

1666. *January 6.* SIR LAURENCE OLIPHANT *against* SIR JAMES DRUMMOND.

THE Lord Rollo his liferent escheat being gifted *in anno* 1658 to Walter Stewart, he assigned the gift, and his own debt the ground thereof, and the general declarator obtained thereupon, to Sir James Drummond, *in anno* 1665. A second donatar now insists for special declarator; wherein compearance is made for Sir James Drummond, who craved preference upon his first gift, and on his general declarator. It was *answered* for the second donatar, That the first gift was simulate, and null by the act of Parliament 1592, in so far as the donatar suffered the rebel to continue in possession until this day, and never attained possession of any part of the lands, nor did any further diligence, but only the general declarator *in anno* 1658; so that the rebel having now possessed by the space of six or seven years, the presumption contained in the act of Parliament, that upon the said possession the gift is simulate and null, takes place. It was *answered*, That there is no definite time in the act of Parliament by which the rebel's possession shall presume simulation; and in this case there were but few *anni utiles*, in so far as the gift being *in anno* 1658, declarator was obtained that same year, and *in anno* 1659 judicatories ceased, and began not again till 1661.

THE LORDS found, that the donatar suffering the rebel to possess four or five years was sufficient to infer the presumption of simulation by the said act of Parliament; and therefore preferred the second donatar.

January 9.—At pronouncing of the former interlocutor, the first donatar further *alleged*, That the presumption of simulation, by suffering the rebel to possess, could not take place in this case; *1mo*, Because the donatar himself was a lawful creditor of the rebel, whereupon there is a stronger presumption that the gift was to his behoof, for his own satisfaction; and the act of Parliament can be only meant of donatars, who have no interest but their gift, and are not creditors; *2do*, The lands were appraised; and the donatar knew he would be excluded by the appraisers.

THE LORDS repelled the first allegiance, and found the *præsumptio juris* in the act of Parliament was stronger than the contrary presumption, that the donatar was creditor; because it might be his purpose to apply the gift to the rebel's behoof, and not to take that way, having other ways of payment competent: And also repelled the second allegiance, unless it were *alleged*, that the appriser had been in possession, so that there had not been three or four years in which the rebel had possessed; and that if the apprising had attained possession at that time, it would have excluded the donatar: But seeing it was offered to be proved that the rebel possessed for three or four years, which was contrary to the allegiance of the appriser's possession of the whole.

They adhered to their former interlocutor.

Fol. Dic. v. 2. p. 157. Stair, v. 1. p. 334.

No 262.

A rebel continuing in possession for five years or thereby, it was presumed that the gift was simulate.

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