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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.

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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

space of two years, freely, without the payment of any rent; and to sequestrate their estate, were to deprive them of the benefit of that act.

It was *answered* for the Creditors; That the same act contained another clause saving their rights, in these words: 'And because it is hard, that any creditor, remaining in peaceable and dutiful allegiance to his Majesty, his heirs and successors, should suffer by the rebellion of his debtor, be it therefore further enacted, by authority foresaid, That no conviction or attainder, on account of the high treason or treasons above mentioned, shall hurt or exclude the diligence of any such creditor remaining peaceable and dutiful, for security or payment of any true, just or lawful debt, contracted before the commission of any of the foresaid crimes,' by which the interests of just and lawful creditors are saved as fully and effectually as no such provision had been made in favours of tenants; so that, whatever the Tenants can plead upon the clause in their favours, the Creditors answer upon the salvo in favours of just and lawful creditors. So the true question will be, Whether, by the above mentioned clause, the tenants have preference to creditors, so as the creditors come only to affect the rents and property of forfeited estates after two years; or if the creditors must first be satisfied, and the benefit intended to the tenants be only effectual after the payment of just and lawful debts, preferable to the fisk.

For the Creditors, it is *alleged*; That they are preferable, because of the express words of the act, 'That no words of the attainder shall hurt or exclude their rights and diligences.' *2do*, What was intended by the Legislature being a bounty to the tenants, that bounty must in reason be judged to be exercised out of that fund which fell to the Crown by the attainder, and noways at the expense of the creditors; more especially considering that some forfeited estates will not be found sufficient to answer all the debts; and in this particular case many debts real and personal have already appeared. And it is indeed questionable, whether the forfeited estate will be able to discharge the whole; so that eventually, what should be retained by the tenants must be taken off the just and lawful creditors. The law was indeed intended for encouragement to tenants, that they might remain dutiful, and not be drawn away by their masters. But the same motive operates as forcibly in favours of creditors, that they might remain in their duty; and indeed more forcibly; because the tenants are *in lucro captando*, and the creditors *in damno vitando*, and therefore *in dubio* always more favourable.

For further clearing the grounds insisted on in behalf of the Creditors, it is to be observed, That, by the laws of Scotland before the said late act, all just and lawful creditors real or personal were entitled to affect forfeited estates preferably to the fisk, by virtue of an act of the meeting of estates, which had a most full and sovereign authority, and also by an act of the Parliament 1690, in pursuance of an article of the grievances, and accordingly all lawful creditors have obtained preference to the crown ever since the revolution.

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before the attainder, preferable to the tenants; but they did not determine whether the other personal creditors were preferable.

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It was further and separately *alleged*; That real rights, such as wadsets and infeftments of annualrent, and arrestments used prior to the attainder upon personal debts, do really affect the estate and rents thereof. The arrestments indeed take only place for bygones, and the current term's rent; but the real debts do affect the estates preferably to the persons attainted, who in effect could not be said to have any real estate, until these debts were discharged, at least the annualrents thereof, bygone and in time coming; for heritable bonds do in common stile contain a clause assigning the rents for payment of annualrents bygone and in time coming, for which the ground may be poinded by virtue of the infeftments following thereupon. Likewise the forfeited estates are liable to ministers stipends, feu-duty and cess, all preferable to the forfeited person's right; and for payment of all which, and for the due management of the estate, keeping up and repairing tenants' houses, a sequestration is necessary; and there are several heritable rights of a considerable value over the whole estate produced.

And, *lastly*, By preferring the Creditors, it is not meant, that the Tenants shall be for ever excluded; for it often happens, in competitions of several persons or creditors having right to the same subject, that the person postponed comes in place of the creditor preferred, and thereby obtains the full effect of his claim in the second place, if the subject be sufficient to answer both; and therefore how soon the preferable creditors are paid by the rents of the estate, the bounty intended for the tenants will take place, and they will have the claim of interest during the time that they are excluded, and also to retain their possessions, they paying their rents to the sequestrator in the interim.

To all which it was *duplicated* for the tenants; That, by the tenor and style of the clause in their favour, they are entitled to continue in their possessions freely, without payment of any rent or duty, which does operate to them a full discharge and exoneration of their rents, which excludes all questions of preference; for the creditors cannot contest their possessions, which, without this act, is secured to them by the law, either by their tacks or tacit relocation; and being discharged of their rents, there is not a subject of competition with them, but the value of the forfeited estate is so far diminished; and then the subsequent clause provides amply for the creditors, and that all their just and lawful debts shall take place preferably to the fisk. *2do*, The creditors have no cause to complain, because they have great benefit by this act, as well as the tenants, in as far as, before the said act, the creditors had no preference upon forfeited estates, by virtue of the acts of the Parliament of Scotland, or meeting of the estates, in respect of the treason act 7mo Annæ, by which it is enacted, That, after the first July 1709, all persons convicted of high treason, or misprision of high treason, shall be subject and liable to the same corruption of blood, pains, penalties and forfeitures, as persons convicted or attainted of high treason, or misprision of high treason in England. By the tenor of which act, and clause foresaid, the laws concerning treason that were then in force in England, are extended to take place in Scotland; whereby all the former laws in Scotland

