if he abstain altogether, which he ought to do by the law of the land, has no benefit, and will be subjected to no burden; but if he will enter in contempt of the law, it is just that his entry should make him *passive* liable in the same manner that it makes other heirs; and the entering vassals is one of those burdens to which he is subjected, and to perform which he can be compelled by a process.

The other point is to make out, that the claimant is regularly infeft as heir to his grandfather. And, to handle this point with the greater perspicuity, we shall first consider the case of a popish heir who is in possession by apparency, from whom the estate is claimed by the protestant heir. In this case the statute is express, that "it shall be lawful to the protestant heir to serve heir to the defunct, to whom the intervening papist might have succeeded." This service then of the protestant heir is a complete title to the estate, without necessity of any declarator, to enable him by a process of removing, or mails and duties, to turn the popish heir out of possession. And if the popish heir should pretend to defend himself upon his apparency as nearest heir, the answer would be sustained, that he is a papist. 2*do*, The case would be the same, though there were a conveyance of the estate to the popish heir: The statute makes no difference betwixt a title by conveyance and a title by apparency.

The only difficulty in this case is, that Duke Alexander was infeft as heir to his predecessor; or, which comes to the same, was infeft upon an adjudication founded upon his predecessor's gratuitous bond; and it may be thought that this infeftment could not be taken away otherways than by a declarator or reduction. But, in answer it may be observed, 1*mo*, That such an infeftment being taken *prohibente lege*, is null and void so far as founded upon to the prejudice of the protestant heir; and therefore cannot require a rescissory action, or action of reduction, which supposes the right to be effectual in law till it be taken out of the way by a process. The statute deprives the popish heir of the privilege of possession as well as of property; and therefore the objection of his being popish will not be reserved to a reduction, but is competent by way of exception: It is competent in this form to the tenants of the estate who are pursued in removings or for mails and duties, and *multo magis* to the protestant heir, as to whom the infeftment is not merely voidable, but void. And, if a conveyance upon which the popish heir is infeft requires not a reduction, which is plain from the statute, as little can an infeftment upon a service require a reduction. 2*do*, As to a declarator, which is the proper action for making nullities effectual, and for ascertaining any right that may be disputed, it appears obvious from the nature of this action, that it is calculated merely for expediency, and can never be necessary *de jure* in any case: It is an action peculiar to this country, and is not known in England. We have no occasion to mention here declarators of escheat, of bastardy, of *ultimus hæres*, and such like, which are of a peculiar nature, and which *de praxi*, are necessary solemni-

ties to establish some sort of rights. The King may bring a removing against any man who is in possession of the annexed property; and the superior may bring a removing against his vassal who has incurred a conventional irritancy *ob non solutum canonem*; a declarator is indeed competent in both these cases, but is not necessary in either. An irritancy of entail, it is true, cannot well be made effectual but by a declarator; because the heir, who is entitled to lay hold of the irritancy, cannot bring an action of removing, or of mails and duties, without a service; and no inquest will readily serve him, until the irritancy be first declared; because private men will seldom undertake determining such intricate points. But a person's being a papist is not an intricate point, and no jury will decline to find so upon good evidence. A service thus obtained will be a good title in a removing to turn the popish heir out of possession; because the popish heir, who is declared to have no benefit by the succession, is not entitled to the privilege of possession more than of property. And in this particular, he is to be distinguished from an heir of entail committing an irritancy, and from a vassal committing an irritancy *ob non solutum canonem*, who are not thereby deprived of their right of possession. No 6.

But the claimant has no great occasion for the foregoing arguments. His case is different, being a service to his grandfather after his father's death. And, even supposing a decree of declarator to be a necessary step for turning his father out of possession, yet surely a declarator after his father's death cannot be necessary, nor even competent; because the claimant has no person to declare against, nor any person to sustain the part of defender. And Lord Stair, B. 4. Tit. 3. § 47. justly observes, "That declarators use not to be raised or insisted on where there is no competition or pretence of any other right," which is precisely the present case; and which is agreeable to the rules that govern this action, that it is not necessary in law, but only calculated for expediency, in order to ascertain the pursuer's right, when he foresees the same will be disputed.

To sum up the whole, the infeftment of a popish heir is a singular sort of right. It subjects the heir entered to all the passive effects of a service, in the same manner as if he were a protestant; and particularly to the obligation which superiors are under to enter their vassals. But such infeftment can afford the popish heir no active title; and particularly it is null and void as to the protestant heir served to the remoter predecessor; which being considered, there can remain no doubt that the protestant heir may serve to the remoter predecessor, if the popish heir be dead.

The President was clear upon both points; *1mo*, That heirs-apparent have the benefit of the clan-act; *2do*, That the claimant was habily vested in his estate by his service to his grandfather. All the Judges were of the same opinion, except the Justice Clerk and Elchies, who did not vote. But the two points were not voted separately. The question was put in general, Sustain the claimant's title, or not? and it was carried, Sustain.

Fol. Dic. v. 4. p. 38. Rem. Dec. v. 2. No 114. p. 229.

