

No 79.

tive, and his moveable goods ordained to be inbrought. The criminal libel proceeded, both upon the act of Parliament against parricide, and also upon the act of Parliament declaring the killing of persons under assurance of trust to be treasonable; hereupon the King granted a gift of Sir James' forfeiture to Sir Patrick Oliphant, who thereupon was infest. It was *alleged* for William Yeaman, who had right by apprising, That there could be no respect to the gift of forfeiture, because Sir James was never forfeit, but only declared fugitive, and denounced, as said is; and that if any doom of forfeiture had been pronounced, the crime behoved to have been proven before an assize, else there could be no forfeiture; neither could the donatar possess *medio tempore*, till the crime were yet put to the trial of an assize, because Sir James is dead.

THE LORDS found that the gift of forfeiture could not be effectual for the reasons foresaid, and found that the act against parricide could be no foundation of a gift, because it only excluded the murderer, and his descendents, to succeed to the person murdered, by declaring expressly, that the murderer's collaterals should succeed, and so there was no place for the King. And as for the other act of murder under trust, they found that there being no probation, it could work nothing; and there is no doubt, but though there had been probation, that act of murder under trust doth not directly quadrate to this case, upon that natural trust betwixt parents and children, but only to trust given by express paction, or otherwise; it could evacuate the benefit of the foresaid other act anent parricide, and would prefer the fisk to the collaterals of the murderer, if he had done no wrong, contrary to the said act anent parricide, which is not derogate by the other.

Fol. Dic. v. 1. p. 316. Stair, v. 1. p. 139, & 160.

1687. February.

HOLBURN of Menstrey *against* SIR THEOPHILUS OGILTHORPE and DAVID MAIN.

No 80.
Sentence of
fugitation
does not draw
back to the
date of the
crime.

THE Lady Earlstoun, after she had disposed her liferent, being pursued before the council for the treasonable crimes of 'harbour and reset,' restricted to arbitrary punishment, and referred to oath, and declared fugitive and denounced; there arose a competition between the assignee to her liferent, and the donatar to her escheat.

Alleged for the assignee; That the cedent's personal absence and contempt could not prejudice him in whose favours she stood denuded before the council-citation.

Answered for the donatar; That the rebel was convened for crimes of treason committed before the assignation, to which the sentence of fugitation must be drawn back,

Replied; Though sentences of forfeiture, upon probation of the crime, are drawn back to the date of the committing thereof, yet the declaring a person fugitive infers only contempt in not compearing, conform to the will of the letters, upon which nothing falls but the single escheat, and the liferent if the rebel continue year and day unrelaxed, as in the case of denunciations upon horning.

THE LORDS preferred the assigneee.

Harcarse, (FORFEITURE.) No 499. p. 138.

No 80.

1750. January 3. MAGOMBIE against DUGUID of Auchinhove.

PATRICK DUGUID of Auchinhove was declared fugitive at a Justiciary Circuit-court held at Aberdeen, upon a libel of spuilzie and oppression, committed by him against Elspeth Macombie, and thereupon denounced; and she pursued him before the Court of Session for her damages, of which she brought a proof; and, at advising, insisted he ought not to be heard in his defence, as not having *personam standi in judicio*.

Answered, A person at the horn is debarred from pursuing, but it were incongruous to summon him, and then to stop his mouth; and the practice has been to allow him to defend.

Replied, As a person at the horn cannot appear, no consequence can follow, as a certification for his contemning that summons; and thus a decret will not be given upon holding him as confest; but the pursuer must prove his libel, which the Lords will advise, but will not admit of any compearance; and thus it has been decided. As, on the same principles, a defender in an adjudication, though at the horn, has been allowed to produce a progress, because he was specially summoned to that effect.

THE LORDS, 8th December, found that the defender was debarred from making any defence in this cause, by virtue of the act of fugitation, and letters of denunciation issued against him, from the Court of Justiciary, and duly executed and registered; and this day refused a bill and adhered.

Act. *J. Grant*. Alt. *Brown*. Clerk, *Pringle*.

Fol. Dic. v. 3. p. 237. D. Falconer, v. 2. No 113. p. 130.

Error in designation, if it saves from forfeiture.—See FALSA DEMONSTRATIO.

Feu in what cases good against forfeiture.—See FEU.

See Drummond against King's Advocate, 18th July 1749, voce FRAUD, Sect. 2.

See No 29. p. 1426.

See APPENDIX.

No 81.

A person who had been declared rebel at a circuit Justiciary Court, upon a libel of spuilzie and oppression, and denounced rebel for non-compearance, being summoned before the Court of Session in a process for damages, the Lords found, that, by his fugitation, he was debarred from proponing defences.