

No 10. albeit the donatar have declarator depending,—yet so long as he has not decret, the creditor being relaxed, will be ordained to be answered and obeyed, he finding caution to make it furthcoming to the donatar, in case he prevail in his declarator.

*Fol. Dic. v. 1. p. 228. Haddington, MS. v. 2. No 2017.*

1668. December 18. ROBERT SWINTOUN *against* JOHN BROWN.

No 11.

A gift of life-rent escheat was not sustained without declarator, though proponed by way of exception.

MARGARET ADINSTOUN being infest in liferent, in certain roods of land near Haddington, she and her second husband grant a tack to John Brown thereof for certain years, and thereafter till he were paid 400 merks, owing to him by the husband; after that husband's death, she being married to a third husband, there is a decret of removing purchased at her and that husband's instance, against John Brown, but the husband did not proceed to obtain possession by virtue thereof, but *brevi manu* ejected Brown; whereupon Brown obtained a decret of re-possession: now the said Margaret Adinstoun having assigned the decret of removing to Mr Robert Swintoun, he charges John Brown to remove, who suspends on this reason, that he having obtained decret of re-possession, after the decret of removing, upon the husband's violence, cannot now be removed without a new warning. The charger *answered*, that the decret of re-possession, bearing to be ay and while this suspender was legally removed, and that in respect he had been put out summarily, and not by the preceding decret of removing; which having now taken effect, he being in possession, the charger may very well insist, that he may now legally remove, by virtue of the decret of removing.

THE LORDS repelled this reason, in respect of the answer, and found no need of a new warning.

The suspender further *alleged* that he cannot remove, because he bruiks by virtue of a tack granted by Margaret Adinstoun and her second husband. The charger *answered*; *1st*, That the tack being only for four years specially, and an obligation not to remove the tenant while the four hundred merks were paid, which is not a tack, but a personal obligation, which cannot defend the suspender against Mr Robert Swintoun, the singular successor; *2dly*, The tack is null, being subscribed but by one notary. The suspender *answered*, that a right of liferent not being transmissible by infestment, but only by assignation, the assignee is in no better case than the cedent, except as to the probation by the cedent's oath. *3dly*, The tack is ratified judicially by the wife, in the court of North Berwick, which is more than the concurrence of any notary. *4thly*, If need be, it is offered to be proven by the wife's oath, that the subscription was truly done by the notary, at her command. The charger *answered*, that the judicial ratification cannot supply the other notary; because the same no-

tary, who is notary in the tack, was also notary in the judicial ratification, which is but done in a baron court : So it is but *assertio ejusdem notarii*, no stronger than it was, neither can it be supplied by Margaret Adinstoun's oath, *de veritate facti* ; because her oath cannot be received in prejudice of her assignee ; and though herself were charger, the law requiring two notaries, till both subscribe, the writ is an unsubscribed writ ; and in all matters of this nature, parties may resile before subscription.

THE LORDS found the tack valid against the wife, subscriber thereof, and her assignee, ay and while the sum thereof were paid ; but found the tack was null, as being but by one notary, notwithstanding of the judicial ratification being by the same notary ; and found that the cedent's oath could not be taken in prejudice of the assignee, to astruct the verity of the subscription, unless the assignation had been gratuitous, or the matter had been litigious before the same : In which case they found that there was no place to resile after the subscription of the first notary, the verity and warrant of the subscription being proven by the said Margaret's oath.

The suspender further *alleged*, that he could remove, because the liferenter being year and day at the horn, he had a gift of her liferent escheat, and thereby had right to possess her liferent land. The charger *answered non relevat*, because the gift was not declared : *2do*, It could not be declared, because it proceeded upon a horning, against a wife clad with a husband, who being *sub potestate viri*, cannot be contumacious, or denounced rebel thereupon. The suspender *answered*, that he needed not declarator himself, being in possession of the only right, to which the declarator could reach. *3tio*, The horning, albeit against a wife, was valid unless it had been upon a debt contracted during the marriage ; yet this horning proceeding upon a decret against a wife as executrix and vitious intromissatrix with her husband's goods, a horning upon her own fact or fault was always effectual.

THE LORDS would not sustain the gift without a declarator, and superceded any extract at the charger's instance, till a day, betwixt and which he might insist in his declarator, and superceded till that time to give answer, in relation to the horning, because the King's officers behoved to be called.

*Fol. Dic. v. 1. p. 228. Stair, v. 1. p. 574.*