*** D. Falconer reports this case:

No 6.

GEORGE Duke of Gordon was infeft under the great seal, in the Marquisate of Huntly, comprehending the Lordship of Lochaber, 1684; and granted the lands of Mamore, part of the said lordship, to Sir Evan Cameron of Lochiel; who was infeft therein 1688, and disponed them to Donald Cameron his grandson, who was infeft thereupon base 1716.

The Duke granted two bonds for L. 50,000 and L. 10,000 Sterling, to Alexander his eldest son, who adjudged, and was infeft 1712; and granted to Donald Cameron a charter, upon the resignation in his grandfather's disposition, and confirmation of his infeftment 1724.

On the death of Alexander Duke of Gordon, Cosmo-George his son, served himself heir to his grandfather, and was infeft 1731, neglecting the title by adjudication, which had been established in the person of his father.

Donald Cameron was attainted for high treason by act of Parliament, 19. Geo. II. and thereupon the Duke of Gordon entered his claim for these lands, as recognosced to him the Superior thereof, in virtue of the provision in the statute made for that purpose.

Answered by the King's Advocate; The claim ought to be repelled, for that the claimant and forfeiting person, were not superior and vassal: The Duke was heir to his grandfather, who granted the feu-right to Sir Evan Cameron, which was disponed to Donald; but neither the granter nor his heir had accepted of the resignation in that disposition, nor confirmed the sasine proceeding thereon; and Donald Cameron had only been received as vassal by the adjudger from Duke George; to which adjudication no title had been made up: The adjudication was either a good title to the superiority; and then Duke Cosmo had no title thereto, as heir to his grandfather, from whom it was carried away; or it was not; and then Donald Cameron was not the vassal, being infeft by a wrong superior.

Replied; It is not necessary to intitle a claimant to the benefit of this act, that compleat titles by investiture have been made up, in the person of both superior and vassal: What the law considered, was the influence which superiority gives; and this is not destroyed by the lying out of either unentered; and, indeed this strict interpretation would very much restrain the act, and make it ineffectual for the purposes for which it was intended. The term of superior, or over-lord, is not confined to the case where rights are completed on both sides, either in common or law language, as appears by the act of Ja. III. P. 7. c. 57. which provides a remedy whereby the vassal may be infeft, when the superior lies out unentered: The act indeed was new, but there are other cases of forfeitures accruing to superiors, according to the analogy of which it ought to be explained; as in England within a county palatine, as the bishopric of Durham, forfeitures for treason belong to the count; and generally for

felony to the superior; likewise, for all crimes, the forfeiture of a copy-hold to the lord of the manor; and in Scotland, liferent escheat falls to the superior: The restrained interpretation is in this case pleaded for the Crown; but in many it would carry away from it a forfeiture, and give it to a person who really has no interest, and comes not within the intention of the law; as suppose a purchaser infeft base, who holds of the disponer, and yet the disponer has no equitable title to the superiority, which the other can complete his title to when he pleases: If such person should forfeit, his Majesty's advocate would scarce suffer the disponer to carry off the subject. *Lastly*, The act determines the question; it creates a new treason, capable to be committed only by persons having lands, to wit, adhering to the pretender within the kingdom; and as the clauses giving the encouragements, are of the same latitude with this determining the treason, on occasion of the commission of which these encouragements are given, the term of holding lands used in these clauses, must be understood in the same sense with that of having; which may be verified of many who have no complete investiture: And so in many cases, after the rebellion in 1715, the benefit of this act was actually enjoyed without complete titles. No 6.

Duplied; This statute, which introduced a novelty into the law, is to be understood by considering the clauses and import of it, and not explained by any fancied rules of analogy. It enacts, "That lands held of any subject superior, should recognosce, and be consolidate with the superiority, as if they had been resigned *in perpetuam remanentiam*." Lands cannot be said to be held of one man by another, unless they are both properly infeft; nor can they otherwise effectually be resigned, in similitude of which this consolidation operates. The instances of the expressions cited from the law by the claimant himself, shew that it is accurately penned, and the words to be understood in their proper signification; as it uses holding where it is granting the encouragements to superiors and vassals, who are such only by holding the one off the other; and yet makes adhering to the pretender treason in all having lands; as it is intended this sanction should not be restricted to persons infeft.

Observed; The term of having lands ought to be only understood of persons infeft as well as holding; considering this is a penal clause introducing a new treason, and therefore to be strictly interpreted; as, when by our law, theft in landed men was treason, it would have been necessary to bring a man into these circumstances, that he should have been infeft: That this was necessary to bring a man under the description of this law, may be inferred from another clause thereof, liberating the heir of a man killed in the King's service from the casualty of marriage; for as one marriage can only be due for one entry, though more heirs have died in the state of apparency; it were unjust that the superior should be deprived of a casualty, that had already accrued to him, by the existence of one apparent heir who died, because another was killed in the service.

