

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

No 45. ment laid on after the gift, but before declarator. Erskine the arrester cited Spottiswood's Practics, p. 98. and 104. where a decision is cited, 19th June 1630, Nisbet and Fullarton, No 38. p. 3643. ; and 24th February 1637, Pilmor *contra* Gagie, No 39. p. 3644. where the arresters were preferred to the donatar; and also since that, on the 19th February 1667, Glen and Home, No 41. p. 3645. ; and 27th March 1707, Henderson *contra* Alison, No 44. p. 3648.— But the cases there are of arrestments both before gift and declarator, and do not determine what the Lords would do where it is prior to the declarator, but after the gift. Which case the LORDS looking upon as new, they, on report of the Lord Arniston, past the bill of suspension on caution, that the competition might be more fully under their view at discussing, though several of the LORDS thought the donatar preferable in this case, but desired to be more cleared ere they decided the point.

Fol. Dic. v. 1. p. 255. Fountainball, v. 2. p. 578.

. Forbes reports the same case :

In a competition betwixt Alexander Erskine and William Elliot, creditors to William Scot merchant in Edinburgh, for the share of a ship belonging to the common debtor, the LORDS preferred Mr Elliot who had a gift of the common debtor's escheat declared in general to Mr Erskine, who, after the other's gift before declarator, had arrested the ship for a debt due before the rebellion, upon this speciality, that the donatar's gift proceeded upon his own horning, and he obtained declarator before Mr Erskine recovered a decret of furthcoming.

Albeit it was *alleged* for Mr Erskine, That as arrestment intervening betwixt an assignation and intimation thereof, would be preferred thereto; so an arrestment intervening betwixt the gift of escheat and decret of declarator, which is the intimation thereof, is preferable to the gift, so be it proceeded on a debt prior to the rebellion, Spottiswood, p. 98. 19th February 1667, Glen *contra* Hume, No 41. p. 3645. ; 27th March 1707, Henderson *contra* Alison, No 44. p. 3648. For the same reason, an executor-creditor confirming a subject belonging to his debtor, after his escheat was gifted to another, but not declared, was preferred to the donatar, 8th November 1710, Borthwick of Fallahill *contra* Arbuthnot, No 53. p. 3655. ; and an arrester was preferred to an executor-creditor, who obtained decret, but did not poind thereon, 20th January 1681, Riddel *contra* Maxwell, No 113. p. 783. ; yea, a general declarator serves only for intimation as to escheat goods in the hands of the rebel, who only is called in the general declarator, and not as to the rebel's debtors, who are in *bona fide* to pay to him or his creditors arresting in their hands, till they be interpellated by a decret of special declarator, *ibid.* ; and 31st January 1628, Cleg-horn *contra* Tenants, No 17. p. 1787. ; nor doth it alter the case, that the escheat fell on the donatar's own horning; for the debt contained in the horn-

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.

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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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