

No 70. the vassal was forfeited; and a person ought not to be excluded from his reward on that account, though he may have failed in his duty on a quite different occasion; the political view of the statute is chiefly for engaging such to remain peaceable, who might else be tempted to rebel; and therefore it can never have been the intent thereof, to exclude from its benefit those whom it was most necessary to engage to their duty; the claimant is sorry that truth obliges him to acknowledge, he was so far misled as to be concerned in that rebellion; but he has seen his error, and his conduct from that time forward has been entirely loyal.

Replied, The act is express, that none are entitled to the benefits granted by it, but those who have continued loyal; and this cannot be restricted to any particular time or occasion, since it is impossible precisely to determine when a rebellion is at an end, or how long a conspiracy tending to it may have been on foot, or may last after its suppression, so as to connect one insurrection with another.

‘THE LORDS found the claimant not entitled.’

Fol. Dic. v. 3. p. 236. D. Falconer, v. 2. No 21. p. 23. and No 26. p. 34.

1750. January 25. The DUKE of GORDON *against* The KING'S ADVOCATE.

No 71.
The Clan act found not to regard solely the rebellion in 1715.

That act takes effect though in the record of the attainder it be not specified to have been for the treasons mentioned in the act.

The Duke of Gordon claimed the lands of Mamore, part of the estate of the late Donald Cameron of Lochiel, recognised to him as superior thereof, on the attainder of his vassal by act of Parliament 19th Geo. II. in virtue of the statute 1st Geo. I. made for that purpose. The same objection was made to this claim as to that of Farquharson of Invercauld, No 69. p. 4758. to which reference is here made.

Objected, 2dly, The act of King George I. gives the encouragement thereby provided, to the superiors of persons guilty of high treason, by corresponding with the Pretender, or those employed by him, or by giving money for his use, or who should adhere to him within this kingdom, and should be attainted thereof; whereas Lochiel was attainted simply of levying war, which is treason by the 25th Edw. III. and not any of the treasons in the said act.

Answered, Levying war in favour of the Pretender, which was the fact for which Lochiel was attainted, was undoubtedly adhering to him within the meaning of the act; and the nicety now pleaded, would, if gone into, make this statute of no effect; as it was always in the power of the conductors of any prosecution, to make it simply for levying war; or indeed for compassing the death of the King; it has not been ordinary to lay, in indictments for levying war, the ground thereof; and the whole attainders which past by statute, either for this, or the last rebellion, were for levying war; and so were those which proceeded by judgment; as they were all carried on in virtue of the acts *imo* Geo. I. and 19 *Georgii* II. allowing trials in different counties from that wherein the

treason was committed, which was confined to levying of war; and so none of those trials could be for any other treason; and yet, on these attainders, many persons were allowed the benefit of this act; the war for which Lochiel was attainted, was notoriously in behalf of the Pretender; and, if this is not allowed, can be proven, and is proven by the statute 20th Geo. II. for vesting in his Majesty the estates of certain traitors; which proceeds on the preamble, that a war had been levied in favour of the Pretender, and thereupon vests the estates of those attainted of high treason in the King; whereupon this estate has been seized, and is now claimed; and also, by act 19th Geo. II. for the more easy and speedy trial of such persons as have levied or shall levy war against his Majesty, which, because a war had been levied, with design to depose and murder his Majesty, and to set up the Pretender, enacts, 'That all persons in custody for the said high treason in levying war, and all persons who were or should be guilty of high treason, by levying war, and should be apprehended within a limited time, should be tried as directed by the act.' In consequence of this act all the trials have proceeded; and as the indictments have been for levying war, the whole procedure must have been erroneous, unless that war is understood to have been in favour of the Pretender.

