

S E C T. IV.

Competition Creditors with the Donatar of Forfeiture.

1611. *May.*OFFICERS OF STATE *against* INGLIS.

No 31.
A man being fugitive for treason, although neither forfeited nor at the horn, yet being under summons, it was found, that his lands and goods could neither be poided nor comprised, he being *sub reatu.*

WALTER GEDDES having clipped money, as well of the King's cunzie as of foreign Princes, and outted the same in St Andrew's and Edinburgh, and other parts of the country, as well to Scotchmen as to Fraeminger an Englishmen, and others; and upon the apprehension of some rogues money with Fraeminger, which he had received from Walter Geddes, some at his father's command, the guard being directed to apprehend him, he being once in their hands was per force taken from them, and fled; and a number of clippings, extending to three or four pound weight, being found in his house and brought to the Council; thereafter James Inglis, merchant in Edinburgh, having registered the said Walter Geddes's obligation for a sum of money, for the price of some wines, and thereupon intented comprising of the said Walter's tenement in St Andrew's, the same was discharged by letters at the treasurer's instance; which being called, the said James *alleged*, that Geddes not being forfeited, nor at the horn, his land could not fall to the King, nor he be prejudged of his debt, nor stayed of his comprising. Nevertheless, the LORDS found, that Walter Geddes being actually fugitive for a treasonable crime, his lands and goods fell to the King, and could not be intromitted, poided, nor comprised by any subject, for his debt.

Fol. Dic. v. 1. p. 314. Haddington, MS. No 2187.

* * * Hope reports the same case :

IN an action of advocation pursued by the Treasurer against James Inglis, the LORDS discharged all comprising, in respect Walter Geddes was fugitive for treason; notwithstanding he was not yet forfault.

Hope, MS. fol. 125.

1667. *July 6.*

SIR HENRY HUME, and Others, the Creditors of KELLO, *against* SIR ALEXANDER HUME.

No 32.
An apprising deduced before treason,

SIR HENRY HUME, and Others, being both creditors to Alexander Hume of Kello, and John Hume his son, apprised the lands of Kello in *anno* 1649.

and in *anno* 1653, charged the superior. In *anno* 1661, John Hume is forfault upon the treasonable crimes committed in *anno* 1651. Sir Alexander Hume is donatar to the forfaulture: The case of Alexander Hume's right before the apprising was, that, by contract of marriage, Alexander Hume had disposed several husband lands to John, reserving his own liferent of certain husband lands. The father continued to possess the lands reserved; and the son of the rest. The question is now concerning the lands reserved, whereanent the competition is betwixt the creditors apprisers, and the donatar. It was *alleged* for the donatar, That he ought to be preferred, because any right the creditors had is but an apprising, and a charge without infestment; which charge, albeit it be equivalent to an infestment, in the competition betwixt con-comprisers, yet it is no way equivalent as to the King; for, after the charge, all casualities of the superiority would fall to the superior, and so must the casualty of forfaulture fall to the King. *2dly*, Though the apprisers had been infest when they charged, their infestment would have been long after the committing of the crime; and there was nothing before the crime but the naked apprising, which was no real right; so that the forfaulture devolving the fee to the King, with the burden only of such real rights as the superior had consented to before the crime, which cannot extend to this apprising, which is no real right, or to the charge and infestment thereon, because after the crime. *3dly*, Albeit the infestment of the son, who was forfault, was base, holden of the father, yet it coming in the person of the King, or his donatar, can no more be a base right, but becomes public so soon as it is devolved to the King, which was at the committing of the crime, before the appriser's infestment or charge. It was *answered* for the Creditors, That they ought to be preferred upon their legal diligence, for satisfaction of the lawful debt contracted before the crime; because they had apprised before the crime, and had charged the superior before the sentence of forfaulture; which charge is equivalent to an infestment, and the King succeeding in the place of the forfault person *utitur jure privato*; and albeit no voluntary deed, after the committing of the crime, would be effectual against the King or his donatar, yet an apprising before the crime, and a charge before the sentence, or process of forfaulture, is sufficient in favours of the creditors; especially seeing the superiority being unquestionably in their father, they might charge him when they pleased, and having charged him, they become in his place, and cannot charge themselves as superiors of the forfault person.

THE LORDS preferred the apprisers in respect of their apprising before the crime, and the charge after, before the forfaulture.

It was further *alleged* for the apprisers, That the forfault person's right being only base, never clad with possession, their apprising against the father, who was not forfault, was preferable. It was *answered* for the donatar, That the forfault person's right was clad with possession, in so far as the forfault person possess a great part of the lands disposed, lying all together; and of the rest, the father's liferent being reserved, the father's possession was the son's possession.

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was committed with a charge after it, but before the process and sentence of forfeiture was preferred to the donatar.

No 32.

It was *answered*, That possession of a part cannot be sufficient for the whole, where there is an express reservation, hindering the natural possession of the rest, and where the rest are actually possest by another party ; neither can the father's possession be the son's ; because it is ordinarily found, that dispositions by a father to his eldest son, and infestments thereon, reserving the father's liferent, are not thereby clad with possession ; and albeit in reservations in favours of wives, the husband's possession will be the wife's possession ; yet that is a special privilege *favore matrimonii et dotis*, and is not competent to any other. It was *answered* for the donatar, That a reservation in favours of a father, in any gratuitous and clandestine infestment, granted to the son, does not validate the same ; yet the infestment being for a cause onerous, viz. a marriage, which is a solemn and public act, the infestment following thereupon is void of all suspicion of simulation ; and as an infestment to a stranger, reserving the disponent's liferent, would be valid by the disponent's possession, so must a son's upon a contract of marriage, otherwise great prejudice will follow, sons being frequently infest in their father's whole estate, reserving their liferent of a part, and ordinarily but basely infest, to secure the property, being more desirous to enter themselves as heirs to their fathers, after their death, if no posterior prejudicial deeds be done, which is more honourable for the family, all the infestments would be overthrown, being upon debts contracted after the infestment.

THE LORDS being of different judgments in this point, were loath to decide them, because the case was decided by the former vote.

Fol. Dic. v. 1. p. 314. Stair, v. 1. p. 470.

1684. *March.* COLONEL MAIN *against* LADY EARLSTON. *

No 33.

A lady was infest in a liferent. Her husband disponed the fee, reserving this liferent. The disposition was confirmed. The reservation of the liferent was held to have been thereby confirmed likewise, so as to secure it against a gift of forfeiture.

IN an action of mails and duties at the instance of Colonel Main, as donatar of Earlston's forfeiture, compearance was made for the Lady Earlston, who *alleged*, That she was infest base in a jointure by her father-in-law, who died *ad fidem et pacem*, and her right was made public by her husband's possession of the fee. 2. Her husband having disponed the fee in favours of their son, reserving her liferent, and the disposition being confirmed by the King, the defender's liferent is thereby confirmed.

Answered for the pursuer ; Base rights made public by possession, do not secure against forfeiture, unless they be confirmed by his Majesty. 2. The King's confirmation of the disposition to the son, cannot be extended to the mother's liferent, which is neither disponed therein, nor flows from the disponent, but is only reserved as a burden upon the son's right ; especially considering, that husband and son are both forfeited rebels, and the confirmation returns again to the King by the forfeiture.

Replied ; The confirmation of the disposition being indefinite, it must be understood to confirm all that was confirmable ; and the reservation of the life-