

* * * Haddington also reports this case :

No 257.

JOHN INGLIS pursued a declarator of the Lord Ochiltrie's escheat and liferent ; the Laird of Caprintoun, likewise donatar, opposed. THE LORDS fand, in that case, That a gift of escheat of all goods pertaining to the rebel the time of his declarator, and which he should acquire during his rebellion, would go no further than to that which pertained to the rebel the time of the gift of his escheat, and a year thereafter. They fand also, That a gift of liferent could comprehend nothing but that whereof the rebel had right of fee or liferent the time of the gift. They fand, That a gift taken *in anno* 1613, whereupon no declarator was sought by the space of nine years after the date of the gift, the rebel remaining always in possession, was thought simulate. They likewise fand, That a gift purchased by the rebel upon his expenses, and past by him the registers and seals upon his charges, was null, as taken to his behoof, albeit he had inserted the name of a donatar, who was his creditor. Farther, they fand, That the donatar, having accepted right from the rebel, of that which was contained in his gift, after the date thereof, acknowledged the rebel's right, and prejudged his own gift. Last, they fand, That John Inglis could not impugn Caprintoun's gift, because he had accepted a ratification from Caprintoun, as donatar, of a tack set by the Lord Ochiltrie to John Inglis.

Haddington, MS. No 2638.

1623. *March 20.* DALGARNO *against* E. MARISHAL.

No 258.

IN a declarator pursued by Dalgarno, as donatar to the escheat of the Earl Marishal, wherein L. Benholm, as another donatar, compeared, the LORDS found, That albeit the gift was taken to the behoof of the Lord Keith, eldest son to the rebel, yet that was not sufficient to stay the declarator, except it had been alleged that the Lord Keith had taken it to the use of the rebel's self; and therefore repelled that allegiance proponed by a contrary donatar, viz. L. Benholm. *See* No 156. p. 11591.

Act. Nicolson & Mouat.

Alt. Hope & Stuart.

Clerk, Gibson.

Fol. Dic. v. 2. p. 158. Durie, p. 59.

1623. *December 18.* LO. YESTER *against* JOHN MURRAY.

No 259.

SIMULATION sustained, upon these heads,—retention of possession, consent given to wadsets, and tacks made to the rebel, and acquiring from the rebel of wadsets; but found, That the gift, in so far as it was taken by the donatar as

No 259. creditor, for his own relief, (ought to be sustained) *et sic pro parte simulat: pro parte non.*

Fol. Dic. v. 2. p. 157. Kerse, MS. fol. 57.

* * * Haddington reports this case :

JOHN BALLANTINE, servitor to the Lord Yester, donatar to the escheat and liferent of the Laird of Drummelzier, pursued declarator. John Murray, of Halmyre, compeared, and *alleged* an anterior gift *in anno* 1618, and declarator 1621. It was *replied*, That the gift was simulate, the rebel remaining in possession unquarrelled, and the donatar taking from him dispositions of his lands, irredeemably and redeemably, and consenting to tacks set by the rebel, for *grassum* paid to the rebel, and yearly duty to be paid to him. THE LORDS found, That the first gift was to be allowed for the lands acquired by the donatar from the rebel, as well heritably as redeemably; and found it simulate *pro reliquo*. Thereafter, the gift was found null, for all redeemable conquests.

1623. December 23.—JOHN MURRAY, of Halmyre, obtained the gift of the Laird Drummelzier's liferent, and declarator thereupon. The Lord Yester obtained a posterior gift thereof, and intended reduction of the former; *alleging*, That it was simulate taken to the rebel's behoof, and that he had suffered him peaceably to possess his own lands; and had bought one part of them heritably, and another part in wadset. It was *excepted*, That the reason of reduction was not relevant, because the defender was not of power to dispossess the rebel; and as for the lands which the defender had bought from him, he had obtained possession thereof, and thereby consolidated the property and liferent. THE LORDS found, That, in respect the first donatar had not pursued removings, nor any other action to obtain to the possession of the lands, that the gift was simulate for all the lands, except those which he had bought heritably and irredeemably; and that the liferent of all the rest pertained to the Lord Yester, pursuer; as well those that were wadset to John Murray, as the remnant that were not yet annalized by the rebel.

Haddington, MS. No 2960. & 2962.

* * * Durie also reports this case :

1623. December 23.—IN an action of declarator of the L. Drumelzier's liferent-escheat, pursued at the instance of John Bannatyne, servitor to the Lo. Yester, compeared John Murray of Halmyre, who was donatar of before to this same liferent, and who thereupon had obtained general declarator, and had intended also special declarator; in respect whereof he *alleged*, That the liferent being once lawfully declared at his instance, no declarator thereupon could again be sought by the pursuer, upon this late gift, granted since his sentence.