did cease, and become void, and consequently nothing can be founded now on the former laws of Scotland on this subject; and if the creditors were to insist on any preference, they must found on the laws that are or were in force in England; which will not afford the preference demanded. 3<sup>to</sup>, Even by the laws of Scotland, there have been many debates raised as to the interpretation and meaning of the laws in favour of creditors; and at best, there are certainly many ambiguities in the law of Scotland, and especially the act 1690, upon that subject; and the creditors have a great benefit and advantage by the said last act of the Parliament of Great Britain, which provides amply for all just and lawful creditors before the commission of the crime, which benefit is more than sufficient to compensate any small inconvenience discharging the tenants of their two years rents; and it has not been pretended, nor can be, but that, supposing the creditors were, before the last act, excluded by attainder or conviction, so that the provisions made for them were to be founded on the clause of the last act in their favour, in that case the tenants would have the full effect of the benefit intended for them by the said last act. 4<sup>to</sup>, Whatever was the law before, the intention of the Legislature being clearly expressed, ought to take effect; or, if there were any ambiguity, the law is to be so interpreted that both clauses may consist together; which can be most naturally and easily done, by allowing the tenants the bounty intended for them in the first place; and the suspension of payment to creditors for two years is but a small thing to them, because the fund will undoubtedly be sufficient, and a short suspension of payment is of small, if of any consideration to them, and *de minimis non curat prætor*; whereas, on the other hand, if the tenants be postponed, their rents being small, the suspension till all the debts be paid will evacuate the benefit of that act to them; for the creditors cannot be paid off for many years, and the present tenants can never hope to live so long as to reap the benefit intended for them; and if the law were to be interpreted as the creditors plead, some tenants might come sooner, and some later, to have the advantage acclaimed; but in no case could they have the present benefit, as was clearly intended, and is fully expressed, in as far as the act provides, that the said two years shall be accounted from and after the attainder; which in no case would take effect, because there is not any person forfeited who has not some debt real or personal.

It was *triplied* for the creditors; That albeit the act does provide, that the tenants shall possess freely, without payment of rent, yet that is to be interpreted in a consistency with the provision in favour of the creditors, viz. that they are not to suffer by the rebellion of their debtors, and that the attainder shall not hurt them, and if they be postponed for two years, they do suffer and are hurt by the attainder, which was not intended, and possibly some of them might be wholly excluded by the course of these two years; for it is impossible to know whether some of them may not be totally excluded till the extent of the debts and of the rebel's estate be compared and considered; but, however, they do suffer by the suspension, *nam qui cito dat bis dat*, contrary to the words

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and intention of the act. *2do*, Whereas it is pretended, that the laws of Scotland have ceased by the treason act 7mo Annæ, that the creditors expressly deny; for the clause founded on, whereby all persons attainted in Scotland shall be subject to the same corruption of blood, penalties, forfeiture, as persons attainted in England, does only concern the punishment of the persons forfeited; for that act being made to render the Union more complete, does only concern the punishment of the persons attainted, but makes no alteration of the law of Scotland concerning the interest of creditors in forfeited estates. *Illud non agatur*, to consider how far creditors in Scotland had, or had not, an interest in these forfeitures; but the act was made in prosecution of the Union, whereby it was provided, that the public laws concerning crimes might be the same in both kingdoms; but otherwise it is provided, that the laws of Scotland shall continue and not be altered, but for the evident utility of the subjects of Scotland; and if the creditors had a more ample security for their debts upon forfeited estates in Scotland than in England, it was not intended by the Legislature to diminish that interest or security. That point was not under their consideration; and certainly it would be a most plain and evident prejudice to the subjects of Scotland, which is never to be presumed, unless the words of the law were so plain and positive, as could not admit of any other sense or interpretation, which cannot be alleged in this case; on the contrary, the creditors in Scotland, who were strangers to the laws of England in this point, have rested secure and depended upon the benefit of the law of Scotland in favour of all just and lawful creditors, real and personal. *2do*, Even by the laws of England, (as the creditors do understand them) real creditors are secured, and also personal creditors who have done diligence to affect the rebel's estate before actual attainder, in as far as the 26th act *Henrici VIII.* and the 5th and 6th act *Edwardi I.* and the 1st and 2d acts of Philip and Mary, contain clauses, saving to every person or persons, their heirs and successors, (other than the offenders, their heirs and successors, or such person or persons as claim to any of their uses,) all such right, title, interest, possessions, leases, rents, reversions, offices, which they, or any of them, shall have at the day of committing such treasons. or at any time before, in as large and ample manner, as if these acts had never been made; by which saving clause, all real creditors are undoubtedly secure by the law of England. The creditors have no doubt that all personal debts are also secure by the standing laws of Scotland; but even the interests of real creditors are sufficient to obtain the present demand of sequestration, because real creditors being secure by the laws of both nations, their debts are preferable to the claim of the tenants, and therefore a sequestration is necessary *ante omnia*; for, as has been already said, the interests of real creditors were preferable upon the subject to the rebels themselves. *3tio*, The creditors did apply for sequestration before the attainder, which was pendent till the first of July instant, and the creditors did apply for a sequestration long before that time; and the sequestration was only stopped by the application of the creditors, who ought not to be prejudged by any impediment arising from

