

No 76.

*Objected* for the Crown ; That, in order to prevent fraudulent claims, and cut off debts that might be contracted for the very purpose of supporting the rebellion, or saving the estates of rebels, the act aforesaid vests in his Majesty all the rights and estates of forfeiting persons from and after the 24th June 1745, allowing all their just and lawful debts, contracted by bonds and other securities therein enumerated, previous to that date. From hence it is evident, that no debt, however just, contracted after that time by the rebel, and by consequence no deed, however available to create a debt, can be sustained to affect the estate vested in the Crown.

' THE LORDS dismissed the claim.'

Act. Garden.

Alt. *Advocatus et Solicitor.*

Clerk, ———.

*Fol. Dic. v. 3. p. 237. Fac. Col. No 211. p. 308.*

No 77.

A lease of teinds forfeited by 20th Geo. II. c. 41. found to be annexed by 25th Geo. II. c. 41. and restored by 24th Geo. III. c. 57.

1793. May 15. SOLICITOR OF TITHES *against* KENNETH MACKENZIE.

THE Earl of Cromarty, in 1696, obtained from the Crown, as successor to the Bishop of Ross, a lease of the teinds of the parishes of Tarbat and Fearn, for thirty-eight years. This lease was, by various prorogations, extended to the year 1924.

The late Earl of Cromarty having been engaged in the rebellion 1745, was attainted, and his property of every description was forfeited to the Crown, by the 20th Geo. II. c. 41. commonly called the Vesting Act.

When afterwards, by 25th Geo. II. c. 41. commonly called the Annexing Act, commissioners were appointed for managing the forfeited estates, so far as annexed by this statute to the Crown, the factor on the estate of Cromarty accounted to them for this teind-duty.

But in 1758, the Barons of Exchequer, with the advice of the then Solicitor of Tithes, granted to Mr Munro, one of the heritors, a lease of the teinds of his own lands, and to Sir John Gordon, another heritor, and brother to the Countess of Cromarty, (probably for her behoof), a lease of the remaining teinds possessed by the Earl before his forfeiture.

These leases were granted for the usual period of nineteen years. Mr Munro paid the ordinary composition of three years value of the teinds. Sir John Gordon only paid three years value of the rent formerly exacted by the Earl of Cromarty, and both paid a nominal rent.

From that period, the factor on the estate of Cromarty no longer accounted to the commissioners for the teind duty.

The leases having expired, that of Mr Munro was renewed, on his paying the usual composition.

In a process brought by the Solicitor of Tithes against Mr Macleod of Cadboll, who had purchased part of the estate of Invergordon, in order to oblige him to accept a similar renewal, appearance was made for Mr Mackenzie of

Cromarty, who contended that the lease of the teinds had been restored to his predecessor Lord Macleod, along with the estate, by the statute of the 24th Geo. III. c. 57. commonly called the Restoring Act. The Solicitor of Tithes *Pleaded*; By the last act mentioned, it is declared lawful to his Majesty to grant to their former proprietors 'all and every the lands, lordships, baronies, fishings, and other like heritages which became forfeited, and which were annexed to the 'Crown,' by the 25th of the late King. The annexing and restoring acts are thus commensurate, and nothing is restored that had not been annexed. But, from comparing the terms of the vesting and annexing acts, it is evident that this lease was not annexed.

By the former it is declared, That 'all and every the lands, heritages, debts, or sums of money, and goods and chattels whatsoever; and generally, the estates, goods, and effects, heritable and moveable, real and personal, descendible to heirs, executors, jurisdictions, liferent-rights, or of what nature or kind soever they be,' &c. belonging to persons attainted on account of the late rebellion, shall be forfeited. A lease of teinds was undoubtedly comprehended in this description.

By the annexing act it is declared, 'That all and every the lands, lordships, baronies, patronages, tithes, fishings, and other like heritages, which became forfeited,' &c. 'as the same,' &c. 'are more particularly enumerated and described in the title-deeds, rights, and infestments of the said attainted persons, or their predecessors, or in the surveys already taken, or hereafter to be taken thereof by the Barons of Exchequer in Scotland, in pursuance of the powers given to them by the aforesaid act of the 20th of the King,' &c. shall be annexed, and remain for ever unalienable, &c.

It is evident, therefore, that the annexing was meant to be much more limited than the vesting act. Heritable rights alone are annexed; and even those only of a certain description, viz. absolute rights of property, and of a permanent nature. The legislature must have meant to exclude such as were limited or temporary only. It was on this account that liferent, one of the most important feudal rights, is specified in the vesting, but omitted in the annexing act. For the same reason, leases were not annexed. Indeed, the phrase, 'remain for ever unalienable,' is quite inapplicable to any lease, and especially to one which had but a few years to run.

This opinion is confirmed by the conduct of all concerned, only five years after the act was passed. The teinds had at first been surveyed under the direction of the Commissioners of annexed estates, in the belief that the Earl of Cromarty enjoyed an heritable right to them; but as soon as it was known that he only held them by a lease, they were immediately withdrawn from their management, and leases granted to the heritors, upon the same terms as if no lease had existed.

*Answered*; The restoring act refers to, and proceeds upon, both the vesting and annexing acts; and therefore both are comprehended under it.

No 77.

Indeed, the annexing was meant to be equally broad with the vesting act. The former takes no notice of moveable property, because in no instance were the moveable funds of the forfeited person sufficient to pay his debts; but it is impossible to imagine any heritable right which it does not include. The lease in question was a right of tithes; it came under the class of 'other like heritages;' and it was surveyed by the Barons of Exchequer. If after the date of that act it had been the subject of enquiry, whether the estate of Cromarty was sufficient to pay the debts of the Earl, this lease, which was to last for 170 years, would have been included in the calculation.

The lease to Sir John Gordon was meant as a favour to his sister, and was granted without examination.

A great majority of the Court, convinced by the arguments stated for Mr Mackenzie, concurred in finding, 'That the tack of tithes in question was annexed to the Crown, and restored to the family of Cromarty.' Some other points in the cause were remitted to the Lord Ordinary.

A reclaiming petition was refused, without answers, on the 5th June 1793.

Lord Reporter, *Craig.* Act. *Solicitor of Tithes Balfour, M. Ross.* Alt. *R. Craigie.*  
Clerk, *Menzies.*

D. D.

*Fac. Col. No 51. p. 105.*

No 78.

1757. *February 27.*M'LEOD *against* ALLAN.

A CREDITOR to a person whose estate was forfeited, entered his claim in terms of the vesting act, which was sustained to the extent of the principal and interest, but not for his expenses, for which the Crown is not liable. The creditor brought an action for his expenses against a person who was cautioner in the bond for the forfeiting person; to which it was *objected*, That the vesting act, which declares that the Crown is not liable in expenses, must of consequence imply, that he the cautioner cannot be liable, otherwise he must have relief against the Crown, which would defeat the enactment of the statute, and in effect make the Crown liable in the expenses.—THE LORDS found the cautioner liable.

*Fol. Dic. v. 3. p. 237. Fac. Col.*

\*\*\* See This case, No 30. p. 2101.