

No 39.

the tenants after his warning. It was *answered* by James Maxwell, That warnings and summons of removing, whereupon nothing had followed, was no interruption; and that the tenants transacting with Westraw, could not invert the Lord Maxwell's possession, to whom they had paid mail and duty many years before; and, that no respect could be had to the warning whereupon nothing had followed. The matter being reasoned, and the last part not decided, it was submitted to the Lords.

Haddington, MS. No 2895.

1666. July 23.

EARL OF SOUTHESK *against* MARQUIS OF HUNTLY.

No 40.

If the five years possession has been interrupted, it will not secure the donatar.

THE Earl of Southesk, and the late Marquis of Argyle, being cautioners for the late Marquis of Huntly, for the tochers of the daughters of Huntly, they got an infeftment of the lands of Badzenoch for their relief, bearing, that according as they should be distressed, they should have access to the rents of the lands, in so far as might pay the annualrent of the sum which they should be distressed for, whereupon they were infeft in *anno* 1643; and thereafter Southesk was distressed in *anno* 1653. Whereupon, in *anno* 1655, he pursued an action of mails and duties upon the said infeftment of relief against the said Lord Argyle, who was in possession; and, my Lord Argyle having long before granted a bond of relief to Southesk, he used horning and caption thereupon in *anno* 1655, and in *anno* 1658, he used inhibition upon the said bond against Argyle, who, in *anno* 1658, entered into a new contract with Southesk, whereby, in corroboration of the first infeftment, he granted him a wadset of the lands of Enzie, with a back-tack; by virtue whereof, Southesk uplifted several years of the back-tack duty. Southesk now pursues the Marquis of Huntly and his tenants for declaring of his right, and payment of the mails and duties. It was *alleged* for the defenders; *first*, Absolvitor, because the Marquis of Argyle hath been retoured, to have possessed the lands of Badzenoch peaceably, by the space of five years before his forfeiture, which was in *anno* 1661, conform to the act of Parliament 1584; by virtue thereof, this Marquis of Huntly, as the King's donatar to the forfeiture, in so far as concerns the estate of Huntly, has undoubted right, and needs not dispute what right Southesk had before the five years. It was *answered* for the pursuer; *first*, That the act of Parliament 1584, ought not now to take effect; because, by the late act of Parliament 1617, sasines and reversions are appointed to be registrate, otherwise they are null, and therefore the ground of the act of Parliament 1584, viz. 'the abstracting of evidents', ceasing, the said act itself must also cease. *2dly*, The said act can only take place where it is not *constant* what right the forfeited person had, but that he was reputed to be the ancient heritor of the lands; but, where the forfeited person's right is known to have been Beatton's comprising, or

this conjunct right granted to him and the pursuer for their cautionry, *presumptio cedit veritati*, and the right must only be holden to be such a right as truly it was. 3dly, The five years possession being in effect a prescription in favours of the King and his donatar, whatsoever would interrupt any other prescription must interrupt this; as if, within these five years, the pursuer had intended a reduction of the forfeited person's right, or an action for mails and duties, or had required for his sums and charged thereupon, all these would be sufficient interruptions against this quinquennial possession, and would take away the presumption of collusion or abstracting. 4thly, The five years possession, by the act of Parliament, bears expressly to be peaceable, so that if it was *turbata possessio*, it would not be enough; and, being once a troubled possession by any legal interruption, after the said interruption, that subsequent possession ceases not to be a troubled possession; though there be no further interruption within the five years, because interruption once used, endures for 40 years. *Ita est*, Argyle's possession was troubled by pursuits to count for the maills and duties of these lands upon this right; and that within a year or two before the five, and likewise within the fifth year, the Marquis of Argyle did corroborate this right, and in corroboration thereof granted wadset of the lands of Enzie, for the sums accumulated; by virtue whereof, the pursuer within the five years was in possession by uplifting the back-tack duty; which being a cumulative right, possession thereon is valid for both. The defender answered, That this defence upon the act of Parliament stood valid, notwithstanding of all the replies, because the act is clear and unrepealed, that five years peaceable possession of the forfeited person, gives the King unquestionable right, it being retoured by an inquest, as now this is; and, as to the troubling of the possession, no deed done before the five years can have any effect, because, as the five years cut off the most solemn anterior rights, much more a citation or other interruption; and as to the interruptions within the five years, they are only two; one is an inhibition against Argyle, which proceeds not upon this infeftment, but upon a personal obligation by Argyle to relieve the pursuer; neither does it at all relate to the possession or any other action, but only as an inhibition prohibits alienation. And as for the contract of wadset with Argyle, it is *post commissum crimen*, and so cannot prejudice the donatar. It was answered, That albeit the forfeited person's deeds being voluntary, *post commissum crimen*, cannot be effectual; yet, where it is upon a cause anterior to the crime, viz. Argyle's intromission by the infeftment of relief, and the distress occurring against the pursuer after the crime, and he having pursued Argyle for count and reckoning in anno 1655, does not constitute any new voluntary right, nor can it be any way collusive, being for an anterior cause, and after a pursuit; and therefore, it must work this much to show that the five years was interrupted; and, in the course thereof, both the pursuer and forfeited person, acknowledged this right in question.

No 40.

THE LORDS found the reply relevant upon the deeds of interruption alleged by the pursuer jointly, to elide the act of Parliament.—See PERSONAL and REAL.—REGISTRATION.

Stair, v. I. p. 400.

* * * Newbyth reports the same case :

In a declarator, pursued at the Earl of Southesk's instance against the Marquis of Huntly, for declaring of his right to the lands of Badzenoch, by virtue of a conjunct infeftment granted to the late Marquis of Argyle and umquhile David Earl of Southesk, from umquhile George Marquis of Huntly, for their relief of cautionry, the Marquis of Huntly being donatar to the Marquis of Argyle's forefaultrie, compearing and defending, &c. ; and the Marquis of Argyle his quinquennial possession, which was so retoured conform to the order prescribed by the act of Parliament 1584 ; against which, the Earl of Southesk alleging many deeds of interruption, and diligence used against the Marquis of Argyle for interrupting his possession, such as summons of exhibition for production of the foresaid conjunct infeftment in anno 1665, summons of count and reckoning against the late Marquis of Argyle, the said year ; letters of horning and bonds of relief, contract and wadset in anno 1658, betwixt the pursuer and the said Marquis, ratifying the said conjunct infeftment, and wadsetting other lands in corroboration of the same ; and an inhibition in anno 1658. THE LORDS repelled the whole defences proponed for the quinquennial possession and act of Parliament 1584 ; and sustained the whole deeds of interruption alleged for the pursuer, as sufficient for interrupting the said quinquennial possession, and therefore decerned in the declarator.

This cause was for several years depending, and debated at great length *in presentia*.

Newbyth, MS. p. 81.

1683. *March.*

LORD LIVINGSTOUN *against* GORDON of Troquhen.

No 41.

The quinquennial possession must be uninterrupted.

In a process of mails and duties, at the instance of a donatar of forfeiture, out of the lands wherein the forfeited person had been retoured quinquennial possessor, compearance was made for a third party, pretending interest in some of these lands, who *alleged, imo*, That he had raised reduction of the retour upon this ground, That the inquest had committed iniquity in not allowing him to propone his allegiance, *viz.* that the rebel was not in peaceable possession for the space of five years, as the act of Parliament required, but that his possession was interrupted and disturbed by a process. *2do*, That there could