

No 42.

can be objected that can extinguish the donatar's gift *in toto*; whereas, recognitions being founded upon the vassal's proper delict and contempt of his superior, by dispoing the greatest part of the feu holden ward of him without his superior's consent, there is a necessity for the donatar, not only to allege that, but to prove so many deeds done by the vassal, by granting disposition and infestment as may infer the recognition craved; which deeds of the vassal being *facti* must abide probation, and the event is dubious, wherein possibly the donatar may succumb, and his gift prove ineffectual; and therefore, unless the defender allege, that there is not only a gift of recognition, but a subsequent declarator obtained thereupon, upon probation of so many deeds done by the Master of Gray, as may conclude the gift of recognition, alleged on the defender's intromission had before declarator, must import a behaviour as heir; which he cannot do, there being no such declarator yet obtained, but allenary an act of litiscontestation and circumduction of the term against some of the defenders, called in the recognition, neither was the probation renounced, nor the cause advised, nor the parties heard, why the deeds and dispositions granted by the deceased Master of Gray, did prove the recognitions craved; neither was the rental of the barony of Fowlis proven, or that there were so many deeds proven as would make up a disposition of the greatest part of the said barony, holden ward, as said is; till all which be done, the donatar had no complete right in his person, to intromit or grant licence to this defender as apparent heir to intromit; but his intromission ought to import a behaviour as heir. THE LORDS found the allegiance proponed for the Lord Gray relevant, to free him from that odious passive title libelled, of behaving as heir; but found, that he ought to be liable to the pursuer *in quantum* he had intromitted, to make the same forthcoming to him.

*Newbyth, MS. p. 76.*

1666. December 16.

ALLAN against CAMPBELL.

No 43.

EDINAMPLE CAMPBELL being pursued as representing his father, upon the title of behaving as heir; it was *alleged*, That he intromitted with the duties of the lands condescended upon, by a right to two comprisings against his father. It was *replied*, The comprisings were not expired the time of his father's decease, so that in effect he was heritor.

THE LORDS found, that *gestio* being *magis animi quam facti*, the defender's intromission by virtue of a title did not infer behaving.

*Fol. Dic. v. 2. p. 30. Dirleton, No 67. p. 28.*