

## S E C T. IV.

## Competitions between Gifts of Escheat.

1588. *December.* GRAHAM *against* GRAHAM.

## No 25.

The first gift with the first intended action was preferred to the second gift, though clothed with possession.

THOMAS GRAHAM, son of the second wife of umquhil Laird of Knockdolzean, as donatar to the gift of his father's liferent, fallen be escheat, persewed for declarator upon the same gift, and the guids and gear that pertained to his father to appertain to him be reason of the gift of his escheat. Compeared Mungo Graham, and being admitted for his interest, *alleged*, That he had the gift of the said Laird's escheat, and albeit his gift was posterior to the other, yet he became first in possession. It was *answered*, That the other party was *prior tempore*, and had first intended action, *et qui prior agat prior appellat*; and as to the possession, it appeared to be simulate betwixt the said Mungo and young Knockdolzean, he being his sister's son. THE LORDS found the first gift with the first intentit action to have place.

*Fol. Dic. v. I. p. 347. Colvil, MS. p. 433.*

1590. *January.* COLLUTHIE *against* DUNDAS.

## No 26.

In a competition between two gifts of escheat, the second, on which declarator was first raised, was preferred.

THE Laird of Colluthie persewit William Dundas fiar of Fregosk to hear and see him to have tynt his liferent of the lands of Fregosk, as being year and day at the horn. It was *allegit*, That he could not be decernit to tyne his liferent at the instance of the persewar, because there was ane disposition made of his liferent for being year and day at the horn, at the instance of three sundry o-ther persons, to James Colvin of East Wemyss, long before the disposition made to the Laird of Colluthie; the whilk disposition made to the Laird of Wemyss was intimate to the said William Dundas, and sua he could not have two liferents; but the first gift with the first intimation aught to have place, as was the daily practise in gift of wairds, of marriages, and gifts of non-entries, where there proceeds double gifts of them frae the Prince, the first gift and the first intimation following thereupon has place; and the Prince after he has once disponit and made a donatar and ordained composition for the escheat, may not again dispone; for utherwayis it wad be to his disponer quasi crimen stellionatus, eandem rem disponere duobus; et princeps lege contractus tenetur, nec debet laqueum alteri immittere, vel jus alteri acquisitum tollere. To this was *answerit*, That albeit the Laird of

Wemyss had been made donatar before the Laird of Colluthie, and upon other hornings had obtained ane anterior gift, and intimated first to the defender; yet it could not prejudge the latter gift dispoit to Colluthie, because the thing that made any gift or disposition of ane liferent to take effect, was the declarator that was sought thereupon; for without ane declaratour of the tynsel of liferent the gift serves for na purpose; but so it was that the Laird of Colluthie had sought the first declarator *et primus ad judicium provocavit, ergo* his gift, albeit posterior to the other, yet had taken first effect be the summons. THE LORDS fand the last gift to take effect, because the donatar thereof had pursued.

No 26.

*Fol. Dic. v. 1. p. 347. Colvil, MS. p. 458.*

1601. February.

FLEMING against BAILLIE.

IN an action of declarator of John Baillie of St John's Kirk's escheat, pursued by Thomas Fleming, compeared another called —, also donatar, and having another gift of the said escheat, and being admitted for his interest, *alleged*, That the said Fleming could have no declarator, because the other had an anterior gift and declarator intended. It is *answered* by Thomas Fleming, That the said first gift was null, because it was simulate taken to the behoof of the rebel upon his own expenses, and that he retained the possession of his own gear, likeas Thomas Fleming had obtained his gift before the rebel was relaxed. THE LORDS found the allegiance upon the first gift relevant notwithstanding the alleged simulation, because the rebel in whose favour the first gift was alleged taken, was relaxed before any declarator intended by Thomas Fleming.

*Fol. Dic. v. 1. p. 347. Haddington, MS. No 646.*

No 27.

The first gift of escheat, though upon the expenses, and for behoof of the rebel, was preferred to a posterior gift taken against him, he being relaxed before declarator was raised on the last gift.

1635. January 30.

L. RENTON against L. WEDDERBURN.

THE L. Renton being donatar to Sir George Hume of Manderston's liferent escheat, and sicklike the L. Wedderburn being donatar to the same, and both the donatars pursuing declarator thereupon, and both compearing, and claiming preference; the LORDS preferred Renton, and declared the liferent in his favours; because albeit the Laird of Wedderburn's gift was a quarter of a year dated, and exped before Renton's gift, yet the summons of declarator at Renton's instance was executed three days, and the day of compearance was three days also before the execution and day of compearance of the summons of declarator pursued by Wedderburn; and so for such little odds as three days, albeit there was the space of a quarter of a year betwixt their gifts, the first diligence of the citation was totally preferred; albeit also L. Wedderburn had raised upon his gift a summons of declarator, long before Renton, and had executed the

No 28.

In a competition betwixt two donatars to a liferent escheat, the Lords preferred him whose summons of declarator was executed three days, and the day of compearance three days before the execution and day of