the opposition of the tenants ; as to whom, the case is to be considered and judged as it was at the time of the creditors' application, and then the tenants must not be considered as having the benefit of the act arising from the attainder ; but the case is to be considered, as if the estate had been sequestrated upon the first application, and then the tenants must come in and debate in the competition, and claim preference for the rents as in the sequestrator's hands, which they can never obtain till the debts be discharged.

3<sup>to</sup>, The Lords will observe, that the same act makes as ample provision in favour of superiors and vassals, that, in the case of an attainder of a vassal holding of a subject-superior, the property shall be consolidated with the superiority. And, in like manner, in case of the attainder of a superior, the vassal holding of that superior attainted shall hold of the Crown ; which provisions are as ample in favour of vassals and superiors, as the other clause is in favour of the tenants of persons attainted ; and which provisions in favour of superiors and vassals, if considered without the saving clause in favour of creditors, would for ever exclude the creditors of the persons attainted ; for if the property of vassals attainted be consolidated with the superiority without the burden of debts, there would be no fund for payment of creditors. And in the case of superiors attainted, supposing, as the case is very often, that the vassal's feu-duty is a third, half, or more of the true rent, and that the superior holds of the Crown blanch, the creditors would lose the benefit of the feu-duty payable to the superior, which often amounts to the half or more of the estate ; so that there would be no sufficient fund for payment of creditors. The tenants did pretend to find some evasion for differencing the case of vassals and superiors from that of tenants, but without any ground ; for the words of the law, considered in themselves, without the saving clause, are as ample in favour of superiors and vassals as tenants ; and if it must be acknowledged, as it is undeniable, that the creditors of superiors and vassals are not cut off, neither can they suffer or be prejudged in competition with tenants.

4<sup>to</sup>, The act provides, That the superiors, vassals, and tenants shall claim their rights, and do diligence to obtain possession within six months, which supposes that tenants may be out of possession, which cannot be, except by the preference of creditors.

5<sup>to</sup>, As to the inconvenience by putting off the tenants payment, which the creditors who lend money for the advantage of interest can far more easily bear, it is answered ; *Incommodum non solvit argumentum*, if the creditors be in law preferable, the tenants must rest satisfied with the benefit the law affords them, in the order that they ought to be ranked in law, and whatever they get at last is *lucrum* ; whereas, whatever the creditors want, it is damage to them, and diminution of their true and legal claims.

THE LORDS found, That the real creditors, upon forfeited estates, were preferable to the tenants, and likewise the personal creditors who had affected the rents by arrestments before the attainder ; and therefore found a sequestration

- No 37. necessary for ranking these creditors, and found no present necessity to determine, whether the other personal creditors were preferable to the tenants or not; but reserved that question to be determined in the ranking, whether the personal creditors or tenants ought to be preferred next to the said arresters and real tenants.'

*Fol. Dic. v. 1. p. 314. Dalrymple, No 157. p. 216.*

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SECT. V.

Quinquennial Possession.

1611. February 26. A. against B.

- No 38. A REPLY found relevant upon the act of Parliament 1584. anent five years possession, notwithstanding it was alleged that within the five years the Lord Maxwell's right of the lands of Middlebie was reduced.

*Fol. Dic. v. 1. p. 315. Kerse, MS. fol. 125.*

1623. July 10. LO. NITHSDALE against WESTRAW.

- No 39. THE LORDS found the act of possession by the space of five years not to militate in favour of the heir of the forfault person, bruiking by disposition of the donatar, except the heir will make faith that he has just cause to affirm that the lands were his heritage, and that he is prejudged by the want of his heritage, and evidents abstracted from him.

They found that the possession of five years shall be proven by any witnesses of the country.

*Fol. Dic. v. 1. p. 315. Kerse, MS. fol. 125.*

\* \* Haddington reports the same case :

JAMES MAXWELL, groom of his Majesty's bed-chamber, infest heritably by his Majesty in the lands of Glendinning, fallen in his hands by forfeiture of John Lord Maxwell, and by resignation of Robert Earl of Somerset, and made assignee by the said infestment to the warning and action of removing frae the said lands, and constitute assignee be Robert Earl of Nithsdale, who was