

not use the gift to the prejudice of the rebel's creditors. This the rebel *alleged* might be proponed in his own name, as well as in the creditors, seeing he was interested to see his creditors rather paid by his own escheatable goods, than that the donatar should meddle therewith, and then the creditors should have recourse to his lands or his person. THE LORDS repelled it as not competent to be proponed in the rebel's own name, 23d March 1630.

Next, because the donatar craved three or four year's crops of land laboured by the rebel since the rebellion, the LORDS deducted the expenses bestowed by him upon the winning of the corns, with the seed likewise.

Spottiswood, (ESCHEAT.) p. 103.

** See Durie's report of this case, No 11. p. 3622. *voce* ESCHAT.

No 63.

1631. February 10. EARL OF GALLOWAY *against* BURGESSES OF WIGTON.

ONE infest feu in lands, which pertained once in burgage to a town, pursuing a removing against some burgesses, it was *objected*, That his title was null, by the 36th act, Parliament 1491, and by act 185th, Parliament 1593, which statutes, that the burghs may not set their common-good for longer space than three years. This was repelled, seeing neither the town, nor any party having better right, challenged the title.

Fol. Dic. v. 1. p. 522. Durie.

** This case is No 21. p. 7193. *voce* IRRITANCY.

No 64.

1637. March 28. HAMILTON *against* TENANTS.

JOHN HAMILTON apothecary, being confirmed executor creditor to umquhile John Glendinning of Drumrash, pursues the Tenants of the said Drumrash's lands, for payment of their duties to him of certain years, resting unpaid before Drumrash's decease; wherein it being *alleged* for William Glendinning of Lagan, That he had intromitted with these duties by tollerance of John Glendinning of Perlan, who was donatar to the escheat and liferent of the said John Glendinning of Drumrash, and who had obtained general declarator thereon; and it being *replied*, That that gift of escheat must be presumed to be simulate, in respect of the act of Parliament 1592, whereby all such gifts are declared simulate and null, where the rebel remains in possession of the lands, and goods, &c., and true it is, that this rebel remained in possession of his lands and goods peaceably, and continually all the years after the gift and declarator, by the space of diverse years, and ay and while this year controverted, and of which year the duties are yet in the tenants hands unuplifted; and the de-

No 65.
Nullity of a gift of escheat, as taken for the rebel's behoof, sustained not only in favour of the one at whose instance he was denounced, but in favour of his other creditors.

No 65.

fender *duplicated*, That this answer of simulation cannot be found well qualified by this presumption alleged, of the rebel's remaining in possession, without some further qualification of a positive act, which may infer simulation; for although the donatar suffer the rebel to possess, that is not enough to make his gift null, where the same is not truly taken to the rebel's behoof; but notwithstanding of that bruicking by the rebel, the donatar may, when he pleases, claim the benefit of his gift; attour this act of Parliament cannot be constructed to any other sense; as also the same expressly appoints that nullity to be in favours of the creditor, at whose instance the rebel was denounced, and cannot militate for every creditor, as the words of the act in themselves proopt, which cannot be extended. THE LORDS found this allegiance not relevant, in respect of the answer; and found the same reply was competent to be alleged for all creditors, as well as for him, at whose instance the debtor was denounced, and found that there was no necessity to qualify any other circumstance of simulation, except the said retention of possession. See PRESUMPTION.

Act. ———.

Alt. *Gilmore*.Clerk, *Scot*.*Fol. Dic. v. 1. p. 521. Durie, p. 843.*

No 66.

1684. *January 23.*NEILSON *against* KENNEDY.

IN a process of special declarator, at the instance of a donatar of single escheat, it was found competent to the defender to plead that the bond was granted by him, more than year and day after the denunciation, and consequently fell not under single escheat, though the gift bore all goods and gear that should belong to the rebel, before his decease; seeing such gifts are restricted to what the rebel shall acquire within year and day; and it was not found *jus tertii* to quarrel the pursuer's want of title.

*Fol. Dic. v. 1. p. 522. Harcarse.**.* This case is No 15. p. 5085. *voce* GIFT OF ESCHEAT.1685. *November 26. & 28.*ARCHBISHOP of ST ANDREW'S *against* The TOWN of GLASGOW.

No 67.

The Magistrates of Glasgow obtained a tack from the Archbishop. The Archbishop charg-

THE Magistrates of Glasgow having got from their Archbishop a nineteen years tack of his parsonage and vicarage teinds, for a grassum of 20,000 merks, and a small tack-duty; the Bishop charged for the grassum.

Alleged for the defenders; *imo*, Their tack is null, as granted after a *conge d'elire* was come from Court for electing the setter Archbishop of St Andrew's; *2do*, The Magistrates, who are but administrators and curators, cannot do