

S E C T. IX.

Act 1. Geo. I. chap. 20. called the Clan Act.

1748. *December 14.*FARQUHARSON of Invercauld *against* The King's ADVOCATE.

No 70.

It was objected that the Clan act was applicable only to the rebellion 1715. The objection was repelled.

The benefit of the Clan act not competent to any person who, on any occasion, has proved dis-loyal.

ALEXANDER FARQUHARSON of Monaltry was attainted of high treason, for being concerned in the late rebellion; whereupon John Farquharson of Invercauld claimed certain lands which had been held of him by Monaltry, as recognised to the superior in virtue of an act of Parliament *primo Georgii I.*, commonly called the 'Clan act'; he having continued loyal, and having obtained himself infeft in the lands, and done diligence for getting possession thereof, as required by the act.

Answered by the King's Advocate, The law was made with a view to the circumstances of the nation at the time, on the accession of a new family to the throne, and when the Pretender had declared his intention of invading the kingdom; on which account it was thought proper to invite the subjects to loyalty by extraordinary encouragements; but these sanctions were not intended to continue, or take place, except with regard to the rebellion which after followed, and of which there was then a near prospect.

The title of the act is for encouraging all superiors, &c. who should continue loyal to his Majesty King George; and his present Majesty is not the King George reigning at making the act.

The law on a preamble, that whereas the Pretender had declared his intention, and in such conjuncture especially it was just to punish rebellious subjects, and to reward those who continued loyal; proceeds to the enacting clauses, which therefore relate to the conjuncture expressed, and that being past, are of no further force: The first of these declares what shall be treason, but goes no further therein than was done before by an act 13, and 14, Gul. III.; then it gives the reward of holding their lands of the Crown, to vassals continuing loyal to the King, his heirs and successors; from which it does not follow, that the provision was to be perpetual, as it was possible the King might have died before the rebellion was suppressed: It next gives a premium to tenants; and then provides, that the lands of vassals guilty of such high treason, or treasons as aforesaid, should recognise to the superior who continued loyal to the King, his heirs and successors; which foresaid treason is the corresponding with or adhering to the said Pretender, who is no where before mentioned except in the

preamble, where mention is made of his declared intentions, and the conjuncture wherein it was expedient to give extraordinary rewards; so that the present clause is still referred to that conjuncture. It is after made a necessary requisite for claiming any benefit by this act, that the person, if called upon, shall have joined with his Majesty's host, in opposition to the said Pretender; that is, with the army of the then present King, against the rebellion which the Pretender was at that time raising.

There are several other heads in this act, one for avoiding all conveyances made after 1st August 1714, by persons who should be convicted of the treasons aforesaid; which must necessarily be only applied to persons convicted of the rebellion 1715, since posterior thereto many conveyances may have been made by persons concerned in the late rebellion, who had no such intention at the time of making them.

There is a provision empowering the Court of Justiciary to call persons suspected to Edinburgh, which is plainly temporary, being limited to 23d January 1715.

The next clause, freeing the heirs of persons who should be killed in his Majesty's service from the casualties of ward-holdings, refers to the reigning King.

The next, because it was hard that any creditor remaining dutiful should suffer by the rebellion of his debtor, enacts, That no conviction on account of the high treasons above-mentioned, should hurt the right of any such creditor. It is to be observed, that by the feudal law, which obtained in Scotland, the Crown, upon a forfeiture, was under no obligation to pay personal creditors, or to acknowledge base infestments unconfirmed; which rigour was first mitigated by act 33d Parl. 1644; but this law being rescinded, was not renewed till the 33d act, Parl. 1690, made in pursuance of one of the articles of grievances declared by the states at the revolution. Afterwards the English law concerning treason being made ours by act 7^{mo} *Annæ*, it was doubted whether the benefit of this act could be claimed by creditors; for which reason the present clause was inserted in the act now under consideration; but this referring to the treasons aforesaid, neither extended to all treasons, nor was a perpetual sanction; and the creditors of the late rebels are indebted for their payment to the act 20th of the King, made for vesting in his Majesty the estates of certain traitors, and also for satisfying the lawful debts and claims thereon.

