

Simon Lord Lovat, - - - - - *Appellant*; Case 53.
 Kenneth Mackenzie, Factor and Assignee Dalrymple,
 of the Creditors of Alexander Mackenzie 17 Dec.
 late of Frazerdale, - - - - - *Respondent.* 1718.

4th April 1719.

Liferent Escheat.—An act of parliament, at the time of the rebellion 1715, having ordained persons summoned by the crown to appear before the Court of Justiciary, and find caution for their good behaviour under the pain of life-rent escheat, &c.; and the life-rent escheat of a person neglecting to appear, being adjudged and granted to a donatory; though there was no previous declarator, the rents are ordered to be paid to the donatory; but the creditors who were real at the time of the falling of the escheat are ordered to be charged on the estate in due course of law.

Construction of the acts of parliament 1 G. 1. c. 20. and 50. and 4 G. 1. c. 8. The act 1 G. 1. c. 50. having enacted that all persons who should be attainted of high treason, before the 24th of June 1718, should forfeit all estates which they were in possession of on the 24th of June 1715, or afterwards, to his majesty; and declared that every grant of such estate, or any part thereof made by his majesty, should be void: Under the prior act 1 G. 1. c. 20. a person's life-rent escheat being adjudged on the 13th of October 1715, is gifted away by the crown; he was afterwards attainted of high treason before the 24th of June 1718; but the gift of escheat is found to subsist, notwithstanding the provisos of the last mentioned act.

The vesting act 4 G. 1. c. 8. having declared the judgments of any court, relative to any claim out of a forfeited estate made since 24th June 1715, to be void; but containing a proviso in favour of the gift of escheat before-mentioned, the judgment given in this case was not voided by said act.

BY an act of Parliament 1 Geo. 1. c. 20. intituled “An act for 1 G. 1. c. 20.
 “encouraging all superiors, vassals, landlords, and tenants in
 “Scotland, who do and shall continue in their duty and loyalty
 “to his majesty King George” &c., it was, inter alia, enacted
 that from the 1st of September till the 23d of January 1715,
 the king's advocate or solicitor in Scotland, might upon a war-
 rant from his majesty apply to the Lords of Justiciary for an
 order to summon such persons whose names should be contained in
 the warrant, to appear at such time and place as his majesty should
 appoint, to find sufficient bail for their loyal behaviour; and in case
 of contempt or wilful disobedience, every person so charged
 should incur the pains of single and life-rent escheat, to be
 brought in for his majesty's use, and should be fined in 500*l.* and
 be liable to a year's imprisonment.

Alexander Mackenzie of Frazerdale, the husband of Emilia who took the title of Baroness of Lovat, was summoned to appear before the Court of Justiciary; but having neglected to do so, judgment was given against him in terms of the said act upon the 13th of October 1715. And he was also engaged in the rebellion that year.

By another act 1 Geo. 1. c. 50. intituled “An act for ap- 1 G. 1.
 “pointing commissioners to enquire of the estates of certain c. 50.
 “traitors” &c., it is, inter alia, enacted, that all the estates real
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and personal, whereof any persons (who since the 24th of June 1715, had been attainted of high treason or should be attainted before the 24th day of June 1718, for any treason committed before the 1st of June 1716,) should be seized or possessed of, interested in, or entitled unto, on the 24th of June 1715, or at any time afterwards, should stand and be forfeited to his Majesty, his heirs, and successors, and should be deemed vested and adjudged to be in the actual and real possession of his Majesty, without any inquisition for the use of the publick. This act contained a clause to the following purport; “ and to the end the
 “ public may have the benefit of all the *forfeited* or *forfeitable*
 “ estates by this act vested or intended to be vested in his Majesty,
 “ it is hereby enacted and declared by the authority aforesaid,
 “ that all and every grant, demise, lease, confirmation, restitution, assurance, and disposition whatsoever, made or granted,
 “ or to be made or granted by his Majesty, his heirs, or successors, under the great seal of Great Britain, or under any
 “ his Majesty’s seals in England, or Scotland, or otherwise, of
 “ the same estates or any of them, or any part thereof, shall be
 “ and are hereby declared to be null and void to all intents and
 “ purposes whatsoever.”

