

No 32.

is granted to him in September 1623, so that he not being vassal year and day before the gift, albeit he was at the horn before the gift year and day, the liferent could not fall. This allegiance was repelled, for the LORDS found, that albeit there was not a year betwixt the rebel's sasine and the gift of his liferent, yet seeing he had a right in his person, which was of a date more than year and day anterior, and before the said gift, by virtue of which right he might have taken sasine of the lands controverted, at the date of the same right, which was a sufficient title and warrant, by virtue whereof he became potentially vassal to the King, albeit he delayed to take sasine, or if he should yet delay, and had not yet taken sasine, he remaining, and being found at the horn year and day, since that time that he had right, by the which he might have been seased, and so have been actually vassal to the King, and at the horn a year before the gift, albeit not actually seased a year before the same, his liferent thereby pertained to the King, and consequently to the pursuer.

1624. *March 11.*—IN an action mentioned before upon the 6th and 9th of March, of William Douglas, donatar to John Stuart's escheat and liferent, THE LORDS found, that albeit that gift was taken, and given by the thesaurer to his donatar, at the rebel's request and desire, and that the same was expedite the seals upon the rebel's own expenses, and by his moyen obtained, yet seeing the donatar was a true creditor to the rebel, and who insisted in that declarator, to recover payment thereby of his true debt, justly owing by the rebel to him, that the said gift could not be found simulate, notwithstanding that the rebel had procured it by his moyen and charges to the donatar, who was his creditor, which the LORDS found he might lawfully do, even as he might pay his debt to the said donatar; and by that deed the LORDS found, that the donatar could not be prejudged to prosecute the declarator, but sustained the gift and pursuit, and repelled this allegiance, the same being proponed by the Viscount of Ayr, a second donatar, who desired to be preferred to the pursuer, in respect of the said alleged simulation, and was not preferred.

Act. Craig.

Alt. Hope et Belshes.

Clerk, Gibson.

Fol. Dic. v. 1. p. 254. Durie, p. 118. 119.

1624. *July 3.* MUIRE *against* AHANNAY and E. of GALLOWAY.

No 33.
Found in conformity with
No 30. P.
3636.

IN an action pursued Muire *contra* Ahannay and the E. of Galloway, wherein a donatar to a rebel's liferent escheat, pursuing for the mails and duties of the rebel's lands, after the expiring of year and day, and the defender defending himself with an infestment of the lands granted to him of the same by the rebel, the LORDS found, that that infestment, albeit it was replied and granted by the defender to be true, that the same was made after that the re-

bel was year and day at the horn, whereby the right of his liferent of these lands was acquired to the King, and so that no deed could be done in the King's prejudice, which might make the liferent unprofitable to him; yet that the same was sufficient; likeas the LORDS sustained the same to liberate the defender, who had acquired the infeftment, for all the duties acclaimed of these lands, of all years preceding the intending of any declarator, upon that rebellion; and that the defender was *in bona fide*, to intromit with the same duties of the saids preceding years; and therefore he could not be compelled to refund the same, seeing they were *fructus bona fide et percepti et consumpti*, and so could not be repetit from him, and therefore assoilzied him therefrom.

In this process it was found, that the liferent of him who was apparent heir to a defunct, who died infeft in lands, fell to the superior, by the apparent heir's rebellion year and day, albeit that the apparent heir was not infeft in the lands.

In this process also, a tack being quarrelled as null, because it was conferred to a time of entry unlawful, and so behoved to be respected as wanting an entry, in which case it would be null, by reason the words of the tack bore; 'That the tacksman's entry is, and shall be at a year therein expresst,' which year was bye-past many years before the date of the tack, the tack being set long after that year, to the which this entry was conferred; which allegiance was repelled, and the tack sustained, in respect it was but the incongruity, or informality in the writing thereof, in these words, 'is and shall be,' respecting the future time, whereas it should have said, the entry was at that time, respecting the preterite; for the which, the LORDS found no cause in substance to annul the tack, or which might derogate therefrom. See LITIGIOUS. See TACK.

Act. Hope & Nicolson, jun.

Alt. Nicolson, sen.

Clerk, Gibson.

Fol. Dic. v. 1. p. 254. Durie, p. 137.

1675. July 22.

MENZIES against KENNEDY.

THERE being a decret obtained against Menzies of Castlehill, as heir to his father, and the Lady Castlehill, as executrix or intromitter, they were both denounced, and a gift of the escheat and liferent taken of the Lady and her second husband, who was denounced and decerned for his interest by Kennedy of Auchtifardel. There is now a reduction at the instance of an assignee against Kennedy, for the reduction of the horning and gift, on these reasons; *imo*, Because the gift of liferent granted by the King is null, because the Lady was provided to be infeft in liferent of lands holden of other superiors. It was answered, *non relevat*, unless it were alleged that the Lady had been infeft; for, a liferent provision without infeftment could only befall to the King, and to no other superior,

No 34.

Found in conformity with No 32. p. 3637. Liferent escheat falls always to the King, where there is no superior, and there cannot be a superior without infeftment.