

Alexander Bayne, Advocate - - - *Appellant*; Case 114.
 The Commissioners and Trustees for the
 Forfeited Estates - - - *Respondents*.

13th Jan. 1724-5.

Temporary Jurisdiction in the Commissioners for the Forfeited Estates.—By several acts of Parliament, the claims relative to forfeited estates, were to be entered before the commissioners by a day certain: in certain cases application was to be made to the Court of Session. A person mistaking his remedy, applied to the Court of Session, and obtained a judgment in his favour; but that was afterwards (among many others) annulled by the House of Lords, for want of jurisdiction: he then entered a claim before the trustees, which they refused to consider as not being entered within the time limited: and an appeal to the Court of Delegates was also refused, “leaving the petitioner in his circumstantiated case, to make application for redress to the proper powers.” The judgment of the Court of Delegates is affirmed.

THE Earl of Southesk, attainted for treason, for his accession to the rebellion 1715, was at the time of his forfeiture in possession of the lands of Leuchars Forbes in the Shire of Fife. These lands were seized and surveyed by the respondents, as forfeited by his attainder, and vested in them for the use of the publick. By several acts of parliament, the mode of claiming any right of, into, or out of any of the estates of which any of the forfeiting persons “was, were, or should have been seised, or “possessed of, or interested in, or entitled unto, on the 24th “day of June 1715, or at any time afterwards in his, her, “or their own right, or to his, her, or their own use, or whereof “any other person or persons was, were, or should have been “seised, or possessed of, or interested in, to the use of, or in trust “for them, or any of them, on the said 24th day of June “1715, or at any time afterwards” was directed to be by entering a claim before the respondents within a time limited, and enlarged, by these acts. By the act 4 G. 1. c. 8. this time was 4 G. 1. c. 8. finally enlarged till the 1st of June 1718.

By a subsequent act, 5 G. 1. c. 22. upon a recital, that several doubts had arisen in Scotland, as if the respondents had seized and surveyed certain estates, which were not vested in his majesty for the use of the publick; it was therefore enacted, that it should and might be lawful for any person pretending right to such estates, and that none of the forfeiting persons were seised or possessed of, or interested in, or entitled unto such estates in their own right, or to their own use, to exhibit their exceptions to the Court of Session, setting forth their rights, within the time limited by the act, which the said Court was directed to hear and determine, in manner pointed out by the said act. 5 G. 1. c. 22.

Upon the footing of this act of parliament, the appellant presented his exceptions before the Court of Session, against the seizure and survey of the said lands of Leuchars Forbes: stating

That

That these lands were originally the undoubted property of Forbes of Reres, but he owing very great debts, the lands were adjudged by his creditors : that the creditors being very numerous a factor was appointed, and an action for determining the preferences of the several creditors carried on which was finished in 1714; and afterwards the estate was exposed to publick sale before the Court of Session, and the appellant as the highest bidder was declared the purchaser, and obtained a decree of sale in 1719 :

That James late Earl of Southesk having right to some debts charged upon the premises, and being cautioner for the factor, upon his death had got into possession thereof, which he held at the time of his attainder ; and the appellant, thereupon, claimed the estate to be decreed to him.

To these exceptions the respondents put in answers ; and, after a hearing upon the question, the Court of Session, “ sustained the “ appellant’s right, and declared the estate in question to belong “ to him.” But the respondents having brought their appeal from that, and many other of the like decrees then pronounced, to the House of Lords ; their lordships, in regard it did appear, and was admitted, *that the late earl was in possession of the estate at the time of the treason committed*, declared void the said decree of the Court of Session, in respect they had no jurisdiction to judge upon such exceptions.

After this the appellant applied by petition to the respondents, praying that they would hear and determine upon the matter of the appellant’s exception and right to the said lands ; and the respondents upon considering the said petition on the 10th of October 1720, refused the desire thereof, in regard, the words of the said act of the 5th of the King, were not sufficient to warrant them to take on themselves a jurisdiction, to hear and determine the merits of the appellant’s right, no claim for the same having been entered in due time, according to the directions of the acts of parliament in that behalf. The appellant then tendered to the respondents an appeal, to be by them, together with the appellant’s reasons of appeal, transmitted to the Court of Delegates (a) ; but they refused the same, since their decree was only upon a petition, and not upon a claim duly given in.

