

Wemyss had been made donatar before the Laird of Colluthie, and upon other hornings had obtained ane anterior gift, and intimated first to the defender; yet it could not prejudge the latter gift dispoit to Colluthie, because the thing that made any gift or disposition of ane liferent to take effect, was the declarator that was sought thereupon; for without ane declaratour of the tynsel of liferent the gift serves for na purpose; but so it was that the Laird of Colluthie had sought the first declarator *et primus ad judicium provocavit, ergo* his gift, albeit posterior to the other, yet had taken first effect be the summons. THE LORDS fand the last gift to take effect, because the donatar thereof had pursued.

No 26.

Fol. Dic. v. 1. p. 347. Colvil, MS. p. 458.

1601. February.

FLEMING against BAILLIE.

IN an action of declarator of John Baillie of St John's Kirk's escheat, pursued by Thomas Fleming, compeared another called —, also donatar, and having another gift of the said escheat, and being admitted for his interest, *alleged*, That the said Fleming could have no declarator, because the other had an anterior gift and declarator intended. It is *answered* by Thomas Fleming, That the said first gift was null, because it was simulate taken to the behoof of the rebel upon his own expenses, and that he retained the possession of his own gear, likeas Thomas Fleming had obtained his gift before the rebel was relaxed. THE LORDS found the allegiance upon the first gift relevant notwithstanding the alleged simulation, because the rebel in whose favour the first gift was alleged taken, was relaxed before any declarator intended by Thomas Fleming.

Fol. Dic. v. 1. p. 347. Haddington, MS. No 646.

No 27.

The first gift of escheat, though upon the expenses, and for behoof of the rebel, was preferred to a posterior gift taken against him, he being relaxed before declarator was raised on the last gift.

1635. January 30.

L. RENTON against L. WEDDERBURN.

THE L. Renton being donatar to Sir George Hume of Manderston's liferent escheat, and sicklike the L. Wedderburn being donatar to the same, and both the donatars pursuing declarator thereupon, and both compearing, and claiming preference; the LORDS preferred Renton, and declared the liferent in his favours; because albeit the Laird of Wedderburn's gift was a quarter of a year dated, and exped before Renton's gift, yet the summons of declarator at Renton's instance was executed three days, and the day of compearance was three days also before the execution and day of compearance of the summons of declarator pursued by Wedderburn; and so for such little odds as three days, albeit there was the space of a quarter of a year betwixt their gifts, the first diligence of the citation was totally preferred; albeit also L. Wedderburn had raised upon his gift a summons of declarator, long before Renton, and had executed the

No 28.

In a competition betwixt two donatars to a liferent escheat, the Lords preferred him whose summons of declarator was executed three days, and the day of compearance three days before the execution and day of

No 28.
compearance
in the other
summons, al-
though the
gift which
was prefer-
red, was dat-
ed three
months after
the other.

same long before Renton's summons, and called the same; but because it was executed upon six days citation, whereas it should have been executed upon 21 days, therefore he stood not at that citation, which could not have been lawful, but copied the summons again off the signet, and executed the same again *de novo* upon 21 days; which execution so made, and day of compearance was three days behind Renton's; and so Renton was preferred, as said is; and for no other defect, was Wedderburn rejected, but because his last execution was three days behind the other, and the day of compearance sicklike; for the Lords thought that Wedderburn might double his summons at the signet, and of new again summon the party thereby; albeit the other party contended, that he could not summon *de novo*, by virtue of that summons, which was once executed to another day of before, and which was insert therein, and called, and accepted in judgment by the party; but if he should use any other execution, it behoved to be by another new raised summons, and not by the same summons, or the double thereof, being executed, as said is; which was not respected, for the double was sustained; but for the priority of the other, the other was preferred, they being both creditors to the rebel; albeit Wedderburn offered instantly to satisfy all the debt, owing by the rebel to Renton. See PROCESS.

Act. *Advocatus et Nicolson.*

Alt. *Stuart.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 348. Durie, p. 748.

No 29.

In a competi-
tion between
donatars of
escheat, the
gift last past
the Exche-
quer, but
first past the
seals, was
preferred.

1662. December 6. GEORGE STEWART *against* MR JAMES NAYSMITH.

GEORGE STEWART having obtained the gift of the escheat of one Hume, pursues a general declarator, wherein compears Mr James Naysmith, having a declarator depending of the same escheat, and *alleged* he ought to be preferred, having his gift first past the Privy Seal, and had the first citation thereupon; George Stewart *answered*, that his gift was first past in Exchequer, and the composition paid in March, before the rebel was denounced on Mr James Naysmith's horning, whose gift past in Exchequer in June only, and *alleged*, that he being postponed, through the negligence of the keeper of the register, whom he had off desired to give him out his gift, it must be esteemed as truly then done; and as to the citation, both being now pursuing, he having done full diligence, could not be postponed, and produced an instrument taken against the keeper of the register, bearing him to have acknowledged, that the gift had been sought from him formerly.

THE LORDS having considered the instrument, and that it was after Naysmith's gift was sealed, although it mentioned former requisitions, that was but the assertion of the notary, or of the keeper of the register, and therefore preferred Naysmith's gift.

Fol. Dic. v. 1. p. 347. Stair, v. 1. p. 148.