SECT. IV.

Casualties of Superiority.

1609. *November* 30. ARDKINGLASS *against* E. of ARGYLE.

No 24.
A gift of ward and marriage, upon which no decree of the avail had been obtained, found to belong to the heir of the donatar. Otherwise if it had been liquidated.

IN a consultation for a question betwixt the E. of Argyle and the Laird of Ardkinglass, for this Earl of Argyle's ward and marriage, it was *reasoned*, That albeit Ardkinglass's father obtained the gift thereof in *anno* 1584, yet, because he had not raised declarator, intented action, nor made any lawful intimation of his right, that Archibald Campbell having obtained a gift of the said ward and marriage in *anno* 1609 in August, the assignation or discharge thereof granted by him to the Earl of Argyle, before any citation made by Ardkinglass, was a lawful warrant to the Earl, and elided Ardkinglass's subsequent intention, notwithstanding of the gift being anterior. It being *answered* that the posterior donatar could put the Earl in no better condition than he was himself, and he would never have prevailed against the first donatar, except he had prevailed against him by his diligence, in obtaining the first declarator, it was *duplied*, That his assignation to the Earl, or his discharge, was as if the Earl had taken the gift in his own person, in which case he needed no declarator; and *alleged*, that the like was practised betwixt John Cunninghame goldsmith, who was assignee to the Duke of Lenox, to the escheat of the Earl Bothwell, and thereupon had obtained a general declarator; and, when he came to pursue a particular declarator, and called the Earl of Home, he defended himself by the particular gift given to him by the King of his own part of the debt owing to him by the Earl Bothwell, long before any declarator intented by the said Lord Duke or his assignee; and so the Earl of Home needing no declarator against himself, was to be preferred; which exception the LORDS found relevant, and assoilzied the said Earl of Home. It was, at that same consultation, *affirmed*, That a gift of ward aud non-entries being given to A. B. of lands whereof John Logan of Couston was sub-vassal, and the said John obtaining a posterior gift thereof, the first donatar seeking declarator, John Logan defended by his posterior gift; and the pursuer *alleging* the anteriority of his gift and diligence in his declarator, the LORDS found that John Logan's gift being anterior to the action of the first donatar, the said John Logan being actual possessor of the lands, and having obtained gift before the intenting of declarator by the first donatar; the said John, albeit he was only a sub-vassal, needed no declarator, but should be preferred to the first donatar. These practiques were alleged by Mr William Oliphant. In the consultation of that

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same action, it was questioned, Whether, if the gift of ward and marriage of the Earl of Argyle obtained by this Ardkinglass's father in *anno* 1584 fell to his executors or to his heir. It was *resolved* that it fell to his heir, and could not come under testament, because it was not liquid. But if decreet had been obtained upon the avail thereof in old Ardkinglass's time, it would have fallen under his testament. For confirmation of this resolution, there was *alleged* a practique betwixt the Earl of Cassillis and Lord Glamis, and another betwixt Sir William Keith and the Laird of Leslie.

Fol. Dic. v. 1. *p.* 367. *Haddington, MS. No* 1667.

1611. *March* 5. LORD DOUGLAS *against* CRAWFURD.

No 25.

THE fiar obtaining renunciation of the liferenter's right in his favour, may thereby have action for the vassal's liferent, who holds his lands of him; which fell before the fiar obtained the renunciation foresaid; because the casualties and superiority not being pursued and decerned, pertain to him that acquires the right of superiority.

Fol. Dic. v. 1. *p.* 367. *Haddington, MS. No* 2177.

1624. *February* 8. L. COULTER *against* FORBES.

No 26.
A gift of liferent escheat, upon which declarator had been obtained, found to belong to the heir of the donatar, except as to bygones, due to him before his decease, which would belong to his executors.

IN an action betwixt the L. Coulter and L. Balbigno, for declarator of Balbigno's liferent, John Forbes, son and heir of umquhile Mr Duncan Forbes compeared, as claiming the right of the said liferent to pertain to him, seeing his father was donatar thereto, and had obtained declarator thereupon, at his instance, before his decease; and so he, as son and apparent heir, had right to the same, and consequently, to impede all declarator at any other person's instance; and the pursuers *contending*, That the apparent heir could have no right to that liferent, the donatar being deceased, but that the same would pertain to his executors; the LORDS found, That the said liferent right, and gift, and declarator thereof, pertained to the heir of the donatar, and not to his executors, except for the bygone years owing to the donatar before his decease, which would appertain to his executors.

Act. *Burnet.* Alt. *Baird.* Clerk, *Scot.*

Fol. Dic. v. 1. *p.* 367. *Durie, p.* 111.