

No 40.

THE LORDS found the reply relevant upon the deeds of interruption alleged by the pursuer jointly, to elide the act of Parliament.—See PERSONAL and REAL.—REGISTRATION.

*Stair, v. I. p. 400.*

\* \* \* Newbyth reports the same case :

IN a declarator, pursued at the Earl of Southesk's instance against the Marquis of Huntly, for declaring of his right to the lands of Badzenoch, by virtue of a conjunct infeftment granted to the late Marquis of Argyle and umquhile David Earl of Southesk, from umquhile George Marquis of Huntly, for their relief of cautionry, the Marquis of Huntly being donatar to the Marquis of Argyle's forefaultrie, compearing and defending, &c. ; and the Marquis of Argyle his quinquennial possession, which was so retoured conform to the order prescribed by the act of Parliament 1584 ; against which, the Earl of Southesk alleging many deeds of interruption, and diligence used against the Marquis of Argyle for interrupting his possession, such as summons of exhibition for production of the foresaid conjunct infeftment in anno 1665, summons of count and reckoning against the late Marquis of Argyle, the said year ; letters of horning and bonds of relief, contract and wadset in anno 1658, betwixt the pursuer and the said Marquis, ratifying the said conjunct infeftment, and wadsetting other lands in corroboration of the same ; and an inhibition in anno 1658. THE LORDS repelled the whole defences proponed for the quinquennial possession and act of Parliament 1584 ; and sustained the whole deeds of interruption alleged for the pursuer, as sufficient for interrupting the said quinquennial possession, and therefore decerned in the declarator.

This cause was for several years depending, and debated at great length *in presentia*.

*Newbyth, MS. p. 81.*

1683. *March.*

LORD LIVINGSTOUN *against* GORDON of Troquhen.

No 41.

The quinquennial possession must be uninterrupted.

IN a process of mails and duties, at the instance of a donatar of forfeiture, out of the lands wherein the forfeited person had been retoured quinquennial possessor, compearance was made for a third party, pretending interest in some of these lands, who *alleged, imo*, That he had raised reduction of the retour upon this ground, That the inquest had committed iniquity in not allowing him to propone his allegiance, *viz.* that the rebel was not in peaceable possession for the space of five years, as the act of Parliament required, but that his possession was interrupted and disturbed by a process. *2do*, That there could

be no process at the pursuer's instance, unless there were a general declarator raised upon his gift.

No 41.

*Answered* ; The retour being upon oath, cannot be quarrelled ; nor can the rebel's possession be reputed unpeaceable or interrupted, upon the account of a process on which no decret followed. *2do*, By the late act of Parliament forfeiture in absence by the justice court is declared equivalent to forfeiture in Parliament, which requires no declarator ; and it would be a great prejudice to the King and his donatars, to run the tedious course of general declarators.

*Replied* ; All prescriptions, long or short, are interrupted by process. *2do*, The act of Parliament makes forfeiture by the justices, of an absent traitor, to be as effectual only, and no better, than their forfeiture of a pannel who is present ; and by custom declarators are always raised and required upon gifts of forfeiture before the justices. And Hope is clear that where forfeiture proceeds by way of act of adjournal, the gift thereof requires declarator.

THE LORDS delayed to give answer to the first point, and were inclined to find, that general declarators were of little use in the case of forfeiture, seeing the nullity of a forfeiture is not competent to be cognosced before a civil judicature ; and therefore sustained process in the special declarator, seeing the pursuer consented to the defender's proponing any defence competent in the general. *Vide* a case between the parties, No 18. p. 3416., where forfeiture before the justices was found to need a declarator.

*Harcarse*, (FORFEITURE.) No 492. p. 135.

\* \* \* P. Falconer reports the same case :

IN the action of mails and duties pursued by my Lord Livingstoun, as he who was donatar to the forfeiture of . It was *alleged*, That there could be no process sustained upon the foresaid gift of forfeiture, it being a forfeiture in absence, before the Lords of Justiciary, and the samen not declared ; and, that the act of Parliament appointing forfeiture in absence before the Justice-general does not privilege decreets of that nature, more than there had been compearance, and if there had been compearance, the samen ought to have been declared. THE LORDS sustained the defence, and found, That the decret ought to be declared, not being a decret in Parliament. *See* No 18. p. 3416. *P. Falconer*, No 56. p. 36.

1687. *July*. THE EARL OF ARRAN, Donatar to COLTNESS'S Forfeiture.

No 42.

THE Earl of Arran, donatar to Coltness's forfeiture, applied to the Council to be put in possession for five years of the lands of North Berwick, whereof the rebel and his factors were in possession the time of the rebellion, that he might find out the rebel's rights in the mean time.