

\* \* \* Spottiswood reports the same case :

IN a general declarator of an escheat, it being *alleged* that the horning is null, because before the charge, or denunciation at least, the debt was paid, and discharge thereof given by the creditor ; it will not be received, but the horning must abide a reduction, whereunto the King's Advocate and Treasurer must be called ; for otherwise the rebel and the creditor might collude together in prejudice of the fisk and the donatar, by granting a discharge antedated. Found betwixt James Douglas, council macer, and the Creditors of umquhile Mr John Wardlaw, whose escheat James was seeking to be declared.

*Spottiswood, (ESCHEAT.) p. 104.*

No 32.  
rebel and creditors might collude in prejudice of the fisk, by antedating the discharge.

1662. *July 22.* WILLIAM MONTGOMERY *against* THEODORE MONTGOMERY.

WILLIAM MONTGOMERY, as donatar to the escheat of Theodore Montgomery, pursues a general and special declarator in one libel, and insists, first, in the general.—The defender *alleges* absolutor, because the horning is null, the denunciation being at the cross of Edinburgh, where the defender had not his domicile. The pursuer opposed the horning standing, bearing, the defender to dwell in Edinburgh, and the horning could not be taken away by exception, *alibi*, not instantly verified.

THE LORDS repelled the defence, but prejudice of reduction thereupon.

*Fol. Dic. v. 1. p. 171. Stair, v. 1. p. 132.*

No 33.  
Found in conformity with No 28, p. 2713, and No 31, p. 2714.

1712. *June 18.*

WILLIAM KER of Chatto *against* THE CREDITORS of SIR WILLIAM SCOT of Elieston.

ROBERT SCOT of Elieston, succeeding to the estate of Harden, on the death of his brother Sir William ; and being much pressed both by his relict and creditors ; he prevailed with William Ker of Chatto to engage cautioner for him in considerable sums ; for relief whereof, the said Robert Scot gave him a disposition to his whole heritable and moveable debts ; and Chatto pursuing some of the debtors, compearance is made for Scot of Wall, and other creditors to Sir William, who craved preference to these debts ; *imo*, Because they are creditors to Sir William the defunct, and Chatto is only creditor to Robert the apparent heir ; which is founded on the 24th act 1661 ; and the debts being originally due by Sir William, their debtor, and they having done diligence within three years of his disease, they were preferable to the creditors of the apparent heir.

No 34.  
Decided likewise in conformity with the above mentioned cases.

No 34.

