

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-

rent in the disposition of the fee may be called in some manner the institution of a liferent by the husband; and all this was long before the crime of rebellion was committed either by the father or son.

No 33.

'THE LORDS found the second alleageance and reply relevant to defend the liferent against the gift of forfeiture.'

The cause being again called, it was *alleged* for the donatar; That in charters of confirmation in Exchequer, they do not consider clauses relative to the procuratory, but only the subject expressly confirmed; and although the charter bears, 'under the provisions expressed in the procuratory,' yet these provisions being restrictions of the disposition, and the warrandice thereof, are not considered to be confirmed; and suppose the charter had expressly narrated the Lady's liferent, that ought not to be looked on as confirmed, seeing the subject of the confirmation is only what is disposed, and what is reserved is not disposed, and consequently not confirmed; nor would such a confirmation of ward (lands) import a confirmation of a liferent so reserved.

Answered; That reservations in charters, either express or relative to procuratories, ought, and are presumed to be considered, and fall under the confirmation if not reserved from it.

THE LORDS adhered to their former interlocutor; because a liferent may be also constituted by reservation, though it would be otherwise in the case of a reserved right of fee.

Upon a new calling, it being *alleged* for the donatar, That the clause runs thus, 'under the provisions, conditions, &c. in the procuratory in favours of' William Gordon, who was the disponent, and did not bear these words, 'in favours of the Lady;' so that the reservation was taxative to the husband,

'THE LORDS again adhered to their former interlocutor.'

Harcass, (FORFEITURE.) No 495. p. 636.

1686. December 3. VISCOUNT STRATHALLAN *against* MONTGOMERY.

A CREDITOR of Montgomery of Lainshaw's, a forfeited traitor, having arrested some teinds prior to his commission of the crime, and Strathallan being donatar to his forfeiture, he claimed them, because they were not fully affected before the crime, there being no sentence nor decret to make forthcoming; and an arrestment is but an inchoate diligence, which vanished by the succeeding forfeiture. THE LORDS preferred the donatar; though it was *alleged* for the arrester, that the confiscation of moveables, by rebellion, was but equivalent to an escheat of moveables, in which case a creditor arresting before denunciation, would be preferred; which the LORDS repelled, in this case of Strathallan's. See 22d February 1628, Anderson *against* Gordon, No 37. p. 3643.

No 34.

Fol. Dic. v. I. p. 314. Fountainhall, v. I. p. 434.