It is of little importance, whether the next head, empowering lieutenants of counties to search for and seize arms and warlike stores, be subsisting or not, as more ample provision is made in that matter by posterior acts; and the last introducing into the law of Scotland an act *primo Gul. & Mar.* for better securing the government, by disarming Papists, seems to be a perpetual provision, but it is nowise a consequence from this, that the rest of the act subsists, since different clauses in the same act may be perpetual and temporary; and this clause probably was of the nature of a rider, added to the act, as there is nothing in the title relative to it.

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Replied, This law ought to be extensively interpreted, both as containing a grant to the people; and as encouragements given to loyalty are advantageous to the government; but however there is no need of extending it by the rules of interpretation; the endurance is not limited, and it must be by interpretation if it is restrained. Little argument can be drawn for this from the title of the act, as titles are added after all the readings are over, and the bill agreed to; besides, the title gives no advantage to the respondent; the King is a sole body corporate, and what is said of him is meant of future Kings; and in this same act the reward is given to those who should continue loyal to the King, his heirs and successors.

The conjuncture referred to in the preamble is not to be understood of the time then present; but of the conjuncture of circumstances, to wit, the existence of a Pretender to the Crown, who had declared his intentions to prosecute these pretensions; and the preamble says, that in *such* conjuncture it was proper, &c. whereas in a subsequent clause, giving power to lay up suspected persons, which is limited in time, the expression is of *this* juncture; the conjuncture of circumstances still remains, at least the conjuncture of the late rebellion, was *such*, being as like the former as one case could be to another.

The treasons mentioned in the act continue for the life of the Pretender, and upon any person's being convicted of the said treasons, the reward is given, which provision therefore is of the same endurance; it has also a retrospect to treasons of that kind formerly committed; so that it had not solely the approaching insurrection in view, and is not to be restricted thereto.

The difficulty arising from the clause annulling voluntary conveyances from October 1714, is solved by the consideration, that in the same act some clauses may be temporary, and some perpetual; which the respondent acknowledges, as he does the reasonableness of taking this for a temporary clause; but if it should be thought so conceived as to annul all conveyances made since by persons concerned in any treason, though innocent at the time of making them; the difficulty is removed by the statute 20th Geo. II, for vesting the forfeited estates in his Majesty, and for satisfying the lawful claims thereon; whereby the retrospect of annulling conveyances is limited to June 1742.

The clause for laying up suspected persons is limited to a fixed time; from which it may be inferred, that where the limitation is not express, the sanctions are designed to be lasting; that is, for the Pretender's life; and the last clause is acknowledged to be a subsisting regulation.

The respondent does not know where to fix the period of the act's endurance, whether at the death of the late King, or the suppression of the rebellion.

Duplied, The law ought to be strictly interpreted, not only as contrary to the common rules of law, but as a trial of an expedient, which was found not to answer, but to have bad effects; and is since repealed, in case it did subsist.

There is nothing to hinder the pleading, that the provision was put an end to by the suppression of that rebellion, at least that it was by the death of the

King ; but the argument insisted on is, that the period was the suppression of the rebellion, it was possible the King's death might have been first, and therefore the encouragement is given to those who continued loyal to him, his heirs and successors ; but the event to be hoped for, and which happily existed, was that the rebellion should be first suppressed ; whence the act, for the most part, makes use of the expression of the King, and of his Majesty King George, as having only the present conjuncture in view ; the clause annulling conveyances is necessarily connected with that giving the rewards, and must be interpreted with the same latitude ; the inconveniency whereof is not solved by the answer made from the late vesting act, as that statute relates to all treasons ; whereas the act in question concerns only a particular kind ; and there is no absurdity that deeds should be annulled from one period by one statute, and the same from a longer period by another, especially when the one is more comprehensive than the other.

By the late vesting act, the estates of traitors are declared to be forfeited, and vested in his Majesty, without any saving of the right of superiors, as was done by that past 1st Geo. I.