No 6. *Observed* in answer; There was no new treason introduced by this act, which was made in the view of a rebellion, in favour of the Pretender, and by adhering to him, means adhering in that war, or rebellion to be raised, or the like, which was treason formerly; and so there is no need of restraining the signification of the words in one clause, for fear of not being at liberty else to restrain them in another, which is penal. It is true that but one marriage can be due upon one entry; but here the superior is not deprived of any casualty accrued, for the heir being dead without entering, the law substitutes the marriage of the next apparent heir, in place of his.

Replied; 2*dly*, Here both superior and vassal were validly infeft, and stood in the full relation to each other: Alexander Duke of Gordon was popish, and for that reason could make up no effectual title to his predecessor's estate: Suppose him to have been served, the service was null, in so far as the protestant heir's interest was concerned, who could have served notwithstanding thereof, and needed not, by the statute 3. S. 9. K. W. any reduction or declarator to have set it aside; much less was there any such need, when the service was not expede till the decease of the popish heir; for as Stair says, b. 4. tit. 3. § 47. "Declarators used not to be raised or insisted in, where there is no competition or pretence of any other right." The case is the same with regard to the Duke's adjudication on his father's gratuitous bond, which was null, and did not carry the estate into the person of him a papist; and thus Duke Cosmo, neglecting this null infeftment, was properly served to his grandfather; whereupon he was validly infeft in the superiority. On the other hand, the title made up in the person of a papist, is not null to all intents; the fee is thereby full, so that the superior could not pursue a declarator of non-entry, it being only null, in so far as the protestant heir's interest is concerned: The interest of the papist's creditors, so long as he continues to possess, is expressly saved by the act, and he may even make valid his title by renouncing popery: The service, in the mean time, is effectual against him, and he is thereby subject to his predecessor's obligations; consequently bound to enter vassals, whose entry must be effectual to them, as the rights of the creditors of a papist in possession are saved; and as they could not obtain their entry from any else than the person vested in the superiority, on a title which is good to all intents, except in competition with that of the protestant heir: Thus, Lochiel was effectually seized in the property of his estate, and became vassal to the claimant, on his making up a title to the superiority.

Duplied; The titles of one or other of the parties must be bad; they cannot both be sustained, as being inconsistent with each other. If the Duke's adjudication, as led by a papist, was null, then the infeftment under it was null also, it being only the rights of creditors of popish heirs that are saved, not their deeds in favour of their vassals: But this adjudication was led against the granter of the bond when alive, and was not an expedient for making up a title to a defunct's estate; and as the legal of adjudications led by a papist, are declared

not to expire, it resolved into a security for the sums in the bonds; and so was no sufficient title to the adjudger, to enter vassals. It is true that these legals expire in one year after the right comes into the person of a protestant; and this adjudication may be said to have come into the person of Duke Cosmo, who was apparent heir to his father the leader; but, then the diligence carried the estate; and he could take nothing by his service to his grandfather, consequently is not yet validly infeft. No 6.

Observed; That without having recourse to the act for preventing the growth of popery, the titles were complete on both sides: When the right of an incumbrance upon an estate, comes into the person of one that can make up the proper title, he may make up his title, and neglect the incumbrance, which flies off; though he will be obliged to acknowledge the rights of third parties under that incumbrance.

THE LORDS sustained the claim.

Act. *R. Craigie, Ferguson, & H. Home.* Alt. *The King's Council, A. Macdowal, & A Pringle.* Clerk, *Kirkpatrick.*

D. Fac. v. 2. No. 130. p. 146.

1750. *December* 13.

LUNDIN of that Ilk, *against* The KING'S ADVOCATE.

No 7.
An irritancy not declared before forfeiture is not proponable to evict the claim of the protestant heir not anteriorly insisted in.

JAMES LUNDIN of that ilk claimed the estate of Perth, surveyed as forfeited by the attainder of John Drummond, brother and apparent heir to James Drummond of Perth, for that the said John Drummond being a papist, was by act 3. ses. 9. Parl. King William, rendered incapable to succeed as heir to any person whatever; and the claimant was protestant heir to the said James Drummond in the said estate, which had been granted by charter under the Great Seal, 17th November 1687, to James Earl of Perth in liferent, and to James Lord Drummond his son in fee, and the heirs-male of his body; whom failing, to his other heirs-male; and disponed by the Lord Drummond, 28th August 1713, to James his son, and the heirs-male of his body; whom failing, to his other heirs-male whatsoever; upon which title, it was found by the Court of Session, and affirmed by the House of Peers, that the estate belonged to the late James, and was not forfeited by the attainder, which the Lord Drummond afterwards incurred on account of the rebellion in 1715. The claimant being grandson to John Drummond Earl of Melfort, brother to the Earl of Perth, was nearest male heir professing the protestant religion to James Drummond, who died last vest and seised in the estate of Perth; notwithstanding that the Earl of Melfort stood attainted of high treason, by judgment of the Parliament of Scotland, 2d July 1695; for that it had been resolved by the Parliament, pending that process, that no doom to be pronounced therein,