

No 27. Laird of Grant; who having defended upon subaltern blanch infeftments from the house of Huntly, it was *answered*, That these could not defend him, seeing the forfeiture of the King's ward-vassal Argyle, who by apprising came in place of Huntly, returned the fee to the King, without any burden by a deed of the vassal not approved by law; and though in Cairnborrow's case, No 2. p. 4170, subaltern feus were sustained by the act of Parliament King James II. allowing such feus, yet there is no ground for other subaltern infeftments, blanch or ward;

Which the LORDS sustained; for though forfeiture be penal, introduced by statute or custom, whereby treason is punished by the loss of life, lands, and goods, yet thereby the King gets no more than the forfault person had; in the same way as in liferent escheat, the fee comes to the superior *cum suis oneribus realibus*, and all infeftments, annualrents, and tacks constituted by the vassal anterior to the rebellion are valid, but forfeiture of a ward-vassal having also implied therein recognition, excludes all deeds of the vassal not authorised by law, or consented to by the superior, and therefore subaltern feus of ward-lands being authorised by the act of King James II. and before the act 1612 repealing the same, are sustained against forfeiture, but no other subaltern infeftment.

Fol. Dic. v. 1. p. 314. Stair, v. 2. p. 493.

No 28.

Found that by the forfeiture of a sub-vassal, not only his own right, but all rights flowing from him, are carried.

1682. November. LADY CALDWELL *against* GENERAL DALZELL.

BARBARA CUNNINGHAM Lady Caldwell being infeft in an yearly annualrent jointure out of her husband's estate, having pursued a poinding of the ground; *alleged* for General Thomas Dalzell who had obtained a gift of her husband's forfeiture, whose lands held of the Earl of Eglinton, That the pursuer's liferent infeftment being but a base infeftment not confirmed, could not affect the ground in prejudice of him, who had right to the lands by a gift of forfeiture. *Answered*, That albeit her infeftment be not confirmed, it ought to be sustained against the forfeiture, and the sub-vassal's feu does not fall to the immediate superior, by any crime or delinquency committed by the sub-vassal; and therefore, albeit the vassal should be denounced rebel, and remain year and day at the horn, yet if the sub-vassal's infeftment be clad with possession before the confirmation, though not confirmed, the sub-vassal would be preferred to the donators, and even in the case of forfeiture, it is expressly provided by the 37th act of Parliament 2d James VI. That where any person having lands, annualrents, liferents, or others whatsoever, holden of any person that is forfeit for treason, shall bruik and enjoy the lands and others, notwithstanding of the forfeiture of their superiors, and shall hold the same of the next immediate superior. And by the 2d act Parliament 9th James VI. declaring the possession of the party forfeited for the space of 5 years preceding the forfeiture to be sufficient to give the King and his donatar's right to the lands, It is declared, that the King has right to the lands pertaining to the persons forfeited. But so it is

when lands are feued and disposed to sub-vassals, the vassal having neither right nor possession, the same cannot belong to the King, nor his donatar, for the King coming in the vassal's place by virtue of the forfeiture, he can have no better right than the vassal had, so that whatever right was valid against the vassal ought to be sustained against the King and his donatar. *Replied,* That it is a certain principal in the feudal law, that when a vassal forfeits his feu it returns to the superior free of any burden, except such as he has consented to, so that the pursuer's base infeftment not being confirmed, cannot be sustained in prejudice of the King or his donatar. And albeit in the case of liferent escheat a base infeftment clad with possession would be preferable to the King's donatar, yet that cannot be extended to forfeitures or other feudal delinquencies, seeing a party that is defuded for a civil cause is not properly rebel, nor has committed any crime. And the King, even in that case, has right to the whole rents by virtue of the liferent escheat, albeit for the reason foresaid, the King is not in use to extend his right; and it is upon that ground likewise, that ordinarily his Majesty, when he grants gifts of escheat, they are always with the burden of the parties debts and to the behoof of the lawful creditors, albeit in law the King is not obliged to pay the debts; and in the case of all other feudal casualties, such as recognition, ward, non-entry, and the like, the feu always returns free to the superior, without the burden of any deeds done by the vassal, except as to such to which he had consented, or was confirmed by him, much more in the case of treason which is so odious and unfavourable; and albeit by the feudal law when a sub-vassal was forfeited, the feu did return to the immediate superior free of any burden, but seeing, by our law, when a sub-vassal is forfeited for treason, the feu belongs to the King, who, in respect he cannot be sub-vassal himself, has power by the law to present a sub-vassal to the immediate superior, by that same reason the donatar, by virtue of his presentation, has right to the sub-vassal's feu likewise, free of any burden, as was decided in the case of the Earl of Bothwell's Vassals, observed by Haddington, the 14th July 1610, Campbell against Lochnoras, No 25. p. 4685.

