

## GIFT OF FORFEITURE.

1697. February 5.

VISCOUNT of TEVIOT *against* The EARL of LINLITHGOW.

**S**IR THOMAS LIVINGSTON, now Viscount of Teviot, his declarator against the Earl of Linlithgow and Callander, is reported. The King had given each of them a gift of the forfeiture of the late Earl of Dunfermline; but Teviot's is six days prior in date. They are both presented to be past in the Treasury and Exchequer about one time; but the Exchequer so far prefers Linlithgow's gift, that it is first revised and past; whereupon protestation and instruments are taken by the King's Advocate, that this preference no ways prejudged the King's first gift; and Teviot's is only past the next Exchequer. Linlithgow first compleats his right by infestment. Teviot raises a reduction, on these grounds, that as he was the first donatar, so he was no ways *in mora*, but presented his gift duly; and though the Exchequer, by a partial gratification, preferred Linlithgow's gift, yet his protestation sufficiently preserved his place. *Answered*, In competitions of creditors upon legal diligences of signature, or upon apprisings and adjudications, the Exchequer has no latitude, but must pass them as they are presented; and if they delay, parties may justly take instruments, and protest *ad hunc effectum*, to be equivalent to a past signature; as has been found in Lord Sinclair's case against Cockburn\*; Milne *contra* the Creditors of Clackmannan, No 20. p. 3028. But where the competition arises upon the King's free gift, as in escheats, or other casualities, the Exchequer has oft-times refused the first, and preferred the second; or has clogged them with what qualities they think fit. See the act 59th 1661, restricting the power given to the Exchequer, by the act of Parl. 1633, and act 66th 1578, anent double confirmations of feus. It was farther *objected* against Linlithgow's gift, that it has been certainly obtained by subreption, concealing from the King what he had so few days before granted away to another. *Replied*, The second behoved to be a revocation of the first, for it cannot be presumed the King in a few days would have forgot it; and therefore he has looked upon himself as imposed upon by the first gift.—THE LORDS finding this point to dip upon

## No 1.

Two gifts of forfeiture, one dated six days prior to the other, were presented to be past in Exchequer at the same time. The Exchequer so far preferred the posterior gift as to revise and pass it first. The donatar in the others gift having protested, that this preference should not prejudice him, the Lords preferred his gift, though the sasine on it was thirteen months posterior to that on the other.

\* Examine General List of Names.

No 1. the Exchequer's power of limiting or passing the King's gifts, in what order or method they pleased; therefore they resolved to hear it in their own presence.

*February 12.*—The cause debated, 5th curt. between the Viscount of Teviot and the Earl of Linlithgow, being this day advised, the Lords were equally divided in their opinions; eight of the Lords, though they did not look upon the preference given by the Exchequer to Linlithgow's gift as properly *res judicata*, yet it was such as precluded the cognition of the Session, the Exchequer being a sovereign-court *in suo genere*, and in use to prefer (without regard to priority of dates) even posterior gifts, and oft-times they qualified, restricted and altered the King's gifts. There were other eight who found the Lords competent to judge this case, and that it was no act of jurisdiction in the Exchequer to pass gifts, acting therein not as judges, but as the King's compositors, and as the commissioners of any nobleman out of the kingdom do act in his casualties; and ought not to give any partial preference. Though this side restricted much the power of the Exchequer in their daily practice, and subjected them to the Session, yet the Chancellor went into that side, and gave his vote that the Session were still judges of this case; *alleging*; though the Exchequer has a *voelle et nolle* in gifts of escheat, which are within their commission, and they can grant them as they please; yet not so in gifts of forfeiture, which can only be past under the King's hands; and though the consent of the Exchequer be requisite to their consummation, yet they may not refuse it; though *regulariter* he who consents may also dissent; and if the King be not pleased with their advice, he can name a new commission of Exchequer; but, in the diligences of creditors competing, if they refuse their consent, the act of Parliament in 1578 supplies it. This first vote carried all the rest; for, supposing the Session competent, the Lords found Teviot's signature, though posterior, yet being first in date, and first presented, and a protestation being taken on the laying it aside till Linlithgow's was past, did sufficiently salve Teviot's right, and he was not *in mora*, being postponed by that undue gratification; and therefore preferred his gift and infestment following thereon, albeit the sasine be 13 months posterior to Linlithgow's; because the protestation salved and preserved his right.

The Earl of Hume, as tutor to the Earl of Linlithgow, compeared, and protested for remeid against this interlocutor, to the King and Parliament.

*February 27.*—The Viscount of Teviot gave in a bill, that his gift to the forfeiture of the Earl of Dunfermline's estate being now preferred to Linlithgow's, and one Ramsay being named factor by the Lords, he craved he might be removed, seeing he now came in place of the heritor; and least the creditors suspect any prejudice, he was willing to find caution to make the rents forthcoming to them according as they should be preferred. It was *answered*, The creditors, by the late acts of Parliament, are now preferable to the King, or his

donatar, and he has no more of the forfeited estate, but what remains after satisfaction of their just debts; and they being in possession, by their factor, cannot be turned out; for though he offered caution, yet this still made their condition harder; for they would have easier access against their own factor than against the Viscount, who was *potentior adversarius*; and the creditors had not only interest to possess for their annualrents, but likewise for their principal sums; and though he came in the heritor's place, yet there was a great difference, for he was only liable *in valorem*; whereas the creditors had the heritor personally bound to them.—THE LORDS, after some struggle, found they could not dispossess the creditors nor their factor; but thought it reasonable, that the Viscount might call the factor to an account how he employed the rents, that there may be no embezzlement or collusion. See JURISDICTION.— SEQUESTRATION.

*Fol. Dic. v. 1. p. 348. Fountainhall, v. 1. p. 764, 767, & 772. . .*

See APPENDIX.