

said, for their exoneration of the premises at all hands, and against all deadly as law will.

Judgment,
19 Feb.
1719-20.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the several decretal orders complained of in the said appeal be affirmed.*

For Appellant, *Tho. Lutwyche, Dan. Forbes.*
For Respondent Wm. Nisbet, *Ro. Dundas.*
For Respondent John Scott, *Rob. Raymond.*
For Respondent Sir Wm. Scott, *Will. Hamilton.*

Case 59. The Commissioners and Trustees of the forfeited Estates, - - - - - *Appellants ;*
James Duke of Hamilton and Brandon, a Minor, by his Curators and Commissioners, - - - - - *Respondent.*

26th Feb. 1719-20.

Forfeiture under the Act 1 Geo. 1. c. 20.—Thirlage.—An act of parliament gives to subject superiors the forfeited estates of their vassals: the Earl of Linlithgow being attainted, forfeited to the Duke of Hamilton a mill held of his Grace as superior; but the earl having thirled part of his estate, held of the Crown, to this mill, this thirlage was not forfeited to the Duke of Hamilton.

BY an act of parliament 1 G. 1. c. 20. it is, inter alia, enacted, “ That if any subject of Great Britain, holding lands or tenements of a subject superior in Scotland, has been or shall be guilty of such high treason, or treasons” (as are mentioned in the act) “ every such offender, who shall be thereof duly convicted and attainted, shall be liable to the pains, penalties, and forfeitures of high treason; and his lands or tenements held of any subject superior in Scotland shall recognise and return into the hands of the superior, and the property shall be, and is hereby consolidated with the superiority, in the same manner as if the same lands or tenements had been by the vassal resigned into the hands of his superiors, *ad perpetuam remanentiam.*” The act likewise contains this farther clause, “ And for preventing of frauds or collusion in order to evade this act, be it further enacted, that if the superiors, vassals, or tenants, to whom the lands, mines, mills, woods, fishings, and tenements above-mentioned are declared and ordained to belong, shall not, within six months, to be reckoned from the time of the attainder of the offenders, respectively obtain themselves in seise, or do diligence, really and without collusion, for attaining possession, in every such case the forfeiture shall belong to his majesty, his heirs and successors.”

By

By another act of parliament, 1 G. 1. c. 32. intituled, "An act to attain John Earl of Mar" and others, it was enacted, "that from and after the 19th of January 1717, James Earl of Linlithgow should stand and be convicted of high treason, and should suffer pains of death, and incur all forfeitures, as a traitor convicted and attainted of high treason."

At the time of the forfeiture the Earl of Linlithgow was seized in certain lands and mills in the shire of Stirling, which he held from Anne Duchess of Hamilton, the respondent's grandmother, as superior. After the attainder, the Duchess of Hamilton, in pursuance of the act first mentioned, brought her action before the Court of Session, within the six months limited by the act, to attain the possession of the lands: but she dying, pending the said action, the same was revived by the respondent, her grandson and heir. On the 27th of June 1717, he obtained a judgment, declaring his right to the said lands, and decreeing to him the possession thereof; which he accordingly did obtain.

Upon the premises there was a mill, called the Mill of Leuchart, to which the late Earl of Linlithgow, after he had acquired it from the Duchess of Hamilton, thirled and astricted the tenants of a great part of his estate, though not held of the Duchess of Hamilton as superior. The appellants seized and surveyed the estate of the Earl of Linlithgow, and among other particulars thereof, the thirlage to the said mill of the lands not held of the respondent as superior.

The respondent, in terms of the act 5 G. 1. c. 22. intituled, "An act 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. After answers for the appellants, the Court, on the 12th of August 1719, "Found that in virtue of the acts of parliament referred to in the exceptions, the respondent had right to the property of half of the lands of Mumrells, and of the north half of the lands of Leuchart and Brimage, with the half of the mills thereof; and also of the south half of the said lands of Leuchart and Brimage, and the half of the mills thereof, with the pertinents which are contained and described in the infeftments of the late Earl of Linlithgow, and were by him holden of the respondent, and to the rents, profits, and issues of the said lands, mills, and others, in the state and condition they were and stood in on the 24th of June 1715, and in and to the said rents, profits, and issues payable for the said lands, mills, and others, from and since that time, with the burden always of a proportion of the debts in terms of the late act of parliament 5 G. c. 22.: and decerned and declared the right and property of the said lands and others mentioned in the exceptions and writs produced, with the whole rents, issues, and profits thereof since the said 24th of June 1715, and in all time coming, to pertain and belong to the said respondent."

