

1636. *March 9.* ROBERT KEITH *against* WILLIAM MURRAY.

ROBERT Keith, merchant in Edinburgh, charged William Murray in Longherdmeston to infest him in certain lands holding of him by James Whitehead, from whom the charger had comprised the same. He suspended upon this reason, That he was content to enter him, he paying a year's duty to the suspender. Answered for the charger, That the compriser should not be prejudged of brooking the lands comprised, by the said James Whitehead's being year and day at the horn: For, if the superior should possess himself of the rebel's lands, as having right to his liferent by virtue of his rebellion, and so seclude the compriser from the said lands during the rebel's lifetime, it were against all equity and reason, that the superior should both brook the lands and get a year's rent of the same compriser; but at least the payment of the year's rent should be suspended till the decease of the rebel. Replied, The superior cannot be obliged to receive a vassal, except he pay him a year's rent, conform to the Act of Parliament; neither ought he to renounce any right competent to him upon any other ground. But, if the compriser will force him to enter him, it must be with reservation of any right the superior hath acquired, either by liferent or otherwise. Many of the Lords were of opinion, that, if the superior had been in possession of his vassal's lands, by virtue of his liferent falling to him, it had been a hard thing to make the compriser pay a year's duty, and be debarred in the meantime, by the superior himself, from the possession of the lands. But, in respect this was not alleged, save only that the superior might hereafter exclude the charger from the lands, if it were not here declared, that he should not do it;—they thought it not reasonable to compel the superior to make any such declaration.

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1636. *March 10.* MALCOLM CRAWFURD of Cartsburn *against* The LAIRD of MURDESTON.

THE Laird of Murdeston being obliged, by contract of marriage, to infest his wife in liferent of all lands that should be conquest by him during the marriage;—they two being divorced, she assigns the right of her contract to Malcolm Crawford of Cartsburn, who pursued the said Laird of Murdeston for fulfilling the same. The pursuer condescended upon a five-merk land of the barony of Murdeston, that the defender had conquest, since the marriage, from John Gray, wherein he sought to be infest during her lifetime. Alleged, That could not be reputed conquest, because John Gray, being vassal to the defender and his predecessors, and the defender holding his lands of the Earl of Bothwel, by the said Earl's forfeiture, both the said John Gray's lands, and the defender's own, fell to the crown, and were disposed to the Laird of Preston: who, being the defender's tutor, in satisfaction of his tutor-accounts, resigned the said whole barony of Murdeston in favours of the defender; who having acquired it thus, had right to the said John Gray's land by this forfeiture, and so cannot be thought to have conquest it from John Gray. Replied, The pursuer produced the dis-

position, made by Gray to the defender, wherein the defender, acknowledging Gray to be heritable proprietor of the lands in question, for sums of money paid by the defender to Gray, takes a disposition of his right, and so cannot clothe himself with the right of forfeiture. Likeas he can never be heard to allege the right of forfeiture; because the defender's grandfather having feued this five-merk land to Gray, with warrandice against all deadly,—granting that the same had fallen into the king's hands through the forfeiture of the Earl of Bothwel,—yet the defender, being heir to his grandfather, and having the right of the forfeiture devolved in his person, could never have evicted the lands from Gray, as fallen by the forfeiture; in respect he would have been obliged, as heir foresaid, to have warranted the same to Gray. Duplied, No respect can be had to the disposition taken by the defender from Gray; because, he having good right to put him from the land, yet, out of favour, gave him some little acknowledgment for his kindness, far within the just price of the land, (the land being worth 600 merks and above, yearly, and that which was given to Gray not exceeding 3,600 merks;) and so was rather a transaction to redeem the action of warrandice that might have been intended against him as heir to his grandfather, than a price given for the lands; which action of warrandice was truly intended by Gray against the defender, before the contract of marriage. And, as to that,—that the defender has taken a disposition from Gray, and acknowledged him to have the heritable right of the said lands,—Answered, That it was lawful for him to denude Gray of all right he did pretend, be it good or not; but that will not import a concession of a right in his person. As to that part,—that the defender is obliged in warrandice,—*Imo*. That gave Gray only an action against the defender, but doth not make him to have a real right to the land, which he not having, the defender cannot be said to have conquest the land from him; *2do*. The defender could never have been obliged to warrant the land to Gray, because of the law, *Venditor non tenetur ad futuros casus evictionis post contractam emptiorem; sed omne periculum aut incommodum quod post dispositionem incidit, ad emptorem pertinet, nisi aut causa præcesserit aut venditoris aliquod factum intervenierit*: as, in this case, it cannot be said that the forfeiture proceeded from any deed of the defender's, or that he was obliged to prevent it. Triplied, Gray had a good real right to the land; for, albeit it was taken away by the forfeiture, yet the right of the forfeiture,—having been derived to the defender, who was obliged in warrandice to Gray,—*eo ipso jure*, Gray's right, extinct through the forfeiture, convalesceth and becometh good in respect of the defender, who could never have removed him from his land; because he would have opposed, by way of exception, his obligation of warrandice, which would have maintained him against the defender. As to that, Whether the defender would be obliged to warrant the forfeiture or not; however it might be questionable, if the right of forfeiture were in a third man's person, yet, it being now in the defender's person, he must be subject to warrant Gray from any distress that may come by himself. The Lords found the right that Gray had to be real, *quoad* the defender, (howbeit, it would not have been thought so in respect of a stranger that had got the right of the forfeiture, either primitively or yet by disposition from the defender;) the right of forfeiture being devolved in his person, which made him subject in warrandice to Gray; and, consequently, the defender not having been able to have evicted Gray's right by law, the disposition that the defender took of Gray was reputed conquest.