And the act of Parliament anent vassals lands, whose superiors are forfeited, was only particular as to the superiors forfeited in that Parliament, as appears by the act, which cannot be extended to other cases, and does rather clear that the common course of the law was in the contrary, otherways there had been no need of the act of Parliament as to that particular case. And the act declaring the 5 years possession of the party forfeited is sufficient to give the King or his donatar right to the lands, doth not concern this case. And albeit in the narrative of the act it is declared, that the King has right to dispose of all lands and heritages pertaining to any person convicted of treason, which are immediately holden of a subject by presentation of an heritable tenant to the superior, yet that can only be understood in *terminis juris*, in case the land be validly and legally feued, and that the same have been confirmed by the immediate superior; but if the feu be not confirmed, any feu granted by the vassal cannot

No 28. be sustained in prejudice of the immediate superior. *Duplied*, That the feudal casualities, which fall to the King by the forfeiture or delinquency of any vassal, are of two sorts; either they fall to the King *jure feudali* as superior, or *jure coronæ* by the right of the Crown; and such casualities that fall to the King *jure feudali*, the feu in that case returns to the King without the burden of any debts due by the vassal, except as to such to which he has consented, or which he has confirmed; as in the case of recognition, ward, non-entry, and the like, which hold in the same manner as other superiors. But when feudal casualities fall to the King *jure coronæ*, as in the case of gift of escheat, bastardy, *ultimus hæres*, or the forfeiture of a sub-vassal whose lands belong to the King, not by any feudal right, seeing the King is not superior, it being a principle in the feudal law, *vassalus vassali mei non est meus vassalus*, for even albeit a crime be committed against a mediate superior, yet, by the feudal law, the feu will return to the vassal who is the immediate superior, *lib. 2. feudor. tit. 55. illud quoque Zoes. de jur. feud. cap. 16. No 55.* so that the King having only right to the sub-vassal's lands, in case of forfeiture *jure coronæ* as King; it being only in the case of *lese-Majesty*, which is committed against the King. It is a certain rule in all cases, though a subject's estate fall to the King *jure coronæ*, it is always with the burden of the party's debts, which is clear from Zoesius in the foresaid cap. 16, No 60; 'Itaque non tenetur dominus, ad omne impositum quatenus feudum ad eum redit tanquam dominum, nam si tanquam ad privatum, uti donatum, aut legatum, a vassallo onera interea imposita eum sequuntur secundum regalum ex qua persona lucrum capio ejus factum impugnare non debeo, leg. 149. Digest. de regul. intr. art. de feud. parte 4. No 105. in fine.'

THE LORDS, in regard the Lady Caldwell's infestment of annualrent was not claimed by the Earl of Eglinton the immediate superior before the committing the crime of treason, found that the feu returned to the King by the sub-vassal's forfeiture, without the burden of the said annualrent, and therefore preferred the donatar.

Fol. Dic. v. 1. p. 314. Sir Pat. Home, MS. v. 1. No 251.

* * P. Falconer reports the same case :

THE Lady Caldwell having pursued a poiding of the ground, of certain lands wherein she was infest upon her contract of marriage, to be holden base of her husband, who was forfeited for rebellion *anno 1666*, and which land her husband held immediatly of the Earl of Eglintoun; there was compearance made for General Dalzell, who *alleged*, that there could be no poiding of the ground, because her husband, who was her immediate superior, was forfeited; and that he was donatar, and was upon a presentation infest by the Earl of Eglinton superior. It was *replied* for the Lady, that albeit, where the King's immediate vassal did forfeit, all the sub-vassal's rights did fall in consequence; and that the feus appertained to the King and his donatar, free of any right

