

No 262.

* * Dirleton reports this case :

IN a special declarator at the instance of Sir James Drummond of Machany, having right by assignation to the escheat of Lord Rollo, and his brother Sir John Rollo of Bannockburn, from Walter Stewart donatar to the same ; Sir Laurence Oliphant and Gavin Drummond, who were also donatars to the escheat and liferent of the said rebels, and had recovered a general declarator, and had intended a special ; having compeared and desiring a preference, *alleging*, That the pursuer's gift was null and simulate ; in respect by the act of Parliament 1592, c. 147, *præsumptio juris et de jure* is introduced ; and it is statuted, that it shall be a relevant exception against any pretending title by assignation or gift of escheat of the rebel, to allege that the rebel his wife and bairns remained in possession ; and it was subsumed, that the pursuer and his cedent had suffered the rebel to continue in possession since the date of the gift *in anno* 1658.

THE LORDS found, that the rebels having been in possession a considerable time by the space of five years or thereabout, the gift, by the act of Parliament, is presumed to be simulate ;

2do, That though the donatar Walter Stuart was a creditor, it doth not alter the case ; seeing he might be (and law prerumeth he was) satisfied ; and gifts being ordinarily affected with back-bonds, it was his fault that he was not satisfied ; and that he should not by his negligence and collusion prejudice other creditors, who would have right after he had been satisfied ;

3tio, That the pursuer having assigned his right, the assignee is in no better case, *et utitur jure auctoris* ;

4to, That the reply that the lands were comprised is not relevant, unless it were alleged, that the pursuer or his cedent had done diligence to attain possession, but was excluded by the compriser.

Clerk, Jo. Hay.

Dirleton, No 14. p. 7.

1669. December 4.

JAFFRAY against JAFFRAY.

No 263.

A son being donatar to his father's escheat, and suffering him to possess for less than a year, not found to make his gift null.

JOHN JAFFRAY of Delspre having obtained a gift of his brother's escheat, and thereupon pursuing a declarator, compearance was made for Doctor Jaffray, son to the rebel, who craved preference, as having a prior gift. It was *alleged* for the pursuer, That the Doctor's gift was simulate, being obtained by his father's moyen, whom he suffered to remain in possession, and to whom he had given back-bond to dispoise the said gift to his behoof. THE LORDS found, That seeing the Doctor had given back-bond to the Exchequer that he should only make use of the gift in so far as he was a true creditor to his father, that the

procuring of the gift by the father's moyen and upon his charges, was only probable *scripto vel juramento*; as likewise, the giving of a back-bond to his father: But as for that part of the allegiance, that he had suffered him to remain in possession, seeing there had not intervened a year betwixt the gift and the intending of this declarator, the Lords would not sustain the same, specially the son having intented a special declarator, wherein he declared he was ready to insist.

Fol. Dic. v. 2. p. 157. Gosford, MS. No 210. p. 84.

*** Stair reports this case :

JOHN JAFFRAY, late Provost of Aberdeen, pursues a declarator of the escheat and liferent of Alexander Jaffray his brother. Compearance is made for Doctor Jaffray, son to the rebel, who produced a prior gift, with general and special declarator, and *alleges*, No declarator at the pursuer's instance upon this posterior gift, because the right is fully established in his person, by the prior gift and declarators. The pursuer *answered*, *First*, That the Doctor's gift is simulate to the rebel's behoof, and so accresced to the pursuer; which appears from these evidences; *1mo*, That the Doctor is the rebel's own son; *2do*, That it is *retenta possessione*, the Doctor having suffered his father to possess for many years; *3tio*, It was offered to be proved, *per membra curiæ* of the Exchequer, that the gift was purchased by the rebel's means and moyen; and severally, it was offered to be proved by the Doctor's and his father's oath *conjunctim*, that he had given a back-bond, declaring the gift to be to his father's behoof. It was *answered* for the Doctor, to the *first*, That the grounds of simulation were no way relevant; for albeit he was the rebel's son, yet he had means of his own, and was not in his family; and albeit he were not eager to put his father out of possession of his house and lands, yet his continuance of possession is not relevant, unless it had been to his death, or for a longer time; but any delay that was is because it is but of late that the Doctor hath obtained special declarator, till which he was not in capacity to discontinue his father's possession; neither can members of Court be admitted to prove that the father wared out the expense and procured the gift, because the Doctor, at the passing of the gift, gave a back-bond, that he being satisfied of the debts due to him and the expenses thereof, there should be place for the rebel's creditors; and did make faith at the passing of the gift that it was to his own behoof, after which no witnesses can be admitted against him, nor any other presumptive probation of the simulation of the gift.

Which the Lords found relevant; and found also the pursuer's reply upon the back-bond alleged granted by the Doctor to his father, relevant to be proved by the Doctor's oath only. See PROOF.

Stair, v. 1. p. 655.