

John Earl of Sutherland, and Captain David
Ross, of Daan, Tenant of the Lands of
Skelbo

Appellants ;

Mr. Archibald Dunbar, and Sir Thomas
Calder, and others, Creditors on the Estate
of Skelbo

Respondents.

Case 122.

19th April, 1725.

Temporary Jurisdiction in the Commissioners of Forfeitures.—Claims upon the estate of an attainted person, which had reverted to a loyal superior, did not fall under this jurisdiction, but remained to the Ordinary Courts.

Process.—Adjudication.—Mails and Duties—In an action of Mails and Duties brought by an adjudger, the superior to whom the estate had reverted makes various objections to the adjudications, as already paid, and as irregular; upon the adjudger finding caution to repeat over-payments, these objections are repelled, leaving to the superior his remedy by declarator.

Sequestration.—An estate of a person attainted, which had reverted to a loyal superior, is sequestered at the instance of competing creditors, adjudgers prior to the forfeiture.

IN 1721, the respondent Dunbar brought an action of mails and duties before the Court of Session, in right of certain decrees of adjudication in his person, against the tenants of the lands of Skelbo, which had belonged to the Lord Duffus, but upon his forfeiture for high treason, had reverted to the appellant the earl as superior, in terms of the act 1 G. 1. c. 20. and 5 George 1. c. 20.

In this action of mails and duties, the appellant the earl appeared for his interest. After the commencement thereof in April 1722, he granted to the other appellant Captain David Ross, a tack of the said lands of Skelbo, for 19 years from Whitfunday 1722.

The earl at first contended, that he was entitled to the lands of Skelbo, and rents thereof, in preference to the respondent Dunbar, but the latter insisting, that by the acts 1 G. 1. c. 20., and 5 Geo. 1. c. 20. the estate was given to the superior subject to the vassals debts, the Lord Ordinary on the 22d of December 1721, “preferred the respondent to the appellant the earl.” The appellant objected to this interlocutor on the head of his privilege of parliament; but when his privilege took no place, the Lord Ordinary on the 3d and 7th of July 1722, adhered to his former interlocutor.

Against these interlocutors the appellant the earl reclaimed to the whole Court, stating that the lands falling to him as superior were only liable to a proportional part of the debts adjudged; and Lord Duffus having had other lands they should bear a proportion of the debt. The respondent Dunbar made answer, contending that he as creditor had a right to affect what estate he pleased with his debt, without prejudice to those claiming the right of property, ascertaining the proportion of the debts among them-

selves. On the 21st of July 1722, the Court “refused the desire of the petition.” The earl presented another reclaiming petition, and, after answers, the Court on the 25th of July 1722, “refused the desire of the petition, reserving to the Earl of Sutherland to insist in any proper action for extinguishing the adjudications as accords, and allowed the decree to be extracted, the respondent in terms of a concession made by him finding caution to repay in case any part of the sums in the adjudication which he insisted on as owing, should be made appear to be satisfied and paid.” The appellant the earl again petitioned the Court, insisting that the adjudications were not regular, and praying to be heard upon the nullities objected to them: but the Court on the 27th of July 1722, “adhered to their former interlocutor, reserving likewise to the earl to insist in any proper action for reducing the respondents’ titles on the grounds mentioned in the petition or any others.”

A commission having been granted to the tenants, to depone as to their rents, on the 5th and 26th of December, 1722, the term was circumduced against them, and they were held as confessed on certain rents condescended on. Other persons having then applied as creditors on the estate, to be made parties, on the 21st of February 1723, the Court appointed the “estate to be sequestered and remitted to the Lord Ordinary to appoint a factor to levy the rents:” and pursuant to this remit the Lord Ordinary on the 8th of March thereafter appointed Sir Thomas Calder factor accordingly.

The tenants suspended the decrees obtained against them, but on the 20th of November, and fourth of December 1723, interlocutors were pronounced against them by the Lord Ordinary, and, on the 12th of December thereafter, by the Court.

Upon the application of the competing creditors praying that Sir Thomas Calder might be continued factor, till the event of the process of ranking was ascertained, the Court on the 6th of June 1724, “continued the sequestration of the said estates and appointed the said Sir Thomas Calder factor thereon, until their Lordships should think fit to recal the same, he giving sufficient security.” The appellant Ross now, for the first time appeared in the action, and gave in a petition, insisting upon his lease of the premises from the Earl of Sutherland; and stating that the Court of Session had no right to determine the claims upon this estate, which came under the jurisdiction of the commissioners of forfeitures: after answers for the respondents, the Court on the 7th of July 1724, “refused the desire of the petition.”

