removed from all poſſeſſion of the eſtate in queſtion which he 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.

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

James Farquhar of Gilmillſcroft, - - *Appellant;* Caſe 66.
The Right Hon. Hugh Earl of Loudoun, - *Reſpondent.*

5th *May* 1720.

Kirk Patrimony.—In 1631, certain vaſſals in church lands advanced money to the Crown, to aſſiſt in redeeming a wadſet granted to the Earl of Loudoun, the lord of erection, upon condition that they ſhould hold of the Crown as ſuperior, and have certain other privileges: in 1633, the ſuperiorities of all church lands were gratuitouſly annexed to the Crown; and about ſame time vaſſals who ſhould advance money for redeeming their feu duties were allowed by his majeſty to treat with the treaſury for that purpoſe, and to retain their feu duties in proportion to the ſums advanced. In a queſtion between the wadſetter and the vaſſals, who advanced money in 1631, it is found that they were not allowed to retain their feu duties, though they had paid money for privileges, the greateſt part of which had been granted to other vaſſals gratuitouſly.

UPON the Reformation in Scotland, the lands, teinds, and ſuperiorities belonging to monaſteries and other religious houſes, devolved to the Crown; and the greateſt part of them were ſoon after erected into temporal lordſhips, in favour of certain perſons called Lords of Erection. In 1608, the lordſhips of Keilſmuir and Barmuir, which were part of the eſtate which belonged to the abbacy of Melroſe, was given to Hugh then Lord Loudoun, the reſpondent's predeceſſor. King Charles the Firſt made a general revocation of all thoſe grants as prejudicial to the Crown, which occaſioning diſcontents, the lords of erection afterwards ſubſcribed a deed called *The General Surrender*, whereby they ſubmitted to his majeſty (under certain reſtrictions) their ſeveral intereſts by thoſe grants; upon which ſurrender the king's decrees arbitral proceeded, which were confirmed in parliament.

After this, in 1630, a contract was entered into between his then majeſty and John then Earl of Loudoun, whereby the ſaid earl agreed to reſign and ſurrender to the Crown the right he then had to the lands, ſuperiorities, &c. of the lordſhips of Keilſmuir and Barmuir, and certain juriſdictions, for which the Crown engaged to pay him 32,000 merks, being ten years's purchaſe; whereof 14,000 merks, in conſideration of the juriſdiction of ſheriffſhip, were actually paid, and his majeſty granted a wadſet

of the ſuperiorities and feu duties of the ſaid lordſhips to the earl, redeemable upon payment of the remaining 18,000 merks.

In 1631, George Reid and Robert Farquhar, the appellant's predeceſſor, two of the vaſſals, for themſelves and in name of the other vaſſals, entered into a contract with the Crown, whereby they agreed to pay to the treaſury 12,000 merks, to be applied towards the redemption of the Earl of Loudoun's wadſet, the other 6000 merks to be paid by the treaſury: and in conſideration of the ſaid 12,000 merks paid by the vaſſals his majeſty became engaged to grant them new charters of their lands to be holden of the Crown, to releaſe all claims that might ariſe from the breach of the conditions of their ſeveral infeftments, and to give them other advantages, *provided that they ſhould always be bound to pay their uſual feu duties to the Crown.*

Purſuant to this contract, John Earl of Loudoun, was afterwards, upon the 28th of September 1633, by order of the then treaſurer depute ſummoned to appear in St. Giles's Church, Edinburgh, at Martinmas then next, to receive his 18,000 merks. Before this term of Martinmas the king ſent down his letter, dated the 8th of October 1633, directed to the lords of the treaſury, and entered in the books of exchequer the 9th of November following, to this purpoſe, "That foraſmuch as divers of the "vaſſals of erection, as his majeſty was informed, were willing "to advance money, for buying their feu mails, to his majeſty's "uſe, they having retention in their hands of their feu mails "for ſuch years after the advancing of the money as in reaſon "and equity might compenſate the money to be advanced by "them, that his majeſty approved of that courſe, and it was there-"fore his pleaſure that public intimation ſhould be made to all "perſons having intereſt, to the effect that ſuch of the vaſſals "as were willing might come in and agree with the treaſurer "and his deputy for advancing the ſaid money, and get ſecurity "by act of the exchequer for retention of their feu mails, for "ſuch terms as ſhould be agreed upon." Prior to the date of this letter, the ſuperiorities of all church lands throughout Scotland had, by the act 1633, c. 14. been annexed to the Crown.

