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' queries to which it referred, dated in 1741: That the charter and sasine were never in his hands except at the general election in 1747, where he voted as a freeholder: That he knew not by whom they were put into his hands; but that he left them with the Sheriff-clerk, to be returned to William Fraser, who was his agent, and had also been Lord Lovat's agent: That he did not grant any obligation for reconveying to Lord Lovat the superiority of the lands; nor was ever any such obligation asked or demanded of him.'

It was *objected* to this claim by his Majesty's Advocate; That the right granted to the claimant was nominal and fictitious, for the sole purpose of giving him a right to vote: That Lord Lovat kept the disposition always in his own possession, in order that the right might be always under his power: That the charter and sasine were afterwards obtained at the expense, and by the direction of Lord Lovat, not of the claimant; and it appeared that neither of them were ever in his possession, except for a moment; and that he immediately restored them to Lord Lovat's attorney.

Answered, The intention of Lord Lovat was indeed to give the claimant only a right to vote; but, in order to do this, it was necessary to give him an absolute and complete right to the superiority of these lands; and this he appears to have done. The queries, and signed opinion of counsel in 1741, show, that it was the intention to give the claimant the superiority absolutely and irredeemably. The not delivery of the disposition appears to have been accidental, the claimant having neglected to ask for it; but the omission was of no importance, as the infeftment taken upon the charter in 1743, was a delivery in the strongest and most irrevocable manner, after which Lord Lovat had no further power over the right; and the claimant was under no obligation, express or implied, to reconvey the superiority to Lord Lovat.

THE LORDS dismissed the claim.'

For the Claimant, *Johnstone*. Alt. *King's Counsel, Macqueen*. Clerk, *Kirkpatrick*.
W. J. *Fol. Dic. v. 3. p. 236.* *Fac. Col. No 36. p. 59.*

1760. November 26.

JAMES DUKE of ATHOLE *against* HIS MAJESTY'S ADVOCATE.

By an act in the 1st of George I. it was provided, ' That if any subject of Great Britain, holding lands of a subject-superior in Scotland, shall be guilty of the treasons therein mentioned, and shall be thereof duly convicted and attainted, his lands or tenements, held of any subject superior in Scotland, shall recognosce and return into the hands of the superior, and the property shall be 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*.'

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An act of attainder passed against James and John Drummond's, whereby it was declared, ' That if they did not surrender themselves on or before the 24th day of

The Duke of Athole was superior of the lands of Tomknoc and Cultranick, belonging in property to James Drummond, commonly called Duke of Perth, who was engaged in the rebellion 1745; as was also his brother, and presumptive heir, John Drummond.

An act of attainder was passed against the said James and John Drummonds, and other rebellious subjects; whereby it was enacted, 'That if they did not surrender themselves to one of his Majesty's justices of peace, on or before the 12th day of July 1746, they should, from and after the 18th April 1746, stand and be adjudged attainted of high treason.'

James Drummond, the elder brother, died upon the 11th May 1746, before the time limited for surrendering himself. John survived; but never surrendered himself.

The estate of Perth, comprehending the lands above-mentioned, was first surveyed as belonging to James Drummond, by whose attainder they were supposed to be forfeited; but the Court of Session having thereafter found, that his estate did not become forfeited to his Majesty in and through the attainder of James Drummond, in respect that he died within the time limited for the surrender, (*See Drummond against The King's Advocate, voce FRAUD*), it was again surveyed as having become forfeited by the attainder of John Drummond.

The Duke of Athole, superior of the above lands, entered his claim to the property of them, in terms of the clan-act; and it appearing to be a matter of doubt, whether they became forfeited by the attainder of James or John, he claimed them in both ways, as forfeited by the attainder either of James Drummond, or of his brother John. It was likewise a matter of doubt, whether the clan-act extended to forfeitures upon occasion of the rebellion 1745. This question had been tried upon a claim of the Duke of Gordon; but never brought to a final issue, because of a compromise which was agreed to between the Crown and the subject-superiors. The Duke of Athole, in order to entitle him to the benefit of this compromise, found it necessary to insist in his claim; which was objected to upon the following grounds.