After the passing of this act, and whilst the said Alexander Mackenzie was in prison for being engaged in the rebellion, the appellant petitioned his Majesty for a grant of the said 500*l.* penalty, and of the single and life-rent escheat, incurred as aforesaid. The appellant in his petition set forth, that the lands (which were the estate originally of the said Emilia) were worth about 500*l.* per annum, but very much incumbered with debts, so that it could not then be known what the clear produce might amount to, and that such a grant would operate thus: that if the said Alexander Mackenzie should elude justice, by not being convicted of treason, this grant would take place during his life; and that if he should be attainted, it would reach his personal estate at the time of the judgment against him for not obeying the summons, and the rent of his lands during his life, as far as the same should not be limited or restrained by any act of Parliament concerning forfeitures. On the 23d of August 1716, his then Majesty, in consideration of the appellant’s zeal and services in suppressing the rebellion in the north of Scotland, did by his grant under the privy seal, give, grant, and dispoise to and in favour of the appellant what had so fallen by the said sentence against the said Alexander Mackenzie.

The appellant having entered to the possession of the estate of Lovat in consequence of this grant, he laid arrestments in the hands of the tenants for their rents; and arrestments having been also used by the respondent, the tenants brought an action of multiple poinding before the Court of Session, in which the appellant and respondent appeared for their several interests. Pending this action Alexander Mackenzie was attainted of high treason.

The respondent contended that no grant from the crown of the single and life-rent escheat could be in prejudice of creditors; especially

especially since the very act which gave these escheats to the crown did in several places shew the anxious care of the legislature to prevent any just and lawful creditors from suffering by the rebellion. And he referred to part of the preamble of the act, in these words, " And whereas in such conjuncture especially, " it is most just to punish rebellious subjects, and at the same " time to reward such as continue firm and loyal to his majesty's " person and government." In proof of this intention of the legislature, he cited also the following clause in the act, " And " because it is hard, that any creditor remaining in peaceable " and dutiful allegiance to his majesty, his heirs, and successors, " should suffer by the rebellion of his debtor, be it therefore " enacted by the authority aforesaid, that no conviction or at- " tainder on account of the high treason or treason above-men- " tioned, shall hurt or exclude the right or diligence of any such " creditor remaining peaceable and dutiful for security or pay- " ment of any true, just, and lawful debt, contracted before the " commission of any of the aforesaid crimes." And he contended, that though the *escheat* was not expressly named in the act, yet in the construction of law, the act was to be extended to such persons, who by it are brought under certain penalties by which loyal creditors would suffer prejudice, if the saving clause were not extended to them. And the rather in this case because the estate was the estate of the wife of Alexander Mackenzie, and could not be forfeited but for his life, and should the grant in favour of the appellant subsist, the creditors would be deprived of the only fund for their payment, which was the rents and profits of the estate during his life. He contended too, that Alexander Mackenzie having been convicted of high treason, his real estate became vested in the crown for the use of the public from the 24th of June 1715, which was long before the penalty of the life-rent escheat was incurred, being the 13th of October following; and therefore that the life-rent escheat, which was subsequent, could not be a burden upon the estate antecedently forfeited for treason; and since the law in general vested all estates, there was no reason to infer the exception of escheats. And he stated, that supposing the life-rent escheat had been incurred, yet it was absorbed by the following forfeiture arising from the attainder, or though the life-rent subsisted after the forfeiture, yet the same was to be understood to be given to the public.

The appellant was heard in answer to all the objections of the respondent, and the Court, on the 18th of December 1717, " found that the escheat being given posterior to the act of par- " liament appointing commissioners, to enquire, &c. whereby the " forfeited estates are vested in the crown for the use of the public, " the rents of the lands in question are absorbed and compre- " hended in the forfeiture of the said Alexander Mackenzie; albeit " the forfeiture was posterior to the gift of the escheat; and found " that the rents of the said lands are thereby subject to the debts and " diligences of the creditors preferably to the appellant." And

by another interlocutor on the 21st of December 1717, the Court “ preferred the creditors to the donator, and decerned accordingly.”

Entered
1 Feb.
1717-18.

The appeal was brought from “ two several interlocutory sentences or decrees of the Lords of Session in Scotland of the 18th and 21st of December 1717.”

4. G. 1. c. 8.

After this appeal had been lodged, the creditors of Alexander Mackenzie presented a petition to the House of Lords, stating an act of parliament which had been passed also since entering the appeal; the act 4 Geo. 1. c. 8. intituled, “ an act for vesting the forfeited estates in Great Britain and Ireland in trustees, to be sold for the use of the public; and for giving relief to lawful creditors by determining the claims,” &c. By this act the trustees were empowered to hear, determine, and adjudge all and every claim and claims of the lawful creditors and other claimants upon the forfeited estates, and the determinations of the trustees were to be final, if the party claimant did not within twenty days enter his appeal to the Court of Delegates. By a clause in the said act it was enacted, “ that all and every sequestration, suspension, arrestment, and other act and decree, made and passed by any Court of Judicature since the 24th day of June 1715, or which shall hereafter be made and passed otherwise than according to the directions of this present act, whereby any right, title, charge, or interest, into, out of, or upon any of the forfeited estates hath been or shall be decided and determined in favour of any creditors or person claiming interest therein, or whereby any person or persons have been or shall be entitled to possess any part of the said estates, real or personal, or to levy, receive, or discharge, any part of the rents and profits of the same by any such decrees or sentences, or without any lawful title, are hereby declared to be void, null, and of no effect, as if the same had never been made or passed.”

