

1627. *March 27.* *Lo. BALMERINOCHE against L. COVINGTON.*

IN an action at the instance of the Lord Balmerinoch against the Laird of Covington, who held the lands of the pursuer by ward-holding, for the double of his marriage; the defender *alleging*, That he was apparent heir to one of his forbears, who held and was infeft in the office of the crownery of Clidsdale by ward-holding of the King, whereby his marriage fell to the King; likeas the King had gifted the same to a donatar, so that the same could not pertain to this pursuer, and the pursuer *replying*, That that infeftment of that office could not prejudice the pursuer, because the same was granted, and proceeded upon the forfeiture of Sir James Hamilton, who was infeft in that office before the forfeiture; and it was of verity, that that forfeiture was by sentence of Parliament reductive, upon process and citation of all parties having interest, reduced and found null, with all that followed thereupon, this reply was found relevant to prefer the pursuer to the King in the defender's marriage, the same infeftment of the said office, which depended upon the forfeiture, having become extinct by the said sentence reductive, deduced in Parliament as said is; which the Lords found sufficient, albeit the defender's predecessors were not specially called to the reduction, seeing, after that reduction, none of the defender's predecessors were alleged to be infeft in that office, there being divers of his predecessors intervening betwixt him and that person, who was first infeft upon the said forfeiture, to whom the defender alleged himself to be apparent heir; and seeing it was *replied* also, that, since that reduction of the forfeiture, the Marquis of Hamilton stood infeft by the King in that office; which the Lords found relevant, albeit the defender's predecessors' infeftments were not reduced in particular, nor none representing him called to that reduction. Before this interlocutor, the parties were reputed to be privily agreed amongst themselves.

Act. Stuart & Lermonth.

Alt. Nicolson & Rollock.

Clerk, Hay.

Durie, p. 295.

1627. *June 29.* *STUART against L. WEDDERBURN.*

IN a cause of wronguous intromission with the teinds of Coldingham, at the instance of John Stuart of Coldingham against the L. Wedderburn and Others; the said John Stuart being provided to the abbacy of Coldingham, and thereafter the Earl of Bothwell his father being forfeited, after whose forfeiture the Earl's posterity, by act of Parliament *anno* 1592, being declared unhabile to bruik any benefice in the kingdom; and, by another act of Parliament, *anno* 1594, the abbacy of Coldingham being annexed to the Crown, and the Earl of

No 50.

Effect of forfeiture by sentence of Parliament. See No 53. p. 4722.

No 51.

Intromission, though for onerous causes, after forfeiture, found to be wronguous.

No 51.

Home having acquired the right of that abbacy from the King, and having set tacks of divers teinds of this abbacy to divers persons, who being convened in this action to repay the same teinds, set in tack to the said John Stuart, as he who in *anno* 1621 was restored against this act of dishabilitation, and his said provision found good by the estates, and all things done in prejudice of his right and provision, with all rights made since his dishabilitation to others, being reduced and annulled by the said acts; the saids defenders defending themselves against the said pursuit, by virtue of the saids tacks, the LORDS repelled their exceptions proponed thereupon, albeit they were purchased conform to the laws then standing, and for sums of money, and causes onerous, and which they alleged should defend them in this possessory judgment, they being possessors *bonæ fidei*, especially against a restitution of grace, as they alleged this to be; seeing that, by act of Parliament 1584, it is provided, that no person should thereafter be restored who was forfeited, but only by way of grace. And, by the 4th act of Parliament 1606, it is provided, that restitutions by grace should not prejudice persons who had acquired right of any thing belonging to the person forfeited from the King, as they and their author had done. And, by the act *salvo jure*, the same Parliament 1621, wherein the pursuer's restitution was done, it is ordained, that no act made in favours of any particular party should prejudice any private party's right; whereby they *alleged*, That the pursuer's act could not prejudice their preceding rights, especially such an act which was not deduced upon process, and whereto they were never called, nor proceeded it upon any citation, and so behoved to be a restitution by way of grace; likeas they alleged, that they compeared in that same Parliament, and protested that that act should not prejudice them; which protestation was in effect admitted by that act *salvo jure*, made after the said protestation, and must work the same effect as if it had been specially admitted. This allegiance was repelled, in respect of the said act, which was not only found to be of the nature of a gracious restitution, but contained a ratification of the pursuer's provision, and a rescission of the deeds done in prejudice thereof, and of the act of dishabilitation, and all rights depending thereon; and that the said act of Parliament could not be drawn in dispute before the Session, if it was formally, or well done, or not, they not being Judges thereto; neither could that act *salvo jure*, take away the other act made in that same Parliament *specificè* done *ex certa scientia*. The like decision was done in an action of removing, betwixt the Earl Nithsdale and M'Lellan, decided 5th July 1627, (*See APPENDIX.*) But the LORDS found, they would reserve to themselves to consider what satisfaction should be made for the years libelled to the pursuer, after adducing of probation upon the quantity of their intromission these years; which years libelled were only the years 1625 and 1626, and so divers years after the pursuer's act of restitution. Likeas to interrupt the defender's *bona fides*, he offered to prove execution of inhibition against these defenders, and intentings of actions of spuilzie for these same teinds of divers other years, preceding these years

acclaimed, which the LORDS admitted to probation, to the effect foresaid, as said is.

No 51.

Act. Aiton & Stuart.

Alt. Nicolson & Belshes.

Clerk, Gibson.

Durie, p. 301.

1667. January 24.

SIR HENRY HOME *against* TENANTS OF KELLO and SIR ALEXANDER HOME.

No 52.

SIR HENRY HOME having apprised the lands of Kello from Henry and John Homes, and being infest, pursues the tenants for mails and duties. Comparance is made for Sir Alexander Home, donatar to the forfaulture of the said John Home of Kello, who *alleged*, That the forfault person, the time of the doom of forfaulture, was in possession of the lands in question, in whose place the donatar now succeeds; and, by the act of Parliament 1584, it is statued, that where the forfault person was in possession the time of the forfaulture, albeit not by the space of five years, which would constitute a right to him, that the donatar must be put in possession, and continue five years in possession, that in the mean time he may search and seek after the rebel's rights. It was *answered, 1st*, That this part of the statute is only in case the rebel had tacks, or temporary rights, which neither is, nor can be alleged in this case. *2dly*, The five years possession must be reckoned from the doom of forfaulture, after which the King's officers or donatar might have attained possession, and if they did not, their neglect cannot prejudice others. *Ita est*, there are five years since the forfaulture, and the rents are extant, being sequestrated. It was *answered*, That the act expresses, not only in case of tacks, but also in possession, and that the five years must be after the possession began, and not the forfaulture.

Forfeiture gives the Crown five years rent of any land the forfeited person was in possession of at the time of the sentence.

THE LORDS found the alleageance relevant; that the rebel was in possession, and preferred the donatar to the five years rent, after the date of the forfaulture.

It was further *alleged*, That the pursuer's right being but an apprising, the donatar would instantly satisfy the same at the bar. It was *answered, Non relevant*, to retain by way of exception, but the donatar behoved to use an order, and pursue a declarator. It was *answered*, That in apprisings, an order upon 24 hours requisition was sufficient, there being no further solemnity required, than that the appriser might come to receive his money.

THE LORDS found, that the apprising might be summarily satisfied *hoc ordine*.

Stair, v. 1. p. 429.