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or trust of such a kind as to terminate by the death of the mandatar; but was a conveyance from the Crown to the rebel's whole creditors, established in the person of one for the benefit of the rest; which being once accepted, must remain a charge upon the acceptor and his representatives, till the ends and purposes for which it was granted were implemented.

It was *answered* for the pursuers; That though the gift was a mandate in trust, yet it appeared, by the tenor of the backbond, that it was only *in rem suam*, or at most for such creditors with whose debts the gift was expressly burdened; but could never be construed to infer either trust or mandate betwixt the donatar and the other creditors, so as to have obliged him to account to them without a warrant from the Treasury, though there had been more in the donatar's hand than answered the special ends of the gift. The known method in such a case was, that when the creditors apprehended that the preferable debts in the backbond were paid, they should have applied for a second gift, which would have entitled them to immediate intromission against the debtors; but the first donatar could only be bound to intromit with as much as would satisfy the debts particularly mentioned in the gift, and if he had intromitted with more, he was accountable to the Treasury.

THE LORDS found, that the heirs of the Lord Bowhill were not liable to diligence.

Act. *Ja. Graham, sen.*Alt. *Ja. Boswell, & A. Hay.*Clerk, *Justice.**Edgar, p. 43.*

* * * This case is reported by Lord Kames, *voce* TRUST.

 S E C T. VII.

Powers of the Barons of Exchequer with regard to Gifts of Escheat.

 1697. December 28. HOWISON *against* BRUCE.

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The Barons issued a gift burdened with a sum. They issued a second gift, in which the burden was restricted. Found that

ARNISTON reported Mr Richard Howison, minister at Musselburgh, and Margaret Darleith his spouse, against Bruce of Kinnaird and his Lady, and Mary Bruce, Lady Thornydikes. When Kinnaird was broke with Clackmannan's cautionry, Mary Bruce, his sister, being a creditor, got the gift of his single and liferent escheat in 1677; but the Exchequer burdened it with the payment of 2000 merks to Kinnaird's Lady, which was the jointure she had by Mr George

Norvel her first husband, and which belonged to Kinnaird *jure mariti*. Mr Howison and his wife being creditors to Kinnaird in the sum of 3000 merks by bond, he obtains a second gift of his debtor's escheat; at the passing whereof Lady Kinnaird compearing, craves it may be burdened with her 2000 merks as the first donatar was. The Exchequer, on debate, restricts her jointure to L. 1000 Scots, and burdens the second gift with the same; so that Mr Howison, the second donatar, had thereby right to the superplus 500 merks of her jointure; and pursuing for the same, the first donatar and the Lady Kinnaird compear, and allege preference, because by the first gift there was a *jus quæsitum* to her, constituting her aliment, which the Exchequer by no posterior deed could take from her. *Answered*, It was *res judicata*, in so far as, after debate, the Lords of Exchequer, at the passing of the second gift, saw reason to restrict her jointure to L. 1000; especially considering, that, by the 147th act 1592, all gifts taken in the name of the rebel's wife, children, and nearest relations, are reputed simulate, if he continue in possession; which is the case in hand. *Replied*, The Exchequer are not judges competent to the decision of rights, nor can they diminish the King's gift once conferred, else they might recall it *in toto*; and as for the act of Parliament cited, that can be only objected by the creditor in the horning on which the gift proceeds, and takes only place where a gift is fraudulently and clandestinely past, but not when it is done *cum causâ cognitione*, as here.—THE LORDS found the Exchequer were *functi*, and could not restrict the first gift by the second; and therefore preferred the first donatar, with the burden of the Lady's 2000 merks.—See JURISDICTION.

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they were
functi by the
first gift,
which they
could not
restrict by
the second.

Fol. Dic. v. I. p. 348. Fountainball, v. I. p. 805.

See No 48. p. 1767.

No 59. p. 1463-4.

No 60. p. 2206.

No 12. p. 2182.

See Hamilton against Tenants, 28th March 1637; Durie, p. 843. *voce* JUS TERTII.

See Oliphant against Drummond, 6th January 1666; Dirleton, p. 7. *voce* PRESUMPTION.

See ACCESSORUM SEQUITUR PRINCIPALE.

See APPENDIX.