The appeal was brought from "An interlocutory sentence or decree of the Lords of Session of the 12th of August 1719."

Entered
22 Jan.
1719-20.

Heads of the Appellants' Argument.

By the act of parliament 1 G. 1. c. 20. the tenement holden by the vassal attainted for treason from the subject superior, continuing loyal and dutiful, is to recognise and return to the superior; which necessarily supposes, that what returns did once belong to the superior, and was given by the superior to the vassal. But the toll payable to the mill by the tenants of the estate of Linlithgow, and their obligation to grind at the same, did not flow from the respondent, but arose by particular agreement betwixt the late Earl of Linlithgow and his own tenants; and therefore the right of exacting that toll cannot in consequence of the said act belong to the respondent.

No right of vassalage or right of superiority can be constituted otherwise than by mutual consent both of superior and vassal; but so it is, that neither the late Earl of Linlithgow nor any ancestor of his, ever did enter into such a paction or agreement with the respondent or his ancestors, as that the estate of Linlithgow should be bound to grind or pay toll at the mill of Leuchart; and that such obligation, and the benefit arising from it, should become a part of the tenement holden by the Earls of Linlithgow of the respondent.

A vassal cannot, without consent of his superior, bring such a burden or servitude upon his tenement holden of such superior, whereby the superior may be hurt if the tenements should return to him by any of the ways that by law they may: and, therefore, the Crown never having consented to the late Earl of Linlithgow's binding his estate to grind at the said mill of Leuchart; when the estate returned to the Crown by forfeiture, such a burden or servitude cannot lawfully be claimed by the respondent to the prejudice of the Crown.

It was contended, that if the late Earl of Linlithgow had resigned the mill into the respondent's hands *ad perpetuam remanentiam*, the tenants of the estate of Linlithgow would have continued thirled to the mill. But the appellants positively deny this to be law.

It was contended further, that the superior is to have the tenement in the same condition that it was at the time of committing the treason. If the subject of the tenement holden of the respondent were improved; as, for instance, by rendering the lands more fertile, no doubt the benefit might accrue to the respondent: but that is not the case; it cannot be admitted, that the toll payable by the tenants of the estate of Linlithgow ever became a part of the tenement holden of the respondent. The late Earl of Linlithgow might very well bind his own tenants for his own conveniency to grind at his mill for a time, without making that obligation of theirs a part of the tenement holden of the respondent, and might have released that obligation to his tenants at pleasure without consent of the respondent. These are evident proofs that the respondent, as superior, had no interest in that obligation. And therefore the mill of Leuchart ought to
return

return to the respondent as it came from his ancestors, without such a burden upon the estate of Linlithgow.

Heads of the Respondent's Argument.

The distinction raised by the appellants, between the value of the lands at the time of the forfeiture, and the time of the grant, seems altogether imaginary, and without foundation. The statute, which is the ground of the respondent's claim, makes no such distinction; on the contrary, it points out the very reverse. The words of the act are, "that the lands and tenements held of any subject superior shall recognise and return into the hands of the superior." Thus the reward given by the act to the superior, is the lands and tenements held of him; and it is the tenure, not the value, which is the rule of what he is to have. And the appellants admit that these lands claimed do all hold of the respondent. But should there have been any question, the subsequent words have removed it: these are, "And the property shall be and is hereby consolidated with the superiority in the same manner as if the same lands or tenements had been by the vassal resigned into the hands of the superior *ad perpetuam remanentiam*." Now there can be no question, but if the late Earl of Linlithgow, in place of forfeiting the premises in question, had resigned them into the hands of the respondent as his superior, that would have carried the lands of the value they were at the time of the resignation, and not at the time of the grant by the superior to the vassal. For, as to this question, there can be no difference betwixt a resignation to a superior and a grant to a stranger, which would have carried the present value; nor can the improvement of the rent by this thirlage make this case different from any other improvement whatever. And this the Court in the present case unanimously determined.

After hearing counsel, *It is ordered and adjudged, that the interlocutory sentence or decree complained of in the said appeal be thus far varied, that as to such lands, wherein the estate or interest of the late Earl of Linlithgow was forfeited to the Crown, the tenants thereof shall not be bound to thirle to, or grind at the mill of the respondent, in the pleadings mentioned; and that in all other particulars, the said decree be affirmed.*

Judgment,
26 Feb.
1719-20.

For Appellants, *Ro. Dundas. John Willes.*
For Respondent, *Rob. Raymond. Dun. Forbes. Will. Hamilton.*