On the 3d March, 1772, the Lords preferred Martin Fenwick's; adhering to Lord Hailes's interlocutor.

Act. Ilay Campbell. *Alt.* B. Sinclair.

1772. *March* 7. TRUSTEES Infeft in the Forfeited Estates of Lochiel and Callart, *against* ALEXANDER, DUKE of GORDON.

SUPERIOR AND VASSAL.

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 donatary, or trustee for the Crown's behoof, the composition of a year's rent.

[*Dictionary*, 15,050.]

1771. *December* 20. COALSTON.—It is a point established, that all purchasers must pay a year's rent, in name of entry, before they can claim an entry. What is the case when the king takes by a donatar, or bastardy, *ultimus hæres?* A year's rent is paid by the donatar. Why should not a donatar, on forfeiture, do the same? The analogy is strong. The argument from the case of singular successors is not conclusive; for the similitude of the cases of an adjudger and an appriser is very great; and yet, during a period of two hundred years, a year's rent was prestable by the one and not by the other.

HAILES. The decision 1680, *Lord Montgomery*, shows that at that time a year's rent was not prestable by the donatar of a forfeiture. There is no decision, or authority, either before or since that time, which says any thing to the contrary; from whence then comes the law to be altered? The suspender urges the analogy between this case and that of a donatar of bastardy, or *ultimus hæres;* but, instead of proving an unvaried and general practice, he refers to a few late instances. In establishing a principle by analogy, it is necessary that the principle referred to be constantly and invariably followed. It is bad logic to found a general analogy on single detached cases.

MONBODDO. I consider the Crown as proprietor of the estate by the forfeiture. I have always held that it is an established rule of the feudal law, wherever that law prevailed, that, in the choice of a vassal, there is a *delectus personæ*, and a *delectus familiæ:* hence the superior is not obliged to receive one for his vassal whom he does not like. This was universally the rule till the statute 1469. No privilege was thereby granted to the superior; but, on the contrary, an encroachment was made on his rights. When adjudications came in fashion, not long after 1669, the exception was extended to adjudgers: still the superior was not bound to receive any voluntary disponee. The circuit of an adjudication was necessary to compel him. The adjudication brought the case under the Acts 1469 and 1669. By the Act 20th Geo. II., an easier

method, by a charge, was devised, but still there was a reservation of the superior's right. I can make no distinction between a private person and his trustee, nor between the trustee of the Crown and the trustee of the private person. If I had any doubt, it is removed by 25th Geo. II., where a distinction is made between the first trustees and *after trustees*. And it is provided that *after trustees* shall not pay any entry. *There* a composition was in the eye of the legislature, and yet it gave no hint that a composition was not due. With respect to the decision 1680, the law of forfeiture stands upon a different footing *now* from what it did *then*. At that time neither vassals nor creditors were secured, but the Act 1690 ensued. It proceeds upon the principle that an innocent person shall not suffer for the fault of the guilty. I cannot distinguish between the case of presentation upon forfaulture and a gift of *ultimus hæres* and bastardy.

JUSTICE-CLERK. I am not clear what is the principle as to paying a composition in the case of *ultimus hæres* or bastardy. Some private people may have paid a composition, perhaps from ignorance, perhaps from a desire of avoiding law questions; but what I desiderate, is either universal practice or decisions. Be that as it will, I go no farther than the case before me. It is dangerous to resort to principles of analogy. Our predecessors, and the legislature itself, did not resort to those principles where the similitude was express, as in the case of adjudications and apprisings. The decision 1680 is express; there is no decision to the contrary. As to the Act 25th Geo. II., there was great equity in providing nothing upon the subject by that statute. The statute left that matter to the decision of the law. But it added a clause to this effect,—That, if the law shall find the superior entitled to an entry, he shall not be entitled to an entry as often as the Crown shall vary the trustees.

KENNET. There was no purchaser *here;* this is the same case which happened in other rebellions: when the Crown presented a donatar, a year's rent was not due. When a vassal sold the feu, the superior was not bound to give an entry. In the case of forfeiture, there is no reason for giving a year's rent, for the superior is bound to give an entry. The Revolution made no alteration in the law as to this point: the Act 1690 did not give any right to the superior which he had not before. The Act, 25th Geo. II., does not determine any thing: as it was a voluntary Act of the King to make a new donatar, it was natural to entertain a doubt whether such new donatar should pay a year's rent. The Act, 25th Geo. II., removed this doubt.