Triplied, That the law was in itself good, but failed to produce the effect, from an abuse committed by the superiors, in favouring their forfeiting vassals ; and the Parliament repealed only part of it ; from which it may be inferred they were of opinion it did subsist, and that the remainder was proper to be left subsisting.

Traitors estates are vested, subject to such eviction as should arise on determining the claims ; which word properly expresses the effect of the right granted to superiors ; and the intention of the act was only to save the necessity of inquisitions.

Observed, It was no absurdity to suppose that all entails and voluntary conveyances to be made, during the life of the Pretender, should be null, if the makers afterwards were guilty of treason in his favour ; and the other sanction in the clause was only intended for prevention of frauds.

THE LORDS found, that the act of Parliament of the first of the late King founded on, was and did continue a subsisting law, in so far as concerned the clauses therein, relating to superiors, landlords, and tenants, who should continue in peaceable and dutiful allegiance to his Majesty, his heirs and successors, until the 29th day of September last, that the said clauses did stand repealed by the late act of Parliament, past in the 21st year of his present Majesty.

January 4. 1749.—IN this cause, which is mentioned 14th December 1748, it was objected to the claimant, that he having failed in his loyalty, on occasion of the rebellion 1715, was not entitled to the benefit granted by the statute to loyal superiors.

Answered, The loyalty made a requisite for claiming the benefit of the act, ought to be understood of remaining loyal on occasion of the treason for which

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the vassal was forfeited; and a person ought not to be excluded from his reward on that account, though he may have failed in his duty on a quite different occasion; the political view of the statute is chiefly for engaging such to remain peaceable, who might else be tempted to rebel; and therefore it can never have been the intent thereof, to exclude from its benefit those whom it was most necessary to engage to their duty; the claimant is sorry that truth obliges him to acknowledge, he was so far misled as to be concerned in that rebellion; but he has seen his error, and his conduct from that time forward has been entirely loyal.

Replied, The act is express, that none are entitled to the benefits granted by it, but those who have continued loyal; and this cannot be restricted to any particular time or occasion, since it is impossible precisely to determine when a rebellion is at an end, or how long a conspiracy tending to it may have been on foot, or may last after its suppression, so as to connect one insurrection with another.

‘THE LORDS found the claimant not entitled.’

Fol. Dic. v. 3. p. 236. D. Falconer, v. 2. No 21. p. 23. and No 26. p. 34.

1750. January 25. The DUKE of GORDON *against* The KING'S ADVOCATE.

No 71.

The Clan act found not to regard solely the rebellion in 1715.

That act takes effect though in the record of the attainder it be not specified to have been for the treasons mentioned in the act.

The Duke of Gordon claimed the lands of Mamore, part of the estate of the late Donald Cameron of Lochiel, recognised to him as superior thereof, on the attainder of his vassal by act of Parliament 19th Geo. II. in virtue of the statute 1st Geo. I. made for that purpose. The same objection was made to this claim as to that of Farquharson of Invercauld, No 69. p. 4758. to which reference is here made.

Objected, 2dly, The act of King George I. gives the encouragement thereby provided, to the superiors of persons guilty of high treason, by corresponding with the Pretender, or those employed by him, or by giving money for his use, or who should adhere to him within this kingdom, and should be attainted thereof; whereas Lochiel was attainted simply of levying war, which is treason by the 25th Edw. III. and not any of the treasons in the said act.

Answered, Levying war in favour of the Pretender, which was the fact for which Lochiel was attainted, was undoubtedly adhering to him within the meaning of the act; and the nicety now pleaded, would, if gone into, make this statute of no effect; as it was always in the power of the conductors of any prosecution, to make it simply for levying war; or indeed for compassing the death of the King; it has not been ordinary to lay, in indictments for levying war, the ground thereof; and the whole attainders which past by statute, either for this, or the last rebellion, were for levying war; and so were those which proceeded by judgment; as they were all carried on in virtue of the acts *1mo* Geo. I. and 19 *Georgii* II. allowing trials in different counties from that wherein the