the instrument of a common notary, which in few cases proves without testimonies of the witnesses insert, and goes no further than testimonies of witnesses can go. No 67.

THE LORDS found the allegeance for the apprisers, that *in cursu* they had presented signatures, relevant to be proven by the members and clerks of Exchequer, to prefer the apprisers to the donatar.

1676. *July* 25.

IN a competition betwixt the donatar of the liferent of Hugh Sinclair and the Creditors who had apprised his estate, it was *alleged* for the apprisers, That they ought to be preferred, because they had apprised *in cursu rebellionis*, for sums due before rebellion, and upon their apprisings had given in signatures to to the Exchequer, *debito tempore*, viz. in such time as they might be affixed, revised, and presented. Likeas they were componed before year and day run, but before infeftment could be expede the year was run, and the donatar took a gift of liferent; and, as infeftment upon apprising *in cursu* excludes liferent escheat, so a charge against a superior *in cursu* doth the like, and hath always been so sustained; but, where the King is superior, his Majesty and his officers cannot be charged, and therefore all that can be done is to give in a signature. It was *answered*, That the Creditors had a year to have apprised and presented a signature, and other superiors being charged, if they obey not, it is their fault, and so excludes them from the casualty of their superiority; but, it is not to be presumed, that the King's officers would do wrong by postponing any party; but it must be their own neglect who should have presented timeously, and protested for dispatch if they were near the year, which is not done; but if a naked giving in of a signature shall be sufficient, the King should be hugely prejudged in this and other casualties, as ward, non-entry, *&c.* And no witnesses can be allowed to prove in this case.

THE LORDS, before answer, recommended to the Lords of Exchequer, to take an exact trial *per membra curiæ*, when these signatures were presented, and what was the cause of the delay.

Stair, *v.* 2. *p.* 222. & 459.

1697. *July* 20. DALRYMPLE *against* HUNTER'S CREDITORS.

MR HUGH DALRYMPLE, advocate, as donatar to the liferent escheat of Alexander Hunter younger of Muirhouse, pursues a declarator against the Creditors. *Alleged*, The Creditors must be preferred to the donatar, because his annual rebellion is not after he was apparent heir by his father's decease, but most of it was run in his father's lifetime; and before year and day expired after the father's death, the Creditors had adjudged and charged the superiors to infeft them; and so they must be preferred to the donatar. *Answered*, An apparent heir being year and day at the horn, before his father's death, *ipso momento* that

No 68.
Such casualties as escheat are *stricti juris*, and not to be extended. When a party's annual rebellion was not whole

No 68.
run in his father's life, creditors were preferred to a donatar.

his father dies, the liferent escheat immediately falls to the superior, whether he be infeft or not; as was found 3d July 1624, Muir against Ahannay and the Earl of Galloway, No 33. p. 3638.; and the 32d act of Parliament 1535, requires no such thing. *Replied*, Both the decision and the act of Parliament must be understood *in terminis habilibus*, that the rebel must be vassal *vel actu vel habitu*, which he cannot be till his father's death; and that it must be so, is explained in that parallel case, 9th March 1624, Douglas *contra* East-Nisbet, No 32. p. 3637., where the reason is given, that he was potentially vassal to the King. THE LORDS considered these strict casualties are not to be extended, and therefore found the escheat could not take place in this case, and so preferred the other creditors.

Fol. Dic. v. 1. *p.* 257. *Fountainhall, v.* 1. *p.* 788.

1699. *December* 6. CLERK'S CREDITORS *against* GORDON.

No 69.
Found in conformity with No 61. p. 3662.

IN the competition for the sum in Ruthven of Gairden's wadset on the Earls of Home and Annandale their estates, betwixt the Creditors and donatars of Mr Clerk's escheat, on the one hand, and James Gordon of Seaton as donatar to Ruthven's escheat; the LORDS found the disposition made of this wadset to James Clerk by Ruthven of Gairden, when he was minor, with the consent of his uncle as curator, was not null in law, though there was no *decretum judicis* interposed, but was only reducible upon minority and lesion; for though a pupil can alienate nothing without the authority of a Judge, yet it was no legal nullity, where a minor either wanting curators, or with their consent, where he has them, alienates heritage without the warrant and cognition of a Judge; but the deed subsists, if not revoked or quarrelled *intra quadriennium utile*. 2d February 1630, Hamilton *contra* Sharp, *voce* MINOR; 13th December 1666, Thomson *contra* Stevenson, IBIDEM. THE LORDS also found, That the donatar to Gairden's escheat was preferable to a base infeftment granted by the rebel to Clerk prior to the denunciation, unless the said base infeftment was either confirmed or clad with possession before the annual rebellion existed; and which agrees with the current of former decisions, 19th March 1633, Renton *contra* Blackader, No 61. p. 3662.; and 21st February 1667, Milne *contra* Clarkson, No 64. p. 3664. And possession *in cursu rebellionis* will do the turn to prefer the base infeftment to the donatar of the liferent escheat. But now, since the act of Parliament 1693, taking away the distinction betwixt public and private infeftments, any infeftment prior to the denunciation will now seclude the superior and his casuality.

Fol. Dic. v. 1. *p.* 256. *Fountainhall, v.* 2. *p.* 71.