

July 2, 1767.

A N S W E R S

F O R

J A M E S Earl of M O R A Y,

T O T H E

P E T I T I O N of *William Mure* of *Caldwall*,
Esq; one of the Barons of his Majesty's Court
of Exchequer in *Scotland*, and of *Thomas Ken-*
nedy, Son and Heir of the deceased *Francis Ken-*
nedy of *Dunure*, and his Tutors and Curators.

THE Petition now to be answered reclaims against
the Lord Ordinary's Interlocutors, therein fairly
recited, in the Process of Reduction and Declara-
tor, at the Respondent's Instance, of the follow-
ing Dates : 23d *January* 1765,—8th *March* 1765,—31st *Ja-*
nuary 1766,—17th *July* 1766, and 5th *March* 1767, in so far
as, by these Interlocutors, the Petitioners are found liable to
the Respondent in the Costs of Suit, and in the Expences
of extracting the Decreet ; and, upon a fair State of the Case,
the Respondent will humbly submit it to your Lordships, if
in any Case Expences have been more justly awarded.

The Arguments pleaded in this Petition, for being free of
Expences, are, that the Petitioners had a *probabilis causa liti-*
gandi, that they were not *altogether* satisfied of the Respon-
dent's having the Right of Superiority of the Lands of *Ab-*
A bayhill,

bayhill, in consequence of his Purchase of the late Lord *Balmerino's* Estate from the Barons of Exchequer ; that it was necessary for their Security, and to render their Title certain, and properly made up, that there should be a Judgment upon that Point, that Baron *Mure's* taking his Charter from the Crown, was owing to an innocent Mistake, into which he was led from the former Charter under the Great Seal, which Baron *Kennedy* had obtained of these Lands, to be holden of his Majesty ; that this did not proceed from any wilful Intention of arrogating a Right, which, in their Opinion, did not belong to them, and that *Francis Kennedy*, Baron *Mure's* immediate Author, in a Representation preferred to the Lord Ordinary, annexed to the Petition, had declared his Purpose to acquiesce how soon the Lord Ordinary should give it as his Opinion, that the Titles had been erroneously made up.

How far this is a just Representation of the Petitioners Conduct, judicial or extrajudicial, shall be humbly submitted from the following State of Facts, from which it will appear, that the Respondent has been most improperly and unnecessarily involved in this Litigation, attended with so much Expence, to obtain Redress of a wilful and deliberate Device, to strip him of his Superiority, which he had bought at a higher Price than Things of that Nature are usually acquired from the Publick ; and as, in stating these Facts, there will be Occasion to mention the extrajudicial Communings which passed between the Petitioner, Baron *Mure*, and the Respondent, previous to the intenting the aforesaid Summons of Reduction and Declarator, your Lordships will hold these as so many undisputed Facts, as they have all along been averred on the Part of the Respondent, and never once contraverted on the Part of the Petitioners.

The Lands of *Abbayhill*, Part of the Estate of *Balmerino*, were granted in Feu to *Archibald Hamilton*, to be held by him
of

of Lord *Balmerino*, as Superior, for Payment of 12 l. 4 s. Scots of Feu-duty.

These Lands were purchased at a judicial Sale, for Behoof of Colonel *William Kennedy*; but, as the Colonel happened to die soon after the Sale, the Disposition was taken in Name of the late Baron *Kennedy*, Brother and Heir of Conquest to the Colonel. Feb. 21st,
1741.

The Estate of *Balmerino* became forfeited to the Crown by Lord *Balmerino*'s Conviction for his Accession to the Rebellion 1745.

Whether Baron *Kennedy*, as Purchaser of *Abbayhill*, might have been intitled to hold these Lands *in capite* of the Crown, in virtue of the Clan-act, is immaterial, as it is an undisputed Fact, that none of the Measures, required by said Act, were taken within the Time limited to intitle the Sub-vassal to hold these Lands *in capite* of the Crown.

And therefore it follows, that, during the Time that the Estate of *Balmerino* was in the Hands of the Crown, by means of Lord *Balmerino*'s Forfeiture, whereby there was a Surcease of any intermediate Superior, it became necessary, that Baron *Kennedy* should take his Charter from the Crown, *supplendo vices*, as in place of Lord *Balmerino*.