Pleaded for the Crown; James Drummond, commonly called Duke of Perth, was indeed vassal to the claimant, in the lands now claimed, during the whole period of the late rebellion, and for some time after; but as he never was attainted, but died a liege-subject, his lands cannot fall to the superior in virtue of the clan-act. The claimant cannot subsume, in terms of the statute, 'That James Drummond of Perth, being his vassal in the lands now claimed, was guilty of the treasons mentioned in the statute, and was thereof duly convicted and attainted.' For, in fact, he never was convicted or attainted of any treason; and consequently the claim is not founded. In the *next* place, with regard to John Drummond, it is impossible for the claimant to maintain, 'That John Drummond, holding lands of the claimant as his superior, was guilty of treason, and thereof duly convicted and attainted.' He was indeed guilty of treason, and thereof duly convicted and attainted; but he held no lands of

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July 1746, they should, from the 18th April 1746, stand attainted of high treason.

James, the elder brother, died upon the 11th May 1746, before the time li-

imited for surrendering himself, John survived, but never surren-

dered himself. The Duke of Athole, supe-

rior of a part of the lands belonging to the family of Perth, claim-

ed the property of these lands upon the clan-act, as forfeited

by the attainder either of James or John.

Objected for the Crown; That James having died before the term appoint-

ed for surrender was never attainted; and John not having sur-

rendered himself, was attainted from 18th April, at which time

the lands were not in his person, but in his brother's, so

that, in either case, the superior must be set aside, as he had no vassal at the

time of their forfeiture. The Lords dismissed the claim.

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the claimant during the continuance of the treason, or prior to the attainder. He declined surrendering himself; and therefore, by the express words of the act of attainder, became attainted from the 18th of April 1746, at which time his brother was alive, and vassal to the claimant; consequently John Drummond was not vassal to the claimant at or before his attainder. The succession devolved upon him afterwards, and became thereby forfeited to the Crown.

Answered for the Claimant; This estate certainly belonged either to James Drummond, or to John, both of whom were in the rebellion, and named in the act of attainder; and it would be hard to deprive the claimant of the benefit of their forfeiture, because James happened to die before the day appointed for his surrendering himself, and because John did not think proper to surrender himself. Besides, the claimant cannot agree to the position, that John Drummond's attainder took place upon the 18th April; for it will be remembered, that Thomas Drummond of Logiealmond entered a claim to the property of the estate of Perth, upon this very footing, that the estate was not forfeited through the attainder of John Drummond, in regard his blood was attainted upon the 18th of April 1746, he not having surrendered himself to justice before the 12th of July following. But the Court of Session, upon the 1st December 1750, found, 'That John Drummond, second son to the late Lord Drummond, now attainted of high treason, was, upon the 11th May 1746, when James Drummond, his elder brother, died, capable to take by descent from his said elder brother; and that the estate in question did then descend, by James's death, to John Drummond, now attainted; and was forfeitable, and forfeited, by the treason and attainder of the said John Drummond;' (*See Drummond against King's Advocate, voce FRAUD*); and this judgment was affirmed in the House of Peers. So that it cannot be maintained, that the attainder of John Drummond took effect sooner than the 12th of July 1746.

Some of the Judges were of opinion, that the forfeiture was incurred after John Drummond's succession; yet they thought the objection good, as the superior had no hold of the vassal during the rebellion.

'THE LORDS dismissed the claim.'

Act. D. Græme, Lockhart.

Alt. Crown Lawyers.

I. C.

Fol. Dic. v. 3. p. 236. Fac. Col. No 249. p. 454.

N. B. There were some other objections made to the claim; but the above was the only material one.