

1699. *January 4.* EARL OF ARGYLE *against* The MARQUIS OF ATHOLE.

No 64.

Debated, but not decided, whether a donatar possessing *bona fide*, obliged by the act 1690, to refund to the heirs of the rebel, the rents uplifted by him.

THE Earl of Argyle pursues the Marquis of Athole, on this ground that by act of Parliament 1689, his father's forfeiture is reduced *per modum justitiæ*, founded on the claim of right, and that Athole in 1684 and thereafter, entered the shire of Argyle with armed force, and under the pretence of a warrant of lieutenancy from the King and Privy Council, and as a creditor, uplifted the rents of my Lord Argyle's lands, and wasted and cut down his policy and planting to a great value; therefore he, as heir served and executor confirmed to his father, pursues the Marquis for repetition of these rents, and for the damages in destroying his planting, and wasting the country. There were seven dilator defences proponed to cast the process; but five of them the LORDS unanimously repelled; the other two they stuck a little upon. The five repelled were, *1mo*, No process for summar discussing without abiding the order of the roll, because the 30th act 1693, allowing summar process to forfeited persons, relates to actions founded on the act recissory in 1690; but this summons does not narrate that act. *2do*, As to Lochnel and Duncanson, also conveyed in this process, their day of compearance was not yet come. *3tio*, The licence from the Commissaries to pursue was yet blank. *4to*, That the Earl is not nearest in kin *quoad* the executry (having younger brothers and sisters) and so by the act of Parliament 1690 the confirmation is null, being there prohibit to confirm, except at the instance of the relict, bairns, nearest of kin or a creditor, none of which he was; and lately, in Wilson of Spango's case, against Farquhar of Gilmilns-croft, it was found, that an eldest son could not be executor. *5to*, The general service could not carry the rents due since the defunct's decease. All these were repelled in respect of relevant answers made thereto. The 6th dilator was, The testament is confirmed by the wrong Judge, to wit the Commissar of Argyle, whereas my Lord must either be reputed to have died abroad, or at Edinburgh; in either of which cases it ought to have been confirmed by the Commissaries of Edinburgh. *Answered*, The Earl's domicile is not to be considered after he escaped out of the castle of Edinburgh, in December 1681, and was forced to live abroad, nor after he was apprehended and brought to Edinburgh in July 1685, and there executed, but must be precisely fixed where he had *focum et larem*, when he was first imprisoned for explaining the Test in November 1681, and that was at Inverary in Argyleshire. THE LORDS found the confirmation lawful and *a suo judice*, his dwelling there at that time by his Lady and family being instructed. The 7th was, The summons bears two diets, the second citation not to be given till the days of the first were expired, conform to the act of Parliament 1672, and yet the citations are both given at one diet, conform to the act 1693; and so is clearly disconform to the warrant. *Answered*, Notwithstanding the act 1693, yet the constant practice and custom of the writers since that time has been to follow the old stile of the act 1672, and the

messenger's executing it both at one time, though not warranted by the summons, yet was sufficiently lawful, being authorised so to do by the last act 1693, was warrant enough to him. THE LORDS, before answer, resolved to try what has been the custom since that act amongst the writers and messengers.

