

S E C T. IV.

Gift of Recognition.

1635. November 27.

BLACK *against* PITMAIN.

No 12.

A GIFT or recognition without declarator, although the donatar of recognition obtain possession, cannot take away a feu infestment, whereof the feuar was in possession.

Fol. Dic. v. 1. p. 229. Auchinleck, MS. p. 180.

1699. November 24.

BALMERINO *against* TOWN of EDINBURGH.

No 13.

THE master of Balmerino, as baron of Restalrig, pursues a reduction and improbation against the Town of Edinburgh, of their right to the mills on the Water of Leith. *Alleged*, The active title is not valid to force a production, being only a charter and sasine flowing upon a gift of recognition from the King, and the gift never yet declared. *Answered*, No necessity of a declarator, because he was in peaceable possession. *2do*, It contained a *novodamus*. *Replied*, If the recognition should be found not incurred, the *novodamus* would fall in consequence; and one might as well pursue a special declarator of escheat without first obtaining a general. THE LORDS refused to sustain process on this title.

Fol. Dic. v. 1. p. 229. Fountainball, v. 2. p. 69.

S E C T. V.

Divorce.—Failzie.—Redemption.—Extinction by Intromission.—
Gift of Forfeiture.

1579. February 6.

LADY RESTALRIG *against* THE LAIRD.

No 14.
After sentence
of divorce
pronounced
*propter culpam
mariti* the
wife may im-
mediately en-
ter to the pos-

THE Lady Restalrig wairnit the laird of Restalrig, some time her husband, she being divorced fra him *ex culpa viri*, to flit and remove fra certain lands. The laird *answerit*, that albeit he was divorced, yet there was no declarator given, wherefor he should not bruik the lands that she was in; and of the practick that had passed before, ay after the sentence of divorsement pronounced and

given be the commissars, there behoved ane declarator of the civil judge to follow upon these lands, because the commissars being judges spiritual, their decret could not be extended *ultra fines suæ jurisdictionis, et quæ civilia fuerunt et profana, non debebant ab iis tractari extra de ordin. cognit.* To this was answered, that first to the practics, that they were not alike, for in all the practics before past, both the parties, *vel saltem* the party failzier was in the land, either be conjunct fee or otherwise; but in this case the Lady Restalrig was only in the land, and so being only infest, there misterit na declarator more nor if her husband the laird had been naturally dead. And as to the law, it was nothing against the law, that the commissars' decret should, be their ain sentence, take effect *quia unicuique judici licet sententiam suam executioni mandare.* THE LORDS pronounced be interlocutor, that in respect the Lady was only in the lands there misterit na declarator, albeit the same appeared to repugn to all the precepts past of before.

No 14.
session of her
liferent lands
without any
declarator.

Fol. Dic. v. 1. p. 229. Colvil, MS. p. 277.

1624. January 21.

M'MATH against L. OCHILTREE.

JAMES M'MATH and some other merchants, having furnished to my Lord Ochiltree certain sums of money, which he bound him to pay to them at the terms contained in the bond, and for their security of payment, in case of failzie of payment, and in warrandice thereof, he gave them charter and sasine of the lands of Saltoun; upon the which charter and seisin, they having convened the tenants of the said lands for payment of their duties,—THE LORDS found that the tenants could not be convened for payment, by virtue of the foresaid charter and sasine, which was given in warrandice, as said is, until the time that the pursuers had obtained declarator, upon the failzie of payment, against the principal party their debtor; for it was not pertinent to these defenders to dispute, neither could they know if the pursuers were paid or not, or if there was a failzie, or if the party had made payment, and so had purged the failzie; for that dispute was only proper to the debtor, who contracted with the pursuers, and not to these defenders.

Act. Stuart.

Alt. Neilson.

Clerk, Hay.

Fol. Dic. v. 1. p. 229. Durie, p. 92.

No 15.
An heritable
bond was
granted for
security of
payment of a
debt in case
of failzie.
The creditor
raised an ac-
tion of mails
and duties.
The Lords
found that he
behooved first
to obtain de-
clarator of the
failzie.

1629. July 29.

PHILIP against PHILIP.

A FATHER having infest his daughter in an annualrent furth of his lands, redeemable by himself for a small sum, and in his own time redeems the said annualrent; after his decease, the daughter pursues pointing of the ground for the said annualrent, from the heir of one to whom her father sold the lands.

No 16.
A father infest
his daughter
in an anual-
rent, redeem-
able by him-
self. He hav-
ing redeemed