*Answered* for Chatto, that the act of Parliament did not concern him; for it only relates to real rights of lands; whereas his disposition was only of moveable bonds, but no ways extended to lands. *2do*, It was only introduced in favours of such creditors as within three years compleated their rights; whereas Wall and the other competitors had not yet brought their diligence the length of an adjudication, much less of an infestment; and Stair, b. 2. tit. 12, expressly requires that the diligence be perfected within three years of the defunct's death. *Replied*, There was no neglect nor *mora* on their part, of constituting their debt within the three years prescribed; but a *medium impedimentum* of an unforeseen accident, viz. Robert Scot of Harden's death, intervened within the three years, which put them to begin *de novo*; and the act does not speak of a complete right, being borrowed from the Roman *separatio bonorum hæredis a bonis defuncti*. THE LORDS found this case fell not under the said act 1661, it neither being an estate in land that was disposed, nor were their diligences perfected within the three years. *2do*, *Objected*, That Chatto's disposition was from a brother-in-law, a conjunct person, and either *omnium bonorum* or very near to it, and so was null by the act of Parliament 1621, in competition with lawful creditors, unless the onerous cause thereof were otherwise instructed than by its own narrative. *Answered*, The act 1621 takes only place where the disposer is dyvor or bankrupt, which cannot be pretended against Robert Scot, who not only had his own estate of Elieston, but also the tailzied estate of Harden over and above all the subject he disposed to Chatto. *Replied*, It is true, no man is hindered to dispose of his estate though gratuitously, if he have a sufficient affectable estate to pay his debt by the current of the Lords' decisions, viz. Clark *contra* Stewart, No 46. p. 917.; Mouswell's Creditors, No 60. p. 934.; and Mackell *contra* Jamieson, No 47. p. 920.: Yet by all these the Lords require it to be a clear solvent unincumbered estate, and not put creditors to expiscations and enquiries after uncertain funds, it being more just the debtor's near relations should fish out these than extraneous creditors. THE LORDS found Robert's disposition to Chatto reducible, unless he either instructed an antecedent onerous cause, or condescended on an estate free of incumbrances able to answer all the debts. *3tio*, Wall founded on a third ground of preference, that he had done more timely diligence by arrestment before the intimation of Chatto's assignation. *Answered*, No respect to the arrestment, being laid on for an heritable sum, which Stair shews was an incompetent diligence, unless made moveable by a charge of horning. THE LORDS found the disposition made after horning used against the said Robert Scot null. *4to*, *Objected*, They had the gift of the said Robert's escheat on a denunciation prior to Chatto's disposition. *Answered*, *Imo*, The disposition being anterior to the gift, is preferable. *2do*, The denunciation is null, being at his country-house, and at Selkirk; whereas he was then living with his family at Edinburgh. *Replied*, He had his *focum et larem*, his furniture and servants at Elieston; and his residence at Edinburgh was only occasional, prosecuting his law pleas with his

sister-in-law, &c. and so the horning is legally execute. THE LORDS repelled the nullity against the horning *hōc ordine*, reserving Chatto's reduction thereof as accords. 510, *Objected*, That Robert Scot having confirmed himself executor to Sir William, his brother, and found Chatto cautioner to make the inventory forthcoming, Robert could not dispoise these goods, nor Chatto validly accept a right thereto, in prejudice of Sir William's creditors, the executor being but a fiduciary trust for the creditors' behoof. *Answered*, He does not plead his disposition to liberate him of his cautionry, but only that he must be pursued *via ordinaria*; and then he would allege Robert Scot, the principal executor, his representatives must be first discussed, ere they come to the cautioner. THE LORDS found, though the executor may assign the inventory, yet if he do it to his own cautioner, he may be debarred *objectione personali* to make use of it to the creditors' prejudice; for *quem de evictione tenet actio eundem agentem multo magis repellit exceptio*. 6to, *Alleged* for Chatto, That this competition was most invidious and merely in emulation; for Wall was uncontrovertedly secured on Sir William Scot's estate, where he could not miss his payment; and yet most unnecessarily they would have no subject but the debts assigned to him, and *malitiis non est indulgendum*: And if they think he must pay, then he is content to do it on their assigning him to their securities. *Answered*, Though an assignation seem favourable and specious in some cases, yet here it is only sought to be a handle to vex Highchester, now Harden's heir, whose estate is tailzied under irritancies. THE LORDS thought it *jus tertii* to the creditors to found on the heir's interest; and that they ought to assign: yet because it had not been fully pled, they remitted it to be farther heard before the Ordinary.

*Fol. Dic. v. 1. p. 171. Fountainhall, v. 2. p. 739.*

See HEIR APPARENT.—BANKRUPT.—EXECUTION.

## S E C T. VII.

### Objections against a Standing Infestment how Proponable.

1612. January 31.

ARTHUR against L. of BLEBO.

AN apparent heir may reduce a decret given against him in an action concerning the heritage to which he is apparent heir. Sasine given to an heir upon his retour by that superior whose father was denuded many years before, by resignation of the superiority in the superior's hands, for infestment to be given to a conqessor, will not be taken away by way of exception or reply.

*Fol. Dic. v. 1. p. 172. Haddington, v. 2. No 2380.*

No 34.

No 35.

A sasine given to an heir upon his retour, by a wrong superior, cannot be taken away by exception or reply.