It was *replied* by the pursuer, That the excipient's gift and declarator was null, because it was simulately taken by the excipient to the rebel's use, in so far as the same was granted *in anno* 1618, since the which time the rebel has continually remained in possession of his lands, goods, and gear, peaceably, as he did before the gift, without any diligence done by the excipient, upon his gift and declarator, to recover possession, or put the rebel therefrom: Likeas the donatar not only has suffered the rebel to retain the said possession, but has taken himself from him a wadset of some of his lands, and consented to the tacks of some other of his lands set by the rebel to his tenants since the date of his gift, and has suffered the rebel to apply the money received for the said wadsets to his own use; which manifestly detects the simulation. The defender *duplicated*, That the donatar's oversight to suffer the rebel to possess, if that were granted, will not cause his right fall, for the alleged simulation is not relevant, except it were *positive* offered to be proved, that the gift and declarator were procured and expedite upon the rebel's own charges, and that it were proved *per membra curia*; and the illative deeds alleged, cannot make simulation, for the consenting to tacks set by the rebel, or accepting of wadsets, is not relevant, seeing he might have consented either to tack or wadset granted by the rebel, for respect borne by the donatar to the receiver of these rights, and the accepting of his own wadsets, which had a longer endurance than the right of liferent competent by the gift, cannot make the gift simulate and to fall: And if these deeds were of force to prejudge his gift, yet the most that the same could work were to make it null, for the liferent of these lands, to the setting whereof by the rebel the defender consented, and whereof the defender's self took wadset; but thereby the gift cannot fall *in toto*, but may subsist in his person for all the rest of the rebel's lands, especially seeing he was both cautioner to diverse creditors for the rebel in sums of money, at the time of the gift, and then also had acquired the heritable right of some lands from him, and since that time has acquired the heritable right of some other lands, for further security whereof he having taken the said gift, no reason were that either he should be hurt in the liferent of the lands whereof he has acquired the heritable right, or in the sums wherein he was bound for the rebel; but he ought to keep the liferent while he be relieved thereof. And this alleged simulation can never be objected by this pursuer, because his name is only borrowed to the behoof of the Lo. Yester, who accepted from the excipient an assignation of his right to a part of the said rebel's liferent-escheat, for sums conditioned to be paid by him to the excipient therefor, by the which acceptation he has approved the right to be lawfully established in his person. THE LORDS sustained the right of the rebel's liferent in the person of the excipient, for the lands acquired by him from the rebel heritably and irredeemably; either before his purchasing of the gift of the rebel's liferent or since that time; wherein they found, that he ought not to be prejudged by any deed of simulation or other alleged for the pursuer against the same *pro tanto*, viz. for any irredeemable lands acquired by him.

No 259. from the rebel; but as for the lands acquired by him since his gift, which were under reversion to the rebel, or set in tack by the rebel, and consented to by him, and for all other the rebel's lands by and attour those which the excipient had acquired irredeemably, the LORDS would not sustain the excipient's gift, but preferred the pursuer the second donatar therein, albeit the excipient was cautioner for the rebel the time of the purchasing of his gift for his relief, whereof they found, that the excipient ought not to possess the liferent of the rest of the rebel's lands, in respect of the reply, which they admitted against the same, viz. the retention of the rebel's possession, and the excipient's consenting to the tacks and wadsets since that time set by the rebel, and his permitting of the rebel to apply the monies acquired therefor to the rebel's own use, which ought to have been employed either for the relief of the excipient or of some other the rebel's creditors; by the which the excipient had so prejudged himself, that he ought not to retain the liferent for his relief of these burdens whereof he might have relieved himself before, if he had not consented as said is, and so defrauded either the fisk or any other creditor, he colluding thereby with the rebel; and consequently admitted the reply to the pursuer's probation.

Act. Nicolson & Stuart.

Alt. Hope & Cunningham.

Clerk, Hay.

Durie, p. 94.

No 260.

1626. November 28.

EARL OF KINGHORN against WOOD.

SIMULATION inferred from the gift being procured at the rebel's expense.

Fol. Dic. v. 2. p. 158. Durie.

* * * This case is No 8. p. 5073. voce GIFT OF ESCHEAT.

No 261.

1637. March 28.

HAMILTON against TENANTS.

If a rebel at the horn be suffered by the donatar of his escheat to remain for several years in possession of his rents, this infers a sufficient nullity upon the act 1592 against the donatar at the instance of any of the rebel's creditors.

Fol. Dic. v. 2. p. 157. Durie.

* * * This case is No 65. p. 7835. voce JUS TERTII.