GARDENSTON. It is clear what was the law before 1690. But that excellent statute made a difference. It, in effect, provided, that the right of the Crown should be neither better nor worse than that of the forfeiting person.

BARJARG. The Act 1690 does not now exist to that extent: it was altered at the time of the Union.

AUCHINLECK. This is a case which seldom comes before us. The trustees are not purchasers; but *that* does not remove the difficulty. Every singular successor is bound to pay a year's rent. There is no Act of Parliament for this; but it is perfectly understood in practice. The question is, Whether are the trustees to be considered as *singular successors?* It is clear that, anciently, the King's donatar was not bound to pay any composition. I ascribe that to the nature of our sanguinary laws against treason. By Act 1690, forfeiture is

considered to be out of the question. How can the superior be deprived of a year's rent upon the change of a vassal?

JUSTICE-CLERK. The Act 1690 has nothing to do with the question. I only say, that the superior shall not, by that law, get a benefit which he had not by the common law of Scotland; and, in so saying, I do not impinge upon the Act 1690, which I have been ever taught to honour and admire.

PRESIDENT. I never heard that, since the time of Lord Stair to the Union, the King's donatar was obliged to pay a year's rent. Lord Bankton says the contrary. It is now agreed that the King is not a purchaser. The Act, 1690, gives no right to the superior which he had not before. The Act, 25th Geo. II., provided singly for the event of the trustees being altered, and removed a doubt concerning that case.

COALSTON. The Act 25th Geo. II. was a hard law, imposing upon subject-superiors, contrary to the genius of the Act 1690. That perhaps makes me the more ready to listen to any argument for the superior. Forfeiture, bastardy, *ultimus hæres*, are all upon the same footing.

KAIMES. I do not admit that purchasers must be entered upon payment of a year's rent. I mean *directly*, for, by the circuit of adjudication, a purchaser may force an entry. It was not till 20th Geo. II. that an easier method was devised; and the truth is, that that statute is very darkly expressed. The King and his donatar are the same: why should the King be bound to pay a year's rent, when the subject superior is bound to receive him?

PRESIDENT. I do not consider the Act 25th Geo. II., nor any of the laws passed on occasion of the late rebellion, as *hard laws*; but as wise and beneficent laws, appropriating the rents of the forfeited estates to the single purpose of improving that country where the rebellion broke out. As to the Act 25th Geo. II., in particular, it was a great measure of public policy: it provided for the indemnification of subject-superiors who inclined to sell their superiority, such as the Dukes of Athole and Argyle: those superiors, who, like the Duke ofGordon, did not choose to sell, it left to the determination and judgment of the common law.

On the 20th December 1771, "The Lords found the Duke of Gordon not entitled to a composition."

Act. H. Dundas, J. Montgomery. *Alt.* R. M'Queen.

Reporter, Kaimes.

Diss. Gardenston, Auchinleck, Stonefield, Monboddo.

[A petition was presented against this interlocutor, on advising which, with answers, (7th March 1772,) the following opinions were delivered:—]

HAILES. The Duke of Gordon lays much of his argument upon the clause in Act 25th Geo. II., which provides, that new trustees shall be received by the immediate superiors, without payment of a year's rent. Hence it is argued, *a contrario*, that the first trustees must pay a year's rent. But that clause seems to have been inserted from an over-caution in the Legislature to obviate, not to acknowledge a claim. Something of the same nature occurs in statute 21st Geo. II., c. 34, That, in all prosecutions for the crime of theft of cattle, or the masterful taking away or detaining the same, it shall be a good objection to any witness produced for proving the libel, that he was himself

particeps or *socius criminis.* So, again, in the statute 21st Geo. II., c. 34, That, in all prosecutions for frequenting any Episcopal meeting-house not allowed by law, it shall be lawful to produce, as witnesses, persons present, who may have been *socii criminis.* Hence, as in this case, it has been argued, that the objection of *socius criminis* went to the admissibility of a witness. Yet, in the Court of Justiciary, this objection, deduced from 21st Geo. II., has been as often disregarded as urged. In this very statute, 25th Geo. II., there is a proviso of the same kind, freeing the heirs of the trustees from passive titles, which they would not have incurred at common law.