Accordingly, of this Date, Baron *Kennedy* expedite his Charter under the Great Seal, the *Quæ quidem* of which is in the following Words: " *Quæ quidem terræ, &c. ad demortuum*
" *Archibaldum Hamilton de Abbayhill, tent. per illum de*
" *Domino Balmerino, perprie hæreditarie pertinuerunt,*
" *&c. et quæ nunc de nobis tenentur, tanquam immediatis*
" *earundem superioribus legitimis, ratione forisfacturæ Ar-*
" *thuri Domini Balmerino nuper demortui, immediate quon-*
" *dam superioris earundem, virtute publicorum parlamen-*
" *ti actorum hac de re confect. tenen. &c.*" July 27,
1752.

And such being the Tenor of the Charter granted to Baron *Kennedy*, and such the declared Title under which the Sovereign granted that Charter *supplendo vices*, it is submitted
to

to your Lordships, without any Argument, whether Baron *Kennedy*, or any in his Right, could from thence entertain the least Doubt, that, in the after Renewal of said Investiture, upon the Sale of the Lord *Balmerino's* Estate, comprehending, *inter alia*, the Superiority of these Lands of *Abbayhill*, they behoved to return to hold these Lands of the Purchaser, and to pay the Feu-duties to him.

March 1,
1753.

Accordingly it appears, that, in pursuance of the publick Advertisements issued from the Court of Exchequer, according to the Directions of the Statute in that Behalf made, the Superiority and Feu-duty of these Lands of *Abbayhill* were exposed to Sale by the Barons of Exchequer, and purchased by the Respondent at thirty Years Purchase of the Feu-duty, whether that was an adequate Price or not, is not material, the Superiority of these Lands was expressly sold and disposed.

And it is material to observe, that though, at this Roup, *Andrew Chalmer*, Writer in *Edinburgh*, appeared and protested, that the Superiority belonged to Baron *Kennedy*, yet being soon made sensible how improper that Protestation was, he withdrew the same, and acquiesced in the Respondent's being preferred as highest Purchaser at the Roup.

Feb. 4,
1755.

The Barons of Exchequer did thereupon, of this Date, execute a Disposition in favours of the Respondent, of the Superiority and Feu-duty of these Lands of *Abbayhill*, and of certain other Parts of the Estate of *Balmerino*, likewise purchased by the Respondent, whereupon the Respondent expedite his Charter under the Great Seal, and was thereupon infest 9th *April* thereafter.

Feb. 24,
1755.

Baron *Kennedy* having died in *May* 1754, was succeeded in these Lands by his Brother *Francis*, who, for a Course of Years, made regular Payment to the Respondent of these Feu-duties, and thereby acknowledged the Respondent's Right of Superiority, of which there could not be the least Doubt.

Notwithstanding

Notwithstanding of which it appears, that, when the said Jan. 29, 1762.
Francis Kennedy came to establish in his Person the feudal Title of these Lands, as Heir to his Brother the Baron, tho' he saw the Respondent's Charter under the Great Seal, and his Infeftment in this Superiority upon Record, and had paid the Feu-duty for so many Years to the Respondent, instead of applying to the Respondent for a Renewal of the Investiture, he served himself Heir-in-special in these Lands to his Brother the Baron, and most improperly retoured them as holding of the King; which Retour, as to the Holding, runs in these Words: " Et quod eadem tenentur in capite de dict. S. D. N. rege, suisque successoribus, immediatis legitimis superioribus earundem, (ratione forisfacturæ Arthuri Domini Balmerino, quondam immediati superioris earundem) in feudifirm. etc. pro annua solutione summæ duodecim librarum et quatuor solidorum monetæ Scotiæ, etc." and concludes thus: " Vero quod feudifirmæ seu non introitus divoriæ, 12 l. 4 s. monetæ Scotiæ, pro annis 1753, 1754, 1755, 1756, 1757, 1758, et 1759, solutæ fuerunt Comiti de Moray, qui nuuc jus habet ad dictam baroniam de Restalrig, quæ pertinuit dict. Domino Balmerino, uti apparent per receptionem et exonerationem dict. divoriarum concessam per Jacobum Maul, factorem pro dict. Comite."

This Retour was erroneous, and the Error was obviously wilful. *Francis Kennedy* saw upon Record the Respondent's Charter under the Great Seal, and Infeftment thereon of this Superiority; his Brother the Baron withdrew the Protest which had been rashly taken at the Sale, the Articles of Roup, and the Respondent's Disposition, was on Record in Exchequer, *Francis Kennedy* had paid the Feu-duties to the Respondent's Factor, for all the Years since his Purchase, down to the 1759, and the Discharges of these Feu-duties were produced at the Service.

