

1686. *November 17.*A. *against* B.

No 43.

THIR two questions were agitated in the Session. *imo*, A rebel's escheat is gifted and declared, but year and day after the denunciation he gets a bond in his own name, and a creditor of his arrests the sum in this bond; the donatar also claimed it; Against whom it is *alleged*, nothing falls under the single escheat but what belonged to the rebel the time of the denunciation, or accresced to him within year and day thereafter. President Lockhart, in a case of the Earl of Breadalbane's with some creditors, thought, if a second donatar were made, he would carry it; and even as it stood, he preferred the first donatar to the arrester; which some thought hard.

2do, One arrests a sum due to a rebel; the donatar of his escheat is paid off his debt, but the second in the back-bond craves to be preferred to the arrester, as being *in eodem corpore*. It was thought he ought to be preferred to the arrester.

Fol. Dic. v. I. p. 255. Fountainball, v. I. p. 428.

1707. *March 27.*

WILLIAM HENDERSON Merchant in Edinburgh, *against* ALEXANDER ALISON
Writer to the Signet.

No 44.
Found in
conformity
with Kirkness
against For-
ster, No 35.
P. 3641.

HARRY CRAWFORD's share in the African Company being found arrestable at the instance of Alexander Alison his creditor, in order to oblige the directors to transfer the same in favours of the arrester, (*vide* March 18 1707. Alison *contra* the Directors of the African Company, *voce* SOCIETY,) William Henderson donatar of Crawford's escheat compeared for his interest, and claimed to be preferred to Mr Alison.

Alleged for Mr Alison; That by Act 8th, Parliament, 1695, the shares of the capital stock of the African Company are exeemed from confiscation, &c. and only transferable by the Company's assignments, except that they may be affected by the real diligence of the proprietor's creditors: And the donatar of his escheat is not a creditor who has affected the same by real diligence, or got a voluntary transfer in his favours. Besides, these things only by our law are escheatable *quæ possunt referri in fiscum*, and which of old could be uplifted, and intromitted with by the treasurer's letters of intrommission, under which denomination the Company's stock that was in effect mortified and not upliftable by the partners themselves, cannot fall; and therefore the gift of escheat cannot take place. Nor is it disanalogous to our law to declare this

subject arrestable by a lawful creditor, and yet not fall under escheat : As when it is provided in a vassal's charter, that his escheat, when it falls, should belong to himself ; and the royal assent to the foresaid act in favours of commerce excluding confiscation, or other transfers of the property, except by the real diligence of the proprietor's creditors, is fully equivalent. *2do*, *Esto* the share were escheatable, yet Mr Alison should be preferred, because he hath fully affected the same and got it adjudged to him upon his real diligence prior to Henderson's declarator of escheat, which was not executed against the directors till after Alison's arrestment, whose decret of furthcoming is prior to the day of compearance in the donatar's process. Thus an executor creditor was preferred to a donatar of escheat, the confirmation being before the gift ; No 52. p. 3654, observed by the Lord Newtoun : And creditors doing diligence after the debtor's rebellion and before declarator of the escheat, for debts contracted before the rebellion, were preferred to the donatar, February 19, 1667, Glen *contra* Hume, No 41. p. 3645. ; February 24, 1637, Pilmoir *contra* Gagie, No 39. p. 3644.

THE LORDS preferred Alexander Alison.

Fol. Dic. v. 1. p. 255. Forbes, p. 164.

1710. June 20.

ERSKINE *against* ELLIOT.

THESE two being both creditors to one Scot, Elliot gets the gift of his escheat, and Erskine arrests his goods and effects ; and a competition arising betwixt them before the Admiral, he prefers the donatar, because his gift was prior to the laying on of the arrestment. Erskine presents a bill of suspension of this decret, on iniquity, that the decret of general declarator being the intimation of his gift, he might legally arrest before that, and should be preferred.—*Answered*, In strict law the goods fall to the fisk immediately after denunciation, so that no diligence of creditors after that should wrong the Crown ; yet such has been the benignity of our princes, that they suffered all creditors to be preferred to them, who did diligence for debts contracted before the rebellion, as long as the casuality of escheat was not gifted. In this competition there were two cases yielded as principles, *1mo*, A creditor arresting before the gift, was always preferred to the subsequent donatar ; the *second* was, An arrestment laid on after the decret of general declarator, was always postponed by the Lords to the donatar, and he preferred. Thus 22d February 1628, Anderson and Gordon, No 37. p. 3643. So the debateable case lies betwixt these two, where the arrestment is after the gift, but prior to the decret or declarator, which is the present question in hand ; and Elliot the donatar founded on the decision 27th February 1623, Thomson *contra* Laird of Murtle, No 36. p. 3641, where a donatar's gift being in payment of his own debt, was preferred to an arrest-

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No 45.

Found in conformity with Thomson against Haliburton, No 36. p. 3641.