

S E C T. IV.

Diligence prestable by Donatars.

1678. January 17. CRAWFORD *against* CHARTERS and Others.

IN a competition between the donatars and creditors of Mr James Winram, Matthew Crawford being the first donatar, Mr Laurence Charters the second, for whose children it was *alleged*, That they ought to be preferred, because the first donatar had given back-bond, restricting the gift to his own satisfaction; *ita est*, he was satisfied by his intromission, at least by what he ought to have intromitted with, and so having entered in possession of the rebel's tenements in Edinburgh, he was liable for the rents thereof, and also for the rents of some lands in the country, whereof he had entered in possession;—It was *answered*, That donatars being assignees by the first gift, have absolute right, except in so far as it is limited by their back-bond, which is only as to intromission, but obliges them to no diligence.—It was *replied* for the second donatar, That escheats do not simply exclude creditors, even without back-bond, and therefore, if a posterior donatar or creditor, arresting or doing other diligence, insist to affect the rebel's estate, the donatar cannot exclude them, and suffer the rebel to possess, but must either intromit, or suffer them to intromit, and so excluding them, is liable for intromission and omission; and so the first donatar entering in possession, could not relinquish that possession to the rebel, but must be accountable therefor, *nam pro possessore habetur qui dolo desiit possidere*.—It was *duplicated* for the first donatar, That he was content to account for the tenements in Edinburgh, but for the lands in the country he was not obliged to account, because he had excluded no creditor, nor had obtained any sentence against the tenants, but they had voluntarily paid him some terms, which did not oblige him to insist for the rest.

THE LORDS found the donatar liable for no diligence, except in so far as he excluded other creditors or donatars, or *dolose* deserted the possession; but found the voluntary payment by the tenants not to make him liable for subsequent terms.

Fol. Dic. v. 1. p. 239. Stair, v. 2. p. 593.

1680. January 14.

*** Fountainhail reports the same case :

THE LORDS found a donatar to an escheat, having no competitors, was not liable for diligence, but where there were two or three donatars, he was either

No 24.
A donatar of liferent not liable for diligence, but for actual intromissions, except in so far as he excludes others.

No 24. obliged to exact diligence, or to give the second donatar possession ; even as in a competition among comprisers, where the party holds both as to intromission and setting of lands; and a donatar's diligence against tenants is pointing and caption, and charging is not enough.

Fountainball, MS.

1686. *February.*

GRANGE DICK *against* BAILIE HAMILTON and LADY SHEENS.

No 25.

A donatar of single escheat being bound by back-bond to make furthcoming what was over payment of his own debt to the other creditors, was found only accountable for his actual intromission.

On this occasion, an act of sederunt was made, declaring donatars liable to do diligence.

THIS point being reported, if a donatar of escheat was liable to do diligence for his own debt, and for that in the horning on which the escheat fell ;

It was *alleged* on the one hand ; That the donatar's omission to intromit would prejudice the creditors, who are to be satisfied by the escheat after the debt in the horning on which it fell, and expenses, and the donatar's other debt, are paid ; and here the Laird of Sheens, the rebel, is the donatar's brother-in-law, whom he suffered to uplift the rents several years.

It was *answered* for the donatar ; That he did not hinder any to take a second gift ; and he needed not intromit, being in a different case from an executor-creditor.

THE LORDS delayed the interlocutor.—Here the gift proceeded on the donatar's own horning.

It being afterwards *urged* for the creditors ; That the donatar was both negligent and colluded with the rebel, and in effect communicated the benefit of the gift to him ; in so far as he recovered decret of special declarator against some of the debtors, and suffered the rebel's wife to intromit with teinds, &c. and consented to the disposition of a tenement in Edinburgh, whereof the liferent fell under escheat, and suffered the rebel and his wife to uplift the price.

Answered ; That the yearly aliment of the rebel's wife and children, appointed by the gift, exhausted most of the subject thereof ; *2do*, The competitors have no gift of their own, but are only included in a second donatar's back-bond, and therefore cannot quarrel the first donatar ; *3tio*, The donatar of Carfrae's escheat was only found liable in diligence to impute his own debt as satisfied, if he hindered another donatar to intromit, which cannot be alleged against Bailie Hamilton.

THE LORDS found, That in this case the first donatar was liable for negligence, in so far as his own debt, (which was the ground of the horning on which the gift proceeded) extended to ; and made an act of sederunt, declaring, That in time coming donatars should be liable to do diligence for their own debt : They found also, That the creditors in the second back-bond had a sufficient interest to declare the first donatar's gift satisfied by his negligence, in suffering the rebel to intromit with as much as would have satisfied his own debt, though they could not force the donatar to denude, except they had a gift in their own name.