

held by the Marquis of Huntly's predecessors ward of the King, and by them feued out to the defenders and their authors; and the Marquis of Argyle having right by apprising led against the Marquis of Huntly, this Marquis of Huntly hath right as donatar to Argyle's forfaulture.—The defender *alleged* absolutor, because by the act of Parliament anent feuars, 1457, cap. 71. 'The Parliament finds it speedful that the King begin and give example to the leave, that what prelate, baron, or freeholder shall give feus of his ward-lands, that the feuar shall remain unremoved, paying to the King sicklike farm during the ward, as he did to his Lord;' so that the defender's feus being conform to this act, and while it was in vigour, the King or his donatar cannot quarrel the same, being granted upon, and accepted by, such an invitation by King and Parliament; likeas such feus have ever been found valid, not only against ward, which is specially mentioned in the act, but against recognition, and against all other apertures of the vassal's fee.—It was *answered*, That the said act bears only, 'That the King shall ratifie such feus,' which therefore cannot extend to feus not ratified; and forefaulture being so atrocious a crime, ought to be further extended than recognition.—It was *replied*, That the King's ratification is not to be understood of a charter of ratification passing the Seals, which alone, without any act of Parliament, would be sufficient; but is to be understood of the King's approbation, and not contradiction, otherwise without a confirmation such feus would not exclude ward or recognition, which yet they have ever excluded without any confirmation.

THE LORDS found, That feus granted by vassals of ward-lands, so long as the foresaid act of Parliament stood, did exclude not only ward and recognition, but forefaulture of the ward-vassal, granter thereof, without necessity of confirmation; because forefaulture of the King's immediate vassal being upon the breach of his fidelity, is in effect recognition, whereby the fee is returned without the burden of any deed of the forefault vassal, except such as are preserved by this statute; but forefaulture of those who are not the King's immediate vassals, confiscates their ward-holdings, as a penal statute, but with the burden of all subaltern rights and deeds of the forefault person. *See APPENDIX.*

*Fol. Dic. v. 1. p. 295. Stair, v. 2. p. 265.*

1680. November 16.

CAMPBELL *against* The LAIRD of AUCHINBRECK, and the EARL of ARGYLE.

CAMPBELL of Silvercraigs having apprised Auchinbreck's estate upon a debt, for which he was cautioner for the late Marquis of Argyle, pursued the tenants for mails and duties. Compearance is made for the Earl of Argyle, who *alleged*, That he, as donatar to his father's forefaulture, had the only right to the lands in question, and which were holden of the Marquis feu, and were not confirm-

No 2.

so long as the act of Parl. 1457. c. 71. stood, did exclude not only ward and recognition, but forfeiture of the ward-vassal, granter thereof, without confirmation,

No 3.

Found as above.

No. 3.

ed. The pursuer *answered*, That there needed no confirmation, in respect of the act of Parliament 1457, 'Allowing feus of ward-lands.' It was *replied* for the defender, *imo*, That that act of Parliament did only contain a declaration, that the King would confirm such feus, which cannot be extended to those who never demanded confirmations. *2do*, The meaning of the act is expressed there, 'In that it was only to secure against ward, that the feuer, though his superior fell in ward, should enjoy his feus, being set to a competent avail, upon payment of the feus-duty, even during the ward;' and, therefore, ward-feuers are only thereby put in the condition as if their superior had holden feus of the King, in which case the forefaulture of the superior would have made the feus return to the King. *3tio*, There is a later act of Parliament 1503, cap. 91. by which, 'During the life of King James IV. all Lords, Barons, freeholders, might set their lands in feus-farm without diminution of the rental;' so that alienation of the most part should not infer forefaulture, which shews that the prior act is not meant to extend to forefaulture. *4to*, The said first act is rescinded in *anno* 1633, after which the lands were resigned in the superior's hands, and new infestment taken thereon; so that, thereafter, any feus granted without the King's consent or confirmation are null. *5to*, The King, by a commission under his Great Seal, for satisfying the Creditors of Argyle, did declare, 'That the feus should be applied to the particular uses therein mentioned,' so that it is *res judicata* by the King: And, whereas, there is a practise alleged, decided in *anno* 1674, betwixt the Marquis of Huntley *contra* Gordon, No 2. p. 4170, sustaining feus of ward-lands before 1633, it was but one decision upon a report, and was appointed to be heard again *in præsentia*, and was no further insisted in; but here there are specialities, viz. the resignation since 1633, and the King's declaration. It was *duplicated* for the pursuer, to the *1st*, That the act of Parliament inviting all persons to feus, is a more solemn consent than if the King had signed dispositions for that feus, and hath ever been so esteemed; so that the wards which have frequently fallen did never exclude a feuer, as being consented to by the King by this act. To the *2d*, If it were a true gloss, that the act did only import that the King would confirm when desired, then all the feus which have no confirmation, could neither exclude ward, recognition, nor forefaulture, which was never pretended, either as to the ward, marriage, or recognition. To the *3d*, The enacting of new acts doth never import that there was nothing done of that nature before. *2do*, The act 1503 doth not only give power to set feus, but also to grant annualrents, which was not allowed by the first act, nor had it any such ground as feus for improvement of the ground, and therefore was but temporary; and it is clear, by that act, that the forefaulture there meant is not by Lese-Majesty, but by alienation of the major part of the ward-holding, which is the proper description of recognition; so that forefaulture doth only open and return the vassal's ward-holding, as it is a species of recognition against the nature of all feus; but, as forefaulture is a just penalty for rebellion, introduced by statute, by which the life, lands, and

