

1632. *March 24.* L. LOCHINVAR *against* LINDSAY of Wauchope.

**No 42.**

A person, after he was rebel, but before year and day, having disposed his lands for an onerous cause, and the purchaser being intett, he possessed 12 years unchallenged. Notwithstanding of which, the superior was found to have right to the profits of the lands during his vassal's life.

IN a declarator of Wauchope's liferent of the lands of Dryburgh, holden of Lochinvar, the defender *alleged*, That the summons should abide continuation, seeing it must abide probation; for he shows not where the defender holds the lands of him, which in declarators at the instance of the King's donatar is presumed, that all the subjects hold of his Majesty, except another superior be instructed; but the like presumption stands not for any subject. This allegiance was repelled, and no necessity found of continuation, where the pursuer shows his own infeftment of the lands libelled, and that the defender was rebel year and day.

*March 28.*—IN this case, mentioned before, 24th March 1632, the LORDS found, That although the vassal had disposed the lands, for a cause onerous to another, who was heritably infeft therein, to be holden of the vassal's self, and that before the vassal was rebel year and day; but he being then rebel, and the rebellion *in cursu*, and the rebel being unrelaxed the time of the disposition; and albeit there were ten years and more bypast since the expiring of year and day, during the which whole space the acquirer of the lands from the vassal had been, as he yet is, in continual peaceable possession of the lands, uninterrupted by the superior, or any other by virtue of the alleged casualty of the rebellion; and whereby he alleged, that the continuing of the rebellion, which hath lain so long over and obscure, cannot now be obtruded against this singular successor, to prejudge his right acquired for onerous causes, and clothed with so long real possession, of the which rebellion he had so probable cause to be ignorant; yet the LORDS repelled this allegiance, and found the superior, notwithstanding of the right made by his vassal, as said is, being then rebel, and the rebellion running, (he unrelaxed) had right to the liferent of his vassal, and that the profits of the lands pertained to him during the lifetime of his vassal.

Act. ——— *Œ Gordon.* Alt. ———. Clerk, *Gibson.*

*Fol. Dic. v. 1. p. 554. Durie, p. 632. & 633.*

1638. *December 6.* COCHRAN *against* DAWLING.

**No 43.**

Found in conformity with Lindsay against Porteous, No 36. P. 8354.

ROBERT DAWLING, by contract betwixt him and Violet Dawling his sister, is obliged to pay to her yearly L. 200 during her lifetime, for the annualrent of L. 2000 which she gave to him; which being yearly paid while he lived; after his decease his two daughters, his heirs, by decret of the Lords, were decerned to pay the same; and according thereto, being paid by their curators, thereafter one of the daughters being married upon one Abercromby of Pitelpie, he and his wife give to the said Violet for her security an infeftment of L. 100

of annualrent, to be paid to Violet during her lifetime, out of a tenement in Edinburgh, pertaining heritably to the said daughter, spouse of Pitelpie; at which time of the said infeftment Pitelpie was at the horn year and day, and his escheat being gifted and declared to William Cochran donatar, he, in a special declarator for the mails of the lands, claims to be answered thereof, by virtue of the husband's escheat; which mails, during their marriage, he claims, as pertaining to the donatar, by the husband's rebellion. And the said annual-renter *alleging*, That she ought to be preferred to the donatar in the mails of the land, in so far as concerned her annualrent, in respect that the wife, who was her debtor, was never at the horn, and the cause of her debt was anterior to the horning; likeas the wife and her husband had given this infeftment of annualrent for obedience of a preceding sentence given against the wife before she was married; which being done *ex necessitate*, and not *ex mera voluntate*, the falling of the husband's liferent could in no reason extend to prefer the fisk to the lawful creditor *ex anteriore causa*, who had done such lawful diligence, as said is; and superinducing of a husband, who was the time of the marriage rebel, cannot prejudice her of that which was justly due to her by her lawful debtor, who had not failed, and was never at the horn, and who was but a consentor to that deed, done by his wife the principal debtor, and by him only for his interest;—THE LORDS found, That the donatar ought to be preferred to the annualrenter, during the lifetime of the rebel and his wife, being on life together; for by this marriage, as the husband had right to the mails, so the King by the rebellion had that right, and whatever deed the husband hath done since he was rebel, being married, albeit for a preceding necessary cause of his wife's debt, and for satisfying thereof, yet the fisk could not be prejudged in the fore-said casualty by that deed, especially seeing neither the wife nor her father were before obliged to grant such infeftment of an annualrent out of the lands libelled, controverted *per expressum*, but only were generally obliged to pay to her an annualrent of L. 200 yearly so long as she lived.

Act. *Advocatus & Nicolson.*Alt. *Gilmer & Neilson.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 555. Durie, p. 865.*

1667. June 12.

LUMSDEN against SUMMERS.

IN a declarator of escheat it was *alleged*, That the goods libelled were disposed to the defender.—It was *answered*, That the disposition was *stante rebellion*.—It was *replied*, That in fortification of the disposition, it was offered to be proved, that the disposition was made for the price of corn and straw, and other goods disposed to the rebel; and whereby his Majesty and his donatar had benefit, in respect the same was employed for the entertainment of the beasts and sowing the ground, whereof the encrease fell under escheat.

No 44.

A donatar of escheat found to be in no worse case than a creditor pouding or arresting, and therefore not bound to enquire, upon what