granted by the traitor, unconfirmed by his Majesty, and that *jure feudali* as immediate superior, yet in this case, where the forfeited person was not the King's immediate vassal, but the Earl of Eglinton's, there was no more forfeited, but that which was standing in the rebel's person, which was only the superiority, the King only having right in this case *jure coronæ*, as he has to all allodials, as did appear from the 2d act of the 9th Parliament King James VI. which bears, That upon the King's immediate vassal's forfeiture, his lands were to remain with the King as property : But as to the other lands, not holding immediately of the King, the King had only right to present a vassal to the lands pertaining to the rebel ; and in that same act, there is an express provision, That neither the donatar of the forfeiture, nor the forfeited person's vassals, should be obliged to procure a discharge of the feu duty due to the forfeited person's superior, nor should be in hazard of irritating their feus upon that account ; which proviso had been superfluous, if the forfeited person's feus had fallen under the forfeiture, It was answered for Dalzell, That although, by the feudal law, upon delinquency of the vassal, the feu did return to the immediate superior, yet by the municipal law of this Kingdom, it did fall to the King, and did open that same way and manner to him, as it did to the immediate superior, by a feudal delict, such as recognition, purpresture, &c. And that it was clear, there is a *nexus feudalis* betwixt the King and all the sub-vassals ; that he had right to their lands not only *jure coronæ*, but *jure feudali* ; and that the same had been already decided in anno 1610, as was observed by Haddington, No 25. p. 4685., where it was found by the forfeiture of the Earl of Bothwell, his vassal's right fell to the donatar, albeit the forfeited person did not hold the forfeited lands immediately of the King, but of Dunbar of Cumnock. THE LORDS found, in regard that the Lady's right was not confirmed by the Earl of Eglinton her husband's superior, her right fell under the forfeiture ; and therefore preferred Dalzell ; which was found, in regard that the King, in the case of treason, came in the Earl of Eglinton's place ; so whatever was competent to the Earl of Eglinton, in the case of recognition, or other feudal delicts committed against him, was competent to the King's donatar of forfeiture ; and that as recognition would have cut off the lady's right, in behalf of the superior, so treason in behalf of the King.

P. Falconer, No 34. p. 18.

* * * This case is also reported by Harcarse :

FOUND that there was no difference as to the case of a sub-vassal, whether the King's immediate or mediate vassal was forfeited, and that in both cases the right of all subvassals fell under the forfeiture ; and that what moved some of the LORDS in this particular case was, that the Lady's right was not confirmed by Eglinton, her immediate superior, the time of the forfeiture, though she was confirmed the time of the debate.

Harcarse, No 493. p. 136.

* * * Fountainhall also mentions this case :

January 27. 1680. GENERAL DALZELL against the Lady Caldwell. He being donatar to Caldwell's forfeiture pursues for mails and duties. The Lady defends upon her liferent infestment. *Alleged, imo, Her husband is yet alive, and so her liferent exists not, (though in France treason is a ground of separation.) 2do, She herself was in the late rebellion in June 1679. 3tio, Though it be confirmed by the Earl of Eglinton the immediate superior, yet it is not confirmed by the King before the deed of her husband's treason; and so cannot maintain against the forfeiture. It is a very dubious case, if liferents (where the husband's possession is the wife's possession, and so her right is clad with possession), and the like sub-feudations, do fall under ward or forfeiture. See L. 66. D. Solut. Mat. where Gracchus's wife gets her jointure, though her husband be executed for sedition; and January 1674, betwixt thir same parties, where tacks were found to defend against a forfeiture. This is decided in favours of the King, in Hadd. Pract. 14th July 1610, Campbell, No 25. p. 4685.*

Fountainhall, v. 1. p. 77.

* * * Forbes also notices the same case :

THE deceased William Muir of Caldwell, having been forfeited in the year 1667, and his forfeiture thereafter gifted to the deceased General Dalzell, and rescinded both by the general act rescissory, and a special act in the year 1690, *per modum justitiæ*; The young Lady Caldwell, as heir and executor to her father, and the old Lady for her liferent right and interest, pursued Sir Thomas Dalzell of Binns, grandchild to the donatar, as having accepted a disposition from him, with the burden of all his debts contracted, or to be contracted, as if he were his heir, for payment of the rents of the estate of Caldwell, intromitted with by the said donatar, or his gratuitous assignees during the forfeiture.

*Alleged for the defender; That esto he were liable to all his grandfather's debts, they must be debts of the defunct before they can affect him. That is, they must be either such as were constituted against the defunct in his own lifetime, or against his heir. 2do, The defender's acceptation of a disposition with the burden of all debts that should be owing by the General the time of his decease, cannot make him liable for this debt, which did not then exist, nor at the time of the acceptance of the disposition was thought to be a debt: Et actus agentium non operantur ultro eorum intentionem. 3tio, The defender cannot be liable in repetition of bygones intromitted with by such a colourable title as the act of Parliament 1669, ratifying Caldwell's forfeiture, with the Sovereign's gift thereof; seeing *possessor bona fide facit fructus consumptos suos.* 4to, The special act rescinding Caldwell's forfeiture, does not bear an excep-*

tion from the act *salvo* past in that same Session of Parliament, which excepts only such acts, as by an express clause therein are excepted from the act *salvo*. So that Caldwell is only restored by the general act which appoints not repetition of rents intromitted with before the 1688, simply to persons thereby restored, but upon the condition of their obtaining special acts. Now the pursuer's special act is null, as falling under the act *salvo*.

