

No 65. be pretended he possesses *tanquam prædo*, which would make him liable to violent profits, yet there is such a rotation in human affairs, that they who take gifts of forfeiture, should remember they are not very secure, and a time of restitution may come; forfeitures being often rescinded with us on every turn and change of government, as appears by the rescissory acts in the Parliaments 1661 and 1690; and by many other examples. However, the restitution of by-gones seemed very hard to some; the answer was, *Durum est, sed ita lex scripta est.*

Fol. Dic. v. 1. p. 315. Fountainball, v. 2. p. 297.

1724. January 21.

The EARL of DELORAIN *against* The DUTCHESS of MONMOUTH and BUCCLEUGH.

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The Dutchess of Monmouth obtained a gift of the Duke's forfeiture, and in virtue of it recovered his personal estate. She afterwards granted to her son, the Earl of Delorain, for love and favour, a bond for L. 20,000, which she paid to him. After the act 18, Parliament 1690, rescinding all forfeitures since 1665, and restoring the heirs against the donatars, was passed, the Earl brought an action against his mother, for the value of his father's personal estate. The Lords found that the gift of the Duke's forfeiture, under the Great

ANNO 1685, the late Duke of Monmouth was attainted of high treason in England, and suffered.

In the same year, after his decease, a process was carried on against him in Scotland for high treason, before the Court of Justiciary, and a doom of forfeiture was recovered.

Anno 1686, the Dutchess of Buccleugh his relict obtained a gift of the Duke's forfeiture, in virtue whereof she recovered his personal estate, which consisted chiefly in arrears of rents.

Anno 1688, Her Grace the Dutchess, for the love and favour she bore to Lord Harry Scot, now Earl of Delorain, her second son by the Duke of Monmouth, granted him a bond for L. 20,000 Sterling; which bond was since that time paid.

Anno 1690, by the act 18. Parliament 1. Sess. 2. William and Mary, entitled an act rescinding the forfeitures, &c. since the year 1665, all dooms of forfeiture pronounced from that period, and particularly that of the Duke of Monmouth, are rescinded, and all forfeiting persons, their heirs and successors, rehabilitated and restored to their goods, &c. and to all and sundry their lands, heritages, tacks, steadings, debts, and possessions; and all donatars of forfeitures made accountable to forfeiting persons, their heirs and successors, for all sums received by them.

The Earl of Delorain, as executor decerned to his father the Duke of Monmouth, brought an action against the Dutchess, concluding payment of L. 50,000 Sterling, as the personal estate of his father, to which he was entitled in virtue of the general act rescissory, and with which the Dutchess had intromitted.

It was *pleaded* in defence for the Dutchess, *imo*, That though by the general act rescissory, the doom of forfeiture pronounced against the Duke in Scotland was repealed; yet his Grace having been forfeited by a different sentence in England, which was under the same Sovereign with Scotland, and which sen-

tence never was repealed, his moveables and personal estate remained forfeited, in consequence of that doom of forfeiture in England, upon this rule in law, *quod mobilia non habent situm, sed sequuntur personam*; and therefore there was no place for any succession to his executors in moveables lying within any of the King of England's dominions.

2do, That granting the act 1690 imported a full restitution as to all estate in Scotland, both personal and heritable, yet it did not restore to any bygone rents of lands due and uplifted before the term of Martinmas 1688, except in case of special reasons and acts to be passed thereanent in manner therein mentioned: But so it was, that no special act ever passed in favour of the Duke of Monmouth's Executors; and therefore the pursuer's claim must come to nothing, since all the executry, which belonged to the Duke in Scotland, consisted in rents preceding the 1685.

3tio, That though the Dutchess should be found accountable even for other subjects different from the bygone rents, yet the L. 20,000 Sterling, contained in the bond of provision granted by her to the pursuer, ought to be imputed *pro tanto* towards the satisfaction of his claim, both upon the maxim *debitor non præsumitur donare*, and upon the presumed intention of parties.

