

1677. November 23.

CUNNINGHAME *against* GORDON.

JAMES CUNNINGHAME as donatar to the single escheat of William Wood, pursues William Gordon to denude himself of a shop and cellar, which were bought by William Wood *stante rebellione*, and so must be presumed to have been acquired by the moveables or money of the rebel, belonging to the King by the escheat, whereby it is surrogate in place of these moveables; for if this practice be sustained, all the benefits of escheats may be easily evacuated. It was *answered*, That whatever might be said against the rebel himself upon such a presumption, yet it imports no real right affecting the lands or heritable rights, which the rebel acquired, upon pretence of surrogation; but can only infer a personal conclusion against the rebel, to make payment of the price he paid, or to shew that it was paid otherways than by the moveables; but can have no effect against the ground, or any singular successor, acquiring from the rebel who was the first purchaser; and in this case the donatar can have no pretence, because the rebel bought this shop and cellar from William Gordon, and for not payment of the price did repon him; for the single escheat hath never been extended to the rebel's money or moveables, by buying or selling, against the purchasers; otherways no man might sell land without enquiring, whether the buyer was at the horn, which no man ever dreamed of; yea the rebel's creditors getting payment voluntarily, or by legal execution, of debts due by the rebel before rebellion, satisfaction being obtained before declarator, have ever been secured against the donatar.

THE LORDS found the defence relevant, and assoilzed.

Stair, v. 2. p. 594.

1684. January 23.

CORNELIUS NEILSON *against* KENNEDY.

CORNELIUS being donatar to the liferent escheat of ———, and the rebel five or six years after the gift acquiring the right of a sum of money owing by bond, and the donatar claiming the said sum in a special declarator, as falling under his gift of the liferent; and it being *alleged*, That it would belong either to the donatar of the single escheat made since the date of that bond, or else be yet at the King's gift and disposal; the LORDS found nothing fell under the compass of the liferent escheat, but only his current liferent, and what moveable sums he acquired within year and day after his gift; and for this that there was *locus secundo donatorio*.

Fol. Dic. v. 1. p. 347. Fountainhall, v. 1. p. 263.

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No 14.

A donatar of escheat found not to have right to a tenement bought *stante rebellione* by a rebel, on presumption that it was bought by moveable sums, falling under escheat.

No 15.

A gift of escheat must be restricted to what was due to the rebel at the time of the gift, and within year and day thereafter.

No 15.

* * * P. Falconer reports the same case :

CORNELIUS NEILSON as donatar to the escheat and liferent of his brother Craiggassie, having intented an action of special declarator against Kennedy, for the sum of 8000 merks, due by the said Kennedy to the rebel, conform to the rebel's contract of marriage with Kennedy's daughter; it was *alleged* for the defender, That there could be no process at the pursuer's instance, for payment of this sum, because the pursuer's gift could only extend to what belonged to the rebel the time of the gift, or acquired by the rebel within year and day thereafter; but so it is, that this contract of marriage was long after year and day, and so behoved to fall under a second gift. It was *replied* for the pursuer, That this gift bore, all that was due to the rebel the time of the horning, or that he should acquire at any time thereafter during his life. *2do*, That this allegiance was not competent to the debtor, but to a second donatar. THE LORDS repelled the first part of the reply, and found it only stile, that notwithstanding thereof the gift ought to be restricted to what was due to the rebel the time of the gift, and within year and day thereafter; and found this allegiance not only competent to the second donatar, but also to the debtor, being exclusive of the pursuer's title.

P. Falconer, No 76. p. 51.

* * * This case is also reported by Sir P. Home :

CORNELIUS NEILSON having obtained a gift of single and liferent escheat of his brother Craiggassie, pursues a special declarator against the Laird of Kinaldie for payment of the sum of 8000 merks due by him to Craiggassie, conform to the contract of marriage with Craiggassie's daughter. *Alleged* for the defender, That the gift could only be extended to moveables that belonged to him the time of the gift, or acquired by the rebel within year and day thereafter. But so it is, that the contract of marriage by which the sum is due, was long after the pursuer's gift, and so could not fall under the sum, but would belong to a second donatar. *Answered*, That the gift bearing all moveables due to the rebel the time of the horn, or that should be acquired by him at any time thereafter during his lifetime, albeit the contract of marriage by which the sum is due was not within year and day of the pursuer's gift, yet must fall under the single escheat, which carries all moveable debts that should belong to him any time during his lifetime, and it was *jus tertii* to the defender, who was debtor, to allege that the sum did belong to a second donatar, seeing there was not a second gift, or any person competing. THE LORDS found, that the gift bearing all moveables that belonged to the rebel the time of the horning, or that he should acquire at any time during his lifetime, was only stile, and restricted the same to the moveables belonging to the rebel the time of the gift, and

within year and day thereafter; and found that defence not only competent to a second donatar, but to the debtor, being exclusive of the pursuer's right.

No 15.

Sir P. Home, MS. v. 1. No 606.

. Harcarse also mentions this case :

IN a special declarator for payment of a sum due to a rebel, at the instance of the donatar of his single escheat; it was *alleged*, That the money was acquired by the rebel after he had been year and day at the horn, and so fell not under the single escheat.

Answered; The pursuer's gift carries him to all goods and gear that shall belong to the rebel before his decease. *2do*, The pursuer has also a gift of the liferent escheat. *3tio*, It is *jus tertii* to the defender, who has no second gift, to propone such an allegiance.

Replied; The clause of all goods and gear that shall belong to the rebel before his death, is but style; and by act of Exchequer, and decisions, such gifts are restricted to the rebel's goods and gear the time of the rebellion, and what he acquires within year and day after. *2do*, The liferent escheat cannot carry the sum, but only the annualrent thereof, if any be. *3tio*, The defender has interest to quarrel the pursuer's want of title.

THE LORDS sustained the allegiance and reply made for the defender. See **JUS TERTII.**

Harcarse, (ESCHEAT.) No 432. p. 115.

1685. December 9. M'INTOSH and SOMERVILLE against PRIMEROSE.

BAILIE M'INTOSH and the Laird of Drum-Somerville having recovered a decret for making arrested goods furthcoming against Sir William Primerose, as he who was debtor to the Laird of Humbie in certain sums of money, as the price of the lands of Crichton, sold by Humbie to him; and Sir William Primerose having suspended upon multiplepoinding; and the suspension being called, there was compearance for Hepburn of Randerstoun, Humbie's brother; and it was *alleged*, That Humbie having resigned his whole estate, whereof the lands of Crichton were a part, in favour of himself, and the heirs-male of his body; which failing, in favour of Randerstoun and his heirs-male; which failing, in favour of the Lady Tarras, with this express provision, 'That it should not be lawful to Humbie to alienate the said estate, or to contract debt, without consent of certain friends therein-mentioned, or such of them as should be on life; as also, that it should be lawful to the said persons to name other persons to succeed in their room, in case of their decease, declaring, that deeds without the consent of their friends should be null;' likeas, upon the foresaid clause, there was inhibition served at the instance of the foressaid

No 16.

Found that a donatar of single escheat, had no interest in the price of an heritable subject, which did not exist at the time of the gift, or for year and day thereafter.