

1622. June 26. INGLIS *against* L. CAPRINTOUN.

No 257.

The Lords found a gift of escheat simulate, although only part of the expenses was laid out by the rebel, and the donatar who bestowed the rest was a real creditor.

IN an action of declarator of the L. Ochiltrie's escheat and liferent, pursued at the instance of John Inglis, who was donatar thereto, the L. Caprintoun, who was a contrary donatar, compeared, and *alleged*, That the gift could not produce an action to the pursuer; for albeit his name was inserted therein, yet, seeing he offered to prove that it was taken, and purchased, and expeded the seals, upon the L. Ochiltrie's own charges and expenses, and upon his moyen, it was alike as if his own name had been inserted therein, and must be counted as done to his own behoof, and so could not be sustained against him, who was a contrary donatar, and also a creditor; especially seeing the gift never became the pursuer's evident, till very lately, before this pursuit, but ever since the date thereof remained in the Lord Ochiltrie's own custody, and in Gilbert Neilson his agent's hands. It was *answered*, That seeing that John Inglis's name was inserted therein, who now used the same to his own behoof, and that the said John was a true creditor to the Lord Ochiltrie at the time of the said obtaining of the gift, albeit the Lord Ochiltrie had expeded the gift, upon his own charges, to the pursuer's behoof, to whom he was debtor then truly, thereby to give him some security for his debt, that ought not to prejudge the pursuer in his right; for the debtor might as lawfully procure that gift to his creditor, for his satisfaction, as he might otherways have lawfully paid him; and, further, he offered to prove that the donatar's self paid for a part of the expenses in expeding of the gift, so that the defender could not be heard to quarrel the same upon the foresaid allegiance. THE LORDS found the allegiance relevant, notwithstanding the answer made thereto.

Act. *Lawrie & Nicolson* younger.Alt. *Hope & Neilson*.Clerk, *Gibson*.*Fol. Dic. v. 2. p. 158. Durie, p. 27.*

. Kerse reports this case:

EXTRACT of a gift of escheat not sustained, except the pursuer reply that the gift was past the Seals; and, in this case, the LORDS astricted him to prove that this same gift of the same tenor past the Seals, in respect the principal was produced disconform.

Item, This exception sustained against the escheat, That it was past upon the rebel's expenses, notwithstanding it was *replied*, The donatar was a creditor, and that thereby the simulation was purged.

Kerse, MS. p. 220.

* * * Haddington also reports this case :

No 257.

JOHN INGLIS pursued a declarator of the Lord Ochiltrie's escheat and liferent ; the Laird of Caprintoun, likewise donatar, opposed. THE LORDS fand, in that case, That a gift of escheat of all goods pertaining to the rebel the time of his declarator, and which he should acquire during his rebellion, would go no further than to that which pertained to the rebel the time of the gift of his escheat, and a year thereafter. They fand also, That a gift of liferent could comprehend nothing but that whereof the rebel had right of fee or liferent the time of the gift. They fand, That a gift taken *in anno* 1613, whereupon no declarator was sought by the space of nine years after the date of the gift, the rebel remaining always in possession, was thought simulate. They likewise fand, That a gift purchased by the rebel upon his expenses, and past by him the registers and seals upon his charges, was null, as taken to his behoof, albeit he had inserted the name of a donatar, who was his creditor. Farther, they fand, That the donatar, having accepted right from the rebel, of that which was contained in his gift, after the date thereof, acknowledged the rebel's right, and prejudged his own gift. Last, they fand, That John Inglis could not impugn Caprintoun's gift, because he had accepted a ratification from Caprintoun, as donatar, of a tack set by the Lord Ochiltrie to John Inglis.

Haddington, MS. No 2638.

1623. *March 20.* DALGARNO *against* E. MARISHAL.

No 258.

IN a declarator pursued by Dalgarno, as donatar to the escheat of the Earl Marishal, wherein L. Benholm, as another donatar, compeared, the LORDS found, That albeit the gift was taken to the behoof of the Lord Keith, eldest son to the rebel, yet that was not sufficient to stay the declarator, except it had been alleged that the Lord Keith had taken it to the use of the rebel's self; and therefore repelled that allegiance proponed by a contrary donatar, viz. L. Benholm. *See* No 156. p. 11591.

Act. Nicolson & Mouat.

Alt. Hope & Stuart.

Clerk, Gibson.

Fol. Dic. v. 2. p. 158. Durie, p. 59.

1623. *December 18.* LO. YESTER *against* JOHN MURRAY.

No 259.

SIMULATION sustained, upon these heads,—retention of possession, consent given to wadsets, and tacks made to the rebel, and acquiring from the rebel of wadsets; but found, That the gift, in so far as it was taken by the donatar as