Replied for the pursuer; The defender having taken upon him the burden of debts, must defend against their constitution, or succumb without any necessity upon the pursuer to call the General's heir, more than a creditor would be obliged to call executors before he could pursue for a moveable debt. *2do*, This was truly a debt the time of the General's death, though then *peti non poterat*, because of the forfeiture, in so far as the same had its rise from the General's intromissions without a justifiable title, and affects *retro*. That the general and the defender never dreamed this debt would have been effectual against them, is a frivolous allegiance; for what is more ordinary, than to see debtors and heirs surprized with debts they little thought of? *3tio*, To pretend a colourable title and possession *bona fide* of a forfeiture rescinded *funditus per modum justitiæ*, is contrary to, and would defeat the design of the law; for then no repetition of bygones preceding the act rescissory could be obtained. Besides, forfeitures in the person of donatars are at best but odious, and he who intromits by virtue of a gift of forfeiture subjects himself to all the hazards and repetition, and can never pretend to a *titulus coloratus*, or *bona fides*; which also holds in many other cases of the law, where reductions are decerned *ab initio*. *4to*, The special act, restoring the Representatives of the Laird of Caldwell, needed not to be excepted from the act *salvo*; because that act includes no statutory laws, but only ratifications and acts in favours of particular persons; whereas the special act in favours of Caldwell is plainly statutory, rescinding the act of Parliament 1669, and all processes of forfeiture before the justice court in absence, as contrary to the act 10th Parliament 11. James VI. The general act rescinding fines and forfeitures is expressly excepted from the act *salvo*, and by this general act, persons restored are allowed to bring in special acts of Parliament in their favours, in order to restitution *per modum justitiæ*. So that Caldwell's special act, if it could have been included in the act *salvo*, is also expressly excepted as a part of the general act.

THE LORDS found, That Sir Thomas, having accepted a disposition from his grandfather, with the burden of all his debts, was liable to the debt his grandfather had contracted by his intromissions with the estate of Caldwell, either by himself or his gratuitous assignees; and that the pursuers were founded in a special act of restitution giving them right to the bygones preceding Martinmas 1688; and that this special act, being statutory, needed not to be excepted in the act *salvo*; and if there had been necessity for any such exception, it was sufficiently provided by the general act rescissory, the foundation of the special act. The defender's allegiance upon possession *bona fide*, by virtue of a

- No 28. *titulus coloratus* was repelled, as incompetent against a restitution *per modum justitiæ; et tanquam ab initio*. Neither did the LORDS regard his other allegiance, That the grandfather's intrusions could not be reckoned a debt to burden him by the quality of the disposition, unless the same had first been constituted against the grandfather's heir of line.

Forbes, p. 104.

1756. February 27.

EVAN BAILLIE and Others *against* His MAJESTY'S ADVOCATE.

No 29.
Cautioners for a forfeited person are not entitled to claim against the Crown the expences laid out in prosecuting their relief against the forfeited estate.

THE pursuers had become cautioners for Lord Lovat in the year 1741; and being distressed by the Creditors, they entered a claim upon the forfeited estate of Lovat, for the sum they had been obliged to pay, and likewise for the expenses laid out in entering and prosecuting their claim.

Objected by his Majesty's Advocate; *1mo*, No part of these expenses did exist at the time the estate of Lovat became vested in the Crown; they are debts contracted after the 24th June 1747; and therefore cannot be charged upon this estate. Besides they were not a debt existing at the time of entering the claim. *2do*, By the vesting act no decree can pass against the Crown for penalties. And it has been a rule constantly observed, not to give the expenses of claims, however just the claims may be; and there appears no reason for establishing a different rule in the case of cautioners claiming relief; seeing every creditor is equally entitled to recover from the debtor what expense he may be put to in making his debt effectual.

Answered for the claimants; To the *first*, The debt did exist before the estate was vested in the Crown, being clearly implied in the obligation in the bond of relief, by which Lord Lovat was bound to keep them free and skaitless of this cautionary obligation, which certainly includes every expense necessarily incurred by means of it. To the *second*, This claim is not properly a penalty, but a part of the obligation of relief; and the claimants are in a very different situation from creditors claiming upon a simple bond or obligation; for that, from the nature of relief, interest is always allowed upon interests paid by the cautioner, but it is otherwise with every other creditor.

'THE LORDS dismissed the claim as to the expenses of entering and prosecuting thereof.'

Reporter, *Prestongrange*.
W. S.

Act. *Burnet*.

Alt. *King's Counsel*.

Clerk, *Kirkpatrick*.

Fac. Col. No 191. p. 284.