

1628. *March 22.* RAITH, DONATOR to MELDRUM's Liferent, *against* The LAIRD of BUCKIE.

IN the declarator of Andrew Meldrum's liferent, mentioned 19th March, 1628,—there being an exception proponed for the defender, upon an anterior gift of the rebel's liferent, whereupon declarator was recovered by the donator, before the pursuer's gift and declarator, to the which the defender, who was a creditor to the rebel, was made assignee; and who, according thereto, was in possession of the lands libelled, desired to be declared to the pursuer in this special declarator now sought by him: and the pursuer replying, that this general declarator cannot exclude this pursuer, who seeks a special declarator of the lands specially libelled; seeing that anterior gift and general declarator thereon cannot prejudge the pursuer, neither can be any warrant to the excipient to have apprehended possession thereon at his own hand, without order of law, except he had obtained special declarator also after the general, for thir lands controverted; likeas he offered to prove, that the rebel, notwithstanding of that anterior gift, and general declarator, retained the continual possession of thir lands to his own use, utility, and profit. This allegiance was found relevant, notwithstanding of the reply; and the rebel's retention of the possession was not respected, seeing the prior donator might pursue him therefore, and might evict it from him by law.

*Vid.* 23d December 1623, Bannatyne *against* Murray.

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1628. *March 22.* MARK HUME *against* TENANTS.

IN an action by Mark Hume, as assignee to the duties owing by the possessors of the lands pertaining to the Prebendary of Kelso, of certain bygone years, whereto the said Mark Hume was made assignee, by Mr Peter Euart, prebend of the said prebendary,—against the tenants;—the Lords sustained the gift and provision of the said prebendary granted to the said prebendary by the Earl of Hume, as patron of the provostry of Dunglas, whereof this prebendary libelled was a part; albeit it was alleged, that the said provision was null, being subscribed only by one who was affirmed to be patron, and not instructed; and which also, albeit it were shown that he was patron, yet could not be sustained, seeing it was not subscribed by the provost, whose subscription the defender alleged to be necessary to the gifts and provisions of all the prebendaries of this benefice. Which allegiance was repelled, except it had been alleged, that, by the foundation, the provost's consent is ordained to be given, and necessarily required to the gift of the said prebendaries; but here it is to be considered, that this allegiance was proponed by the tenants addebted to pay their duties, who had no right of retention.

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