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 EARL OF  
 SUTHERLAND  
 v.  
 ROSS, &c.

WILLIAM, Earl of SUTHERLAND, - *Appellant* ;  
 ROSS, ANDERSON, *et alii*, - - - *Respondents* .

25th March, 1743.

SUPERIOR AND VASSAL.—FORFEITURE.—RECOGNITION.—PERSONAL OBJECTION.—ACT 1. Geo. I. c. 20.—ACT 1. Geo. I. c. 50.—ACT 5. Geo. I. c. 20.—A vassal having incurred recognition by alienating part of his lands, and the superior, upon his subsequent forfeiture, having, in his exceptions taken before the Court of Session against the survey made by the trustees, founded his claim solely upon 1st Geo. I. c. 20, and obtained decree, it was found not competent for him thereafter to insist in a declarator of recognition on the ground of the alienation.

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[Elchies, *voce* Forfeiture, No. 3.]

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By the act 1 Geo. I. c. 20, entitled, “ An No. 69. “ act for encouraging superiors, vassals, &c. in “ Scotland, who shall continue in their duty to “ his Majesty,” it was enacted, ‘ That if any ‘ subject of Great Britain holding lands of a sub- ‘ ject superior in Scotland, had been, or should be ‘ guilty of high treason, his lands, &c. should re- ‘ cognosce, and return into the hands of his supe- ‘ rior, and the property be consolidated with the ‘ superiority, so as such superior did diligence ‘ really and without collusion, for attaining posses- ‘ sion of such lands within six months from the at-

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‘ tainder of the vassal.’ But it is provided, “ That  
 “ no attainder should exclude the right or dili-  
 “ gence of any creditor remaining peaceable and  
 “ dutiful, for security of payment of any just debt  
 “ contracted before the treason committed.”

By the 13th sect. of the 1st Geo. I. c. 50, (an act for vesting in his Majesty for the use of the public, all the estates of persons attainted for high treason,) “ All persons having any right or claim,  
 “ &c. whatsoever in law or equity, in or to, &c.  
 “ such estates,” are directed to enter the claim before the commissioners in the manner directed, and in default thereof, every such right, claim, &c. shall be held null and void, &c. and the claimant is directed to express particularly the nature of his right or claim.

By the 5th Geo. I. c. 20, All persons claiming any right to an estate, which has been seized by the trustees, &c. or claiming such estate as superior or vassal, by virtue of the act for encouraging superiors, are required to present to the Court of Session their exceptions against the possession taken by the trustees, together with the grounds of their right, &c. within the term prescribed.

The present question, as affected by these acts, arose out of the following circumstances: Lord Duffus (the vassal in the lands of Skelbo,) was attainted of high treason by act of Parliament, and the estate was surveyed by the trustees as forfeited to the crown.

A claim was then given in for John, Earl of Sutherland, the superior of the lands, founded 1st upon the act of the 1st Geo. I. c. 20, “ for encou-

raging superiors," and setting forth that he had brought his action within the six months after Lord Duffus' attainder; and 2d, Upon an act of recognition alleged to have been committed by Lord Duffus previous to his attainder, in alienating the one half of his lands without consent of his superior, and bearing that a summons of declarator of recognition, reduction, &c. had already been instituted upon this ground against the vassal.

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No determination, however, was pronounced by the trustees, and afterwards in pursuance of the 3d act above recited, (5th Geo. I. ch. 20,) the Earl of Sutherland, and William Lord Strathnaver, his son, presented to the Court of Session their exceptions against the survey made of the lands of Skelbo by the trustees, and claimed the same under the act of the 1st Geo. I. ch. 20. "for encouraging superiors." The Court of Session, (10 Sept. 1719,) "Sustained the above exceptions, and declared the said Earl of Sutherland and his son had right to the full property and possession of the lands therein mentioned; with the burden always of the payment of the debts affecting the same."

After this, some of the creditors gave in claims in virtue of this reservation, and were found entitled to payment of their debts; and the appellant then instituted (in 1736) an action of declarator of recognition, on the ground (already mentioned) that Lord Duffus had, previously to his attainder, alienated more than half of his estate without the consent of his superior.\* In this action the creditors

\* The effect of a decree of recognition would have been to have cut out the creditors from their claim of debt, whereas under the act "*for encouraging superiors*," &c. the estate recognoscing to the superior was burdened with the payment of lawful debts.