Replied, That the attainted person, in levying war, did thereby adhere to the Pretender, cannot be taken upon notoriety; nor otherwise proved but by the record of his attainder; and does not at all follow from the acts of Parliament founded on for that purpose; for though these acts narrate in the preamble, a war raised in behalf of the Pretender, yet the one vests the estates of all persons guilty of high treason; and the other regulates all trials for treason by levying war, which might have been on any other account; and with regard to the precedents, of cases after the rebellion in 1715, they can have no influence in this question, as the objection was not made; and perhaps, at that time, it was thought proper not to be too critical in objecting to those who claimed under this act of Parliament; which now, it is proper, should be more narrowly attended to, as it has been found to have consequences different from what was intended by it; and yet there is a case wherein it may take place, to wit, Lord Lovat's, who was impeached directly of corresponding with the Pretender's agents, and thereof found guilty.

Objected, 2dly, The claimant has not done diligence for attaining possession without collusion, or obtaining himself infest, in terms of the statute; it is said he pursued an action of mails and duties, wherein he called the forfeiting person, his tenants, and the officers of state; and that he infest himself on his own precept; but the first of these is annulled by act of Parliament, and the other was out of time.

Answered, The doing diligence for obtaining possession was proper for a superior; and the obtaining infestment for a vassal, intending to take the benefit of this act; so this last step was useless to the claimant; and though his decret was

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annulled; yet it was true he had sued it out, which at the time was the proper diligence for getting possession.

'THE LORDS found the act to subsist, and repelled the objections.' See a case between the same parties, 15th Feb. 1750, *voce* PAPIST.

Fol. Dic. v. 3. p. 236. D. Falconer, v. 2. No 125. p. 141.

No 72.

The creditors of vassals forfeited for the rebellion 1715, not obliged, by the vesting act, to enter claims, to affect their debtors estates falling to the superiors by the clan-act.

1757. June 22. STEWART of Blairhall *against* STEWART of Appin.

STEWART of Blairhall pursued Stewart of Appin for a bond of pension, granted in the year 1714, by the predecessor of Appin, to the predecessor of Blairhall.

Appin's *defence* was, That his ancestor had gone into the rebellion 1715: That the Duke of Argyle, his superior, had taken the advantage given him by the clan-act, and entered to his vassal's estate, though he restored it several years afterwards, burdened with the payment of debts due upon it: That Stewart of Blairhall had not made any claim upon this debt before the 24th of June 1717; and yet, that by the vesting act of the 1st of George I. cap. 40. all superiors and creditors were obliged to enter their claims upon the forfeited estates before the 24th June 1717, otherwise to lose them; by which neglect Blairhall had lost his right to the debt pursued on.

Answered for Blairhall, The necessity of creditors claiming before the 24th June 1717, related only to estates vested in his Majesty by the vesting act 1st George I. cap. 50. and not to estates vested in superiors by the clan-act 1st George I. cap. 20. By the clan-act, it was enacted, 'That if any subject holding lands of a subject superior in Scotland, shall be attainted of high treason, his lands, held of any subject superior, shall recognosce, and return into the hands of the superior; and the property is thereby consolidated with the superiority, in the same manner as if the same lands had been by the vassal resigned into the hands of the superior, *ad perpetuam remanentiam*.' By this act, which was made the session before the forfeited estates were vested in the Crown for the use of the public, the estates of vassals attainted of high treason, were, upon such attainder, *ipso facto*, vested in the subject-superiors, and became their property, as if they had been resigned by the vassal, *ad perpetuam remanentiam*; and, therefore, the estate of Appin was, upon Appin's attainder, fully and absolutely vested in the Duke of Argyle, his superior. In the next session, the vesting act was passed, by which the estates of attainted persons were vested in the Crown, for the use of the public; and those who had any claim out of such estates, were appointed to give in their claims, in the time and manner prescribed by the act; but then, as by the first mentioned act, the estates of attainted vassals were already vested in the loyal superiors, it was necessary to make an exception of such estate from the general vesting clause in this last act; for as these estates had been formerly vested in the superiors,