

S E C T. XII.

Fugitation.

1662. July 30. WILLIAM YEAMAN *against* MR PATRICK OLIPHANT.

WILLIAM YEAMAN, as having right by an apprising to the lands of Newton, pursues Mr Patrick Oliphant, to hear and see it found and declared this his apprising was satisfied, by intromission with the mails and duties within the legal. The defender *alleged*, Apprising cannot be satisfied by his intromission, because any intromission he had was by virtue of other rights; viz. Mr James Oliphant, the common author, having killed his own mother, and thereupon he being declared fugitive, not only upon the parricide, but upon a criminal ditty against him, upon committing murder under trust, which is treason; the defender obtained gift of his forfaultry, and thereupon stands infest and in possession. The pursuer *answered*, *Non relevat*, *imo*, Because the act of Parliament against parricide doth not declare it to infer forfaultry, but only that the committer thereof should be excluded from succession; and as to the committing of slaughter under trust, the act of Parliament expresseth what it meant by trust, viz. though getting assurance from persons that had been formerly in variance. *2do*, Whatever the cause were, yet the infestment upon the gift of forfaultry cannot be respected, unless there had been a doom of forfaultry pronounced; for all that the Justice-General does, is to charge the party accused to find caution to underly the law; and if he appear not he is denounced rebel, and his escheat only falls; or if, having found caution, he appear not *in causa*, he is denounced fugitive, which hath the same effect; but none of them can infer forfaultry, unless doom of forfaultry had been pronounced, which the justice doth not, but when the defender compears; albeit the Parliament forfaults persons absent, having taken probation of the libel *contra absentes*; and unless the justice had either cited the party with letters of treason, under certification of treason, and that certification had been granted, or had cognosced the crime, the defender being present, the gift of forfaultry can work nothing.

THE LORDS found the reply relevant, unless the defender would allege as aforesaid; because the defender was not clear in the matter of fact, they, before answer, ordained him to produce the gift and warrants.

1663. January 22.

IN a competition betwixt Yeaman and Oliphant, anent the estate of Sir James Oliphant, who having killed his mother, was pursued criminally therefor before the Justice, and being charged to underly the law for the said crime, under the pain of rebellion, he compeared not, and by act of adjournal was declared fugi-

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A traitor being declared fugitive by the Court of Justiciary, a gift of his forfeiture was found null *quoad* his lands, because there was no doom of forfeiture pronounced.

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,