against form, so summarily, without preceding sentence, to pursue him to make an alleged debt owing by his father, as arrested in the defender's hands, to be made forthcoming. The Lords repelled the allegeance, and sustained the pursuit, which they found formally and orderly deduced; for the rebel's self might have convened the defender, as heir to his father, to pay a debt owing to himself by his father, and referred it to his oath, and therefore the donatar might do the same.

Act. Craig. *Alt.* Primrose and Chaip. Gibson, *Clerk.* *Vid.* 23d February 1628, Nasmith; 9th December 1626, Lord Blantyre.

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1627. *July* 6. The EARL of ANNANDALE *against* RICHARD MURRAY.

IN a general declarator of umquhile the Laird of Cockpule's escheat, at the instance of the Earl of Annandale, donatar thereto, made by the king since the rebel's decease, *against* Mr Richard Murray of Cockpule, his brother,—the Lords preferred the pursuer to another donatar compearing and alleging that he was made donatar thereto by the king, and had obtained declarator thereupon before the rebel's decease, so that it could not be declared again at the second donatar's instance. Which allegeance was repelled, and the said second gift sustained, because it was replied by the pursuer, the second donatar, that the first gift could not be respected, being taken to the rebel's use, and upon his own charges; and he continuing rebel thereafter unrelaxed, the king had right, by continuing of his rebellion, to gift his escheat or liferent to another donatar, who ought to be preferred to the other. And the defender contending, that the first donatar had right to the rebel's whole goods, which he had then at the time of the said gift, notwithstanding that the gift was taken to the rebel's own use, and notwithstanding he thereafter continued at the horn unrelaxed; because, he alleged, the king might gift the same to the rebel's self, where no creditors compeared to quarrel the same, and where no party was prejudged thereby; for, the king being only interested in that rebellion, his majesty's interest was taken away by his gift, which being once given, there could not (except there had been a new rebellion to make a new cause of vacation to the king's majesty,) be any new gift effectually given to a second donatar. Which allegeance was repelled, for the Lords found, that the first gift could not be effectually given, neither to the rebel's self nor to any other to his use, he remaining still rebel after the gift; and that the rebel, continuing rebel unrelaxed, was not capable to receive the same, albeit no creditor were prejudged thereby, nor compeared to oppone the said gift; but that there was place to confer a new gift to any other donatar, notwithstanding of the said first gift, which second donatar might as lawfully quarrel the said first gift, as any creditor might have done; likeas it was found as relevant, being proponed for the second donatar, as it would have been, being proponed for a true creditor. And also the Lords found, that, although the first gift had been valuably given to a donatar's own behoof, yet, if the donatar should thereafter either dispone, or transact for sums of money, or otherways, the right thereof to the rebel, and that he should, after that disposition, remain unrelaxed,—that the king might dispone valuably a new

gift of the same escheat to another donatar, as being acquired, and as a new purchase made by the rebel after the first gift, whereto the king had right by the continuing rebellion, and the acquisition by the rebel of these goods while he was rebel; which being so acquired after the first gift, by the rebel's remaining so, it gave place to the king of new to confer them.

Act. Hope and Burnet. *Alt.* Nicolson. Scot, *Clerk.* *Vid.* 25th and 28th November, 1626, E. Kinghorn *against* Wood.

In this same process, the persons who, of law, would have been executors to the rebel, being called, and proponing the exception foresaid upon the said prior gift and declarator; and alleging that the donatar, who had obtained declarator, had made one Grahame assignee thereto, who had transacted with them for the said goods escheatable; and so that this pursuer could not seek a declarator upon that which is declared already, seeing they behoved to be countable to him who had obtained the said first gift, and which was declared;—the Lords found, that this allegeance was not competent to these excipients, to be proponed by them, albeit they were specially called in this process; but the same was only competent to the donatar and his assignee.

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1627. *July* 12. ROWAN *against* SHAW.

IN a suspension betwixt Rowan and Shaw, where a bond was made by a debtor, granting him to have borrowed from umquhile Ferguson some money, which the debtor obliged himself to pay to his said creditor, or to another called Shaw, or to either of them, presenters of the bond, and their heirs and executors; which sum being craved from the said debtor, after the decease of Ferguson the principal creditor, by the creditor of the said Ferguson, who had arrested the same; and also the said sum being craved by the executors of Shaw, who was adjected in the bond, acclaiming the same to be due to them, seeing the payment by the bond was appointed to be made to one of the two presenters of the bond, and their heirs and executors, and that they had the bond, and so contended the right of it to pertain to them, and not to Ferguson, nor his creditors;—the Lords preferred the executors of the person adjected, in respect of the tenor of the bond appointing payment to be made to one of the presenters, or their heirs or executors; for, albeit the bond was not presented by Shaw in his own lifetime, and that the sum was the proper money of Ferguson, yet it was found as due to his executors as to Shaw himself, seeing they had the bond: and albeit, by the civil law, *adjectus solutioni non potest petere sed tantum potest solutionem accipere*, yet that agrees not with our practice, whereby *adjectus potest etiam petere*: And albeit, by our practice, *is possit petere*, yet if he and the principal creditor were contending for the sum, the principal creditor, lender of the money, would be preferred to the adjected; nevertheless here, the executors of him who was adjected were preferred to the creditor of him who principally was deduced in the obligation; for, if he had been living, the *adjectus* would have been preferred to himself, because the said executors of the person adjected had the bond in their possession the time of his decease, and it was found *in bonis ejus*, and amongst his writs, after his decease; and that the principal