

vacant, and supplied with another minister, upon the account of his having deserted it ever since the indemnity; yet that did not hinder but that the church, by virtue of the foresaid acts of Parliament, might censure for other offences as they had done, and that censure could not be reviewed but by a superior judicatory. If the censure of the church had been after the suspender had applied, in the method directed by the act of toleration, to have a meeting-house, then it might well have been argued, that the toleration act did exeem episcopal ministers in meeting-houses from the jurisdiction of church judicatories: but that is not the case; for, by the sentence of deposition, compared with the suspender's application to set up the meeting-house, it appears he was deposed long before that time; and, therefore, as to the benefit of the toleration, and as to all civil effects, he was to be considered as a laic, whatever his own apprehension might be as to the character of his ministerial function. Yet, as the law had invested the church with authority to censure, even to deposition, he was, by that sentence, rendered incapable of the benefit of the toleration: neither was there much reason to fear any bad consequence, seeing the law presumes the judicatories will deal justly, and there has been little complaint of rigour that way, and superior judicatories of the church have given just redress when there was occasion for it.

The Lords refused also to pass the bill upon that reason.

*No. 175, page 240.*

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1718. *December 17.* The Creditors of FRASERDALE *against* The LORD LOVAT, Donator to the single and Liferent Escheat of ALEXANDER M'KENZIE of FRASERDALE.

HIS Majesty and the Government understanding that a rebellion was like to break out in Scotland, there passed an act in the Parliament of the first year of King George, for encouraging of superiors, and vassals, landlords, tenants, and others, who should continue stedfast and firm in their loyalty; and likewise for summoning suspected persons in the way and manner prescribed in that act; and under the penalty of single and liferent escheat, in case of not compearance.

Fraserdale had the misfortune to be one of these suspected persons, and who being summoned, did not compear, and thereby incurred the penalty. He was also engaged in the rebellion, and thereafter forfeited: there being a gift of his single and liferent escheat to Simon Lord Lovat, (so he is designed in the gift,) whereupon he entered immediately to the possession of the moveables, and by the favour of the tenants attained also to the rents of his lands.

The creditors raised a process for constitution of several debts, calling the Officers of State, and likewise Fraserdale; and upon the dependence of that process, they did arrest in the hands of the tenants; who having suspended upon double distress, the question of preference came to be debated,—Whether the donator had the benefit of the escheat without the burden of any debt, or if the rents of the land were subject to the debts and diligence of creditors, and preferable to the donator.

It was ALLEGED for the donator,—That, by the law of Scotland, escheats, single or liferent, are free from all burden of debts, except the debt of the horning; which is a burden upon the escheat by special act of parliament. And albeit, by the benignity of our Princes' escheats, upon denunciation for not payment of debts, have been generally applied for the payment of the rebel's debts, with preference to the debt of the horning; yet that is by favour, and not by right: and, in denunciations for crimes, gifts are granted more freely, without regard to debts.

It was ANSWERED for the creditors,—*1mo*, That the uniform practice of our Sovereigns, to apply the benefit of escheats to the payment of debts, is now, by custom, become a part of our law; but the escheat arising upon the penult late act of Parliament is of another nature than other escheats formerly known by our law, and more undeniably subject to debts.

It was ANSWERED for the creditors,—*2do*, That the liferent escheat of lands, holden of a subject, did not fall to the Sovereign, but to the immediate superior; because the vassal continuing a year under rebellion, was considered as *capite diminutus*, and as nobody; whereby the superior enjoyed the fruits of his land during his life; whereas, by the late act, not only the single, but the liferent escheat falls immediately, without allowing year and day to purge, and falls to the crown only as a penal confiscation for contempt and disobedience. By the genius of the law of Scotland since the revolution, forfeiture prejudices no creditors. It was a grievance presented to King William, with the offer of the crown, that forfeitures should prejudice vassals or creditors; and for redress of that grievance, the 33d act of the Parl. 1690, did fully provide for the security of creditors in time coming: and the statutory penalty against suspected persons, ought not in reason or equity to be further extended to the prejudice of creditors, than forfeiture for per-duellion; especially seeing the same act that warrants the calling of suspected persons, does very amply secure creditors that they shall not be prejudged by the forfeiture of the debtor.

It was *separatim* ALLEGED for the creditors,—That Fraserdale was also forfeited, whereby the penalty of the escheat was absorbed and comprehended under his forfeiture; and consequently, by the law of Scotland before the Union, and by the law of Britain since, the diligence of creditors is preferable; more especially considering, that, by another act shortly after the suppression of the rebellion, the forfeiture of all the estates of such as have joined therein, that were past, or should be betwixt and the 24th of June, 1718, were vested in the crown for the public use; which act proceeded upon the narrative of his Majesty's gracious condescension in that behalf, his majesty having, in a speech to the Parliament, given up all the estates that should be forfeited to the crown by the rebellion, to be applied towards the defraying the extraordinary expense thereby incurred: and it could not be thought that his Majesty's condescension should be so narrated, as to reserve the escheats of such as had incurred a penalty upon bare suspicion, which would, in a great measure, have taken off the effect of the forfeiture; because generally the most of those who had the best estates, had incurred the penalty of single and liferent escheat before their forfeitures: so that no benefit could arise to the public for an age; and, in the mean time, the growing debts would carry off the rest; and many creditors would lose their debts, and all be postponed. All which is inconsistent with the whole tenor of the act, vesting the forfeitures in the crown, for the use of the public.

It was ANSWERED to the first,—That the effect of the escheats single and liferent was known in our law: and the act for summoning suspected persons, under the penalty of single and liferent escheat, having entitled the crown to the escheat of suspected persons; and thereupon the King being pleased to gift Fraserdale's single and liferent escheat long before his forfeiture, when no other casualty had fallen to his Majesty; the donator had thereby a right to the liferent, whereof he could not be prejudged by a posterior forfeiture. And albeit the loss of escheat was merely penal, yet the casualty did fall to the crown according to the nature of it; that is, amply, without the burden of debts. Neither did it alter the case, that the said act did put his Majesty in the place of a subject superior, as to that casualty, or that the liferent escheat did fall immediately without waiting year and day.

*No. 181, page 248.*

This case was appealed. The subsequent proceedings will be found in Robertson's Appeal Cases, page 241.