The appellant thereupon applied by petition to the Court of Delegates, praying them to take his right under their consideration and to hear and determine the same ; and he enforced the prayer of his petition on this consideration, that the foundation on which the respondents refused to transmit the appeal, (viz. because he was not properly a claimant, and therefore that the judgment given upon his petition was not subject to the same rules, as judgments upon claims,) was the very matter in dispute,

(a) By the act 4 G. 1. c. 8. power was given to his majesty by commission under the great seal of Great Britain, to appoint five of the English Judges to be a Court of Delegates, and of record in England ; and five of the Scots Judges to be a Court of Delegates, and of record in Scotland, to hear and determine appeals from the decisions of the commissioners for the forfeited estates.

and was properly to be determined by the said Court. But the Court of Delegates, having advised this petition with answers made thereto for the respondents, on the 24th of January 1724, "refused the desire of the petition; leaving the petitioner to make his application in his circumstantiated case for redress to the proper powers."

The appeal was brought from "a sentence or decree of the Court of Delegates in Scotland, made the 24th of January 1724."

Entered,
24 Feb.
1723-4.

Heads of the Appellant's Argument.

The act of the 5th of George the 1st, as it gives a power and liberty to every person, who pretends a right to the estates in question, and that the forfeiting persons were not seised, or possessed thereof, to present exceptions together with the grounds thereof, to the Court of Session, with power to determine thereon; so if the case of the exceptant should be such as a claim might have been entered for before the respondents, or if it appeared that the forfeiting person was in possession, &c., then the Court of Session is discharged from determining thereupon, and *the same* is to be heard and determined by the trustees in the manner directed by the act of the 4th of the king. By these words, *the same*, are meant, as the appellant conceives, the exceptions which the Court of Session are not empowered to determine; and therefore this act gave the respondents a power to determine upon such exceptions as were presented to the said Court of Session, and of which that Court could not properly determine.

All penal laws are to be strictly interpreted; and though any person claiming any interest out of a forfeited estate, was to enter a claim; yet that does not oblige the person who has a right to the estate itself, and to which he thinks the forfeiting person had no right, to enter any claim: for none of the words used in the act directing claims to be entered, import so much; and this is the appellant's case, who insists on a title to the estate in question, not under the forfeiting person, but as a *bonâ fide* purchaser at a judicial sale, paramount to him, and insists that the forfeiting person though in possession had no title at all.

The respondents cannot give themselves any absolute jurisdiction, when it is limited by law, and subjected to the review of a superior court; and if they refuse to transmit an appeal, the Court of Delegates may interpose and judge whether the refusal is reasonable; for otherwise, even in cases where a claim was regularly entered, they might refuse to transmit the appeal and so make the Court of Delegates quite useless; and therefore that Court must judge how reasonably the respondents refused to transmit the appeal in this case. If the appellant has a right, it were hard, that he should lose his estate without any fault, or that the publick should enjoy this estate without any right to it. What the appellant humbly desires, is to have his right examined; if he had a right and was a purchaser of that right for a valuable consideration,

sideration, it were hard to deprive him of the opportunity of having it enquired into, that his property may not be lost.

Heads of the Respondents' Argument.

The respondents conceive, that it is unnecessary for them to enter into the consideration of the appellant's title, further than to say, that a decree of sale pronounced by the Court of Session, in February 1719, could not affect any forfeited estate. The appellant's pretended right, and the rights of the pretended creditors, in whose names the estate was decreed to be sold are declared void by the express words of the statute 4 Geo., *because no claim was entered for the same, within the times limited by that and subsequent statutes.* Though they are a Court of record and have jurisdiction the same is limited to the particular matters mentioned in the statute; that is, they have a power to determine claims upon forfeited estates, entered within the times limited by the several acts made in that behalf; but were not empowered by any act of parliament to receive, hear, or determine upon any claim, unless such claim was entered before those times, and the words of the act giving them jurisdiction are express to this purpose. No clause in the act of the 5th of the king does enlarge the time for entering claims before them, nor does it extend their jurisdiction further, than as by the said act of the 4th of the king: on the contrary it gives a part of the jurisdiction formerly in them to the Court of Session, and leaves the other part of their jurisdiction in the same condition it was by the said act of the 4th of the king.

By the same act of the 4th of the king, the determinations and decrees of the respondents were declared to be final and binding upon all parties concerned, except the claimant, or claimants, should enter his, her, or their appeal against such decree or determination, within 20 days after the same should be made: and in case of such appeals so entered, the commissioners and trustees were required to transmit the same to the Court of Delegates in the manner by that act likewise directed; and the Court of Delegates were thereby empowered finally to hear and determine such appeals. But this power given to the commissioners to review and transmit appeals, and to the delegates to determine thereon, was only upon claims entered in pursuance of some of the said acts.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the decree or sentence refusing the petition of the appellant and therein complained of be affirmed.*

For Appellant, *Dun. Forbes. Will. Hamilton.*
For Respondents, *P. Yorke. Ro. Dundas.*

Judgment,
23 Jan.
1724-5.