

do fall *in consequentiam*; whereas in forfeitures for treason, whether the vassals hold of another superior, or immediately of the King, the lands fall to the King and his donatar, as the punishment appointed by the act of Parliament for the crime of treason, with all other estate and goods, moveable and immoveable, bonds, or other rights which belong to the person convicted of treason, as being *crimen publicum*, and to which all subjects, whether they be vassals or not, are liable to that pain and punishment; but thereby tacksmen are not under that maxim.—THE LORDS having seriously considered that case, and long debated amongst themselves, both upon the ground of law and the inconveniences that might arise to the King's interest, did find that there was a great difference betwixt a tack set for a whole duty by a vassal, and tacks set for grassums for many years to run, paying but inconsiderable duty, which are of the natures of rentals, whereby there being sums of money advanced to the vassal forfeited, the King might suffer prejudice during all these years; whereas a vassal, before the forfeiture, setting tacks for a full duty, doth nothing but that which is *ordinaria administratio feudi*, and thereby the lands being meliorated, the King, who succeeds by the forfeiture, doth immediately reap the benefit thereof, having his lands full and tenant-stead; which by the extinguishing of the tenant's tacks, he would be forced either to plenish or stock the same upon his own charges, or set the same for less duty than were paid by the former tacks; and therefore the LORDS decerned, That where the tenants were innocent, and did not concur in the crime, and had but tacks of an ordinary indurance, that they should stand valid for the years to run after the forfeiture, seeing no law, practice, or custom did ever require a consent or confirmation of such tacks; as likewise, that in politie for the good of the King and kingdom, tenants who were innocent, and have employed their fortune and means in labouring and improving of the lands set in tack, should not be turned out of their possessions, which would encourage them not to concur in any act of rebellion and treason; whereas, were they exposed to that great prejudice and loss, they might easily be induced to assist and join with their masters in treasonable acts upon that pretence, that in law, by the fall of their masters, of necessity they must be removed from their livings and possessions, not knowing where to settle themselves, but must be exposed to great trouble and danger; and if upon the reasons of convenience and inconvenience it were fit to judge otherwise, it ought to be done by an act of Parliament, *et eget constitutione imperatoria*.

Gosford, MS. No. 682. p. 403.

1677. January 12. MARQUIS of HUNTLY against The LAIRD of GRANT.

THE Marquis of Huntly as donatar to the forfaulture of Argyle, pursues improbation and reduction against the vassals of Huntly, and specially against the

No 27.

Forfeiture found to exclude a subaltern right granted by the forfeited person.

No 27. Laird of Grant; who having defended upon subaltern blanch infeftments from the house of Huntly, it was *answered*, That these could not defend him, seeing the forfeiture of the King's ward-vassal Argyle, who by apprising came in place of Huntly, returned the fee to the King, without any burden by a deed of the vassal not approved by law; and though in Cairnborrow's case, No 2. p. 4170, subaltern feus were sustained by the act of Parliament King James II. allowing such feus, yet there is no ground for other subaltern infeftments, blanch or ward;

Which the LORDS sustained; for though forfeiture be penal, introduced by statute or custom, whereby treason is punished by the loss of life, lands, and goods, yet thereby the King gets no more than the forfault person had; in the same way as in liferent escheat, the fee comes to the superior *cum suis oneribus realibus*, and all infeftments, annualrents, and tacks constituted by the vassal anterior to the rebellion are valid, but forfeiture of a ward-vassal having also implied therein recognition, excludes all deeds of the vassal not authorised by law, or consented to by the superior, and therefore subaltern feus of ward-lands being authorised by the act of King James II. and before the act 1612 repealing the same, are sustained against forfeiture, but no other subaltern infeftment.

*Fol. Dic. v. 1. p. 314. Stair, v. 2. p. 493.*

No 28.

Found that by the forfeiture of a sub-vassal, not only his own right, but all rights flowing from him, are carried.

1682. November. LADY CALDWELL *against* GENERAL DALZELL.

BARBARA CUNNINGHAM Lady Caldwell being infeft in an yearly annualrent jointure out of her husband's estate, having pursued a poinding of the ground; *alleged* for General Thomas Dalzell who had obtained a gift of her husband's forfeiture, whose lands held of the Earl of Eglinton, That the pursuer's liferent infeftment being but a base infeftment not confirmed, could not affect the ground in prejudice of him, who had right to the lands by a gift of forfeiture. *Answered*, That albeit her infeftment be not confirmed, it ought to be sustained against the forfeiture, and the sub-vassal's feu does not fall to the immediate superior, by any crime or delinquency committed by the sub-vassal; and therefore, albeit the vassal should be denounced rebel, and remain year and day at the horn, yet if the sub-vassal's infeftment be clad with possession before the confirmation, though not confirmed, the sub-vassal would be preferred to the donators, and even in the case of forfeiture, it is expressly provided by the 37th act of Parliament 2d James VI. That where any person having lands, annualrents, liferents, or others whatsoever, holden of any person that is forfeit for treason, shall bruik and enjoy the lands and others, notwithstanding of the forfeiture of their superiors, and shall hold the same of the next immediate superior. And by the 2d act Parliament 9th James VI. declaring the possession of the party forfeited for the space of 5 years preceding the forfeiture to be sufficient to give the King and his donatar's right to the lands, It is declared, that the King has right to the lands pertaining to the persons forfeited. But so it is