

1728. *July 24.*CARGILL *against* The RELICT and CREDITORS of M'DONALD.

No 67.

UPON the act 18th, Parl. 1690, it was questioned, if the onerous purchaser of a forfeited estate was obliged to account for the whole rents, without deducting the purchase money? The donatar of a forfeiture had paid in to the Exchequer ten years purchase for the lands, and it was *argued* for him, That it could not be the intention of the act, in restoring the ancient proprietor, to forfeit the innocent purchaser, who laid out his money upon the faith of the standing laws of the country. The defence was repelled, and the donatar was refused deduction of the price out of the rents. See APPENDIX.

*Fol. Dic. v. I. p. 315.*1724. *June 17.*MARGARET KER and MR THOMAS LINNING her Husband *against* ANNA KER Lady Kersland, and her HUSBAND.

No 68.

ROBERT KER of Kersland was forfeited anno 1669, and died in the year 1680; thereafter his spouse Barbara Montgomery deceased before the 1688, leaving behind them one son and three daughters. The son, who had the benefit of the act rescissory, and also by a special act had access to repetition of all bygones intromitted with by the donatar of his father's forfeiture, made a settlement of his estate, and died anno 1692. His sister Anna coming to the succession, she and John Ker her husband confirmed themselves executors to her father, mother, and brother; in which testament, among other things, were given up the bygone intromissions had by the donatar with the rents of the estate of Kersland.

The wife of a forfeited person, who survived her husband, died before the act 18th Parl. 1690. Her representatives were found entitled to a proportion of the bygone rents, as their mother's *jure relictæ* and *terce*.

Mrs Linning, one of the sisters, having been provided by her father in a portion, which she recovered from her sister Anna and her husband; upon payment Mr Linning and she granted a discharge, not only of that provision, but likewise of all interest they could have to the executry of her father and brother. Thereafter Mrs Linning and her Husband brought an action against Kersland and his Lady for payment of their share of the mother's executry, consisting of a third of the rents of the lands of Kersland, from the time of her father's forfeiture to his death, as belonging to her mother *jure relictæ*; as also of a third of the rents, from the father's death till the 1688, to which her mother was entitled by her *terce*; which subjects the defenders had recovered from the donatar.

It was *pleaded* for the defenders, *imo*, That the foresaid claims were cut off by the generality of the discharge above mentioned. *2do*, That the relict had

No 68.

no interest in the bygone rents intromitted with by the donatar, since she died before the act rescissory ; and therefore the pursuers could not claim in her right. 3^{to}, By the act rescissory the bygones were provided only to the heirs of the forfeiting persons, and consequently neither the relict nor younger children had any right, but such bygones fell to the person who succeeded as heir in *immobilibus*, who was the brother, and whose succession the pursuers had expressly renounced. 4^{to}, The relict's share of moveables must be considered as the husband's circumstances were at the dissolution of the marriage, and the terce could only take place with respect to the lands in which the husband died infest ; but so it was that when Kersland died in the 1680, he had neither right to the bygone rents, nor to the lands themselves.

It was *answered* for the pursuers to the 1st, That the subject could not come under the discharge ; for they did not claim as executors to the father or brother, but only to the mother. To the 2^d, That the forfeiture being rescinded *ex justitia*, the right of every person revived as if no such forfeiture had been, and repetition was competent to every one lesed thereby. Nor does it make any difference that the relict died before the restitution, she and her heirs being *eadem persona* in law ; and the restitution respected the right, and not the person. To the 3^d, That the act makes no difference betwixt the heir and younger children ; for though the word ' heir ' be used in some part of the act, yet it is not to be taken in a limited sense, as contradistinct to ' nearest of kin,' but in general of every ' successor called by law ;' for younger children are also heirs in moveables ; and that the act had an eye to the security of the wives and widows of forfeited persons, appears from the special clause in their favours restoring them against transactions made with donatars or others for their liferents ; so that if they had right to repete even contrary to a transaction, much more were they designed to be fully restored where they were not excluded by one. *Lastly*, They must have undoubted right both to the rents claimed *jure relictæ* and in right of terce ; for though the forfeited person died before the restitution, yet it drawing back to the date of the forfeiture in all its consequences, the husband must be presumed to have died in the possession both of the bygone rents and also of the lands.

' THE LORDS found, that the discharge did not extend to this claim, and that the representatives of the relict of the forfeited person had right to a proportion of the bygone rents, as her *jus relictæ* and *terce*, notwithstanding her death before the revolution.'

Reporter, Lord Cullen. Act. *Ja. Boswell.* Alt. *And. Macdowal.* Clerk, *Murray,*
Fol. Dic. v. 3. p. 235. *Edgar, p. 49.*