

APPENDIX.

PART I.

SUPERIOR AND VASSAL.

1771. February 28.

THE COUNTESS of SUTHERLAND and TUTORS, *against* THE CREDITORS of Skelbo.

THE estate of Skelbo, the property of Lord Duffus, held ward of the Earls of Sutherland. Being forfeited to the Crown in the year 1715, it was claimed by the Earl of Sutherland, in consequence of the Stat. 1 Geo. I. commonly called the Clan Act; but Lord Duffus, the former proprietor, being deeply involved in debt, Dunbar of Thunderton obtained several adjudications against the estate.

In 1721 Thunderton brought a process of mails and duties, the rents were sequestrated, and in 1723 a ranking and sale was raised. A variety of procedure followed; but at length it was found by the Court, 'That the Countess of Sutherland is not entitled to hold the estate of Skelbo upon paying to the creditors only the appraised value of that estate; but that she must either pay the whole debts due to them, or bring the estate to a voluntary sale by public roup, or allow the creditors to do so;' and in order that her tutors might make their election, the creditors were ordained to produce their grounds of debt.

This judgment was objected to by the Countess and her tutors; who *contended*, that before she could be compelled to make her election, the absolute amount of the debts should be ascertained upon objections and conclusive findings. That this estate was *de jure* the property of a minor, and that the tutors were not authorised to dispose of it *sine causa cognita*; so that the propriety and necessity of the sale could only be judged of by the precise amount of the burdens being previously ascertained. If, again, they did not choose to sell,

No. 1.

A superior, claiming right to the vassal's forfeited property, in virtue of the Clan Act, bound *quam primum* to declare, either to take the burden of the debts affecting the same, or to allow the estate to be sold for payment of the creditors.

No. 1. they run the hazard of subjecting their infant pupil to an universal passive title ; and hence, in whichever way they acted, they might hereafter expose themselves to a challenge at the instance of their pupil when she came of age.

The *creditors maintained*, That the Countess' predecessors and her present tutors had sufficient opportunity of being fully acquainted with the extent of the debts ; that all objections to the validity of these claims remained entire ; and as the estate was under the management of her own factor, the value must be equally well known. Her demand was contrary to the spirit and practice of the law in similar cases : Her situation was like that of an heir, charged to enter by his predecessor's creditors ; who, though he might be a minor, and unacquainted with the value of the succession, was allowed but a very short time to make his election. It was contrary to the terms of the Clan Act ; by which the donator could be in no better situation with regard to the creditors than the former proprietor, who could not have protected his estate from their diligence. The payment of the debts was the condition under which she had any pretensions to the estate at all ; so that, till once she made her election, she had truly neither right nor title to the subject.

The Court was clearly of opinion, that the Countess was bound to make her election;—that this case was similar to an exhibition *ad deliberandum*, where minority was no exception.

It was accordingly found, ' That, pursuant to the interlocutor of the 9th July 1768, the tutors of the Countess of Sutherland, in behalf of their pupil, must, on or before the 20th day of June next, declare her option, Whether she will hold the estate, and pay the creditors thereon the whole debts justly due to them ; or, if she and her tutors will expose the said estate to sale by roup, for payment of the said creditors ? And in case the tutors, in name of the Countess, shall fail to declare such option by the time before limited, find, That the creditors on the estate may, in their own right, without consent of the Countess or her tutors, bring the same to a sale, for the payment of their debts, as accords.'

Lord Ordinary, *Kennet*.

For the Countess, *Lockhart, et alii*.

For the Creditors, *Sol. H. Dundas, Bruce*.

Clerk, *Campbell*.

R. H.

Fac. Coll. No. 84. p. 246.

1777. July 4.

JOHN M'KENZIE of Delvin, *against* SIR HECTOR M'KENZIE of Garloch.

No. 2.
Particulars of
the case
No. 58.
p. 15053.

SIR ROBERT M'KENZIE was proprietor, and Mr. M'Kenzie of Delvin superior of the lands of Kinloch. Sir Alexander M'Kenzie, father of Sir Hector,