

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.

But it was not thought that donatars would be liable for diligence or negligence, in so far as concerned the debts of creditors brought into the back-bond. Thereafter the LORDS altered this interlocutor as to Bailie Hamilton's negligence and omissions, which they found not to extinguish his debt, in respect there was no prior act of sederunt or interlocutor, to put donatars in *mala fide* as to omissions; but ordained the act of sederunt to take effect *pro futuro*.

No 25.

Fol. Dic. v. 1. p. 239. Harcarse, (ESCHEATS.) No 436. p. 116.

* * * The same case is reported by Fountainhall:

March 5. 1685.—Dick of Grange, his cause with Bailie Thomas Hamilton, about Johnston of Sheens, being advised, 'THE LORDS found a donatar to an escheat liable to do diligence for recovery of the rebel's debts, by a special declarator, like an executor.'—But this point was not fully decided; for the LORDS were equal, six against six.

February 18. 1686.—The case of Dick of Grange against Bailie Thomas Hamilton, mentioned 5th March 1685, was advised; and the LORDS found, That Thomas having taken the gift of escheat, and a decret of special declarator, and yet suffered the common debtor to possess, he ought to be simply liable in so far as his decret of special declarator extended. And, *pro futuro*, they made an act of sederunt, declaring donatars of escheat liable in diligence as well as executors-creditors. They had decided the contrary on the 17th of January 1678, between Crawford and Charters, No 24. p. 3489.

Fountainhall, v. 1. p. 349. & 405.

* * * Sir P. Home also reports this case:

IN the action at the instance of Thomas Hamilton, Bailie of Edinburgh, against William Dick of Grange, mentioned the day of last; THE LORDS having found Bailie Hamilton as donatar only liable to count for his actual intromissions; and there being count and reckoning appointed, which was to this effect, that if Grange cannot make it appear that Bailie Hamilton was satisfied and paid off the sums due to him, and that the conditions and qualifications of his back-bond to the Exchequer were fulfilled; then Grange was to be liable to him for the teinds of the lands of Grange, from the year 1569 to the year 1683; that the Lady Sheens was declared to be preferable by her second gift; and Grange, among the rest of the articles of the charge, having charged Bailie Hamilton with the annualrent of the sum of L. 12,000 due by the Earl of Annandale from Martinmas 1659 to Whissunday 1674, that Sheens the rebel died;—*Answered* for Bailie Hamilton, That he could not be accountable for the rents of the Earl of Annandale's money, because he never receiv-

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ed nor intromitted therewith ; and by the interlocutor he is only accountable for his actual intromission.—*Replied*, That Bailie Hamilton having consented to the uplifting of Annandale's money, and having subscribed as consenter to the disposition granted by Sheens, his consent must import actual intromission.—*Duplied*, That Bailie Hamilton's consent had only the effect of a *non repugnancia*: That he did not hinder Sheens to uplift the sum ; and he being only found accountable for his actual intromissions, his naked consent cannot make him accountable for the annualrents ; as also, the annualrents were profitably employed for payment of a debt due by Sheens, for which there was an apprising led at the instance of David Howieson ; and by the back-bond to the Exchequer, Bailie Hamilton was allowed to employ the escheat goods for payment of Sheens' debt.—*Triplied*, That Bailie Hamilton could not consent to the uplifting of these annualrents, in order to the employing the same for payment of Howieson's apprising, because it was an extrinsic debt ; and there is an express interlocutor in the same cause, finding, that Bailie Hamilton, as donatar, could not pay any debt resting to the creditors upon the general clause in the back-bond, except the creditors had been expressly named in the back-bond ; but that the other creditors not named therein, behoved to take a second gift.—*Quadruplied*, That the annualrents being employed for payment of Howieson's apprising, it ought to be allowed as being in the terms of the back-bond to the Exchequer ; for by the back-bond it being declared, that the gift should be especially to Bailie Hamilton, for all sums due to himself, and whereto he should acquire right ; these annualrents being employed for payment of Howieson's apprising, was in the terms of the back-bond ; in so far as Sheens having disposed to Bailie Hamilton a tenement of land in Edinburgh, he was to allow the price of that tenement in the fore-end of the sums due to him, Sheens always purging the tenement of all incumbrances, and Howieson's apprising was an incumbrance that affected the tenement ; and if that apprising had not been satisfied and paid, any right that Sheens made to Bailie Hamilton of the tenement was ineffectual ; so that he having consented to the uplifting of these annualrents, that the annualrents that fell under the escheat might be employed for Howieson's payment, to relieve the tenement of the incumbrance ; that the disposition made to Sheens of the tenement might be made effectual, whereof the price was to be allowed to Bailie Hamilton in the fore-end of the sums due to him, for payment whereof the escheat is granted ; it is all one, and states Bailie Hamilton in the same case as if he had actually acquired an assignation to Howieson's debt, which did state him in the terms of the back-bond to the Exchequer ; for if Howieson's apprising had not been paid, any right granted by Sheens to Bailie Hamilton of the tenement would not have been effectual ; and consequently the price of it could not have been allowed in the fore-end of the sums due to Bailie Hamilton, which did affect the escheat ; as also, Grange cannot question the employing these annualrents for payment of Howieson's apprising ; because the right that he had to the teinds being an assignation from Sheens, to whom Bailie Hamilton had granted a back-bond, after the back-bond granted to the Exchequer, by which

he was obliged to denude himself in Sheens's favour of several rights upon the conditions and qualifications therein mentioned;—and upon that ground the LORDS found the assignation made by Sheens to Grange, before the date of the second gift, was profitable to Grange; in so far as he intromitted with the teinds *bona fide* by virtue of that right, providing the reservations and conditions contained in Bailie Hamilton's back-bond to Sheens, be first made appear to be satisfied and paid; so that seeing Grange's assignation to the teinds cannot be made effectual before the qualifications of Bailie Hamilton's back-bond be fulfilled; whereof the purging of all incumbrances that did affect the said tenement, and particularly that of Howieson's apprising was one, he is not in the terms of the interlocutor finding that he, as donatar, could not pay any debt resting by the creditors upon the general clause in the back-bond; which is only to be understood of extrinsic debts, but not as to such debts that fall under the conditions and qualifications of the back-bond granted by him to Sheens; which, by another interlocutor, is appointed to be fulfilled before Grange's assignation to the teinds can be effectual.—THE LORDS allowed the articles in the count and reckoning for purging the right of the tenement of Howieson's apprising, by the annualrent of the debt due by the Earl of Annandale; and find the donatar will not be liable to count therefor.

Sir P. Home, MS. v. 2. No 886.

No 25.

S E C T. V.

Diligence prestable by Executors.

1628. December 2. POOL against MORISON.

A LEGATAR pursuing an executrix for payment of a particular legacy of sheepskins, cairsays, and some money addebted to the testamtar, by his debtor designed in the testament, and which he gave special power to the legatar to seek and pursue for himself; which testament of the defunct's, bearing this particular, *being confirmed by the executrix*, that debt was not given up by her in the inventory of the defunct's goods, but was omitted to be confirmed, albeit the body of the nomination bearing the legacy thereof, was confirmed, as it proported; and the relict being pursued by the legatar for payment thereof, it was found that she was not subject to pay the same, and that her omission could not put her in *mala fide*, seeing it might be omitted as a desperate debt; and her not doing of diligence was not imputed to her, seeing power was given by the

No 26.

The nearest of kin confirming some of the defunct's moveables, is not liable, tho' he knowingly omits others; for this debars no party having interest, as such may confirm *ad omnia*.