This act contained a proviso to the following effect, “ that nothing herein contained shall be construed to extend to, or in any way to invalidate or infringe a grant made by his majesty, and passed under the privy seal of Scotland, bearing date the 23d day of August 1716, whereby his majesty grants to Simon Lord Lovat the single and life-rent escheat and sum of 500l. penalty, incurred and forfeited to his majesty by Alexander Mackenzie of Frazerdale, on account of his disobedience and not appearing before the Lords of Justiciary, when summoned so to do, pursuant to the directions of an act passed in the last session of the present parliament, intituled, ‘ an act for encouraging all superiors,’ &c. The petitioners therefore prayed, that the appeal should be dismissed.

The House made an order, that the creditors should be at liberty to be heard by their counsel on the matter of the said petition at the same time the cause was heard.

Heads of the Argument of the Creditors on this preliminary Point.

The appeal being brought to reverse those sentences which are since annulled and made void by the said act 4 Geo. 1. c. 8. the creditors hope the said appeal shall be discharged, especially since the appellant in the mean time continues in possession of the estate, and thereby deprives the creditors of their just debts and interest, which many of them want for their subsistence.

With regard to the proviso contained in this act in favour of the appellant; this proviso only relates to the grant, but not to any decree for or against that grant, which stands upon the foot of the law, as it was on the former act of parliament for the forfeitures. The appellant will, no doubt, be entitled to insist upon the benefit of his grant before the trustees, and will receive their determination, but this proviso will not be any prejudice to the respondents, who are lawful creditors.

His majesty's solicitor-general in Scotland being satisfied that the sole power of hearing and determining all claims relative to the forfeited estates, as well life-rent escheats as others, was by the last-mentioned act vested in the commissioners, exhibited a claim before the said commissioners, for and on behalf of the crown, for the single and life-rent escheats of all the persons, who had by virtue of the said act for encouraging superiors, &c. forfeited the same. These commissioners, on the 22d of September 1718, after hearing counsel on both sides, pronounced the following decree, viz. "That the real estates of the persons
 "attainted and convicted were vested in his majesty, and are
 "now vested in them as trustees for the use of the public, with
 "all rights and titles thereto, as they stood in the forfeiting persons on the 24th of June 1715, free from the life-rent escheats
 "claimed; and do therefore dismiss the claim as to the life-rent
 "escheats." The solicitor-general appealed from this decree to the Court of Delegates, and they, upon hearing counsel the 30th day of December 1718, did "order and adjudge that the said
 "appeal, so far as relates to the said life-rent escheats, be dismissed; and that the decree of the said trustees, with relation
 "to the said life-rent escheats be affirmed."

No case for the appellant upon this preliminary point appears.

On the Merits—Heads of the Appellant's Argument.

The debts of the pretended creditors, who oppose the appellants have been contracted with a design to burden the estate, and bear date for the greatest part after the 24th of June 1715. These creditors joined in naming the respondent, Kenneth Mackenzie, (who had all along been factor and agent to Alexander Mackenzie, the forfeiting person) as their factor, to whom they assigned their pretended debts.

No law ever burdened single or life-rent escheat, with any other debt than that of the horning whereon it fell, and which was introduced by express statute; and therefore as the escheat in question

did not fall on account of any debt, no reason could be assigned why this grant should be burdened therewith; for though the lords of the treasury, by the king's allowance, have sometimes granted escheats with the burden of the rebel's debts, and for that purpose have taken bond from the grantees for payment thereof, yet this favour was never claimed of common right.

The respondents contended, that there having been no general or special declarator, before the appellant's grant passed, the same was not a good title for possession against personal creditors endeavouring to affect the life-rent escheat by arrestments. But on escheats being vested in the crown, his majesty's grant passing the exchequer and the seals is a sufficient title for possession, and a general or special declarator was not necessary either for completing his majesty's right, or establishing the appellant's title, especially in this case, where the solemn manner, in which the escheat in question was adjudged by sentence of the Court of Justiciary to be fallen, superseded the necessity of any such declarator.

