tacks were decerned to fall under single escheat; notwithstanding whereof, his hail allegeance were repelled. Thereafter compeared the Laird of Melgum, and alleged that no letters conform could be given to the said tack, so far as concerned his teinds, because young Bonitown had set to him a 19 year's tack of his own teinds, long before the committing of the crime for which he was forfeited, like as the entry thereof was at Lammas 1600, long before the crime, and so could not fall under his forfeiture. It was *answered* by Sir Walter, That the alienation foresaid could be no right to the said Melgum, because young Bonitown having no right to the 19 year's tack, which was set to his heir, he could not make any assignation thereof longer than his own life; and his gift was not only of things pertaining to Bonitown younger, but also of things fallen to his highness by inhability of his posterity.—THE LORDS considering that Melgum's tack was of his own teinds of his own lands, and had the entire and apprehended possession before the crime, they would not annul it so summarily, and therefore granted letters conform to Sir Walter, but prejudice of Melgum's tack as not compearing. No 14.

Fol. Dic. v. 1. p. 313. Haddington, MS. No 666.

1675. *November* 11. VEITCH *against* PALLAT. No 15.

A BANKRUPT having granted assignation to one of his creditors in prejudice of another who had done more timeous diligence, by horning, &c. the prior creditor having affected the subject assigned, by taking a gift of escheat, was found to have action of repetition against the asssignee, who had received payment.

Stair. Dirleton.

*** *See* No 127. p. 1029. No 159. p. 1073. and No 91. p. 2874.

1680. *January* 23. MARQUIS of HUNTLY *against* GORDON. No 16.

GORDON of Cairnborrow's predecessor having gotten a feu-right of the lands of Cairnborrow from the Earl of Huntly, whereof the *reddendo* is 10 bolls of victual, and 14 pounds money; thereafter, in *anno* 1625, there is a charter by Huntly to Cairnborrow of the same lands, wherein the feu-duty is ten merks; and there is a clause subjoined, that, whensoever the lands should be in the King's hand, by ward, non-entry, or any other way, that Cairnborrow should pay to the King 50 merks, which is more than the quadruple of the retour. This Marquis of Huntly being donatar to the forfaulture of the Marquis of Argyle, who was infeft in the estate of Huntly by an expired apprising, thereupon

A blank in a charter for the *reddendo* to the King not being filled up before forfeiture, the vassal was found liable for the feu-duty in the original feu charter.

No 16. having pursued Cairnborrow and his tenants for the rents of his lands, he in defence proponed upon these two feu-charters, and upon the old act of Parliament 1457, cap. 71. 'Allowing feuing of ward-lands,' which stood valid as to the feus granted by the King's ward-vassals, till the act 1633.——The Lords sustained the defence even against forfaulture. Whereupon it was *alleged* for the Marquis, That neither of the charters could defend, because the first charter was past from by the last, and the last charter had no warrant by the act of Parliament anent feus, which bears expressly, 'that the feus must be set to a competent avail,' which avail is ordinarily interpret to be the retour-duty, which was the ordinary avail the time of that act, and became the legal avail between the King and his vassals. *Ita est*, that the feu-duty in the last charter is only ten merks, whereas the retour-duties of these lands is the feu-duty in the former charter. 2*do*, Though this charter could subsist, yet it is evident by inspection, that 50 merks, payable to the King, is lately filled it up with new ink; and likewise by Cairnborrow's oath, who acknowledges that he hath filled it up during the dependence of this process, and therefore it must be yet held as blank; and seeing the clause bears expressly, 'that the sum payable to the King is more than the quadruple of the retour-duty of the lands of Cairnborrow,' that retour being the former feu-duty of 10 bolls and 14 pounds, the quadruple thereof at least ought to be filled up in the blank. 3*tio*, The liberty granted to ward-vassals to set their lands feu, being with this provision, 'that they be set to a competent avail, without prejudice to the King,' so that this power being once exercised by setting the first feu, *jus erat acquisitum domino regi*; so that thereafter the King's ward-vassal could not diminish the feu-duty once settled, in prejudice of the King, albeit he might diminish it during his own right; and therefore Huntly's last charter, though valid against him and his heirs, as to ten merks of feu-duty, yet it can have no effect against the King or this Marquis, who is not heir to the granter of the charter, but only donatar to Argyle's forfaulture; and therefore the blank ought to be filled up in the same way as if the prior charter had been standing. It was *answered* for the defender, That albeit the charter bears a passing from the former, yet that is not simply, but in order to the new charter; and, therefore, if the new charter be found null, the defender may defend himself by the old charter, as the Lords already sustained; but even the new charter is valid, wherein, though the clause of the *reddendo* to the King was blank, being so delivered to the defender, and no mutual contract, he might fill it up so as it might subsist in law, which he hath done by filling in 50 merks, which is much more than the new retour of the lands; for the whole Earldom of Huntly being retoured to 600 merks, these lands having no special extent by merk lands, can only have a proportion of the retour of the Earldom divided by the rent, which will not extend to ten merks; and it is a groundless assertion, that wherever there is a feu-duty, that must be in the new retour, which holds only in feus immediately holden of the King; but in feus holden of the King's vassals, the retour must be a proportion of the re-

tour in the charter of the King's immediate vassal, whereof the feued lands are a part. It is true that such feu-vassals do oft-times retour their lands to the retour duty, which thereby becomes their new retour, but they cannot be compelled so to do; but the subdivision of the retour requiring a special process to prove the rents of the whole barony, and thereby divide the retour, the feuers, rather than delay their retour and infeftment, do set down in their service their feu-duty for their retour. And it is evident by the clause, that the Marquis of Huntly's meaning by more than the quadruple of the retour, is not by the feu-duty, but doth expressly relate to the retour of the Earldom of Huntly, and therefore the most that could have been filled up in the blank, is the quadruple of the share of the retour-duty of the Earldom of Huntly effeiring to the lands of Cairnborrow. No 16.

THE LORDS found, by Cairnborrow's oath, that the blank in his last charter, for the *reddendo* to the King, not being filled up before the forfaulture of Argyle, ought now to be filled up with the feu-duty in the first feu-charter, being 10 bolls victual, and 14 pounds of money; and found Cairnborrow liable therefore since the forefaulture, and in all time coming, seeing the lands are come in the King's hand by forfaulture, which is perpetual, and not by a temporary return, and ordains Cairnborrow to accept a charter from the Marquis accordingly.

Fol. Dic. v. 1. *p* 313. *Stair, v.* 2. *p.* 744.

1687. *July.* DUKE of GORDON *against* LOCHIEL.

No 17.
A superior being forfeited, all rights flowing from him fall in consequence.

IN a reduction and improbation at the instance of the Duke of Gordon, as donatar of the Marquis of Argyle's forfeiture, against Lochiel, one of his vassal's in Badenoch,

Alleged for the defender; That his lands are not expressed in the pursuer's right, nor did the defender ever acknowledge my Lord Argyle for his superior, nor does the retour say, that the rebel was habit and repute heritor by labouring, &c. and other qualifications mentioned in the act of Parliament about the quinquennial possession, but only that he was repute superior.

Answered; Rights of superiority cannot be retoured by deeds of possession, but only by being habit and repute.

Replied; Receiving payment of feu-duties is a possession; and the defender is willing to hold the lands of the pursuer as superior; and the property not being alleged to have been in the rebel's person, but only the superiority, it ought not to fall under his forfeiture.

Duplied; A superior being forfeited, all rights flowing from him unconfirmed, fall in consequence.

THE LORDS sustained the retour, and repelled the defender's allegeance and reply.