

1712. February 8.

The LORD MINTO *against* JOHN MARSHALL Writer in Edinburgh.

No 18.

A gift of single and liferent escheat, bearing, not only what pertained to the rebel at the rebellion, but what had fallen or should fall and belong to him during his remaining at the horn, found to carry right to a debt falling due to him many years after the rebellion.

IN a competition betwixt the Lord Minto as donatar to the single and liferent escheat of Henry Mein merchant in Kelso, and John Marshall, who had arrested in the hands of John Thomson debtor to the said Henry Mein; the Lord Minto craved to be preferred, because his gift and declarator thereon, were both prior to the arrestment.

*Answered* for Marshall; The debt owing by Thomson to Mein being L. 20 Sterling, as two years' fee due to him many years after the rebellion, doth not come under either the single or liferent escheat; not under the single escheat, because nothing but the moveables belonging to the rebel the time of the rebellion, or accruing to him within year and day thereafter, did fall under the single escheat; nor under the liferent escheat, because that comprehends only rents and profits belonging to him by liferent right. Therefore the subject in question is only affectable by arrestment, or by a second gift of escheat, Stair, Instit. Lib. 3. Tit. 3. § 19. Consequently the arrester in this case is preferable to the donatar.

*Replied* for the Lord Minto; That his gift carries not only what pertained to the rebel the time of the rebellion, but what had fallen or should fall and accrue, pertain or belong to him in time coming, during his remaining at the horn; and as my Lord Stair, Instit. Lib. 3. Tit. 3. § 15. Pr., observes, the whole moveable goods and debts of parties denounced are escheat and confiscated, and all that they shall acquire thereafter till they be relaxed. For whatever doth not fall under the liferent escheat after the annual rebellion, falls under the single escheat. Where the Lord Stair restricts the single escheat to what shall belong to the rebel within year and day, that is in relation to the rents or product of an heritable subject. And the practise betwixt Somerville and Stirling, No 9. p. 5074; is not to the purpose; for there the gift bore only what belonged to the rebel the time of the rebellion.

THE LORDS preferred the arrester.

*Fol. Dic. v. 1. p. 347. Forbes, p. 585.*

\* \* \* Fountainhall reports the same case:

My Lord Minto being creditor to Hary Mein merchant in Edinburgh, he takes the gift of his single and liferent escheat, and gets a general declarator. John Thomson being debtor to the said Hary in L. 20 Sterling, one John Marshall a writer, likewise creditor to Hary Mein, arrests that sum in Thomson's hands; whereon a competition arises betwixt him and my Lord Minto the donatar; against whose gift it was *objected*, That this sum could not fall under his

right, because it was acquired by the rebel many years after he was denounced. *First*, It could not be carried by his single escheat, because that comprehends no more but the moveables which belonged to the rebel the time of the denunciation, and within the year and day after. Next, it cannot fall under the liferent escheat, for that carries nothing but the rents of the rebel's lands, and what has *tractum futuri temporis*; whereas this debt was a salary for being Thomson's book-keeper. And Stair is very clear, b. 3. t. 3. § 15, and 19.; and Sir George M'Kenzie in his Institutions; that though the gift bear expressly all goods which the rebel shall acquire during the rebellion, yet that extended only to what he had the time of the gift, and within year and day thereafter; and cites the case of the Earl of Kinghorn *contra* Wood, No 8. p. 5072; as also Somerville *contra* Stirling, No 9. p. 5074; where goods acquired by the rebel after the year and day, and so not falling under the single, are not found to be carried by the liferent, but there is room for the King, or his officers, to dispone the same *de novo* by a new gift, or may be affected by his creditor's diligence by arrestment or otherwise. The decision Sibbald *contra* Lethundy, and Cluny, No 6. p. 3616, distinguishes very accurately betwixt what is acquired within year and day, and what falls to the rebel afterwards. See also the case of Haliburton and Stewart, No 9. p. 3618; Wardlaw and Dick, No 4. p. 5070.—*Answered*, That by our old customs all the rebel's moveables were summarily ordained to be brought into the Treasurer, who issued out letters of intromission to the Sheriffs and other Judges, to uplift the escheat goods, act 75th, 1579. But this method went into desuetude, and gifts came in its place. The next step was, if he lay year and day contemptuously at the horn, then he lost the *dominium utile* of the rents of his lands during his lifetime, as if he had been *civiliter mortuus*; and therefore to say, that moveable sums, acquired by the rebel after year and day, fall not under the gift, is to speak without book, and contrary to the analogy of our law; for as the rebellion is punished by the loss of his moveables, so the continuation of his contumacy is farther punished by the tinsel of his liferent, by which he loses the protection and countenance of lawful authority, and is divested of his right to stand in judgment, and his goods acquired after run the same fate with those he had at the time of his denunciation; otherways, he would be in a better case after year and day than before, which is an absurdity not to be mentioned; and seeing Stair is appealed to, he is frankly willing to go thither, and stand or fall by his opinion; who plainly says, in the forecited place, that the effect of an horning, duly used and registrated, is, that the whole moveables and debts of the party denounced escheat to the Crown, and all that he shall acquire thereafter till he be relaxed. See the case of Murray *contra* the Donatar of the Commissary of Dunkeld's escheat, No 11. p. 3622; so that the *jus mariti*, the profits of a clerkship, the bygone casualties of superiority fall under the escheat. THE LORDS found the practiques cited did not meet the case, where it was a gift both of the single and the liferent; and that such a

- No 18. gift extended *ad acquirenda* after the year, as well as the *acquisita* before ; and therefore preferred the donatar to the arrester, especially seeing he was founded in the express stile and words of his gift, carrying all the rebel's goods that should belong to him during the rebellion.

*Fountainhall, v. 2. p. 720.*

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S E C T. III.

Gift of Liferent Escheat.

1622. *June 25.* ROBERT DICKSON *against* LO. BORTHWICK.

- No 19. FOUND, that a liferent escheat cannot be farther extended than to the lands pertaining the time of the gift to the rebel.

Simulation of an escheat sustained, proving the escheat to be taken to the behoof of the rebel's bairns.

*Fol. Dic. v. 1. p. 347. Kerse, MS. fol. 220.*

1623. *February 7.* BUCKIE *against* DAVIDSON.

- No 20. THE LORDS found, that a gift of escheat, bearing all that pertained to the rebel the time of the denunciation, cannot be farther extended, and cannot comprehend neither the subsequent crop, nor no goods and gear acquired after the denunciation and before the gift.

*Fol. Dic. v. 1. p. 347. Kerse, MS. fol. 220.*

1628. *March 8.* DOUGLAS *against* WEDDERBURN.

- No 21. DEBATED whether a gift of liferent escheat reaches casualties arising after its date.

*Fol. Dic. v. 1. p. 347. Durie. Spottiswood.*

\* \* \* See this case No 3. p. 3556, and No 10. p. 3620.