With what Views this special Service was expedite in these Terms the Respondent shall not pretend to say, further than

B

to

June 25,
1762.

to observe, that as Baron *Mure* had then concluded a Bargain for the Purchase of these Lands, he, of this Date, obtained a Disposition from *Francis Kennedy*, and, upon the 23d *February* 1763, took out a Charter under the Great Seal.

What followed thereon merits particular Attention: The Respondent's Agent, having received Intelligence of the fore-said erroneous Service and Charter, did forthwith apply both to Baron *Mure* himself and his Agent, representing the Impropriety of what had been thus done, and that the Baron behoved to take his Entry from the Respondent: And as both the Baron and his Agent seemed then fully satisfied of the Impropriety of their Method of proceeding, they expressed it in Terms unnecessary to repeat.

But as, notwithstanding thereof, Baron *Mure* still retained Possession of the fore-said erroneous Charter, and made no Advances to set Matters to right, the Respondent, as a Spur to him, gave Orders to his Agent to raise a Summons of Reduction and Declarator, but which the Respondent did thereafter stop, upon Baron *Mure's* calling upon him at his Lodgings in *Edinburgh*, in the End of *March* or Beginning of *April* 1764, when, in respect of his being then about to set out for *London*, he asked, and the Respondent readily granted, a Delay till the Baron should return from *London*, when the Baron said he would settle Matters with Mr. *Kennedy*, and take an Entry from the Respondent.

Trusting to this Promise, the Respondent delayed raising and executing the Summons of Reduction and Declarator, not only till the Baron returned from *London*, but during the whole Summer and Autumn 1764, during all which Time not the least Advance was made on the Part of the Baron; and at length the Respondent was given to know the Baron's Resolution, not to give up the Charter from the Crown, nor to take an Entry from the Respondent.

Dec. 1,
1764.

The Summons was thereupon raised in *October* 1764, called and given out, and of this Date returned, with the following Defence:

Defence : " That the Charter to Baron *Kennedy*, in consequence of the Clan-act, vested him in the Lands as holding of the Crown for ever, under Protestation to add and " eik." How proper and becoming that Defence was, is humbly submitted.

When the Process came to be insisted in, though the Writs called for were all in the Defenders Possession, and could instantly have been produced, they did not chuse to satisfy the Production *instante*, but craved a competent Time for that Purpose, whereby the Respondent was put to the Expence of extracting an Act, and, after the Production was satisfied, of applying for a Warrant to discuss; which being remitted to the next Week's Ordinary in the Outer-house, came to be insisted in before the Lord *Elliock*, of this Date, when the Defenders thought proper to absent, and suffer Decreet to go in Absence. Jan. 23, 1765.

It is now made an Article of Complaint, that, as the Summons did contain not only a Reduction and Declarator, but also of Tinsel of the Property, Mails and Duties, Damages and Expences, it was improper for the Respondent to have taken Decreet in these Terms; and, therefore, that a Representation on the Part of the Defenders became necessary. But, as it is known to your Lordships that such is the established Form and Stile of all Summonses of that Nature, when the Vassal, disclaiming his true Superior, and has taken a Charter from a wrong one: And as, from the Defenders Conduct in the Particulars above mentioned, it was apparent, that Shifts and Delays was all they had in view, hoping the Matter would wear out of head, the Decreet in Absence, in Terms of the Libel, was meant for no other Purpose but to force them to compear; and the Respondent appeals to the whole Proceedings, from first to last, that all he ever insisted upon was, for Reduction of the foresaid erroneous special Retour, Infeftment, and Charter; and that, in consequence of his Right of Superiority, they should take the Entry from him.

The

The Defenders preferred a Representation, reclaiming against the aforesaid Decreet in Absence, 23d *January* 1765, no earlier than the 22d *February*, which being advised by the Lord Ordinary, without appointing it to be answered, he pronounced the Interlocutor recited in the Petition, of Date the 8th *March* 1765, declaratory of the Respondent's Right of Superiority, and reducing the aforesaid special Service and Retour of the said *Francis Kennedy*, Infeftment following thereon, and Charter under the Great Seal, in favour of Baron *Mure*; but assailing from the other Conclusions of the Libel. As the Respondent had hitherto had no Opportunity of being heard in the Cause, he preferred a Representation, insisting upon the several Grounds above mentioned, therein specially set forth, that he ought to be allowed the Expences he had been put to, and of extracting the Decreet: To which the Petitioner, Baron *Mure* put in his Answers, insisting, that as Mr. *Francis Kennedy* was then recently dead, and had left a Son, who was entitled to take up the Lands as Heir to his Uncle, Baron *Kennedy*, he ought to be called in the Process; and that the Process, in the mean time, ought to stop, till it should be regularly transferred against the Heir of Mr. *Francis Kennedy*:—But the Lord Ordinary, by Interlocutor 31st *January* 1766, found Baron *Mure* liable in Expences, and allowed an Account of them to be given in.

