

No 35.

Creditors were held to be preferable to a donatar, the rebel having, before the forfeiture, disposed, under the burden of his debts, and the disposition having been confirmed by the superior.

1687. *February.* LORD BALCARRAS *against* WALTER DENHOLM and Creditors.

IN an action of mails and duties at the instance of the Lord Balcarras, donatar to the forfeiture of Sir William Denholm of Westshiels;

It was *alleged* for Sir William's Creditors; That he was denuded by a disposition and infeftment to his brother, with the burden of his debts therein enumerated, and the infeftment confirmed by the president as superior, two years before committing the crimes for which he is forfeited.

Answered; Sir William was cited for the crimes of treason, viz. 'harbour and reset,' before the disposition, and thereafter declared fugitive by the Justices; and the committing of the last crime of invading the kingdom with Argyle, was a continuation of the treasonable design, or *meditatio criminis*; and the effect of the forfeiture ought to be drawn back to the first citation.

Replied; The disposition was before the denunciation, by which nothing falls but the single escheat till after year and day. 2. No sentence hath followed upon that citation for crimes of reset, &c. And if *meditatio criminis* were sustained to disappoint rights granted and confirmed before committing the crime, (nothing) could be secure.

The matter ended in a transaction, though the Creditors appear to have been well founded in law; but it was considered that they lay under the danger of a new forfeiture of their debtor upon the ground of 'harbour and reset,' before the disposition.

Harcarse, (FORFEITURE.) No 497. p. 137.

1687. *December 15.* LADY SALTOUN *against* E. of DUMBARTON.

No 36.

Debate, in a competition with a donatar of forfeiture, whether the act 1584 applies only to inferior vassals, or likewise to the immediate vassals of the Crown; not decided,

A LETTER from the Lords of the Treasury, in favours of the Earl of Dumbarton, is read, requiring the Officers of State to concur with him in getting that point which he had in debate with the Lady Saltoun, decided in his favours, viz. that the bygone annuities of her liferent should not affect the lands of Saltoun, in prejudice of the King and him as donatar, it being a leading case: And the King founded on the 3d act 1584, that bygone feu-duties and annuals, in cases of forfeiture, are presumed paid.

1688. *February 24.*—This day, and the two preceding forenoons, were much taken up with the debate betwixt the Lady Saltoun and the Earl of Dumbarton, who was donatar to her son's forfeiture, for the bygones of her liferent, as mentioned 15th December 1687. *Alleged*, By the 2d act 1584, anent the quinquennial retour, all bygones are presumed to be paid *præsumptione juris et de jure*, because the rebel and his friends will abstract the discharges to defraud the King, and so *lex statuit super præsumpto*. *Answered*, The case of that act is

only in subvassals who enter by presentations from the King, and not where they hold immediately of his Majesty, as Saltoun and his mother did. *Replied*, There is the same parity of reason in both, and therefore it ought to be so extended, otherwise the King by their collusion may be cheated. *Duplicated*, *In materia favorabili* laws may be extended, but not *in materia pænali, odiosa et correctoria*, as this is; for which were cited, *imo*, Our own law, viz. act 107th, Parl. 1427, and act 115th, Parl. 1581, that statutes are not to be wrested beyond their precise words; and also *Faber. Cod. Sabaud. tit. de leg. et constitutionibus princip.* and *Everardus loc. legal. num. 13. et 16.* And though the correctory law of debtor and creditor, in 1661, is extended against apparent heirs buying in comprisings, yet that is to prevent fraud, and *in causa maxime favorabili*; but the Lords have been very nice in extending laws, as appears by the decision in *Durie*, 10th Dec. 1622, *Roths, voce JURISDICTION*; and 21st July 1636, *Grier, voce SUPERIOR AND VASSAL*; and the same is likewise observable in the cases of annualrent due after denunciation, of declining Judges as well for affinity as consanguinity; of the third of the dead's part given to executors nominate, and not to executors dative; and of the nullity of tacks by the 15th act, 1621; none of which last four cases the Lords would extend *de casu in casum*. And whereas *l. 3. D. ad leg. Pomp. de parricid.* and *l. 59. D. de R. Nupt.* were cited to prove that laws are extended even *in materia pænali*; to the 1st, The extension is *in odium et ob atrocitatem criminis parricidii*; and in the 2d, There is no doubt but *sub nomine liberorum venit nepos* and is extended *ad hæredem extraneum*, because *hæres et defunctus sunt unâ et eadem persona in jure*. It is confessed a new Parliament might extend it to this case; but as it stands, the Lady is not in the case of that old act 1584.