The appeal was brought from “several interlocutory sentences or decrees of the Lords of Session of the 22d of December 1721; the 3d, 7th, 21st, 25th, and 27th of July; the 5th and 26th of December 1722; the 21st of February, 8th of March, 20th of November; 4th and 12th of December 1723; the 6th of June and 7th of July 1724.”

Entered,
26 Nov.
1724.

Heads of the Appellants' Argument.

The Court of Session had no jurisdiction to determine of Mr. Dunbar's claim upon a forfeited estate, the power of determining such claims being by act of the 4th of his present majesty's reign c. 8. vested in trustees exclusive of all Ordinary Courts. And as superiors are by the act 5 Geo. 1. c. 20. obliged to pay a proportion of the forfeiting persons' debts, answerable to the estate returning to them; so this proportion ought to have been determined by decree of the said trustees.

By the proceedings had in the present case, the whole debt claimed by the respondent Dunbar, is made a burden upon that part of the estate of the forfeiting person which fell to the earl as superior, though the earl was able and offered to have proved to the Court, that the attainted person had another estate forfeited for the use of the publick, which therefore ought to have been liable to a proportion of the respondent's claim. The earl further offered to prove to the Court that the respondent Dunbar had possessed the estate of the late Lord Duffus, lying in the county of Moray, amounting to 400*l.* yearly, by which possession his claim was extinguished.

The respondent contended that these objections were not available in that state of the process, and were reserved by the interlocutors of the 25th and 27th of July 1722: but the case of the possessor is always favourable, and a good plea for recovering possession, must by the principles of law be of greater force to retain it when recovered. And by the law of Scotland, whatever is a legal ground for setting aside a deed, in an action of reduction, is always held a proper defence for a possessor, when insisted against in an action to eject him. The reservation, therefore, in favour of the earl does in effect admit the justice of his cause, and the iniquity of the decree.

Heads of the Respondents' Argument.

The objection to the jurisdiction of the Court of Session was never started, till after the power of the trustees for determining claims was expired. But the trustees for forfeitures had no power of determining claims upon this estate, because it was not vested in them for the use of the publick; in consequence of the act of the 1 Geo. 1. c. 20., it had devolved on the appellant, the Earl of Sutherland, subject to the demands of creditors. The appellant himself claimed this estate not before the trustees, but the Lords of Session, and the same was then decreed to him subject to the debts.

The appellant the earl offered to prove that the forfeiting person had a separate estate, upon which a proportion of the debts ought to have been charged; though this allegation in general might seem to merit regard so far as to be admitted to proof, yet when the appellant was desired to mention any one parcel of estate that belonged to the forfeiting person, he could not particularize any, the Court therefore justly looked upon the allegation as groundless, and made of design to gain time.

The earl also offered to prove that the adjudications of the respondent Dunbar, were satisfied and extinguished by payment, and made several objections to the regulation of the securities. As this seemed only a pretence to retain possession, the Court justly refused a commission to make proof of such general allegations, but reserved an opportunity to the appellant if he thought fit to bring a proper action for that purpose, and the respondent gave security to be answerable for whatever should appear to have been over paid.

The appellant Ross who had a tack from the appellant the earl stated that he was turned out of possession without being made a party to the action. But the tack in question is dated in April 1722, more than a year after this action commenced, and several months after the first judgment pronounced in favour of the respondent; and as he, therefore, could not be originally made a party, so there was no occasion for making him a party afterwards, the question being as to the right of the lessor, and that being determined against him, his lease made after the suit commenced was of no consequence.

Judgment,
19 April
1725.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the several interlocutory sentences and decrees therein complained of be affirmed.*

For Appellants, *C. Wearg. Ch. Areskine.*

For Respondents, *Dun. Forbes. C. Talbot. Will. Hamilton.*

Case 123. Volrath Tham, Merchant in Gottenburgh *Appellant;*
Edgar, 23
Dec. 1724. Charles Sheriff, and Richard Sheriff *Respondents.*

23d April 1725.

Factor.—A foreign factor advises his correspondents, that he has disposed of a cargo, and shipped returns for it, on both which he charges commission; he afterwards brings an action against the correspondents, alleging that he had sent his own goods, and had not received proceeds for theirs; but he is not allowed to prove facts contrary to his correspondence.

The knowledge of the ship-master, though Supercargo, and part owner, not relevant against the correspondence.

Proof.—The factor having refused to allow a proof of the ship-master's knowledge by his own oath, a proof by witnesses is refused him.

IN the year 1717, the merchants who sent goods to Sweden, suffered great losses, by an ordinance of the then king, by which a small piece of coined copper, of the size of a farthing, called a *Minttoken*, was made current for the value of a dollar Swedish: having been paid in this specie, the homeward cargoes could not be purchased but at a great discount.

In 1718, the respondents and several others, who had purchased, on their own separate accounts, parcels of herrings, loaded them
had