February 24. 1699. The famous action betwixt the Earl of Argyle and the Marquis of Athole was at this time settled and agreed. See the dilators in this cause discussed *supra*, 4th January 1699. In this place, I shall but touch and resume the peremptors proponed, though not decided, because it was an important process, *imo*, It was *alleged* for the Marquis, That the general rescissory act of fines and forfeitures in 1690 gives no right to repeat any rents of years before Martinmass 1688, unless they had a special act reponing them even to bygones, as Jerviswood and others had; but *ita est* the Earl has no such special act. *2do*, No repetition, because he was *bona fide* possessor, by virtue of a title legal and valid, according to the laws then standing, viz. a decret of the LORDS giving him a locality out of that forfeit estate, and a charter under the Great seal, with sasine following thereon, more than which no man has for his property, and which he then esteemed his own; which must liberate from bygones, conform to that fundamental principle of law, that *bonæ fidei possessor facit fructus perceptos et consumptos suos*. *3tio*, As that *bona fides et illæsa conscientia* gives all possessors *medio tempore* a full and perfect right to what they have spent, so much more in this case, where he is not a lucrative donatar, but had his allocation out of this forfeiture for a most onerous cause, viz. debts due by the family of Argyle, equivalent to the lands he got, and so he got nothing but his own, and the law says, *qui suum recepit conditione non tenetur*, and was so decided lately betwixt Hope of Carse and the Representatives of the Earl of Bramford, No 61. p. 4741, where he was not found liable for restitution, in respect to that part of Ruthven's forfeitures given him for an onerous cause. *Answered* for my Lord Argyle, That he had an act more ample and special than any of the restored persons, viz. the act of Parliament 1689, rescinding his forfeiture *ab initio*, on an express article of the claim of right, which gives him full interest to repeat all bygones, though not expressly mentioned. To the *2d*, *Bona fides* has indeed this effect, that it liberates the party from all crime or punishment that may ensue thereon; but it cannot be pled, where one forfeit is restored *per modum justitiæ*, but he recovers all as if there never had been such a sentence against him; and this is the difference lawyers put betwixt restitution *ex gratia* and *ex justitia*. In the first case he gets only what remains undisposed of, whereas the second sweeps away the forfeiture *funditus*, and repones him to all, though it had been bestowed on a third party, as Sir George M'Kenzie, in his Criminals, shews: And in the Parliament 1661, the Marquis of Argyle then pled his *bona fides* against the Marquis of Montrose, craving repetition of bygones; yet the Parliament repelled both it and his coloured title he bruiked by; and the LORDS have determined accordingly in all the cases since the revolution, viz. Baillie of Jerviswood against the Duke of Gor-

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don, No 62. p. 4746; Kersland against the Viscount of Strathallen*; Caldwell's Heirs against General Dalzell's Heirs, (*infra*). To the 3d, That he was a creditor; *Answered*, He could not but know how horribly unjust the first doom of forfeiture was, for explaining the test, and yet most officiously he bought in debts upon the estate, not being a creditor before. 2do, The Earl is content to pay his father's debts, but most of these were his grandfather's the Marquis's debts, whom he noways represents; and the rule *qui suum recepit* has many *fallantia*; for what if a creditor come to take his own *manu forti*, *suum recepit*, and yet he will be a robber in the case; so it must be understood where the payment is voluntary, and where there is a debtor; but here there was no willing payment, neither was Argyle debtor any more, he standing forfeited. And Carse's decision does not meet, for he was not Bramford's creditor, but a creditor to the estates, who had forfeited Bramford. But here there was neither a true debtor nor voluntary payment, but stretches made to be a handle to make their benefit by their neighbour's calamity. *Replied* for my Lord Athole, All lawyers agree that restitutions have no retrospect *ad præterita*, else this would strike at the root of the most innocent possessions, to disturb the quiet enjoyment of the same, while we are under the dread and apprehension that we must sometime be forced to restore, which were a terrible preparative; and the 35th § *Instit de rer. divis.* says, that *dominus superveniens de fructibus perceptis agere non potest*, and *Novel. 115. cap. 3.* states the case of one forfeited for heresy, if he afterwards be converted, the forfeiture rescinds, and he gets back his goods, yet he has no right to the fruits preceding his restitution. See Gayll, lib. 2. Observ. 18. and *Ant. Perez. ad tit. C. de sententiam passis*. And the learned Mathæus *de criminibus, cap. de indulgentia principis, fructos perceptos non recuperabit*; and add here, *Nicolaus Antonii de exilio jureque exulum*. And, in our very reductions they only take effect from the date of the interlocutor finding the writ null, but the *bona fides* secures them *quoad* bygones. THE LORDS had no occasion to decide this, because my Lord Marquis redeemed his trouble by paying 24,000 merks of composition to the Earl, for a discharge of his claim.

Fountainball, v. 2. p. 31. & 47.

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The representative of a donatar of a forfeit person being sued upon the act rescissory 1690, by the heir of the rebel, it was found that the defender be-

1705. December 5.

CALDWALL against DALZELL.

WILLIAM MUIR of Caldwell being forfeited in 1667, for the rising at Pentlandhills, and his forfeiture being gifted to General Dalzell, and this being rescinded not only by the general act in 1690, but likewise by a special act, the Heiress of Caldwell pursues Sir Thomas Dalzell, as representing his father, and his goodsire, the General, for repaying the rents of these lands, intromitted with by them from the date of the gift in 1669, to the restitution in 1689, be-

* See General List of Names.