

levant, and in respect thereof, the exception repellit. This was but for ane part of the tenants; but other of the tenants *ansrit*, That they had tacks for terms to rin, set to them be the Laird of Riccarton, before the Earl Bothwell's forfeiture, and so be him who had power to set the same. The persewer *replyit*, That the exception should be repelled, because the Lord Bothwell superior, and also Riccarton proprietor being forfaitit, the King who wald not have regairdit an heritable infestment given be Riccarton at the time of the said assedation, but wald remove the heritable tenants, meikle more aught the tacksmen to be removit at the King's instance and his donatar's. The reply was repellit be the Lords, and tacks ordained to stand to the issue of their assedation, notwithstanding the forfeiture; because the King having the maills and duties of the lands is not defraudit as he is be the heritable infestments, and therefore sould not remove the poor tenants having leisomely obtained the said tacks be their awn geir, of them who were not, nor yet their superior convict of the said crimes wherethrough forfaulture might have followit; and the like practic was between John Lesly of N. and \_\_\_\_\_.

No 24.

*Fol. Dic. v. I. p. 313. Maitland, MS. p. 229.*

\*.\* Balfour makes the following observation on this case:

ALL landis and tenandries haldin in chief of ony man that is forfaitit, and not lauchfullie confirmit be the King, cumis in his Hienes's handis be ressortin of foirfaulture.

*Balfour, (FORFEITURE.) No 7. p. 562.*

1610. July 14.

CAMPBELL *against* L. of LOCHNORAS.

A SUB-VASSAL being forfeited, he who is infest in his lands upon the King's presentation may remove the sub-vassal's vassal, albeit he have possessed forty or fifty years after the forfeiture; and needs not to reduce nor annul his infestment; because the forfeiture of his superior is a decret of Parliament, whereby his right, and all rights flowing from him, are in effect reduced. Campbell *against* Laird Lochnoras having right to lands in Cumnock from Riccarton Hepburn, who was vassal thereof to James Earl Bothwell, who, before his forfeiture, held them of Dunbar of Cumnock.

*Fol. Dic. v. I. p. 314. Haddington, MS. No 1962.*

No 25.

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

1674. January 28.

GENERAL DALZIEL *against* The TENANTS of CALDWELL.

GENERAL DALZIEL, as donatar to the forfaulture of Muir of Caldwell, pursues the tenants of Caldwell to remove; who *alleged* absolvitor, because they bruiked

No 26.

Tacks let for grassums received by the vassal, and

No 26.  
 cases granted  
 to the detri-  
 ment of the  
 superior, fall  
 by the forfei-  
 ture of the  
 vassal; but  
 tacks let for  
 a sufficient  
 rent are valid  
 against for-  
 feiture.

by tacks from the forfault person, clad with possession before the forfaulture or crime, whereof there are terms to run. It was *answered*, That the defence is not relevant, for forfaulture returns the fee to the King, in the same manner as he granted it, without the burden of either infeftment, tack, or servitude, not consented to by him; for, by the nature of all feudal rights, there is implied the fidelity of the vassal as a legal resoluteive clause, and therefore contrary deeds do annul and resolve the same, & *resoluto jure dantis resolvitur jus accipientis*; the vassal's right being void, all rights flowing from him fall therewith, which holds not only in forfaulture, but in recognition, disclamation, &c. And forfaulture in this case is not as a statutory penalty, but is in effect as recognition by the delinquence of the King's immediate vassal against him by rebellion; for, if a sub-vassal of the King's had been forfault, the feus or tacks granted by him would not fall, but the King would have right by the forfaulture to the sub-vassal's fee, burdened as it was the time of the rebellion; because, by the forfaulture, the right granted by the King to his immediate vassals, did not become void, neither the sub-vassal's right, nor any right from him, but was adjudged to the King as his moveables were; and the King would present a sub-vassal to his vassal in the same condition as the former sub-vassal was, with the burden of infeftments and tacks granted by him before the crime. But here the King's immediate vassal being forfault, his right, and all depending on it, is void. And it cannot be denied, but that in the case of ward, the tacks could not defend against the superior, but sleep till the ward be ended, and then revive, because the vassal's right revives; but in forfaulture or recognition are simply void, because the vassal's right can never revive; so that, as solemn infeftments fall by forfaulture or recognition of the immediate vassal, granter thereof, so much more tacks, which are but contracts of location, which are personal, and no real rights. And albeit, by the statute of King James II, tacks are declared valid against buyers or purchasers, whereby they become as real rights against them; yet that statute had no effect against superiors who do not purchase or succeed to their vassals. It was *replied* for the Tenants; *imo*, That tacks clad with possession before the crime are real rights *in suo genere*; and there is no reason to extend forfaulture against them, nor is there any parity from the excluding of infeftments given by vassals, which carry away the property or servitudes which have no remuneratory cause profitable to the superior; but tacks are profitable both to vassal and superior, and for public good; for thereby tenants are induced to plant and improve their grounds, whereof they will be altogether careless if they have not standing tacks, nor will they acquire them, if they be not secure against forfaulture and recognition; and it is a public interest not to incite tenants to follow their masters in rebellion, which they will the more easily be induced to do, if their masters rebellion shall not only forfault but his right his tenants right; wherein if they find themselves secure they will not be induced to follow him, but rather suffer him to forfault himself alone; seeing he cannot prejudge them if innocent;

