

25 Feb.

The judges accordingly attending, they were directed to deliver their opinions in relation to the following matter as stated to them, viz.

“ The act of parliament for the attainder of George Earl of Marischall, and others, having enacted, ‘ That unless Major General *Thomas Gordon*, Laird of Auchintoule, should render himself to one of his majesty’s justices of peace by a day therein specified,’ and no such render being made; and all the said additions belonging to the respondent, but that his christian name is Alexander, and not Thomas, ‘ whether if the respondent Major General Alexander Gordon, Laird of Auchintoule, had been brought into the King’s Bench, and execution prayed against him, that Court would have awarded execution against him?’ ”

And having conferred together, the Lord Chief Justice of the Court of King’s Bench delivered their opinion, “ That the said Court could not award execution on the act against *Alexander*; because in awarding of execution, they must pursue the act of parliament, which is the judgment on which it is to be founded.”

Judgment. It is thereupon ordered and adjudged, that the said petition and appeal be dismissed, and that the decree therein complained of be affirmed.

For Appellants, *Ro. Dundas.* *Tho. Bootle.*  
For Respondent, *Will. Peere Williams.* *Will. Hamilton.*

Case 61.  
Vide No. 57  
of this Col-  
lection.

The Commissioners and Trustees of the Forfeited Estates, - - - *Appellants*;  
Kenneth Mackenzie of Assint, a Minor,  
by Colonel Alexander Mackenzie, his  
Curator, - - - *Respondent.*

1st March 1719-20.

*Act of Parliament 5 Geo. 1. c. 22.—Popish—Trust—* Estates forfeited by vassals were acquired by the trustees for a Papist superior, but were forfeited again by the Papist’s treason.

THE respondent, the minor, had obtained the judgment of the Court of Session, decerning to him in his character of protestant heir, the estate of Seaforth, upon the attainder of the late earl for high treason, but that judgment was reversed upon appeal (No. 57 of this Collection.) He had also made a claim before the Court of Session, founded upon a clause in the act 1 Geo. 1. c. 20. “ for encouraging all superiors,” &c. for the estates of six of the vassals of the late Earl of Seaforth, who were attainted of high treason, viz. John Earl of Mar, Sir John Mackenzie

kenzie of Cowll, John Mackenzie of Avoch, Alexander Mackenzie of Applecrofs, Alexander Mackenzie of Devockmaluack, and Rory Mackenzie of Fairbairn. The ground of his claim was, that he the respondent as nearest protestant heir was the superior of these vassals; and having remained dutiful and loyal to his majesty, he had right to the estates of the vassals attained in virtue of the said act of parliament.

The Court of Session pronounced six decrees in favour of the respondent, decerning the estates of the six vassals to belong to him.

The appeal was brought from these six "several interlocutory sentences or decrees of the Lords of Session, pronounced the 3d day of September, and 28th and 29th days of October 1719." Entered,  
11 Feb.  
1719-20.

This appeal was the same in its merits as the former; for if the respondent was entitled to the estate of the Earl of Seaforth, he was also entitled to the estates of the attained vassals, as a superior remaining dutiful and loyal. And the same arguments which were used in the former appeal, applied with equal force to the present.

After hearing counsel, *It is ordered and adjudged, that the several interlocutory sentences or decrees complained of in the said appeal, whereby the Lords of Session found, "that the exceptant hath right to the property of the lands of Kairlochue and Reogy which belonged to the late Sir John Mackenzie," &c. (a) be reversed. And it is further ordered, that the respondents be removed from all possession of the estates in question, which they may have obtained, and from the receipt of the rents and profits thereof, and that the said commissioners and trustees of the forfeited estates take possession and receive the rents and profits thereof, and proceed to execute the powers and authorities in them vested with respect thereto, any right, title, or claim of the respondents notwithstanding.* Judgment,  
1 March  
1719-20.

In this appeal there appears to have been a dispute whether or not a seventh judgment relative to the estate of Sir Donald Mackenzie, attained, had been pronounced by the Court of Session; the respondent produced an affidavit of Colonel Alexander Mackenzie, bearing that he had passed from and withdrawn his exception relative to that estate before any judgment was pronounced. The House of Lords dismissed the appeal as to that exception, "there being in reality no decree pronounced thereupon."

This case shews, that notwithstanding the *ipso jure* clause of devolution in the act 1700, c. 3. in favour of the protestant heir, that the papist, where there was no declarator, was entitled to acquire by forfeiture of his vassals, and to lose such acquisitions by his own forfeiture.

(a) Here the other lands, and the several former proprietors of them, are enumerated.