

No. 7.
 tition, summarily ordered them to be sealed, without intimating the petition.

on the 23d February, 1692, for inventorying and securing the writs of persons *moribundi*, that they might not be put out of the way, and that there was *periculum in mora*; therefore, without either intimating the bill, or giving it up to see, or going to the minute-book, they sent one of the Clerks of Session to seal up his cabinets and coffers where his writs lay, to be opened when application shall be made, and all concerned are advertised to attend, it being better thus *rem salvam fore*, than, by after explications, to be pursuing them to exhibit upon oath; though it was judged somewhat singular, if upon our death our papers shall all be sealed up at the desire of some friends, without hearing others concerned, why no such restraint and embargo should be made; for if an apparent heir summarily intromit, it is a passive title; but he may put material papers out of the charter-chest, and these fraudulent conveyances are not so easily discovered thereafter, *et præstat in tempore occurrere quam vulnerata causa remedium quærere*.

Fol. Dic. v. 2. p. 365. Fountainhall, v. 2. p. 214.

1707. June 7. CATENACH against ALEXANDER FRASER.

No. 8.
 A factor of a sequestrated estate preferred to the rents in the hands of a tenant, tho' that tenant had obtained a gift of the debtor's life-rent escheat before sequestration, and general declarator after sequestration.

CATENACH, a factor nominated by the Lords for uplifting of the rents of a sequestrated estate during the competition of creditors, pursues Alexander Fraser for the mails and duties of his possession; who having alleged upon a preferable right, and a term being assigned to produce it, he did produce a gift of the common debtor's life-rent-escheat, and a declarator following thereupon, and therefore craved preference, because the rebellion was prior to any legal right or diligence of any of the other creditors.

The factor alleged: There was a competition of creditors, in which the defender might compear, and crave preference; but, in this process, he must be liable for his rents during the competition, because it was easy to allege that his right was preferable in a pursuit at the factor's instance, who was neither master of the creditors' right, nor concerned in the preference, but his trust was only to uplift the rents, and secure them for the use of the creditors that should be preferred.

The defender answered: That sequestrations were introduced and appointed by the Lords of Session for securing the rents during the competition of creditors endeavouring to attain possession; but sequestrators were never admitted to dispossess nor disturb any creditor who was in actual possession, and willing instantly to debate his right; and here the pursuit being for the rent of the lands possessed by the defender, the libel proves the possession, and the defender produces his gift prior to the sequestration, and defends his possession by the general declarator, and needs no special declarator for his own possession.

It was duplied: Sequestrators do not disturb or dispossess creditors who are in possession by virtue of real rights flowing from, or diligence against, the common debtor; but the pursuer can pretend to no such possession; for he entered as a

tenant, and his gift was after the common debtor's affairs were in disorder, and declarator after the sequestration, and he cannot invert the title of his own possession, and ascribe it to his gift of declarator in prejudice of the creditors, who were not called in the declarator, and may have objections against the same, and the gift which is the grounds of it; and he can be in no better condition than if a third party were tenant, and he competing upon his gift and declarator to exclude the factor.

“ The Lords preferred the factor.”

Fol. Dic. v. 2. p. 365. Dalrymple, No. 78. p. 99.

* * Fountainhall reports this case :

FANTON of Hiltown's estate being put under sequestration at the desire of his creditors, and Catenach being put in as factor, he pursues the tenants for his mails and duties. Compearance is made for Fraser, a creditor, who alleges he must be preferred, because he had obtained the gift of Hiltown his debtor's liferent-escheat from the superior, and thereon had procured a decret of general declarator, and now repeated his summons of special declarator; and thereon craved preference to the factor, who, if he had the rents in his hands, behoved to answer him, and make them forthcoming to him, as having best right thereto. Answered, This demand would frustrate and evacuate the design of all factories upon incumbered estates; which was to prevent the tenants from being harrassed with the diligences of competing creditors, and putting in a responsal indifferent person to intromit for all their behoofs, who finds caution to be accountable. It is acknowledged, that any creditor who is in possession before the date of the factory, cannot be dispossessed by the factor; but if they had not attained possession prior to the sequestration, they could never compete with the factor. Replied, This party was in possession, as tenant, and, being creditor, became donatar to the heritor's escheat; both which were before the nomination of the factor, and since that time he has perfected his right by a general and special declarator; which being retrotracted *ad suam causam*, viz. the gift, it clearly prefers him, *nam frustra petis quod mox es restiturus*. Duplied, Your possession *qua* tenant, can give no right; for that was the common debtor's possession; and in the person of a tenant, it is not so properly possession as detention only; and *non constat*, how far you will be found preferable in the ranking of the creditors, who may be infest prior to the denunciation, or the outrunning of year and day; and, at the date of the factory, you had only a personal incomplete right, viz. a gift of escheat, which, though you have now completed, yet that cannot prefer you to the possession, to the prejudice of the other creditors; but if you be truly preferable, you will be at small loss; for, by pushing on the discussion of the ranking, you will get a decret of preference, and make the factor liable to pay you; but *hoc ordine* you cannot invert his possession, else this would confound all sequestrations, and break the tenants. The Lords found the factor, *hoc loco*, ought to be answered of the mails and duties, reserving

- No. 8. the donatar's rights, as accords; but recommended to the Ordinary, before whom the ranking was depending, to give them all convenient dispatch; that he may have ready access to the rents, so far as his preferable right will carry him.

Fountainhall, v. 2. p. 369.

1711. *December 27.* JAMES HUNTER Supplicant.

No. 9.

JAMES HUNTER, collector of the cess for the shire of Ayr, gives in a petition, representing, That a competition having long depended betwixt the creditors of James Chalmers of Brockloch, and the factor dying, for these ten years bygone none have looked after the estate; so it has lain waste, and he has been forced to pay its proportion of cess to the general receivers, though he has no access to the ground, it not being tenant-sted; therefore craves that, for his reimbursement of bygones, and security of the cess in time coming, a new factor be named to set the lands at a roup to the greatest offerer. The bill being intimated, and none offering to answer it, they named the collector to be factor, on his finding sufficient caution, after his own payment of the cess, to make the surplus forthcoming to all parties that shall be found to have best right. It was remembered the Lords had done the like in the lands of Quhap, the heritor being out of the kingdom, and none meddling, and the cess running on unpaid. These warrants are a part of the Lords' *officium nobile*; but necessity justifies them, that such cases, in human accidents, must have a remeid.

Fol. Dic. v. p. 366. Fountainhall, v. 2. p. 695.

1714. *January 27.*

JANET MAXWELL, LADY COWHILL, and her HUSBAND, for his Interest,
against JOHN SHARP of Hoddam.

No. 10.

IN the count and reckoning, at the instance of the Laird and Lady Cowhill, for the rents of the Lady's estate during the time that John M'Naught, writer in Dumfries, was factor, against Sharp of Hoddam, cautioner for M'Naught, the Lords found, that creditors upon the estate, who, at the commencement of the factory, were in possession thereof by proper wadsets or tacks, are presumed to have continued in the possession during the time of the factory; but that such creditors as had improper wadsets, or only infestments of annual rent, with an assignation to mails and duties *in gremio* till they were paid, having possessed the lands, or uplifted the rents before the factory, are not presumed to have continued to possess, but their intrusions with the rents behoved to be proved in order to exonerate the defender from counting for the same.

Fol. Dic. v. 2. p. 365. Forbes, MS. p. 17.