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of Lord Duffus made appearance, and objected that the appellant's father and grandfather having, in place of making up any title to the said estate by virtue of the said recognition, claimed it, (in their exceptions to the Court of Session,) as forfeited to them under the act "for encouraging superiors," and having obtained a decree, declaring the estate to belong to them, in respect of the rebellion of their vassal, they thereby acknowledged a right and property in their vassal at the time of the rebellion, which was a waiver of any claim of recognition,—that the Earl of Sutherland ought,—in his exceptions to the Court of Session,—to have claimed the estate upon his casualty of recognition in the terms of the 5th Geo. I. c. 20, and having failed to do so, his claim of recognition was now barred.

It was answered, that a claim had been duly entered before the trustees, both under the act "for encouraging superiors," and upon the recognition, upon which no decision having been pronounced, the appellant was now at liberty to insist in his declarator of recognition.

The Court, by their first interlocutor, (5th Feb. 1740,) found 'That the appellant, the Earl of Sutherland, having presented a claim before the commissioners of inquiry, upon his right of recognition, as well as upon the act 1 Geo. I. c. 20, for encouraging superiors, &c. and the commissioners having given no judgment on the same,—it was competent to the said Earl to insist now in the process of declarator of recognition, and therefore repelled the objections.'

In a reclaiming petition it was pleaded, that abstracting from the act of the 5th Geo. I. c. 20, and

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supposing it unnecessary to have entered an exception before the Court of Session on the claim of recognition, yet no sufficient claim had been entered with the trustees, upon the title of recognition now set up, in terms of the vesting act of the 1st Geo. I. c. 30, sect. 13, and that the claim thus presented on that ground was not a proper claim, nor agreeable to the directions of the statute, being destitute of many of the forms and requisites prescribed.

It was answered, *inter alia*, that even supposing the claim to have been imperfectly brought, it was not incumbent upon the Earl to enter any claim before the trustees on the casualty of recognition, in order to preserve his right.

Upon advising these pleadings, and after a hearing in presence, the Court (9 July, 1740) found, “ That  
 “ for preserving the pursuer’s casualty of recogni-  
 “ tion, it was necessary for him to enter a claim  
 “ thereof before the commissioners appointed for  
 “ enquiring into forfeited estates, and that notwith-  
 “ standing of his right as superior of the lands, sub-  
 “ ject to the recognition by the act of the 1st Geo.  
 “ I. ‘ for encouraging superiors,’ ” &c. ; and found,  
 “ That no sufficient claim of the said recognition  
 “ was by him entered before the commissioners,  
 “ and therefore that he was not entitled to insist in  
 “ this recognition.” Their Lordships adhered (24  
 June, 1741.)

A petition was then presented by the creditors, stating that the court had only determined upon some of the objections made by them to the action at the instance of Lord Sutherland, and that others were still undisposed of. They insisted, therefore, 1st, That a recognition could not be declared after

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a forfeiture, as this would expose the crown to collusion between the superior and vassal. 2dly, That if there had been any room for the recognition, Lord Sutherland was now barred from claiming any right under it, by his having presented his exceptions to the Court of Session, against the survey made by the trustees of the lands of Skelbo, and having founded his claim entirely upon the act “for encouraging superiors.”

Answers were given in to this petition, but before the same were advised,

Entered  
 11 Dec.  
 1741.

An appeal was brought by Lord Sutherland from the interlocutors of 9 July, 1740; and 24 June, 1741.

*Pleaded for the Appellant*:—It was not by any means necessary for the appellant, for the preservation of his right of recognition, to enter any claim before the commissioners. The clause of the act of the 1st Geo. I. c. 50, requiring the presentation of claims under forfeiture, relates solely to estates vested by that act in his Majesty for the use of the public, but by the previous act “for encouraging superiors” the lands of persons attainted, held of subject superiors, were declared to recognise, and return to such superior, as, without collusion, and within the time limited, obtained possession of them; and as the subsequent act “for vesting forfeited estates in his Majesty, for the use of the public,” could not be intended to take away such estates from those to whom they had been granted by the previous statute, the estate in question could never have been vested in his Majesty, so that the claim required to be presented by this act was not necessary. Indeed there is an

express provision in the latter statute, that the right before granted to superiors should not be taken away, or even altered.

