

of the said Thomas Stewart, and he aught to have no right to the said lands nor entres after the decease of the said Thomas Shank, before whose decease the said Stewart was banished, and sua he was deid cevillie or he came to the right of the land, and sua it vaiket in the said Commendator's hands, sua that he might dispone thairupon at his pleasure, and was not obliged to receive any o-ther tenant be the Queen's right. It was *ansrit* be the said Matthew, that the said Thomas Stewart had as good right at the first time the tack was set as he could have after the death of the said Shank, because he was as well in tack, and the same set to him, as to the said Shank, nor the said Shank might noways dis-ponne the same frae him, howbeit the use of the said lands was suspensit fra the said Stewart for the lifetime of the said Shank, notwithstanding he had another a like right. The whilk answer and reply the LORDS fand relevant, and in res-pect thair of repellit the said Bishop's exception, and ordained him to receive the said Matthew, donatar foresaid, in the said Stewart's place.

No 10.

*Fol. Dic. v. 1. p. 313. Maitland, MS. p. 112.*

1559. February 15.

JAMES STEWART *against* The QUEEN and her Comptroller.

GIF ony persoun committis tressoun or lese majestie, and summondis be raisit thairfor aganis him at the King's instance, all alienatiounis and dispositiouns of his landis, gudis, or geir, maid be him, togidder with all infestments thair of ob-tenit by quhatsoever persoun after the executioun of the saidis summondis, and for ony cause followand the committing of the said crime of tressoun are of nane avail, and aucht and sould be reducit at the King's instance, because all and hail the landis, gudis, and geir, movabill and immovabill, quhilks pertentit to him, quha committit the tressoun, in the self samin time of the committing thair of, pertentit to our Soverane Lord as ane part and pertinent of the patri-mony of his crown, and thairfor without his consent may not be disponit or occupyit be ony persoun.

No 11.

*Balfour, (FORFEITURE.) No 10. p. 563.*

1559. February 16.

JOHN STEWART *against* The QUEEN, and her Comptroller.

GIF ony persoun committis spuilzie, or dois ony deid hurtful or prejudicial to ane uther, and thairefter committis the crime of lese majestie or tressoun aganis the King's hienes, and the persoun quha is hurt be the said spuilzie or uther deed, callis and perseuis the doar and committar thair of, and obtainis decree aganis

No 12.

No 12.

him thairupon, be virtue quhairof he causis seik his movabill gudis to poind and distrenzie thame thairfoir, and because nane can be apprehendit he causis denunce his landis to be comprisit for executioun of the said decreet, and lauchfullie comprisis the samin befor the executioun of ony summondis of tressoun, intentit at the King's instance against the committar of the said spuilzie or deed, the samin executioun and comprising is sufficient togidder with all char-touris infestmentis and sasines followand thairupon, albeit the samin be gevin and maid after the intending and executioun of the saidis summondis of tressoun, because the landis being lauchfullie comprisit befor the execution of the said summondis of tressoun as said is, the awner of the samin committar of the said tressoun was denudit of the richt and propertie thairof; and sua the infestment followand thairupon, as upon the ground richt of the comprising and assignation is gude and valid in the self, and may on na wayis be reducit and annullit at the King's instance; because the spuilzie or uther deid beand done befor the committing of the said tressoun, and the decrete thairanent obtenit befor the executioun of the summondis of tressoun should be principallie respectit and considerit *quia uniuscujusque origo est primum inspicienda*.

*Balfour, (FORFEITURE.) No II. p. 563.*

\* \* Maitland reports the same case :

ANENT the action persewed be J. Stewart of Cardowe against the Queen's Grace and Comptroller, for certain lands alleged be the said J. to pertene to him in heritage, and intromettit with be the said Comptroller in the Queen's name; it was *alleged* be the Queen's advocate, That her Grace nor the Comptroller did no wrong in the intromission with the said lands, because they pertained to umquhile the Earl of Lenox, and became in the Queen's hands be reason of forfaulture of the said Earl, for the crime of lese majestie. It was *alleged* be the said J., That, long before the said forfaulture, the said Earl had intromittit spuilzie, for the whilk the said J. had called the said Earl before the Lords of Council, and obtained ane decreet of spuilzie against the said Earl, and apprisit his lands and obtained infestment thereupon. It was *alleged* be the said Queen's advocate and Comptroller, That the crime of lese majestie was committit before the apprising of the said lands, and the doom and sentence of forfaulture given against the said Earl, or ever the said J. obtained sasine of the said lands. It was *alleged* be the said J., That the said spuilzie was committit be the said Earl, and als the decreet of spuilzie was obtained, and the said lands were apprysit, or ever the summons were raised upon the said Earl, and the infestment obtained or ever the sentence was given against the said Earl, albeit sasine was not taken while afterwards the Lords of Council decernit be their decreet the said lands to pertene to the said J. in heritage, notwithstanding the allegiance of the said advocate and Comptroller, because the said spuilzie was committed and summons raisit thairupon, and depending before the committing

of the crime, and the apprising of the said lands made and deduced before the summons raised against the said Earl, whilk apprising was *venditio necessaria*, and denudit the said Earl of the said lands, so that he could forfeit no more lands than was in his hands the time of the raising of the summons and giving of sentence.

No 12.

*Maitland, MS. p. 129.*

1598. February. L. of EDMONSTONE against TENANTS of NIDDRY.

THE Laird of Edmonstone pursued the Tenants of Niddry to remove from certain lands of Niddry pertaining to him as donatar to the forfeiture of umquhile Archibald Wauchope of Niddry. It was *alleged* by the Bailie of Niddry, That he would not remove, because he was infest by umquhile Robert Wauchope heritably in the said lands; which was repelled, because the son was not confirmed by the King. Thereafter the Bailie *alleged*, That he could not be removed at the instance of this donatar, because the lands could never fall in forfeiture by Archibald, because he was never infest therein, *neque poterat spes successionis pertinere ad regem per ullius prodicionem, quia nunquam fuerat hæres in spe*, because his father survived him; and so dying before his father, the lands could not forfeit before his decease. It was *answered*, That, by the said Archibald's contract of marriage, umquhile William Wauchope of Niddry, Marshal his gudsher, and Robert Wauchope his father, were obliged to infest the said Archibald in the said lands; and so, by his forfeiture, his right is fallen in the King's hands. His Majesty, by the contract, had sufficient right to the lands, and needed no sasine, being seised by his Crown in all the lands within the realm, and so the disposition made to his donatar was sufficient. To this it was *answered*, That the contract was but *jus ad rem, et jus ad fundandam actionem*, but no real right; so that the donatar had only place by the contract to pursue for infestment. And farther, offered them to prove, that, after the said William's decease, Robert was retoured heir to him in the fee of the said lands, and infest therein; and, by virtue thereof, in possession many years; and so he died last vested and seised, as of fee, in the said lands, long after the said Archibald's decease, therefore would not forfeit by Archibald's fact. It was *duplicated* by Edmonstone, That not only Archibald had right by contract, but also, conform to the said contract, he was seised in the fee of the said lands, and resignation was made thereof in the King's hands; whereupon a charter was granted, which passed the Privy Seal; which allegiance was admitted to probation.

No 13.

As an apparent heir may forfeit *spem successionis*, so resignation being made of lands in favour of a man, and the infestment past the Privy Seal, it was found, upon his committing treason, that the lands were forfeited.

*Fol. Dic. v. 1. p. 313. Haddington, MS. No 633.*