At Martinmas 1633, the 18,000 merks were tendered to the Earl of Loudoun in St. Giles's Church, but neither he, nor any perſon for him, having appeared to receive the money, it was conſigned in the hands of the dean of guild of the city of Edinburgh, for the earl's uſe, and an inſtrument taken thereupon. An action of declarator was alſo commenced againſt his lordſhip in the Court of Seſſion, by the officers of the Crown, to have it declared, that the ſaid wadſet was redeemed.

By a ſecond contract, in 1634, between the treaſury and the then Earl of Loudoun, it was agreed that upon payment of the 12,000 merks, being the ſum advanced by the vaſſals, the earl ſhould ſurrender his right of the ſuperiorities to the Crown, ſaving to himſelf his right to the feu duties until the other 6000 merks, for which the wadſet was redeemable, ſhould be paid. Accordingly

ingly ſuch ſurrender was made by the earl of Loudoun. By a charter granted by Queen Anne, in 1707, and infeftment thereon, the right of redemption of the wadſet was releaſed in favour of the reſpondent. And by an act of parliament 1707, c. 11. the power of redeeming kirk lands from the lords of erection was for ever renounced by the Crown. 1707, c. 11.

The reſpondent's predeceſſors had all along continued to exact and receive from the vaſſals in the ſaid lordſhips the feu mails, originally payable by them, till 1687, when the appellant ſtopped payment of his feu-duty, amounting to 34*l.* 9*s.* Scots annually. The appellant, in virtue of an aſſignment by the ſaid George Reid in favour of the appellant's predeceſſor, was become entitled to the whole benefit and advantage of the ſaid 12,000 merks, advanced by Farquhar and Reid, in terms of the contract with the treaſury in 1631, for redemption of the wadſet: and he contended that in virtue of the ſaid contract, and the king's letter in 1633, he was entitled to retain his feu-duties, until he was paid the ſaid 12;000 merks advanced to the Crown.

The reſpondent thereupon (after the date of his new charter in 1707) brought an action againſt the appellant, before the Court of Seſſion, for payment of the arrears of his feu-duties. The appellant appeared and made defences, and after ſundry proceedings the Lord Ordinary, on the 9th of July 1719, "Found that "the ſuperiorities, feu-duties, and other rents of the erected "lordſhip of Keilſmuir and Barmuir, being wadſet by King "Charles the Firſt to John Lord Loudoun for 18,000 merks in "the year 1630: and albeit by the ſubſequent contract 1631, "his majeſty ordained the ſaid wadſet to be redeemed, and the "feuars to furniſh 12,000 merks, and the treaſury 6000 merks, "for redemption thereof, it was agreed that after redemption "the feuars ſhould hold of his majeſty, and pay their feu-mails "and duties in their infeftments: and found, that the 12,000 "merks being paid to my Lord Loudoun, he did, in 1634, renounce the wadſet as to the ſuperiorities, and reſign the ſame "into his majeſty's hands, to the effect they might hold of the "Crown; but found that the ſaid Lord Loudoun was thereby "allowed to retain the wadſet right for the feu-mails and duties; "which wadſet and infeftment was ratified in parliament, 1633, "in his favour, till the wadſet ſhould be redeemed: and found "by the charter under the great ſeal, and infeftment thereon, in "favour of the reſpondent, in 1707, the reverſion of the wadſet "as to the feu-mails and duties is diſcharged, and the ſaid duties "of new diſponed to him; and repelled the defences founded on "the king's letter, in regard it was not alleged, that the appellant did make any agreement with the exchequer, by advancing of money and receiving a warrant for retaining their mails "in terms of the ſaid letter, the 12,000 merks being for getting "right to their ſuperiorities, and other advantages, in the terms "mentioned in the contract 1631."

The appellant reclaimed: but after anſwers for the reſpondent, the Court on the 28th of July 1719 "Found that the appellant

" had no right to retain his feu-mails and feu-duties, neither in " virtue of the contract 1631, nor of the king's letter 1633; and " adhered to the interlocutor of the Lord Ordinary." The appellant having reclaimed and petitioned the Court to receive a ſummons of reduction of the reſpondent's new charter, the Court on the 30th of the ſame July and 19th of Auguſt following, " refuſed " the deſire of his petitions." And by two ſubſequent interlocutors on the 21ſt of January and 17th of February 1720, the Court " Decerned the appellant to pay to the reſpondent all the arrears " of his feu-duties not only from the date of his new grant, but " likewiſe for all the preceding years ſince the year 1687."

Entered, 24 March 1719-20.

The appeal was brought from " ſeveral interlocutory ſentences " or decrees of the Lords of Seſſion of the 9th, 28th, and 30th " July, the 19th Auguſt, the 21ſt January, and 17th February " laſt (*a*)."