But if such a claim had been necessary, there was one presented to the commissioners, which made express mention of the recognition.

*Pleaded for the Respondents* :—It was essential for the preservation of the right of recognition, that a claim should have been entered, because by the act of the 1st Geo. I. c. 50, all estates belonging to attainted persons were vested in his Majesty for the use of the public, and this without any exception, so as to include even those estates which were liable to be claimed by the superiors, and as the interest granted to superiors by the previous act “for encouraging superiors” was not simple or absolute, but conditional, and depending upon a future potestative condition,—viz. the performance of the statutory requisites, with which superiors might or might not comply,—the estate of the forfeiting vassal must, in the mean time; be held to have vested in the crown, until the superior has complied with the terms required by the statute, to divest the crown of the estate, and to vest it in himself.

By the failure, therefore, to present a proper claim before the commissioners, and by the appellant’s having, in his exceptions to the Court of Session, founded his demand solely upon the above act, without taking any notice of his claim arising from the alleged recognition, he must be held to have renounced this claim; for although the same person may have different titles to the same estate, yet as the statute expressly declares all titles not claimed

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before the commissioners to be null and void, and the estates liable thereto to be from thenceforth freed and discharged, it follows that a person claiming under one title, and not claiming by virtue of any other, as effectually extinguishes that title on which he neglects to claim, as if the two titles had been in different persons, one of whom had omitted to make any claim, according to the maxim, *Quamdiu duo jura concurrunt in uno*.

If there is any deficiency in point of law in the appellant's title, he can have no pretence to indulgence from a court of equity, the whole purpose of the present attempt being to deprive onerous creditors of the payment of their just debts.

Judgment,  
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After hearing counsel, 'it is ordered and adjudged, &c. that so much of the said interlocutor, whereby the Lords of Session found, "That no sufficient claim of the recognition in question was entered before the commissioners for enquiring into the forfeited estates," be, and the same is hereby reversed; and that in the said interlocutor, after the words ("casualty of recognition") these words be inserted, ("incurred prior to the treason committed by the vassal;") and it is hereby declared, that the appellant's grandfather and father having claimed the estate in question, by their exceptions presented to the Court of Session, as forfeited to them under the act of the first year of his late Majesty, for encouraging superiors, &c. and having, in the year 1719, obtained a decree of the said court, declaring the estate to belong to them, by virtue of the said act, in respect of the rebellion of their vassal, with the burden always of a proportion of the debts affecting the said estates, the same



‘ was a waiver or renunciation of any recognition  
 ‘ prior to the treason so committed as aforesaid, and  
 ‘ that the appellant is bound thereby. And it is fur-  
 ‘ ther ordered and adjudged, that the residue of the  
 ‘ said interlocutors, with the alterations or varia-  
 ‘ tions before mentioned, be, and the same is here-  
 ‘ by affirmed.

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 CALDER, &C.  
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For Appellant, *Ro. Craigie, C. Erskine.*  
 For Respondents, *Will. Hamilton.*

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PATRICK CALDER of Redford, and } *Appellants ;*  
 WILLIAM ANDERSON, Surgeon, }  
 MARY PROVAN, - - - - - *Respondent.*

12 *January*, 1744.

PACTUM ILLICITUM.—BILL OF EXCHANGE.—Action sustained upon a gratuitous bill which had been granted by a man in security of a promise of marriage, the marriage not having taken place.

Costs.—£40, given to Respondent.

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[*Elchies voce* Bill of Exchange, No. 25; Rem. Dec. II. No. 30 ;  
 C. Home, No. 193 ; Mor. Dict. 9511.]

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MARY PROVAN raised an action against Calder and No. 70. Anderson, concluding for restitution and payment of a bill for L.100, which had been granted to her