

No 63. the vassal's rebellion; upon this infeftment, removing being pursued, the Earl compares and propones, that the vassal was year and day at the horn, therefore in respect of the provision foresaid, the pursuer cannot pursue removing, seeing he accepted the precept, with that clause. THE LORDS repelled this allegiance, in respect there was no declarator obtained of the vassal's liferent.

Fol. Dic. v. 1. p. 256. Durie, p. 891.

1667. February 21.

ROBERT MILN *against* CLARKSON.

No 64.

Found in conformity with
No 61. p.
3662.

ROBERT MILN, as donatar to a liferent escheat, having obtained a general declarator, insists now in a special declarator for mails and duties. It is *alleged* for Clarkson, That the pursuer has no right to the mails and duties, because he stands infeft before the rebellion. It was *answered*, Any infeftment Clarkson has, is but a base infeftment, never clad with possession till the rebellion, and year and day was run, and so is null as to the superior or his donatar. It was *answered*, That the base infeftment is valid in itself, and albeit by the act of Parliament 1540, a posterior public infeftment for causes onerous, be preferable, yet that cannot be extended to the right of a liferent escheat, or to a donatar. It was *answered*, That by the course of rebellion year and day, the superior's infeftment revives as to the property, during the rebel's liferent, and cannot but be in as good condition as any posterior public infeftment; and it was so decided, Lady Renton *contra* Blackader, No 61. p. 3662.

THE LORDS found that the base infeftment, though prior to the denunciation, not having attained possession within year and day, could not exclude the liferent escheat.

Fol. Dic. v. 1. p. 256. Stair, v. 1. p. 448.

1672. January 19.

BEATON *against* SCOT of Lethem.

No 65.

Found in conformity with
No 57. p.
366c.

IN a double pointing, raised by the tenant of Etherny, betwixt Mr William Beaton, donatar to the liferent escheat of Rig of Etherny, and an infeftment of annualrent, holden of Etherny, and clad with possession before the rebellion, granted to Scot of Lethem, it was *alleged* for the donatar, That by the liferent escheat of Etherny, the fee of his lands returning to his superior, he or his donatar behoved to enjoy the same, free of any burden induced by the vassal, unless consented to by the superior, or approven by law. It was *answered*, That albeit it be true, that where fees return to the superior *ex natura feudi*, either by ward, non-entry, or recognition, they return as little burdened as when they were granted; but it is not so in the case of liferent escheat, which does not arise from the nature of the feudal contract, but from statute or custom, upon disobedience to law, or civil rebellion, which is not a feudal

delinquency; and therefore, the superior has only the benefit of the vassal's liferent, as it is the time of the denunciation; and any right constitute before, whether infeftment or tack, is not excluded: And though subaltern infeftments, being base, if they be not clad with possession before denunciation, exclude not the superior, because possession is requisite to accomplish their right; yet, such as are perfected by infeftment before the rebellion are not prejudged thereby.

THE LORDS sustained the base infeftment, and found the rebellion of the superior not to exclude base infeftments, or tacks granted by him, and complete by possession, before the rebellion.

Fol. Dic. v. 1. p. 256. Stair, v. 2. p. 51.

* * The like was decided, 23d February 1671, Lord Justice Clerk against Fairholm, No 14. p. 2766.

No 65.

1673. July 15. JANET SAVAGE against ANDREW CRAWFORD.

IN a suspension of a decret of poinding the ground obtained at the said Janet's instance, as infeft in an annualrent out of the lands of Bathgate, at the instance of Crawford, who was donatar to Bathgate's liferent escheat, upon this reason, that Bathgate was denounced rebel before the charger was infeft, and having continued year and day in rebellion, the liferent escheat belonged to the King, as was decided (Wallace against Porteous, *voce* LITIGIOUS,) in a competition betwixt a donatar and a lawful creditor, whose infeftment was after rebellion, but yet *in cursu*;—it was answered, That the charger, notwithstanding, ought to be preferred, because her infeftment depended upon an heritable bond which was prior to the denunciation, bearing a precept to infeft her in this annualrent and of the same lands, so that she taking infeftment before the donatar was year and day at the horn, could not be prejudged by the donatar of the liferent escheat which did fall long thereafter; and by the simple rebellion, the moveable escheat could only fall; likeas the said practise did not meet this case, seeing the infeftment was given after rebellion, not upon an heritable bond, but to a creditor by a personal bond. THE LORDS did find the letters orderly proceeded, and preferred the charger to the donatar, seeing her infeftment did not flow from any deed done by the debtor after his rebellion, but long before, and that her forbearance was no ground of law to prejudge her who had a full power to infeft herself when she pleased.

Fol. Dic. v. 1. p. 256. Gosford, MS. No 624. p. 362.

No 66.
Found in conformity with
No 57. p.
3660.