With regard to the saving clause in the act of parliament for encouraging all superiors, &c. whereby it is provided, that the rights and diligences of just creditors shall not be hurt or excluded by the conviction or attainder of their debtors for high treason; that saving clause is limited and restrained to the case of forfeiture on conviction or attainder for high treason, and no way related to escheats, which are left untouched, to fall to the king, in the same extent, as they did belong to him before that act.

By the vesting clause in the act appointing commissioners to enquire, &c. the life-rent escheat in question, at the time of the grant thereof to the appellant, was not vested in his majesty for the use of the public: for although that act vests in his majesty, for the use of the public, the estates of persons attainted of treason, which they were seized of the 24th of June 1715, yet this life-rent escheat was vested in his majesty for his own use, before the attainder of the said Alexander Mackenzie for the treason, by virtue of an act for encouraging superiors and vassals; and by a clause in the said act of enquiry, it is expressly provided, that that nothing in that act should extend or be construed to extend to repeal, alter, or make void any of the provisions, matters, or things contained in the said act for encouraging superiors and vassals. And the vesting the life-rent escheats thereby fallen in the king for his majesty's use, and at his disposal, is one of the principal provisions and matters in the said last-mentioned act.

As the escheat and forfeiture for treason are the punishments for two different crimes, and the effects of two different causes, the first for the contumacy of Alexander Mackenzie, and the other for his treason; so if he had had a fee in this estate, which by his attainder for treason would have become vested in his majesty for the use of the public; yet there would have been two different estates in the king; the first a life-rent escheat vested in his majesty by the act for encouraging superiors and vassals for his own use, and the inheritance vested in him for the use of the public;

public; and therefore it would be a strange construction to have consolidated both these estates, which would have been vested in his majesty for different purposes. And it cannot be denied, but that if the said Alexander Mackenzie had not been so attainted, the right to the said escheat would still have existed in the appellant; and it would be strange to imagine, that the right so vested in him should by the attainder of the said Alexander Mackenzie, so happening afterwards, revert to his majesty, and be re-vested in him, and then consolidated with the estate forfeited by the treason for the use of the public; but, however, in this case Alexander Mackenzie had no fee in him to forfeit.

But it did not properly lie before the Court of Session, (as the appellant conceives) to determine and make void the appellant's said grant, as in effect they have done, at the instance of the respondents, whose pretended debts would not affect the said estate in the hands of the trustees; but their lordships ought only to have determined, whether or not the respondents ought to be paid their several debts out of the escheat lands in question, that so the appellant (who never refused the payment of any real debt affecting the estate) might have disputed the justice of any of the respondents' debts, and put them to make due proof thereof.

By a clause in the act 4 Geo. 1. c. 8. for vesting the forfeited estates in trustees, &c. (made since pronouncing the interlocutors appealed from) it is provided, that nothing in the said act contained shall be construed to extend to, or in any way to invalidate or infringe his majesty's said grant to the appellant, whereby the said life-rent escheat, notwithstanding any such pretended consolidation is well saved to the appellant.

(Subjoined to the appellant's case, he gives a list of the debts claimed by the respondents, with their respective securities and dates thereof.)

Heads of the Respondents' Argument.

Though Alexander Mackenzie was not attainted of high treason till some time after the date of the grant to the appellant, yet whenever that attainder took place, it was drawn back expressly by the act 1 G. 1. c. 50. to the 24th of June 1715, and as that was before the penalty of the escheat incurred, so this escheat is in the nature of every other charge, and could not affect the forfeited estate posterior to the time when that forfeiture commenced; and therefore since the estate of Mr. Mackenzie is declared by law to be forfeited from the 24th of June 1715, the succeeding penalty of the escheat could be no charge, and the same was vested in his majesty, independent of that charge, for the use of the public.

Though the grant to the appellant was prior to Mr. Mackenzie's attainder, yet it was posterior to the act vesting the estates in his Majesty for the use of the public; now should any grant be made posterior to that act, of any part of the estate so surrendered, it were eluding the act. Had Mr. Mackenzie never been forfeited, the grant might have been good, but when he was

attainted of treason, and that attainder drawn back to the 24th of June 1715, before the escheat fell, it must void that grant; for his Majesty having surrendered to the public the real estates of the rebels in the event of their respective attainders, whereby their estates were by law to become forfeited to his Majesty prior to the surrender, and by which their escheats were to be absorbed, it could not but be in view that they were to go to the public free of those burdens. For the surrender must be understood to be *pro omni jure*, especially as *beneficia principum* are to be interpreted in the most benign and ample manner.