Monboddo. In the feudal law there was originally a *delectus personæ ;* afterwards the superior was obliged to receive a vassal, but was entitled to a year's rent. The statute of Geo. II. seems express. It relates to all who shall either purchase or acquire. They are to be entered on payment of casualties. The only casualty is the payment of a year's rent. Before the Revolution, the donatar of the Crown did not fall within the rule. This I ascribe to the rigour of the law of Scotland in matters of treason. This was altered by the Act 1690. The Act was a correctory one, restraining the rigour of forfeiture. Upon the same plan the statutes after the Rebellion 1715 were framed. The practice in the case of *ultimus hæres* confirms this. There is also one instance since 1745, in the sale of the estate of Restalrig.

Justice-Clerk. It is admitted, that, by ancient law in Scotland, a superior could not be compelled to change his vassal without a gratification given : that there is an exception where the fee opens by forfeiture to the king. His donatar must be received. The question is, Whether has this ancient prerogative been taken away? I do not see this case was in the eye of the legislature in 1690. As to the statutes after 1715, a method was provided for vesting the estate in the king, or his commissioners *vi statuti.* This was equivalent to a gift. The commissioners being once vested, when they came to sell, the purchaser behoved at common law to pay a year's rent.—But here the king cannot hold ; he must vest the lands in a donatar. It is a condition in the superior's right that he shall be obliged to receive the king's donatar.—The common law of Scotland said, that, after a donatar is once established, the superior is not obliged to change his vassal. This was remedied by the statute obliging the superior to receive as many donatars as the king shall present.

Pitfour. Of old, the tie between superior and vassal was indissolvable ; but, when commerce came in, there was a necessity of mitigating the ancient constitution. The statute, *quia emptores,* was made in England : In Scotland the statutes of Alexander II. and James III. But vassals were not allowed an arbitrary admittance at pleasure : they behoved to pay for their admission. This was the purpose of the statute 1469. In the case of forfeiture the king takes the land, not by bargain, but from the necessity of the law in his own right. Shall the king pay for what he takes in his own right? This is not the case of a man giving away his lands for his own conveniency : this is no branch of our ancient rigorous law in cases of forfeiture ; for the same thing prevails in questions of bastardy and last heir. I do not look critically into the words of late statutes, but into the principles of the law of Scotland. The Act 1690 did not mean to abolish a part of our law inherent in the feudal constitution. The statute 25th Geo. II. provided for the case of donatars actually imposed.

COALSTON. The Act 25th Geo. II. has not sufficiently provided for the interests of superiors. By it subject superiors have forfeited the right of non-entry; the duplicando and the composition to be paid by singular successors. I must give full effect to it, though I could not extend it beyond the words. I am now satisfied that the Crown takes from necessity.

PRESIDENT. No circumstance of equity, or idea of benignity, will make me alter the principles of the feudal law, which is the constitution of Scotland. I will not inquire into the reason of any principle of the feudal law; but *here* Lord Pitfour has explained the principles. I do not consider the Acts 20th and 25th Geo. II. as hard laws. In great measures of government there must be little hardships to individuals.

On the 7th March 1772, the Lords adhered to their interlocutor, 21st December 1771.

Act. H. Dundas. *Alt.* A. Lockhart.

Reporter, Kaimes.

Diss. Monboddo, Gardenston.

1772. *June* 23. MESSRS GIBSON and BALFOUR *against* HUTTON and COMPANY.

NEGOTIORUM GESTOR.

Arrestment used by him *proprio nomine*, upon a blank admiral precept, not available to the person in whose name it was afterwards libelled, in a competition with an intermediate arrester.

[*Fac. Coll. VI.* 44; *Dictionary*, 9283.]

HAILES. The forms in the court of Admiralty as to blank precepts, &c. are certainly erroneous, but custom has sanctified them. We can go no further than custom has gone. If we argue from the analogy of erroneous forms, *where* can we *stop?* The next thing would be to sustain a precept without any name of pursuer, for the behoof of all concerned; and it will be said that when the summons comes to be filled up, it will be time enough to insert parties; and it will be pleaded that this also is very convenient, and not more erroneous than other forms already practised. Much is said of the security of foreign merchants, but every thing in forms must not bend to that security. The counter-objection seems over critical. It is said that the word copy of an arrestment should have been used. Yet this, in strictness of speech, is incongruous. By the same rule, an account of the Battle of Minden, in the Gazette, ought to be termed the copy of a battle.

GARDENSTON. Strangers would have been in a bad situation as the law stood, till lately, if the Ordinary's judgment were to be held as the rule. The