

be no process at the pursuer's instance, unless there were a general declarator raised upon his gift.

No 41.

Answered; The retour being upon oath, cannot be quarrelled; nor can the rebel's possession be reputed unpeaceable or interrupted, upon the account of a process on which no decret followed. *2do*, By the late act of Parliament forfeiture in absence by the justice court is declared equivalent to forfeiture in Parliament, which requires no declarator; and it would be a great prejudice to the King and his donatars, to run the tedious course of general declarators.

Replied; All prescriptions, long or short, are interrupted by process. *2do*, The act of Parliament makes forfeiture by the justices, of an absent traitor, to be as effectual only, and no better, than their forfeiture of a pannel who is present; and by custom declarators are always raised and required upon gifts of forfeiture before the justices. And Hope is clear that where forfeiture proceeds by way of act of adjournal, the gift thereof requires declarator.

THE LORDS delayed to give answer to the first point, and were inclined to find, that general declarators were of little use in the case of forfeiture, seeing the nullity of a forfeiture is not competent to be cognosced before a civil judicature; and therefore sustained process in the special declarator, seeing the pursuer consented to the defender's proponing any defence competent in the general. *Vide* a case between the parties, No 18. p. 3416., where forfeiture before the justices was found to need a declarator.

Harcarse, (FORFEITURE.) No 492. p. 135.

* * * P. Falconer reports the same case :

IN the action of mails and duties pursued by my Lord Livingstoun, as he who was donatar to the forfeiture of . It was *alleged*, That there could be no process sustained upon the foresaid gift of forfeiture, it being a forfeiture in absence, before the Lords of Justiciary, and the samen not declared; and, that the act of Parliament appointing forfeiture in absence before the Justice-general does not privilege decreets of that nature, more than there had been compearance, and if there had been compearance, the samen ought to have been declared. THE LORDS sustained the defence, and found, That the decret ought to be declared, not being a decret in Parliament. *See* No 18. p. 3416. *P. Falconer*, No 56. p. 36.

1687. *July*. THE EARL OF ARRAN, Donatar to COLTNESS'S Forfeiture.

No 42.

THE Earl of Arran, donatar to Coltness's forfeiture, applied to the Council to be put in possession for five years of the lands of North Berwick, whereof the rebel and his factors were in possession the time of the rebellion, that he might find out the rebel's rights in the mean time.

No 42. The Council ordained him to be possessed, and the bygone rents to be paid to him by the factors; though it seems, by the act of Parliament, he could only claim right to these *pro futuro*, after the decret for his possession; and here Inglis of Cramond was competing for these bygones, who having, since the act of council, arrested them in the factor's hands, the Lords of Session, upon a bill given in to them, discharged the arrestment without loosing, the factor being put in by themselves. Here the rebel's right was notourly known to be a wadset. The like act of council for summary possession was given, August 2. 1687, to Andrew Ker donatar, who had no retour of quinquennial possession.

Harcarse, (FORFEITURE.) No 500. p. 139.

S E C T. VI.

Forfeiture of a Sub-vassal.—Effect of Rebellion.—Misnomer.

No 43. 1506. *February 17.* ABBOT OF DUNFERMLINE *against* FORRESTER.

GIF ony man, haldand landis of the kirk, or ony uther of the King's lieges, as superiouris, beis convict and foirfaltit for ony crime of lese-majestie committit aganis the King; the proffitit, maillis, and dewties of the saidis landis per-tenit to the said immediat superiour, fra the time of his foirfaltung, ay and quhill the King present to the over-lord ane tenent in his place.

Balfour, (FORFEITURE.) No 5. p. 562.

No 44. 1540. *March 2.* SOMERVILLE *against* TENANTS of Liberton.

GIF ony persoun committit the crime of lese-majestie or tressoun, and is foirfaltit thairfoir, all landis baldin of him as superiour, be his vassalis, sub-vassalis, or thair free tenentis, cumis in the King's handis be ressoun of the said foirfaltung, be the law and consuetude of this realm; and, gif his hienes gevis and disponis the saidis landis to ony persoun, for compositioun or utherwayis, the saidis vassalis or sub-vassalis, aucht and sould be of new infest be him in thair landis, the quhillk thay hald in cheif of him that is foirfaltit, in the samin form and manner as thay wer infest befor the said foirfaltung, thay payand for the said new infestment to the maker and gevar thairof thre zeiris maillis of the saidis landis.

Balfour, (FORFEITURE.) No 4. p. 561.