

## SECT. V.

## Effect of acts of the Superior inconsistent with the Gift.

1669. June 19.

SCOT *against* LANGTOUN.

## No 32.

The consent of a superior to a wadset found to carry the liferent escheat of the vassal then in the superior's hand, and to exclude a gift by the superior of the same date with his consent.

JOHN GRAHAM of Gillesby having wadset certain lands to James Langtoun, he did thereafter (with consent of the Earl of Annandale superior) eik twelve hundred merks to the reversion, and the Earl ratified the former wadset; and Graham, with his consent, of new disposed again the lands for the sums in the first wadset and eik, and added some other clauses; the first wadset was before the act between debtor and creditor, and by virtue thereof the wadsetter was in possession; the second wadset was after the said act; the superior consented only to the second wadset, and of the same date gave a gift of Graham's liferent to Robert Scot; whereupon Robert having obtained general declarator, pursues now special declarator for the mails and duties of the wadset lands, as falling under the liferent of Graham, the granter of the wadset. It was *alleged* for Langton the wadsetter, That he ought to be preferred to the donatar, not only for the first wadset, which was constituted before the rebellion, but for the second wadset, comprehending the eik; because the superior, by his consent to the second wadset, without any reservation, had communicated all right in his person, and consequently the liferent escheat of Graham, the granter of the wadset, in the same manner as if he had given the wadsetter a gift thereof; and so no gift, not being anterior to the other, could prejudice the wadsetter. It was *answered* for Scot the donatar, that the allegiance is no way relevant to exclude his gift, unless the wadsetter could allege a deed denuding the superior, anterior to the pursuer's gift; but here the superior's consent is not anterior, but of the same day's date, and may be posterior; and therefore the gift, which is the *habilis modus*, must be preferred unto the superior's consent to the wadset; which is but indirect, and consequential to infer the right of liferent; at least both must be conjoined, and have equal right as done *simul et semel*. It was *answered* for the wadsetter, That the superior's gift must not be preferred to the consent, though of the same date, because he was then in possession of the wadset lands, and needed no declarator; and the gift is but imperfect until a general declarator, which is the intimation thereof; no declarator being requisite to the consent of the superior to the wadsetter; and so is preferable.

THE LORDS preferred the wadsetter.

It was further *alleged* for the donatar, That the wadsetter must restrict himself to his annualrent, and be countable to him for the superplus, seeing now he makes an offer to find the wadsetter caution; and so he must either quit his possession, or restrict conform to the act betwixt debtor and creditor. The wadsetter *answered*, That his second wadset bearing, not only a ratification of the first wadset in all points, but a disposition of the same lands, falls not within that clause of the said act of Parliament, which regulates only wadsets prior to that act; and the new disposition makes the old wadset as extinct and innovate. The donatar *answered*, That there being a *jus quæsitum*, conform to the act, as to the former wadset, the posterior ratification cannot derogate therefrom, or take it away, unless it had been exprest; and *in meritis causæ* it was alleged that the wadsetter had near the double of his annualrent.

THE LORDS preferred the donatar as to the superplus, more than the annualrent of the first wadset, and ordained the wadsetter to restrict.

The wadsetter further *alleged*, That the gift was antidated and simulate to the rebel's behoof, and so accresced to the wadsetter. Which the LORDS sustained, and found the simulation probable by the oath of the superior, and the witnesses insert in the gift.—*See IMPLIED DISCHARGE AND RENUNCIATION. See PROOF.*

*Fol. Dic. v. 1. p. 348. Stair, v. I. p. 620.*

\* \* \* Gosford reports the same case :

IN a special declarator for the mails and duties of the lands of Shankend, pursued at the instance of Scot, as donatar to the liferent escheat of Robert Graham; who was vassal to the Earl of Annandale, and had disposed the liferent escheat to the pursuer, comparance was made for James Langtoun, who had a right of wadset of the said lands, and *alleged*, that the very day the gift was granted, the Earl of Annandale did consent to his right of wadset, and did ratify the same. It being *replied*, That the superior's ratification was qualified in so far only as concerned an eik to the reversion; and that the donatar being a lawful creditor, he did only insist for the superplus of the rents of the wadset lands, more than would satisfy the annualrent of the sums upon the wadset, both principal and eik;—the LORDS did sustain the pursuit and reply, notwithstanding it was *answered*, That the late act of Parliament anent debtor and creditor was not made known, by public proclamation of these acts of Parliament, before the date of the last eik to the reversion; for they found the date thereof posterior to the act of Parliament; and that the said act was both printed and published at the market cross of Edinburgh immediately after the passing thereof, and before the second right of wadset.

*Gosford, MS. No 142. p. 55.*