

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 iudicium 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