

1771. December 21.

ALEXANDER, DUKE of GORDON, *against* The COMMISSIONERS for Managing the Forfeited Estates annexed to the Crown.

No. 57.

Lands held of a subject-superior being forfeited and annexed to the Crown, the said superior is not entitled, upon an entry, to demand from the Crown's donatory, or trustee for the Crown's behoof, the composition of a year's rent.

The estates of Cluny, Callart, and part of Lochiel, were held of the Duke of Gordon and his predecessors. The proprietors of these lands having been attainted after the year 1745, their estates became forfeited; but the present Duke's father having entered his claim thereto, in virtue of the Statute 1st Geo. I. C. 20. called the Clan-act, his right was sustained by the Court.

The clan-act having been repealed, a statute was passed the 25th Geo. 2. C. 41. by which his Majesty was empowered to treat with "such subject superiors, concerning their claims to the property of the said forfeited estates held of them, &c. and also for the purchase of the superiority of the said lands and estates, &c." The statute farther provided, "That, until such superiorities shall be purchased, it shall be lawful to his Majesty, &c. to vest, in such manner as shall be agreeable to the laws of Scotland, the said lands and estates held of subject superiors, or such part of the lands and other of the premisses herein before annexed to the Crown, as shall appear to have been formerly held of subject superiors, in one or more trustees, their heirs, &c. to be renewed from time to time by his Majesty; and which trustee or trustees, their heirs, &c. shall, according to the forms of the law of Scotland, be, from time to time, entered and received vassals in the lands and other of the premises by the respective superiors thereof, &c. Provided also, that his Majesty, his heirs, &c. may change such trustees at his pleasure, and present new ones from time to time; who shall be received by the immediate superiors respectively for the time being, without payment of a year's rent, or any other composition."

The Duke of Gordon did not choose to compound for the superiority of the lands mentioned; and the Commissioners of annexed estates having been appointed trustees to hold the property thereof, precepts under the quarter-seal were issued, requiring the Duke as superior to enter them as vassals in the lands.

The Duke declared his willingness to receive the Commissioners as his vassals, upon their paying him the usual composition of a year's rent; but the Commissioners having refused to do so, the Duke presented a bill of suspension; which, having been discussed, the question came to be argued in a report upon informations to the Court.

Pleaded for the Duke of Gordon, the suspender,

Ino, It was the established law of this country, that every singular successor whatever, was bound to pay a year's rent to the superior as a composition for his entry; and this equally held, whether the change happened by the voluntary act and deed of the vassal, or by the act of law. According to the stat. 1469, C. 36. which obliged the over-lord to receive the creditor as his vassal, the former was entitled to a year's mail as the land was let for the time. The stat. 1621, C. 6. also provided for the composition to the superior, upon the

redemption of comprising; and by stat. 1669. C. 18. it was enacted, that superiors should not be obliged to "grant a charter for infefting the adjudger, till such time as he be paid and satisfied of the year's rent in the lands, &c. in the same manner as in comprisings."

As, by these different statutes, a superior was bound to receive the creditor as his vassal, upon payment however always of a year's rent, and as, by the granting of a bond for the purpose, an intended purchaser could at any time be made a creditor, it came to be understood in practice, that it was needless for a superior to refuse accepting a voluntary resignation: And hence the composition of a year's rent came, in the usage of the country, to be considered as much a fixed casualty as any other incident to feudal holding.

This rule was farther established by stat. 20th Geo. II. C. 50.; which provided, that no superior shall be bound to give obedience to a charge to enter, unless there was tendered to him "such fees or casualties as he is by law entitled to receive upon the entry of such heir or purchaser." All distinction betwixt appraisers or adjudgers, and purchasers or voluntary disponees, being thus removed, and the superior being accordingly entitled to this composition whenever his vassal was changed, no reason could be assigned, why, in the present instance, when he entered the Crown's donatar, he should be deprived of it.

2do, The charger's argument, that subject-superiors were bound to receive the donatars of the Crown to lands forfeited, without payment of any composition, was easily answered. Though, in the case relied on, Blair against Lord Montgomery No. 54. p. 15045. in consequence of the enactment 1584, C. 2. a judgment to that import had been pronounced; yet as the treason laws of Scotland had, since that period, undergone a great alteration, it could not now be regarded as a precedent. The stat. 1584, C. 2. was in a great measure repealed by stat. 1690, C. 33. which provided, that no forfeiture should thereafter prejudice the superiors vassals, &c. of persons forfeited; but that such estates should be subject to all the casualties due to the superior, either before the forfeiture or thereafter, by opening the fee.

By the statutes which followed the Rebellions in 1715 and 1745, the superior's right had been preserved entire. Such was the spirit of the Clan-act; and by the 6th Geo. I. C. 24. the buyers of estates forfeited were appointed to be infeft, not in terms different, but in the same manner as other voluntary purchasers. By stat. 20th Geo. II. C. 41. the estates of persons forfeited were vested in his Majesty: The Barons of Exchequer were at the same time authorised to sell the same; and it never had been pretended that the purchasers of such as held of subject superiors would be entitled to claim an exemption from the usual composition. Bankton, v. 2. p. 263. As a purchaser from the Crown acquired the estate *tantum et tale* as it stood in the Crown, and as such an onerous acquirer would be liable for the composition, there was no principle in law why he should be in a worse situation than a gratuitous donatar; and as every other donatar, whether of bastardy or *ultimus heres*, was liable in payment of a year's rent upon

No. 57. being entered by a subject-superior, there was no reason why a donatar of forfeiture should be on a different footing.

