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It was afterwards *alleged* for the defender ; That his lands were feued out before the 1633 ; and the act of Parliament allowing vassals to feu their ward lands, is equivalent to a confirmation of the subvassal's right.

Answered ; Non relevat, unless the defender say, that his lands held ward before the year 1633, and were feued for a competent avail, and prove both, as in Lord Lauderdale's process of recognition ; and here the pursuer produces his charter, bearing the barony to hold feu of the King, which is presumed to be the ancient holding, unless the defender prove the contrary, by the more ancient infeftments, which are more likely to be found related to in his rights from the rebel's authors, than that the pursuer, as donatar of the forfeiture, can have them.

Replied ; The pursuer's charter proceeds upon his own resignation ; and all lands holding of the King are to be presumed ward, till the contrary be proven.

THE LORDS found the defender obliged to instruct *positive*, that the lands feued before the 1633, held [ward] anciently, and that they were feued for a competent avail.

Fol. Dic. v. 3. p. 313. Harcarse, (FORFEITURE.) No 498. p. 238.

1750. November 8. ROBERT BARON *against* The KING'S ADVOCATE.

No 18.

A bill granted after 24th June 1745, when the forfeited estates were vested in the King, not sustained.

ROBERT BARON in Down claimed out of the forfeited estate of Gordon of Tarpersy L. 66 Scots by bill, dated 26th September 1745 ; to which it was *objected*, That by act 20th George II. there are vested in his Majesty, without any office of inquisition, all estates belonged to the persons attainted, on the 24th of June 1745 ; so that Tarpersy's estate being vested in the King from that time, cannot be charged with any debt contracted by him afterwards.

Answered, The act vests all estates which did at that time belong to the forfeiting person, or at any time afterwards, but does not enact that they should be vested from thence, nor could with regard to estates afterwards accruing : The time of the vesting is determined by the law ; to wit, that of committing the treason for which any person was condemned ; and Tarpersy had not at the date engaged in the rebellion ; and was condemned for the taking of Carlisle.

Replied, The act is plain enough, That the estates are vested from the 24th of June, or the time of their accruing to the forfeiting person : The estates of rebels in 1715 were in the same terms vested by an act *imo* George I. for appointing commissioners to inquire, &c. And in an act *4to* George I. for vesting the forfeited estates, &c. it is said the said estates were vested from and after the 24th of June 1715 ; whereby, if there had been any dubiety, the time from which they were then vested, was determined ; and the present act, in the same terms, must have the same meaning : Sequestrations of any such estate from the first of August are declared void ; which must have been good till the actual at-

tainer, if till then the estate was vested in the condemned person ; and payments by tenants after the 24th of June, without fraud, are sustained to discharge ; whereas, if the estate was not then vested in the King, the payments were good in law.

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Duplied, The act does not vest from the 24th of June, as neither does that *imo* George I. and the recital in the act *4to* George I. is a mistake ; but however, there has been no statute reciting the present act in this manner : The clause annulling sequestrations makes for the contrary interpretation, as they are only annulled from the first of August ; whereas otherwise they were null by law from the 24th of June ; and the clause discharging tenants was necessary ; because payments might have been made after the master's engaging in the rebellion, which would have been criminal in the tenants.

THE LORDS rejected the claim.

Reporter, *Strichen*.

Act. *H. Home*.

Alt. *A. Home*.

Clerk, *Pringle*.

D. Falconer, v. 2. No 161. p. 184.

* * * Lord Kames reports the same case :

ROBERT BARON, 26th September 1745, sold to Charles Gordon of Tarpersy some corn and straw, and got a bill of L. 66 Scots for the price. This transaction was after the commencement of the rebellion ; but Tarpersy was a loyal subject at the time, though he afterward joined the rebels. His estate being surveyed for the use of the Crown, Robert Baron put in his claim ; to which it was *objected*, that, by the late vesting act, the estates of those who were attainted of high treason were vested in the Crown as upon the 24th June 1745, and therefore, that the Crown was not liable for any debts contracted after that period.

In *answer* to this objection it was premised, that it is contrary to common justice to punish one person for the crime of another, a maxim that obtained in the Roman law, not only during the times of liberty, but even after the empire was established, when the punishment of treason was farther extended than perhaps in any other country ; creditors were safe, and even children, who notwithstanding the confiscation, had a claim for their legitim.

It may be thought strange at first sight, that the laws of this island should have deviated so much from common justice ; but, upon examination, this will not be found a just accusation. When a vassal committed any crime that rendered him incapable to serve his superior, his land returned to his superior, because it was held upon the condition of doing service ; and the superior, thus getting possession of his own land, was not liable upon any ground of law to pay the vassal's debts. This was the law even in treason, till it was altered by the statute 25th Edward III. in which it is enacted, That, upon forfeiting for treason, the lands shall return to the Crown, not only what are held of the Crown, but what are held of any other subject superior ; which was founded

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upon good policy, because it broke, in some measure, the connection between superiors and their vassals; whereas formerly, the confiscation for treason was nothing where it was committed with the superior's consent. The clan-act, which restored the old law in this particular, was certainly an error against good policy; and therefore is justly abrogated in this particular by a late statute. But this by the way; for it is chiefly to be attended to, that when the King came in place of the superior, with regard to forfeitures for treason, he enjoyed the same privilege which the superior did before him, to be free from the vassal's debts; therefore this regulation was no infringement of the principles of common justice, but what follows from the nature of the feudal holding.