goods of all forefault persons fall to the King, it is extrinsic to the nature of feus, but only in so far as it comprehends a ground of recognition competent to all superiors, whether Prince or subject; as if the vassal should kill, wound, or invade his superior, it infers recognition, whereof rebellion against the King is the most atrocious kind, but should not be extended against the innocent vassals, who, upon the King's invitation, did give great sums of money to acquire feus of ward-land: And, as to the pretence of the parity, that the forefaulture of the King's feu-vassal would return the feu to the King free of sub-feus, it was *duplicated*, That that case was never decided, nor any example shown that it took effect. 2do, Statutes can neither be restricted nor amplified *a paritate rationis*, but are *strictissimi juris*, which is a known principle. 3tio, There is no parity when the King sets his lands in feu, importing to be for the melioration, that the vassal should sub-feu, and commit the melioration to another without the superior's consent, and therefore the King might, upon just ground, allow his ward-vassal, who was not obliged to meliorate, to set feus for melioration, though he allowed not his own feuers, to whom he granted feus for melioration, to sub-feu for melioration without his consent; and therefore this case was fully debated both in the Outer-house and *in presentia*, and most solemnly and un-animously determined by the Lords, albeit the Marquis of Huntly's curators gave in an appeal to the Parliament then sitting or current, yet the Lords were unalterable in securing the vassal's right, and the Marquis did judicially pass from the appeal; nor was there any stop of that decision, but an act extracted thereupon; and several other debates have since arisen upon Cairnborrow's having two distinct feus upon the same lands, which are also determined. Neither do the specialities alleged alter the case, for a resignation *in favorem* doth not alter, but continue the same feu; and as to the King's declaration, it is ever understood *salvo jure*.

THE LORDS found, that the feus in question being set before the year 1633, were secured by the act of Parliament 1457, and that the resignations thereof, after the act of Parliament 1633, did not alter the same, unless the resignations were *ad perpetuam remanentiam*, and that the King's declaration was *salvo jure*.

*Fol. Dic. v. 1. p. 295. Stair, v. 2. p. 796.*

\* \* \* Fountainhall reports the same case:

PRACTICES which are not upon a full hearing *in presentia*, cannot be a rule, and no practice is so obligator upon the Lords, but themselves and their successors, upon more convincing arguments, may alter them. The decision of a Sovereign Prince has the force of a law, l. 6. *De Legibus*.—THE LORDS found feus of ward-lands granted to vassals while the act 7th Parliament 1457 stands in force, viz. ay till 1633 that it was rescinded, being set for the competent avail, (that is for a feu-duty), does exclude not only ward and recognition, but also forefaulture; and

- No 3. which the Lords had decided formerly, 12th February 1674, Marquis of Huntly against Gordon No 2. p. 4170; but if ward-lands were given out by a subaltern blench holding, this would not defend against any of these casualties.

*Fountainball, MS.*

1680. December 2.

ERSKINE of Dun *against* ROBERT VISCOUNT of ARBUTHNOT.

No 4.

Feu rights granted before the act 1606 are valid to exclude ward, recognition, &c. unless the pursuer could allege, that the feu-duty was with diminution of the new retoured duty.

THE LORDS found there was an avail of the Arrat's marriage due, because the said Arrats had the superiority of the ward-lands yet standing in their person unresigned, notwithstanding it appeared there was an obligation upon them to resign it in the King's hands, which was a debt as large as the superiority was; and the Lords modified the said avail to two years feu-duty, which was 20 pound Scots; and allowed Dun to condescend upon any other estate they had beside that superiority; in which case the Lords would yet modify more. Though the smallness of the sum modified did not make it worth the pains to reclaim, yet the preparative of the interlocutor, and the reason of it, may prove very dangerous; for, where a man stands under an obligation to dispoise lands, the estate which he is bound to denude himself of cannot be looked upon as his estate, nor fall under consideration to enhance or raise the valuation of his marriage, when the donatar pursues. Only, he is the King's vassal till he be denuded formally.

The 2d. point reported was, that Dun's gift not being a gift of non-entry *per se*, but a gift of ward, marriage, and non-entry *conjunctive*, it extended to no other non-entries, but allenarly to three terms subsequent to the ward; and as to these, it was only the retoured duty, which in feus is the feu-duty, as Durie and Hope tell us.—But the Viscount's prior gift of non-entry will even cut down from these three terms.

1681. January 5.—In Dun's case against Arbuthnot, (2d Dec. 1680,) the Lords, in valuing the marriage of an apparent heir of a ward-vassal, would not regard what tocher he had got abroad out of the kingdom as a soldier, or for other personal merits; but would only modify with consideration to what estate he had within Scotland, especially he not being served, entered, nor infeft, but only apparent heir; which moved the Lords much more than his being married abroad. *2do*, Where ward-lands are feued *tempore licito* before the act of Parliament 1633, (in which case it is required by law that the feu-duties shall not be beneath the old valued retoured duty) the vassal needs not prove that it is conform and proportional to the retoured duty; but the donatar of the recognition, (who quarrels the feu,) must prove there is a diminution; else it is presumed to be legal. Yet we say, *qui excipit, probare debet exceptionem*. Anent the retouring of lands not yet retoured, see the last of the unprinted acts in 1597.

*Fol. Dic. v. 1. p. 295. Fountainball, v. 1. p. 120. & 124.*