Heads of the Appellant's Argument.

Although there was nothing expreſsly ſtipulated in the contract for the retention of the money to be advanced by the vaſſals, yet the whole ſtrain of that contract ſhews the king's careſulneſs that the vaſſals ſhould have ſuitable reparation. And though, perhaps, the method for it was not then reſolved upon, yet it cannot be reaſonably ſuppoſed that thoſe, who advanced their money early, ſhould be worſe uſed than others, who came later to his majeſty's aſſiſtance. Nor could thoſe little conſiderations, of holding immediately of the Crown, inſtead of the Lords of Erection, or the diſpenſing with irritancies, or containing their rights in ſix ſignatures, be looked upon as any compenſation for their advancing ſo much money; ſince the advantage of holding of the Crown is given by act of parliament to all vaſſals of church-lands, as well as to thoſe who advanced their money; and the diſpenſing with irritancies could concern thoſe only who had irritancies in their charters, of whom perhaps there were few or none; and the comprehending their rights in ſix ſignatures, is calculated for ſmall vaſſals; for, thoſe that are more conſiderable, will not deſire ſuch a comprehenſion, but rather to have their own ſignatures by themſelves.

The king's letter did very well explain his intention towards the vaſſals, who ſhould advance money for the ſaid redemption; and though it did not come till two years after the contract, yet the money which the appellant's predeceſſor and the other vaſſals were thereby obliged to advance, was not ſo advanced till the day that the ſaid letter was recorded in the Exchequer.

Heads of the Reſpondent's Argument.

By the ſaid contract 1631, the appellant's predeceſſor and other vaſſals covenanted to pay that ſum of 12,000 merks, in order to have the privilege of holding their lands of the Crown, and for the other cauſes expreſſed in the contract itſelf, and never were to

(*a*) It appears from the Journals that the Earl of Loudoun was preſent in the Houſe when this appeal was entered; he *conſents* that the ſame ſhould be received, and to anſwer the ſame; and an order to receive, and to anſwer *forthwith*, is thereupon made.

have

have that ſum repaid them, nor any retention of their feu-duties on that account: on the contrary it was expreſsly provided, that they ſhould be bound to pay their feu-duties annually as uſual.

The king's letter in 1633 had not the leaſt relation to the appellant's caſe; it was written in conſequence of an act of parliament in that ſame year, annexing the ſuperiorities of church-lands to the Crown, reſerving the feu-duties to the Lords of Erection, redeemable by the Crown at certain rates, and concerned ſuch vaſſals of church-lands, as, after the date of that letter, ſhould advance money for redemption of their feu-duties to the uſe of the Crown; but this letter never took effect. And ſuppoſing (which cannot be admitted) that this letter had relation to the appellant's caſe, yet no agreement having been made with the Exchequer, as was by that letter directed, the letter could give the appellant no power of retention. For the appellant never could have had a retention, ſuppoſing it had been covenanted to him, as it was not, until once the earl's wadſet was totally redeemed, which never was done, and cannot now be done, after the ſaid act of parliament (1707, c. 11.) and grant from her late majeſty, renouncing the right of reverſion.

After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed, and that the ſeveral interlocutory ſentences or decrees therein complained of be affirmed.* Judgment, 5 May 1720.

For Appellant, *Rob. Raymond.* *Pat. Turnbull.*
For Reſpondent, *Rob. Dundas.* *Will. Hamilton.*

The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Appellants*; Caſe 67.
Sir James Macdonald of Slate, Bart. - *Reſpondent.*

11 *May* 1720.

Forfeiture for Treaſon —An act of parliament, paſſed on the 7th of May 1716, enacts that the perſons therein mentioned, ſhould, under pain of attainder, ſurrender themſelves to a juſtice of the peace by a day certain. A perſon, who had ſurrendered by letter to the commander in chief, before the paſſing of the act, and was directed to proceed to a place appointed, but who, it was alleged, was prevented by indiſpoſition; and who never ſurrendered to a juſtice in terms of the act, was nevertheleſs attainted of treaſon.

Proof —The Court having allowed a party to repeat a proof led in the ſame matter at iſſue, but in a cauſe at the inſtance of another party, in which his preſent opponents "*did compear*," the judgment is reverſed.

BY the act of Parliament 1 G. 1. c. 42. intituled, "an Act for "the attainder of George, Earl of Mariſchall," &c. "of high "treaſon, unleſs they ſhall render themſelves to juſtice by a day "certain therein mentioned," it was enacted that if, among others, Sir Donald Macdonald of Slate, ſhould not render himſelf