3710, Though the question, as a general point, had been subject to doubt, the clauses of the statute founded on, 25th Geo. II. C. 41. were sufficient to remove it. The prior clauses provided that the trustees shall be entered and received as vassals in the lands, "according to the forms of the law of Scotland," that is, agreeable to what has been fixed by the law and uniform practice of Scotland in other cases. In the subsequent clause, respecting the changing of the trustees, a distinction was made; it being expressly provided, that the new trustees shall be received by the immediate superior "without payment of a year's rent, or any other composition." The inference here was obvious, that the Legislature did not intend any such exemption in favour of the original trustees, but that their entry should remain upon the same footing as that of any other vassal; and had the Legislature besides meant to bar the superior of his right, it would have done so in express terms.

The Commissioners, the chargers, pleaded:

Upon the principles of the feudal law, no superior could be compelled to accept a resignation in favour of any purchaser or singular successor in lieu of his former vassal. The law was the same at this day, except in the particular cases where the contrary had been established by statutes. The first alteration of the law, in this particular, was in favour of creditors apprisers, by the statute 1469, C. 36.; by which the over-lord was obliged to receive the creditor as his vassal or tenant, upon payment of a year's mail, as the lands were let for the time; or, in default thereof, to take the lands to himself, and undergo the debts. The same rule was, by statute 1669, C. 18. extended to adjudications; but as, prior to these statutes, a year's rent had not been payable even by apprisers or adjudgers, and as no statute had enacted that a year's rent should be payable by any voluntary purchaser, the law, in this particular, continued the same as before.

It had hitherto been understood to be law, that subject-superiors were bound to receive the donatars of the Crown as vassals in the lands forfeited, without payment of any composition. This was agreeable to the opinions delivered by Lord Stair, B. 2. T. 4. § 13. Bankton, B. 3. T. 3. § 41. and by Dirleton and Stewart, *voce* Presentation upon Forfeiture; and so the point had been adjudged, in the only instance where it had been disputed, Laird of Blair against Lord Montgomery, No. 54. p. 15045. Though this case had been somewhat inaccurately taken down, the chief argument, on the part of the donatar, appears to have been, that the subject-superior was entitled to a year's rent only from apprisers and adjudgers; and as no posterior statute had authorised the like composition in the case of voluntary purchasers, it could not by inference or implication be extended. Though it might therefore have been customary for purchasers and other singular successors to pay a year's rent to the superior, or to compound for it, in order to avoid the trouble and expense of an adjudication in implement, it did not from thence follow that the subject-superior could be compelled to receive such purchaser, or that he was *de jure* entitled to exact this composition.

The law, in this particular, had, in some measure, no doubt, been altered by the statute 20th Geo. II. C. 20. but though this enactment had gone the length of obliging the superior to receive purchasers in place of his former vassals, it had no where declared or appointed that a composition should be paid on that account; and although it were admitted that a composition was exigible from a purchaser, it did not follow that such right could be extended to affect the Crown's donatar; it being a general rule in practice, that no composition of this nature had been in use to be exacted from donatars of any description, whether by forfeiture, *ultimus heres*, or bastardy.

If it had been intended that subject superiors, who did not choose to sell their superiorities, should be entitled to a year's rent upon receiving the Commissioners appointed by the Crown, the statute 25th Geo. II. C. 41. would have declared so in express terms, and have made provision for payment of the money. Nothing of this kind had been done; on the contrary, the clam made, in the present instance, was not only inconsistent with the whole system of the vesting and annexing acts, but was adverse to the spirit and language of the statute founded on.

The Court was much divided upon this question. Several Judges of high authority were of opinion, that, according to the enactment 1690, C. 33. the Crown could take the estate merely *tantum et tale* as it had been vested in the traitor; and as the purchaser or donatar of the traitor must have paid the composition, the Crown's donatar could be in no better situation. The majority, however, were of opinion, that no composition was due; and an interlocutor was pronounced—repelling the reasons of suspension, and finding the letters orderly proceeded; to which, upon advising a petition and answers, the Court adhered.

Lord Ordinary, *Kames*.
Clerk, *Gibson*.

For the Duke of Gordon, *Lockhart*, *Macquhen*.
For the Crown, *Adv. Montgomery*, *Sol. H. Dundas*.

R. H.

Fac. Coll. No. 121, p. 356

1777. July 4. MACKENZIE against SIR HECTOR MACKENZIE.

The Lords found, that a superior of entailed lands was obliged to enter the heir of entail, who in this case was likewise the heir of the former investiture and lineal successor in the lands, on receiving a *duplicando* of the feu-duty, and was not entitled to demand from him a year's rent or other composition; reserving to the superior, and his successors in the superiority, any right which they may have to a year's rent or other composition on the entry of any future heir of tailzie, not an heir of investiture prior to the tailzie. See APPENDIX

Fol. Dic. v. 4. p. 314.