

ing upon which the gift proceeds, gives no preference to the gift. True, when the donatar gets the whole escheat goods by the benefit of another's horning, it is but just he should pay him ; and when the escheat falls upon the donatar's own horning, he acquires the goods without any such burden. The act 143d, Parl. 12th, James VI. declaring all intromitters by gift, assignation, or otherwise, with any part of the rebel's effects, liable to pay the debt contained in the horning upon which the gift proceeded, is only to be understood of a competition betwixt the creditor upon whose horning the escheat fell, and the donatar or others covering themselves with the gift ; and cannot be stretched against other intromitters or creditors doing diligence upon separate titles, who cannot be thought either personally liable or obnoxious through completing their rights.

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In respect it was *answered* for Mr Elliot, A gift of escheat is indeed of the nature of an assignation, in a competition with other gifts or rights flowing from the same granter ; so that a second gift first declared will be preferred to the first gift ; but not in a competition with a creditor deriving right from a different author. In all the decisions cited for Mr Erskine, the arrestments were before the gift ; and there is more reason to prefer an arrester before, than one arresting after the gift, whereby the donatar has *jus quasitum*. The case of Borthwick *contra* Arbuthnot, doth not meet ; there being a great difference betwixt an executor-creditor, whose legal assignation needs no intimation to complete it ; and an arrester, who hath but an inchoated diligence, till it be completed by a decret of furthcoming, which transmits the property. But where the escheat gifted fell upon the donatar's own horning, (as in this case,) he was preferred to one arresting the rebel's goods after the gift, before declarator, 27th February 1623, Haliburton *contra* L. Murthills, No 36. p. 3641.

Forbes, p. 579.

 S E C T. VI.

Competition Single Escheat with Assignation.

1566. July 13.

STEWART *against* BURN.

ANENT the action perseued be Francis Stewart, donatar to the Earl of Morton's escheat, against William Burn, for certain farms, for being of the said Lord at the horn, and therefore the said farms came under escheat ;—in the

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donatar's right; therefore, in a competition betwixt a gift of single escheat and an assignation granted before rebellion, the right first intimated will be preferred.

whilk action compearit the said William Burn and *alleged*, That long before the committing of the crime wherefore the said Earl was put to the horn, he had coft all and hailt the said farms, at the least 24 chalders thair of perseued be the said Francis, fra the said Earl, and had given him the maist part of the price thereof, and had obtained the said Earl's precept, direct to the tenants and fermours, payers of the said fermes, to answer the said William thair of; whilk precept the said William lawfully intimate to the said tenants, who promittit to pay the said William the said fermes; and all this was done before the committing of the said crime, except the intimation to the said tenants, and their promise to pay, which was done before the execution of the said horning upon the said Earl, as said is; whilk allegiance of the said William Burn was found relevant be the LORDS, and admittit to his probation, notwithstanding the allegiance of the donatar, *de quo supra*.

Fol. Dic. v. 1. p. 255. Maitland, MS. p. 169.

No 47.

Found as above.

1614. February 11. CLERK *against* NAPIER.

IN an action of special declarator, pursued by John Clerk, donatar to the estate of John Cuthbert, *contra* William Napier of Wrightshouses, the LORDS found that, a declarator made by John Cuthbert before the rebellion, that the hailt sums pertained to William Napier, which also contained an assignation to the sums, could not prejudge the King's donatar, because it was not intimated.

Fol. Dic. v. 1. p. 255. Kerse, MS. fol. 53.

No 48.

Found as above.

1642. February 12. MOSMAN *against* TENANTS of Monkcastle.

KATHARIN MOSMAN, donatar to her husband James Nisbet's escheat, charges the Tenants of Monkcastle for payment of some money contained in a bond granted by them to her said umquhile husband, conform to a sentence of declarator obtained by her against them thereupon; and they suspending, *alleged*, That her husband in his own lifetime made an assignee to that bond, which was intimate to them, and to which assignee they made payment, and reported his discharges, with consent of the said James Nisbet in his own lifetime. This reason was sustained, albeit the wife *alleged*, That when the payment was made her husband was at the horn, so that his rebellion made the right to pertain to the King; which was repelled, seeing the payment was made with consent of the husband, before the gift of escheat dispooned to the donatar, which they found only put the tenants debtors in *mala fide*.

Clerk, *Scot.*

Fol. Dic. v. 1. p. 255. Durie, p. 893.