A second Representation was preferred for Baron *Mure*, reclaiming against the last mentioned Interlocutor, so far as it found the Expences due, and again insisting, that the Process should stop, till the Heir of Baron *Kennedy*, and Mr. *Francis*, were made Defenders.

However necessary this Transference might be in point of strict Form, in order to found the Conclusion of Non-entry, and Mails and Duties, of Tinsel of the Property, in regard Baron *Mure* had not hitherto expedite his own Infeftment, neither of which were ever seriously meant to be insisted on; such

such Transference was quite unnecessary to the Purpose of obtaining Declarator of the Respondent's Right of Superiority, as against Baron *Mure*, or for reducing his erroneous Charter; but in order to avoid all Objections on this Head, the Respondent brought a Transference against the Petitioner, *Francis Kennedy*, which was returned the 24th *January* last, with a *no* Process afterwards departed from.

Upon advising said last mentioned Representation, with the Answers, the former Interlocutor was adhered to, by another Interlocutor, 17th *July* last, against which a 4th Representation having been preferred, the same was also refused, by Interlocutor 5th *March* 1767, when the Lord Ordinary found the Defenders liable in the Expence of Process, and the Expence of extracting the Decreet.

From this State of Facts, and Proceedings in the Process itself, the Answers to the Petition, reclaiming against the Expences, will be obvious. The Respondent's Right of Superiority of these Lands, as Purchaser upon the publick Sale of the Barons of Exchequer, was clear and unexceptionable, as any thing of the Kind could be, and the Doubt pretended to be entertained, whether the Respondent's Purchase did comprehend the Superiority, or only the Feu-duty, was most affected, as his Disposition, Charter, and Infeftment, all upon Record, contain a clear and explicit Grant of the Superiority of these Lands; Baron *Kennedy's* Charter and Infeftment, while the Right stood in the Crown, was proper *supplendo vices*, and from the Tenor of the Charter itself, it was apparent, that no more was thereby meant, or intended. Baron *Kennedy*, by his Agent, attended the Sale, and witnessed the Respondent's being preferred as Purchaser; Mr. *Francis Kennedy*, the Heir of the Baron, acknowledged the Respondent's Right, and paid him the Feu-duties for several Years, notwithstanding of which, when he came to expedite his special Service and Infeftment, he retoured these Land as holding of the Crown, the Impropriety of which could not

be unknown, either to him or Baron *Mure*; Baron *Mure*, notwithstanding, expedite his Charter under the Great Seal, which the Respondent having found fault with, the Baron confessed the Wrong, said he was ashamed of it, begged a Delay, and promised, upon his Return from *London*, to take his Entry from the Respondent, and after many Months Forbearance on the Part of the Respondent, without one Step taken on the Part of the Baron to redress this Wrong, he at length positively refused to give up the Charter from the Crown, or to acknowledge the Respondent for his Superior. And, when the Process came to be insisted in, your Lordships have heard how the Defence was conducted, which has protracted this Litigation now for the Space of more than two Years and an Half. His first Defence was upon the Clan-act, as intitling Baron *Kennedy* to hold these Lands for ever *in capite* of the Crown, though the Baron himself had taken his Charter only *supplendo vices*, and tho' the Respondent, upon his after Purchase from the Barons of Exchequer, stood publickly inest in that Superiority, upon his Charter under the Great Seal, and had been acknowledged as such by Mr. *Francis Kennedy's* paying so many Years Feu-duties to him as Superior.

The Respondent is willing to put the most favourable Construction upon these irregular Proceedings; but as by means thereof, he was laid under the disagreeable Necessity of bringing the present Action for asserting his just Right, had the Error or Mistake been never so innocent on the Part of the Petitioners, as they have thereby brought upon the Respondent this unnecessary Expence, which might justly have intitled him to carry his Demands much higher, he submits it to your Lordships, whether material Justice and Equity does not require that he should be indemnified of these Expences by those who so groundlessly gave occasion to them.

In respect whereof, &c.

ALEX. LOCKHART.