

## No 68.

run in his father's life, creditors were preferred to a donatar.

his father dies, the liferent escheat immediately falls to the superior, whether he be infeft or not; as was found 3d July 1624, Muir against Ahannay and the Earl of Galloway, No 33. p. 3638.; and the 32d act of Parliament 1535, requires no such thing. *Replied*, Both the decision and the act of Parliament must be understood *in terminis habilibus*, that the rebel must be vassal *vel actu vel habitu*, which he cannot be till his father's death; and that it must be so, is explained in that parallel case, 9th March 1624, Douglas *contra* East-Nisbet, No 32. p. 3637., where the reason is given, that he was potentially vassal to the King. THE LORDS considered these strict casualties are not to be extended, and therefore found the escheat could not take place in this case, and so preferred the other creditors.

*Fol. Dic. v. 1. p. 257. Fountainball, v. 1. p. 788.*

1699. December 6. CLERK'S CREDITORS *against* GORDON.

## No 69.

Found in conformity with No 61. p. 3662.

IN the competition for the sum in Ruthven of Gairden's wadset on the Earls of Home and Annandale their estates, betwixt the Creditors and donatars of Mr Clerk's escheat, on the one hand, and James Gordon of Seaton as donatar to Ruthven's escheat; the LORDS found the disposition made of this wadset to James Clerk by Ruthven of Gairden, when he was minor, with the consent of his uncle as curator, was not null in law, though there was no *decretum judicis* interposed, but was only reducible upon minority and lesion; for though a pupil can alienate nothing without the authority of a Judge, yet it was no legal nullity, where a minor either wanting curators, or with their consent, where he has them, alienates heritage without the warrant and cognition of a Judge; but the deed subsists, if not revoked or quarrelled *intra quadriennium utile*. 2d February 1630, Hamilton *contra* Sharp, *voce* MINOR; 13th December 1666, Thomson *contra* Stevenson, *IBIDEM*. THE LORDS also found, That the donatar to Gairden's escheat was preferable to a base infeftment granted by the rebel to Clerk prior to the denunciation, unless the said base infeftment was either confirmed or clad with possession before the annual rebellion existed; and which agrees with the current of former decisions, 19th March 1633, Renton *contra* Blackader, No 61. p. 3662.; and 21st February 1667, Milne *contra* Clarkson, No 64. p. 3664. And possession *in cursu rebellionis* will do the turn to prefer the base infeftment to the donatar of the liferent escheat. But now, since the act of Parliament 1693, taking away the distinction betwixt public and private infeftments, any infeftment prior to the denunciation will now seclude the superior and his casualty.

*Fol. Dic. v. 1. p. 256. Fountainball, v. 2. p. 71.*