

ment of 4000 merks; and annualrents due by Sir William Nicolson to the defunct, (which bond he had delivered up to Sir William, and taken a new bond in his own name,) or otherways, to assign Sir William's bond to her; and the libel being referred to his oath, he deponed, and acknowledged he had renewed the defunct's bond in his own name. The oath coming to be advised, it was *alleged*, That the bond was delivered by the defunct to him, for his own behoof, and that accordingly he renewed it when he was on death-bed, as said is, and that it was in satisfaction to him of a debt due to him, by virtue of his contract of marriage, long before the pursuer's contract of marriage, which was the ground of this pursuit.—THE LORDS found, That there being nothing instructed, that the bond was delivered by the defender's father to him, in satisfaction of that debt; and the oath bearing nothing thereof, they found him liable to pay the money contained in Sir William Nicolson's bond, granted to the defunct, or otherways, to assign Sir William Nicolson's bond, which was granted in place thereof to him. They were likewise of opinion, (but it came not to be decided) that although it had been proven, that the defunct had delivered up the bond upon his death-bed, yet it not being a habile way to transmit it, it was not a relevant defence.

It was *alleged, 2do*, for the defender, That he, as donatar to his father's life-rent escheat, ought to be preferred to the bygone rents of Sir William's bond, preceding the defunct's death.—It was *replied*, That the gift was obtained, not only after the pursuer was confirmed executrix-creditrrix, but likewise after she had recovered sentence for this debt before the Commissaries of Edinburgh, against the defenders.—THE LORDS preferred her, as executrix-creditrrix, to the donatar, in regard her confirmation was before the obtaining of the gift.

*Fol. Dic. v. I. p. 255. Gilmour, No 99. p. 69.*

1710. November 8.

WILLIAM BORTHWICK of Fallahill, *against* MR ROBERT ARBUTHNOT,  
One of the Accountants in Exchequer.

IN the competition betwixt Fallahill, executor-creditor to the deceased Colonel William Borthwick of Johnstounburn, and Mr Robert Arbuthnot, donatar of the Colonel's single escheat, for L. 177: 19s. Scots, of arrears due to him out of the equivalent, the donatar claimed preference upon this ground, That his gift being duly sealed and registered eight months before the other's confirmation, was a legal assignation to the escheat goods, for payment of the debt due by the rebel to the donatar before the rebellion.

*Answered* for Fallahill; He ought to be preferred, his debt being constituted by the rebel's bond long before the rebellion, and his diligence for payment completed before declarator of the gift of escheat; because the confirmation is

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A donatar of a defunct's escheat having procur'd his gift, and several months thereafter, another creditor confirming before intending declarator of the gift, the Lords preferred the executor-creditor before the donatar.

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a complete assignation to the executor-creditor, affording *jus ad rem, et in re*, and immediate access to the subjects confirmed; whereas, on the other hand, it was never pretended that a sealed gift not declared is a complete assignment; seeing gifts of that nature pass *periculo petentis*, and it is only known by the declarator, that the casualty is duly fallen.

*Replied* for Mr Arbuthnot; The gift of escheat, after appending the seal to it, is a complete assignment to the escheat goods, requiring no intimation to the rebel's debtors, whom it is not necessary to call in the general declarator, (which *nihil novi juris tribuit*) but only to call himself or his representatives; and a donatar's gift for payment of his own debt (and such is Mr Arbuthnot's) was preferred to an arrester of the rebel's goods after the gift, though before declarator, 23d February 1623, Thomson against the Laird of Murtle, No 36. p. 3641.

*Duplied* for Fallahill; Though generally declarators *nihil novi juris tribuunt*, but only establish, ascertain, and declare what was formerly obtained; yet declarators of escheat are of a separate nature; and other declarators have their own special effects, as in a declarator of non-entry the whole mails fall due to the superior after citation. It is true the rebel, *ipso facto*, by the rebellion, falls from his own right to his goods; but by our law and custom, a lawful creditor before the rebellion, completing his diligence before declarator of the gift, is preferred to the donatar, Stair, Inst. Lib. 3. Tit. 3. § 16.; Dirleton's Doubts, p. 80.; M'Kenzie's Inst. p. 77. and the Note in the Appendix; 24th February 1637, Pilmuir against Gagie, No 39. p. 3644.; and our benign princes did ever account *id solum nostrum, quod debitis deductis est nostrum*.

*Triplid* for Mr Arbuthnot; The practick between Pilmuir and Gagie is wholly foreign to the present purpose; the question there being betwixt a creditor and a donatar of escheat, whose gift was posterior to the arrestment.

THE LORDS found, That Fallahill had the first complete right to the Colonel's arrears due by the Commissioners of the Equivalent, which was the subject of the competition; and therefore preferred him to the donatar of escheat.

*Fol. Dic. v. 1. p. 255. Forbes, p. 439.*

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

THE Lady Kersland, relict of Major Bothwick of Johnstounburn, takes the gift of his escheat in the name of Mr Robert Arbuthnot, and pursues the Commissioners of the Equivalent in a special declarator, for his money he had given in to the African Company. Borthwick of Fallahill, who had married the Major's sister, compares and craves preference on this ground, that he had confirmed himself executor-creditor to the defunct, before you raised your general declarator, and so is preferable in law; your gift of escheat, though prior, being only of the nature of the assignment, which is never complete till intimation,

which, in this case, is by the general declarator ; and I having prevented you by my intervening confirmation, I must carry the subject.—*Alleged, In rigore juris*, the whole rebel's moveables fall to the fisk, immediately upon the denunciation ; and of old the treasurer, (without any declarator) issued out letters of intromission, by which he summarily intromitted with the escheat goods ; but the benignity of our princes had somewhat mitigated this rigour, in favour of creditors who had done diligence before the casualty of escheat was gifted ; but after the gift, no diligence was regarded, which is the present case in hand, the confirmation being eight months subsequent to the gift. And Durie has observed sundry decisions where donatars to escheats have been preferred to apprisers, annualrenters, arresters, assignees, &c. where posterior to the gift ; and Stair seems to be of the same opinion. And whatever unfavourableness may lie against lucrative donatars, yet here this gift is for a most onerous cause of debt, and so *in pari casu quoad* that with the executor-creditor, and preferable to him on that separate ground, that his gift is long before the confirmation ; and the declarator *nihil novi juris tribuit*, but only give the donatar an opportunity to object the nullities of the horning, if any be.—*Answered*, Whatever stretches our old laws and customs made in favour of donatars, yet the later practiques had wholly receded therefrom, and had preferred lawful creditors doing diligence before declarator, and was so marked by Dirleton in his Doubts and Questions, p. 80. and 146. ; and by Sir George M'Kenzie, Tit. Casualties of Superiority ; and whose testimonies are the more considerable that they were both his Majesty's Advocates, and would not have decided *contra fiscum*, had it not been our plain law. See a parallel case *supra*, 20th June 1710, Erskine, No 45. p. 3649. where are sundry law citations here omitted.—THE LORDS, by plurality, preferred Fallahill the executor-creditor to the donatar, though his gift preceded the confirmation. If either the debt be contracted after the denunciation, or the diligence done after the declarator, the donatar in both these cases would undoubtedly be preferred, but here the debt was before the rebellion, and the diligence before the raising of the general declarator.

*Fountainhall, v. 2. p. 403. 596.*