

- No 37. necessary for ranking these creditors, and found no present necessity to determine, whether the other personal creditors were preferable to the tenants or not; but reserved that question to be determined in the ranking, whether the personal creditors or tenants ought to be preferred next to the said arresters and real tenants.'

Fol. Dic. v. 1. p. 314. Dalrymple, No 157. p. 216.

SECT. V.

Quinquennial Possession.

1611. February 26. A. against B.

- No 38. A REPLY found relevant upon the act of Parliament 1584. anent five years possession, notwithstanding it was alleged that within the five years the Lord Maxwell's right of the lands of Middlebie was reduced.

Fol. Dic. v. 1. p. 315. Kerse, MS. fol. 125.

1623. July 10. LO. NITHSDALE against WESTRAW.

- No 39. THE LORDS found the act of possession by the space of five years not to militate in favour of the heir of the forfault person, bruiking by disposition of the donatar, except the heir will make faith that he has just cause to affirm that the lands were his heritage, and that he is prejudged by the want of his heritage, and evidents abstracted from him.

They found that the possession of five years shall be proven by any witnesses of the country.

Fol. Dic. v. 1. p. 315. Kerse, MS. fol. 125.

* * Haddington reports the same case :

JAMES MAXWELL, groom of his Majesty's bed-chamber, infest heritably by his Majesty in the lands of Glendinning, fallen in his hands by forfeiture of John Lord Maxwell, and by resignation of Robert Earl of Somerset, and made assignee by the said infestment to the warning and action of removing frae the said lands, and constitute assignee be Robert Earl of Nithsdale, who was

made assignee by Robert Earl of Somerset, to the warning and action of removing intended by him against the Laird of Westraw, pursued Westraw to remove. He *excepted*, That James Maxwell could have no action, because the warning being made by the Earl of Somerset in *anno* 1610, he resigned the lands in the King's hands *ad remanentiam* in *anno* 1612; and so neither was the warning transferred to the King by the resignation, nor could Somerset be desired to be decerned to be possessed in lands resigned to him, but only had action for the violent profits for the years betwixt the warning and resignation, and the Earl of Nithsdale was not capable of the assignation, not being infeft; which allegiance, and the answer thereto, being considered, the Lords thought the warning and profits thereof could not pertain to the King by the instrument *ad remanentiam*, and that he who was made assignee to a warning, having no other right to possess, could not be decerned to be possessed; but because the Earl of Somerset's whole right, petitioner and possessor, concurring in the person of James Maxwell, who was heritably infeft by the King, in whose favour Somerset resigned *ad remanentiam*, and being assignee constitute by Nithsdale, who was assignee to Somerset, the said James Maxwell was capable of the warning, and had sufficient action and interest to pursue removing. Thereafter, Westraw *alleged*, That James Maxwell's infeftment could give him no right, because it proceeded upon the Lord Maxwell's forfeiture, who was never infeft. It was *answered*, That he was infeft in the barony of Esdale, whereof the lands of Glendinning were parts and pertinents, and were so possessed by the Lord Maxwell five years before his forfeiture, which was a sufficient title without infeftment, in respect of the act of Parliament in August 1584. It was *answered*, That the Lord Maxwell could not be heard to pretend the want of his evidents, because he was not in the case of an extraordinary donatar made by the King, but was restored to all his lands, and served heir to his brother and father; and therefore behoved to be presumed to have their evidents. THE LORDS repelled the allegiance, in respect of the reply to be proven by ane cognition, all parties having interest being called according to the act of Parliament. It was thereafter *alleged*, That the E. of Nithsdale could never claim benefit by the forfeiture, because it was rescinded by Parliament and he restored against the same, *et sic quod approbo non reprobo*. It was *answered*, That the lands disposed by his Majesty to James Maxwell were excepted from the act, and he thereby ordained to enjoy them with all privileges. Westraw *replied*, That the exception could not subsist, since the forfeiture was declared null and rescinded, nothing could fall to the King by the forfeiture; and farther *alleged*, That the Lord Nithsdale could never be heard to allege the benefit of the act of Parliament, because it appointed the five years possession to be peaceable before the forfeiture, and he offered to prove, that it was interrupted lawfully by warning and summons of removing used by the auld Laird of Parton in *anno* 1605, and by young Parton by warning and summons of removing in *anno* 1606, whereupon diverse interlocutors had past, and by Westraw's real possession of a part of the lands by consent of

No 39.

the tenants after his warning. It was *answered* by James Maxwell, That warnings and summons of removing, whereupon nothing had followed; was no interruption; and that the tenants transacting with Westraw, could not invert the Lord Maxwell's possession, to whom they had paid mail and duty many years before; and, that no respect could be had to the warning whereupon nothing had followed. The matter being reasoned, and the last part not decided, it was submitted to the Lords.

Haddington, MS. No 2895.

1666. July 23.

EARL OF SOUTHESK *against* MARQUIS OF HUNTLY.

No 40.

If the five years possession has been interrupted, it will not secure the donatar.

THE Earl of Southesk, and the late Marquis of Argyle, being cautioners for the late Marquis of Huntly, for the tochers of the daughters of Huntly, they got an infeftment of the lands of Badzenoch for their relief, bearing, that according as they should be distressed, they should have access to the rents of the lands, in so far as might pay the annualrent of the sum which they should be distressed for, whereupon they were infeft in *anno* 1643; and thereafter Southesk was distressed in *anno* 1653. Whereupon, in *anno* 1655, he pursued an action of mails and duties upon the said infeftment of relief against the said Lord Argyle, who was in possession; and, my Lord Argyle having long before granted a bond of relief to Southesk, he used horning and caption thereupon in *anno* 1655, and in *anno* 1658, he used inhibition upon the said bond against Argyle, who, in *anno* 1658, entered into a new contract with Southesk, whereby, in corroboration of the first infeftment, he granted him a wadset of the lands of Enzie, with a back-tack; by virtue whereof, Southesk uplifted several years of the back-tack duty. Southesk now pursues the Marquis of Huntly and his tenants for declaring of his right, and payment of the mails and duties. It was *alleged* for the defenders; *first*, Absolvitor, because the Marquis of Argyle hath been retoured, to have possessed the lands of Badzenoch peaceably, by the space of five years before his forfeiture, which was in *anno* 1661, conform to the act of Parliament 1584; by virtue thereof, this Marquis of Huntly, as the King's donatar to the forfeiture, in so far as concerns the estate of Huntly, has undoubted right, and needs not dispute what right Southesk had before the five years. It was *answered* for the pursuer; *first*, That the act of Parliament 1584, ought not now to take effect; because, by the late act of Parliament 1617, sasines and reversions are appointed to be registrate, otherwise they are null, and therefore the ground of the act of Parliament 1584, viz. 'the abstracting of evidents', ceasing, the said act itself must also cease. *2dly*, The said act can only take place where it is not *constant* what right the forfeited person had, but that he was reputed to be the ancient heritor of the lands; but, where the forfeited person's right is known to have been Beatton's comprising, or