It is still more evident, that these escheats, after the surrender to the use of the public, did not continue in the king, otherwise it would have been unnecessary for Lady Panmure, and others, to apply for acts of parliament to enable his majesty to make provision for them during their husbands lives, if their husbands life-rent escheats (which were all incurred in the same manner as Mr. Mackenzie's) had remained in his majesty.

The appellant founded upon a proviso in the act 1 G. 1. c. 50. for appointing commissioners, declaring that nothing in that act should extend to take away, repeal, alter or make void, any of the provisions, matters, or things, contained in the act for encouraging superiors. But this proviso is only in favour of the rights of superiors, vassals, tenants, creditors, &c. continuing dutiful and loyal to his majesty, but does not reserve any interest to the crown; and for this obvious reason, because nothing was or could be supposed to be in the crown, but what was made over to the public by the first vesting clause, which was to have its full effect from the 24th of June 1715.

1689. c. 33.

By an act of parliament in Scotland 1689. c. 33. it is enacted, that no vassal or creditor, personal or real, shall be prejudged or lose any of their lands or estates, or any of their true and just sums remaining due to them, by their debtors' or superiors' default. And the crown never used to make any grant of these life-rent escheats to the prejudice of creditors; but on the contrary, the donators of such escheats have always been obliged to grant back bonds to be accountable to the creditors. Both from the recital and enacting part of the act for encouraging superiors, &c. it is plainly the intention of the parliament, that no forfeiture or conviction on account of treason should prejudice creditors: It never can be imagined, that a forfeiture arising from a smaller crime was to be extended to the prejudice of the creditors; that, in most cases, would have been a forfeiture of the king's loyal subjects, especially the respondents, who have no other fund of payment but these very rents.

The appellant himself did understand, that the escheat was to be charged with the debts, for in his memorial to his majesty, he sets forth the value of the estate to be 50*l.* per annum, *but much incumbered with debts*; it were then unreasonable for the appellant now to pretend to exclude these creditors.

After hearing counsel upon the petition and appeal of Simon Lord Lovat, as also upon the answer of Kenneth Mackenzie, and likewise upon

Judgment,
4 April,
1719.

upon the petition of the said Kenneth Mackenzie, It is ordered and adjudged, that the said interlocutors, sentences, or decrees complained of in the said appeal be reversed, and that the rents of the estate in question be paid to the appellant according to his grant; but that such debts of the creditors of the said Alexander Mackenzie as were real, and did by the law of Scotland affect the estate in question, at the time of the forfeiture of the life-rent escheat, be charged on the said estate in due course, according to the said law.

For Appellant, *David Dalrymple. Rob. Raymond.*
 For Respondent, (in both cases) *Edw. Northey. Will. Hamilton.*

William Morison, of Preston Grange, Esq; *Appellant*;
 James Smith of Whitehill, and David Burton
 Glazier in Edinburgh - - *Respondents.*

Case 54.

8th April 1719.

Society.—The minutes of a meeting of a company, subscribed by the preses, bore that certain members sold to another their shares of the joint stock at a given price; the person to whom the shares were so assigned afterwards entered to the management of the whole concern, and applied the profits to his use; it is found that he was obliged to pay to each partner the sums mentioned in said minute, though it was objected, that the minute was erased in some sentences, and that there was *locus penitentiae* till a more formal assignment was made.

The assignee is also ordered to free the assignors from the debts of the society, and pay them interest on the sums found due.

Compensation.—In a suspension, the suspender's plea of compensation is rejected.

Costs.—20*l.* costs given against the appellant.

BY articles of agreement, executed in March 1698, between the appellant, Sir William Binning, Patrick Steel, the respondents, and others, it was agreed to set up and carry on a glass-work in Morison's Haven, at their mutual expence, and to their mutual profit, and to consist of shares of 50*l.* sterling each share; and it was agreed, that if any of the copartners should be inclined to sell or assign his share, it should not be lawful for him so to do, until he should make the first offer thereof to some of the copartners, and if they should refuse, he might then sell, so as it were not at a lower value than what was offered by the said copartners: They were likewise by the said articles to appoint some of their own number to be overseers of the work; and they named George Livingston, one of the copartners, to be their cashier or treasurer.

By other articles of agreement in April thereafter, between the appellant and the other copartners, and Daniel Titterie, glass-maker in Newcastle, the said copartners leased to Titterie the said glass-manufactory and premises for 9 years, commencing at Whitsunday 1698. At a meeting of the copartners in September 1699, Sir Wm. Binning and Patrick Steel, two of them, surrendered their shares to the appellant, he paying to each of them
 10*l.*