and that this hath been the constant practice and opinion of this kingdom, is clear from this, that it cannot be shown that a donatar of a forfeiture of recognition did ever remove a tenant by any sentence; and, on the contrary, Craig, l. 2. diég. 10. p. 206. asserts, that tenant's tacks are valid, albeit the setter *in forisfacturam inciderit*; and Lethington observes the same to be so found in the case of Home of Manderston against the Tenants of Oldhamstocks, in anno 1570, No 24. p. 4684., as appears by the decision produced, bearing the debate from the parity of infeftments, and in that case he mentions another decision before to the same effect. Neither is there any way to validate tacks against forfeiture or recognition, seeing there is neither custom nor style of confirmation of tacks, as there is of infeftments. 2do, Whatever might be pretended against lucrative tacks for an inconsiderable duty, to the great prejudice of the superior, in the same way as he is prejudged by infeftments; yet tacks set for a competent avail of the lands, as they were worth the time of the set, or upon grassums equivalent to the ease, must stand effectual against the superior; because as to these they are *necessariæ et ordinariæ administrationis*, wherein the vassal, before any crime, acts profitably both for himself and his superior; and without which lands cannot be improven, as in the case of tacks set by a tutor, which stands valid after the tutory is ended, if set for a just avail. It was *duplicated*, That nothing can be pretended here from custom, but we must recur unto the ground of law, *resoluto jure dantis, &c.* And though tacks have not been called in question, that was the favour of donatars, and custom is not inferred from negatives; and as to the practise, it is old and not authentic; and Balfour, whose practiques are known, hath observed a contrary decision;\* and there is good reason to extend forfeitures in a time wherein rebellion hath been frequent. It was *triplicated*, That Lethington's practiques are as authentic as Balfour's, which doth not mention any debate, or whether the tack there in question was for a small duty to the prejudice of the superior; and all the reasons adduced for tacks, militate for all tacks, although for an elusory duty, which have not been accustomed to be confirmed, yet no doubt they may be confirmed.

THE LORDS found, that tacks set to tenants, who were innocent clad with possession before the crime, and set for a just avail, as the lands were worth the time of the set, and for an ordinary endurance, were valid against forfeiture, but sustained not tacks set for grassums, received by the vassal, and eases granted to the detriment of the superior; and for instructing whether the tacks in question were for the just avail, the Lords granted mutual probation to either party.

*Fol. Dic. v. 1. p. 313. Stair, v. 2. p. 258.*

\* All that appears in Balfour, relative to the case alluded to, will be found p. 4685.

No 26.

\*\* Gosford reports the same case :

IN a removing pursued at the instance of General Dalzell, as being infeft in the property of the lands of Caldwell, upon forfeiture of the deceased Laird of Caldwell, against the tenants, it was *alleged* for the defenders, That they had standing tacks of their several rouns, granted to them long before the forfeiture, for years yet to run.—It was *answered*, That these tacks could not defend them, because the right and property of the lands being come in the King's hands by reason of forfeiture, the tenants tacks fall *in consequentiam* ; seeing by our law in wards, non-entries, recognitions, and liferent escheats, the lands returning to the superior by the vassal's delinquency, all subaltern rights, to which the superior did not consent or confirm the same, fall *in consequentiam*, and the right of the lands and property is consolidated with the superiority, and thereby the superior hath *plenum dominium*, as if the lands had never been disposed by him to the vassal, and may remove all tenants, notwithstanding of their prior tacks, which is grounded upon this maxim of law, that *resoluto jure dantis resolvitur jus accipientis* ; likeas by an old practic of Balfour's\*, he declares that it was so decided, and was never since controverted.—It was *replied*, That the allegiance stood relevant notwithstanding ; *first*, because tacks of lands are of their own nature far different from heritable rights and dispositions, which, by their own nature require the superior's consent or confirmation, otherwise *ex natura contractus feudalis*, they return to the superior by recognition, or the vassal's committing such other deeds as the law ordains shall cause the vassal lose his right of property ; seeing no law or act of Parliament requires the superior's consent or confirmation to tacks set to tenants, which, of their own nature are but temporary, and for a just duty ; likeas by acts of Parliament they are declared to stand against a singular successor, and especially by the 205 act, 14th Parliament, King James VI. they are only declared null where they are set after the crime of treason. And Craig, Dieg. 10. lib. 2. p. 206. affirms, that tacks and assedations are not thereby extinguished *etiam si vassalus in fori faturam acciderit*. And Maitland of Lethingtoun, in his Practics, observes the case to be so decided betwixt Home and Tenants of Old-hamstocks, conform to another practic prior to that case, No 24. p. 4684 ; so that the tacks being set for a just and yearly duty, or for grassums and a less duty during the years of the tack, the same cannot be extinguished by forfeiture, as in the case of recognition or wards, where the lands and property return to the superior, without which he would be altogether prejudged of the benefit of the law, appointing the return of the lands in satisfaction of the injury and delict committed by the vassal. And as to the tack of ward-lands during the ward, they are not extinguished, but are declared to sleep during that time, and to revive again after expiring of the ward ; and in recognitions and escheats, the vassal's right being dissolved *ex natura contractus feudalis*, the tacks set by the vassals

\* See p. 4685.

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.