

No 65.

fender *duplicated*, That this answer of simulation cannot be found well qualified by this presumption alleged, of the rebel's remaining in possession, without some further qualification of a positive act, which may infer simulation; for although the donatar suffer the rebel to possess, that is not enough to make his gift null, where the same is not truly taken to the rebel's behoof; but notwithstanding of that bruicking by the rebel, the donatar may, when he pleases, claim the benefit of his gift; attour this act of Parliament cannot be constructed to any other sense; as also the same expressly appoints that nullity to be in favours of the creditor, at whose instance the rebel was denounced, and cannot militate for every creditor, as the words of the act in themselves proopt, which cannot be extended. THE LORDS found this allegiance not relevant, in respect of the answer; and found the same reply was competent to be alleged for all creditors, as well as for him, at whose instance the debtor was denounced, and found that there was no necessity to qualify any other circumstance of simulation, except the said retention of possession. See PRESUMPTION.

Act. ———.

Alt. *Gilmore*.Clerk, *Scot*.*Fol. Dic. v. 1. p. 521. Durie, p. 843.*

No 66.

1684. *January 23.*NEILSON *against* KENNEDY.

IN a process of special declarator, at the instance of a donatar of single escheat, it was found competent to the defender to plead that the bond was granted by him, more than year and day after the denunciation, and consequently fell not under single escheat, though the gift bore all goods and gear that should belong to the rebel, before his decease; seeing such gifts are restricted to what the rebel shall acquire within year and day; and it was not found *jus tertii* to quarrel the pursuer's want of title.

*Fol. Dic. v. 1. p. 522. Harcarse.**.* This case is No 15. p. 5085. *voce* GIFT OF ESCHEAT.1685. *November 26. & 28.*ARCHBISHOP of ST ANDREW'S *against* The TOWN of GLASGOW.

No 67.

The Magistrates of Glasgow obtained a tack from the Archbishop. The Archbishop charg-

THE Magistrates of Glasgow having got from their Archbishop a nineteen years tack of his parsonage and vicarage teinds, for a grassum of 20,000 merks, and a small tack-duty; the Bishop charged for the grassum.

Alleged for the defenders; *imo*, Their tack is null, as granted after a *conge d'elire* was come from Court for electing the setter Archbishop of St Andrew's; *2do*, The Magistrates, who are but administrators and curators, cannot do

deeds to the lesion of the burgh, which hath the privilege of a minor; and any such deed of lesion may be not only redressed by action against the Magistrates who malversed, but also by way of defence against third parties; for if third parties were not liable in such a case, the lesion might prove sometimes irreparable by the administrator's insolvency.

Answered, 1mo, It is denied that the tack was posterior to the *conge d'eslire*, for advancing the setter to the primacy; and though such a thing had been, it is *jus tertii* to the defenders to propone such a nullity, which is only competent to the succeeding Bishop of Glasgow; *2do*, Burghs are not in every thing privileged as minors, and contracts with Magistrates cannot be quarrelled upon the account of lesion, but the burgh is only to seek redress off the Magistrates, in the case of any bargain made by them with third persons, to the disadvantage of the community; nor is the tack in question prejudicial to the burgh.

THE LORDS found it was *jus tertii* for the town to propone upon the foresaid nullity in the tack, seeing it was not quarrelled upon the head by the Bishop's successor; and found; That only the Magistrates who malversed, and not third parties, were liable to make up any lesion sustained by the burgh.

Fol. Dic. v. 1. p. 523. Harcarse, (MAGISTRATES.) No 678. p. 192.

* * * Fountainhall reports this case :

November 28.—THE LORDS advised the town of Glasgow's bill against the Archbishop of St Andrew's, with the answers, anent the 20,000 merks bond, given by them for the tack of teinds he had set to them. Their objections (wherein the Archbishop of Glasgow joined with them, to see if he could make the casualty to fall to be in his time,) were, *1mo*, That the Bishops were but administrators, and may not dilapidate; and he was *in fuga* to St Andrew's; *2do*, That it was set *tempore indebito*, seeing the former tack was not fully expired, but had a month to run. Anent which, see Craig, *feud. page 205.*; Durie, 26th July 1631, Bishop of the Isles against Shaw, No 17. p. 5630; January 1612, Home against Home, *voce TACK*; and 29th June 1613, Balfour against the Parishioners of Cardross, *IBIDEM*.

THE LORDS refused the Town of Glasgow's bill, reclaiming against the exorbitancy of the grassum of 20,000 merks, for a tack of teinds not worth 500 merks by year; which was taken by the last Provost Barns for his own ends, when he was put in by the Archbishop to be Provost, and when he was bankrupt.

Fountainhall, v. 1. p. 379.

* * * See P. Falconer's report of this case, No 3. p. 2496. *voce COMMUNITY.*

No 67.

ed for a stipulated *grassum*, after he had been elected Archbishop of St Andrew's. Found to be *jus tertii* to the leasees to plead that the right was in the succeeding Bishop of Glasgow.