It was answered for the pursuer, *imo*, That before the Union, when the two nations were, in point of law, jurisdictions and judicatories, distinct and independent, an attainder pronounced in one of the nations could not produce any effect whatsoever in the other; and for this reason it was thought proper to carry the Duke of Monmouth's estate in Scotland into a forfeiture by a sentence of the Court of Justiciary there. That the rule *mobilia sequuntur personam* may obtain where a foreigner is condemned by the laws of any country as to his moveables in that country, but can never have any force or authority as to his personal estate at home.

2do, It was answered, That the arrears of rent which fell due during the Duke's lifetime, and composed his personal estate, were debts intromitted with by the Dutchess in virtue of her gift; and that though the donatar's accounting for bygone rents, preceding Martinmas 1688, was limited to the case of special reasons and acts thereafter to be made, and that no such special acts were ever made in favours of the Duke of Monmouth's Executors, yet this clause must relate only to the bygones betwixt the forfeiture and the year 1688, but does not concern rents due before the forfeiture, which must come under the word *debts* in the act of Parliament, to which the forfeited person and his heirs were restored without any such limitation or exception.

It was answered to the 3d, That though it be a rule in law, that *debitor non præsumitur donare*, yet that could not take place in this case, the Dutchess being a person of an opulent fortune, who might well be presumed to give her son this gratuity out of her own estate, the better to enable him to live up to his rank and quality. 2do, The bond being granted before the act rescissory, the Dutchess was not debtor at that time; and therefore the brocard could not

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Seal of England, could not give the donatar right to his moveables in Scotland; and that the Dutchess was not liable for rents due preceding Martinmas 1688, and uplifted by her before the date of the act; and that the L. 20,000 must be imputed *pro tanto* of the sums for which she might be accountable.

No 66. be applied in this case. *3tio*, That in the discharge granted not many years ago for the last moiety of the bond, there is an express reservation of my Lord Delorain's right to his father's executry; which must imply an acknowledgment on the part of the Dutchess, that my Lord had right to that executry, and that she meant not to have the bond imputed towards the extinction of that right.

Replied for the Dutchess, That it appeared from the whole strain of the act, that *bygone rents* were mentioned in contradistinction to *debts*; and if the subjects amongst which the word *debt* is classed are considered, it must be plain that *debts* are only to be understood of bonds or other securities which the forfeited person was possessed of at the time of the forfeiture.

As to the imputation of the bond of L. 20,000 it was *replied, imo*, That my Lady Dutchess's intention at the time of granting it must appear plainly to have been, that it should be paid out of the Duke's executry; for at that time she had no other fund but an estate so closely entailed, that she could not burden it with such a sum. *2do*, The bond bears to be in satisfaction of what her son could claim by her death, which was nothing else than the personal estate of the Duke, as at that time in the person of the Dutchess. *3tio*, That though at the time of granting the bond, the forfeiture was not repealed, so that the Dutchess was in appearance not debtor, yet, by the retrospect in the act rescissory, she is stated debtor even before that date. *4to*, As by the reservation in my Lord Delorain's discharge of the last moiety in the bond, his right was reserved; so by the nature of the thing, without any express words, my Lady Dutchess's objections and defences were likewise reserved.

THE LORDS found, That the gift of the Duke of Monmouth's goods and chattles, under the Seal of England, on his attainder there, could not give the donatar right to his moveables in Scotland. And found the Dutchess of Buccleugh was not liable on the act rescissory, for rents preceding Martinmas 1688, uplifted before the date of the act rescissory. And found the bond of provision by the Dutchess to the Earl of Delorain must impute at least *pro tanto*, in satisfaction of the claims for which the Dutchess, in virtue of the act rescissory, may be accountable to the Earl, as executor to his father.

Reporter, Lord Pollock. Act. Dun. Forbes. Alt. Dundas Advocatus. Clerk, Mackenzie.

Fol. Dic. v. 3. p. 235. Edgar, p. 2.