It was pressed that the Lords would advise this cause; and the President, *Tarbet*, *Carse*, and the other lawyers on the bench, were clear for the Lady; but *Dumbarton's* favour got it delayed; and, in June, a new stop came from the King. All the Lady could procure, was, that the Lords decerned in her poinding of the ground for the years since the forfeiture. But, on a bill given in by *Dumbarton*, pretending that she was paid thereof, by intromission with her son's moveables, his library and the wood, &c. the LORDS ordained her to find caution to refund, in case in the event she were found paid of these bygones resting since the doom of the forfeiture; and she found *Sir Patrick Murray* cautioner. They were content to take her oath on these intromissions, but refused to take it as to precedings; though it was contended that it was all she was obliged to do by the act of Parliament, to purge collusion betwixt her son and her for abstracting the discharges, unless they would prove it *scripto*.

Fountainbail, v. 1. p. 491. & 500.

* * * *Harcarse* reports the same case:

THE Lady *Saltoun* being infest in a yearly annualrent of 7000 merks, pursued a poinding of the ground for — years annuities before her son's forfeiture.

No 36.

Compearance was made for the Lord Dumbarton, as donatar of the forfeiture, for whom it was *alleged*, That by the act 2. Parl. 9. James VI. the King or his donatars are not bound to produce discharges of feu-duties or annualrents preceding the forfeiture.

Answered for the pursuer; That last clause in the said act doth only concern the forfeiture of inferior vassals, the words being, ' That no person presented,' &c. and presentation is not made to the forfeiture of immediate vassals; and the reason of the disparity is, because there is a greater presumption of fraud in a sub-vassal, who is a stranger to the King, than in his own immediate vassal.

Replied; The other provisions in the act anent the quinquennial possession, concern the King's vassals as well as others; and therefore the last concerning discharges should also be applied to lands holden immediately of the King. 2. The danger is as real in the one as the other. 3. The word presentation is to be taken in an ample sense (as appointed) as the words (feu-lands) in the act will be extended to ward or blench.

THE LORDS did not decide this point.

Harcarse, (FORFEITURE.) No. 501. p. 139.

1716. July 5.

The CREDITORS of the VISCOUNT of KILSYTH *against* The TENANTS of the Estate of KILSYTH.

No 37.

In a competition betwixt the creditors on a forfeited estate and the tenants, both founding upon an act of George I. on the one hand, expressly saving the interest of creditors, on the other, bestowing upon peaceable tenants, in name of bounty, two years possession without payment of rent, the Lords found, the real creditors, and also the personal creditors who had arrested the rents

THE Viscount of Kilsyth, who is lately attainted by the House of Lords, having many Creditors real and personal, who have done diligence by arrests and other processes for affecting the rents; and the Tenants having presented a suspension of multiple-poinning, the Creditors applied to the Lords, representing, that it was necessary for their security that the estate should be sequestrated, as is usual in the case of competition of creditors.

The tenants having founded upon the late act of Parliament, allowing their possessions to be continued two years, without payment of any rent; and a hearing *in presentia* being allowed, it was *alleged* for the Tenants, That, by an act 2d Geo. I. it is provided, that all and every tenant or tenants in Scotland, who shall continue peaceable and in dutiful allegiance to his Majesty, his heirs and successors, bruiking or occupying any lands, mills, woods, fishings or tenements, as tenant or tenants, tacksman or tacksmen, from and under any such offender, shall, and are hereby ordained to bruik and occupy all and every such lands, mines, mills, woods, fishings and tenements, for the space of two years or crops, to be accounted from and after such attainder, freely, without payment of any rent, duty or service, for the said two years or crops; by virtue of which act and clause, the Tenants of Kilsyth, who have continued dutiful according to their allegiance, are entitled to continue their possessions for the