While the superior was understood proprietor, it could be reckoned no hardship that his own land should return to him free, when the vassal proved unable or unwilling to perform the service covenanted. But after the vassal came to be considered as proprietor, which introduced the law term *dominium utile*, it was certainly unjust to deny creditors a remedy, when their debtor was forfeited of his land; and this was considered as a real grievance for more than a century before the revolution. The act 33. Parl. 1644, 'declares it to be against all equity and reason, that creditors should be prejudged by the forfeiture of their debtors; or vassals, by the forfeiture of their superiors.' And the act 33. Parl. 1689, 'declares it to be one of the great grievances of this nation, that in the late times many honest and faithful subjects have been ruined and undone, for other men's crimes and rebellions.' And the act 33. Parl. 1690, though it afford not a complete remedy to this evil, yet cleaves to the same rule of justice, 'that every man should suffer for his own fault, and not the innocent for the guilty.'

These things premised, the claimant proceeded to examine what remedy was afforded to creditors by the treason-law since the union. By the 1st act, 1mo *Georgii I.* appointing commissioners, the estates personal and real of persons forfeited for the rebellion 1715, at any time betwixt the 24th June 1715 and 24th June 1718, are declared to be vested in his Majesty for the use of the public, without any retrospect. And, to prevent collusion, 'declared that all conveyances and assurances of any real estate, made after the first of August 1714, by any person attainted as above, shall be deemed fraudulent.' In this statute debts are not mentioned, nor are they in any shape brought under a legal presumption of fraud. The act 4to *Georgii I.* vesting the said estates in trustees, proceeds upon a mistake, as if, by the foresaid statute, the said real estates had been vested in his Majesty from and after the 24th June 1715. But then, as this must have been a forfeiture of all debts contracted thereafter, so far as concerns the said real estates, which was never intended, there is a salving clause in favour of creditors, who lent their money *bona fide* after the said 24th June 1715, and before committing the treason, that upon proof of their being true debts, they should be sustained.

Now it appears, that the late vesting act is copied from the former of the statutes now mentioned. The real estates are not vested in his Majesty more than the personal, before the actual forfeiture; for the statute has no retrospect. And, to prevent collusive conveyances of real estates, every such conveyance is deemed fraudulent that is granted after the 24th of June 1745; unless the onerous cause be proved. But not a single word of debts, which are left to the provision of the common law. And indeed, had it been the purpose of the statute, to vest in the Crown the real estates *retro*, from the 24th of June 1745, there must have been a clause saving such debts contracted thereafter, as should be proved to be *bona fide* contracted.

THE COURT was of opinion, that, by the late vesting act, the real estates were vested in the Crown upon the 24th June 1745; and their reason was, *imo*, That it is expressly declared, that every subject belonging to a forfeiting person, 24th June 1745, or that afterwards did belong, should be vested in his Majesty; which must mean, that they were vested in his Majesty, as upon the 24th June 1745. They observed that the first vesting act in the time of George I. was in the precise same terms with the present; and that the second vesting act *4to* *Georgii* I. understood it to have the same meaning that is now given to the present vesting act.

‘ And upon this ground they cut down Baron’s claim, as being a debt contracted by Tarpersy after his estate was vested in the Crown.’

If this was the intendment of the statute, it ought to have provided for debts contracted after the 24th June 1745, by giving access to prove the true cause, as in the second vesting act of George I. above mentioued. But this was an omission, which no doubt would have been corrected, had there been an application to Parliament. But so few creditors were in the same case with Baron, that it was not thought necessary to make the application.

Rem. Dec. v. 2. No 119. p. 244.

1753. February 9.

ELIZABETH FARQUHAR *against* His MAJESTY’S ADVOCATE.

ELIZABETH FARQUHAR laid out the price of her own estate in purchasing the lands of Pitscandle, and took the disposition in favours of herself in liferent, for her liferent use allenary; and, in the case of her predecease, to James Stormont her husband in liferent, for payment of an annuity of 500 merks Scots; and to Francis Stormont their son, and the heirs-male of his body in fee. James Stormont the husband, being attainted of high-treason in January 1747, was transported to the plantations in America, in pursuance of a condition inserted in his Majesty’s pardon to that purpose. And this banishment was confirmed by act of Parliament passed in the 20th year of his Majesty’s

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A husband’s forfeiture does not transfer to the Crown the rents of his wife’s land estate. The *ratio decidendi* of this case was, that the husband having been banished for life, the wife was to be considered as a *femme sole*.