

1710. November 28. SPOTT'S CREDITORS *against* HAY.

LORD ROYSTON reported the Earl of Glasgow, Carmichael of Boninton, and other Creditors of Murray of Spot, against Lord Alexander Hay of Lawfield. The said Lord Alexander having purchased the lands of Spot by a minute of sale; but Murray the proprietor being year and day at the horn prior to the minute, and his liferent escheat gifted, the Creditors having right to the gift by backbond competing with the purchaser, he craved preference and deduction out of the price for 16,000 merks, contained in an heritable bond granted by Spot to Mrs Patricia Ruthven, his sister-in-law, whereon she was infest, and has disposed it to Lord Alexander. *Alleged* for the Creditors in the backbond, That the said interest ought to be repelled, because though the obligation to infest in that annualrent was prior to the denunciation, yet the sasine taken thereon was long after the year and day of the denunciation and charge of horning; and Sir George Mackenzie, book 2. tit. 5. lays it down for a principle, that no voluntary infestment can compete with the donatar of escheat, unless it was expedite within the year and day of the denunciation running, whereas this was after. *Answered* for Lord Alexander, That though the infestment be posterior to the expiration of the year and day of the rebellion, yet it can never be construed a voluntary deed of the vassal's to prejudice the superior of his liferent escheat, because the vassal was bound *ab ante* to grant the infestment, the heritable bond being prior to the denunciation; and the sasine being taken before the gift, it is sufficient to prefer the annualrenter; the completing the right being no voluntary but a necessary deed, to which he could have been compelled by law; and the rebellion never having been a constitute right till it be gifted and declared; and before that time the Lords had preferred both arresters and assignees to the donatar, as was found, 10th November 1710, in the case of Borthwick an executor-creditor, No 53. p. 3655. *Replied*, The fallacy of this argument lies in confounding single and liferent escheat; for, in the *first* case, it belongs to the King, as King *jure coronæ*; and therefore all creditors doing diligence before citation in the declarator are preferred; but the liferent is due *qua* superior, and the vassal by the rebellion being *capite minutus*, the fee returns during his life to the superior; and the heritable bond bearing a clause to infest, was no more than a personal obligation on the vassal till sasine was taken thereon; and if that was delayed till the year and day after the denunciation was run, then the escheat was fully devolved, and was such a *medium impedimentum* that hindered the retrotracting the sasine to the heritable bond, its warrant, and so can never prejudice the superior's casualty of escheat. See Harris *contra* Glendinning; No 58. p. 3060. and Stair, p. 265, (276.) and the case of Milne and Clarkson, No 64. p. 3664. there cited. THE LORDS found, by the constant tract of decisions, the donatars to liferent.

No 70.
Found in conformity with
No 57. P.
3660.

No 70. escheats have always been preferred to infestments taken after the year of rebellion, though depending on causes anterior thereto; but thought if a law were made, it would be no iniquity to bring both the liferent and single escheat to one level, that creditors doing diligence before the gift or declarator may be preferred to donatars; but they could not alter the law and practice as it stood at present.

Fol. Dic. v. 1. p. 256. Fountainball, v. 2. p. 601.

* * * Forbes reports the same case :

THE gift of Archibald Murray of Spot his liferent escheat acquired by Lord Alexander Hay (who purchased the barony of Spot by a minute of sale, after Archibald Murray had been denounced and registered at the horn), being found to accrue to the rebel and his creditors; with the burden of the expense of the gift, and debt in the horning, and other sums Lord Alexander had advanced to the rebel; and it being found, That others of his creditors ranked in Lord Alexander's backbond to the Exchequer, had right to the annualrent of the price in the terms of the minute, as coming in place of the rents of the lands; Lord Alexander craved allowance out of the price of 16,000 merks, contained in an heritable bond, granted by the common debtor to Mrs Patricia Ruthven, from whom he had right.

The Earl of Glasgow and other Creditors in the backbond, sought to be preferred to the said heritable bond, upon this ground; That albeit the obligation therein to infest, was prior to the denunciation, and the sasine following thereupon prior to the gift of escheat; yet sasine was not taken within year and day after the denunciation.

Alleged for Lord Alexander Hay; Voluntary deeds of the vassal after denunciation, do not indeed cut off the superior from his liferent escheat; but infestment by a rebel who stood specially bound and obliged to grant it before the rebellion, being a necessary deed, which he might have been compelled to grant, hath always been sustained to prefer the creditor; which is plainly Lord Alexander's case. And seeing liferent escheat is only a casualty introduced by statute, as a penalty for disobedience to the law; when it falls to the crown, there seems to be the same reason for the preference of lawful creditors completing their rights before the gift or declarator thereon, as in the case of single escheats, to prefer a lawful creditor before the rebellion, doing diligence or completing his right after the gift, before declarator, which is always done.

Answered for the other Creditors; There is a great difference betwixt the single and liferent escheat; in so far as the former falls to the sovereign, *jure coronæ* by the rebellion; whereas the later is competent to every superior, by

reason of the fee, and that the vassal being in the construction of law *capite minutus*, cannot serve the superior; and a gift of liferent escheat needs no declarator to complete it. Though the bond and precept of sasine were granted before the denunciation, it still continued in the state of a personal obligation, till after the casualty fell to the fisk; and personal obligations cannot compete with the superior, or donatar of the liferent escheat. Seeing infeftment was not taken within the course of the rebellion, that is, within year and day after the denunciation, *jus erat quæsitum domino superiori*, which no posterior infeftment can take from him. And seeing the gift and declarator adds no new right to the superior, but only declares what was his by the denunciation, and the rebel's continuing year and day at the horn; it is all a matter, whether the infeftment be prior or posterior to the gift, Stair, Instit. p. 265. (276.)

Replied for Lord Alexander Hay; All the decisions preferring the donatar, were in cases where the infeftment was taken after the liferent escheat was gifted; whereas the infeftment in question is more than year and day anterior to the gift.

THE LORDS found the gift of escheat preferable to the heritable bond.

Forbes, p. 442.

S E C T. X.

Liferent Escheat once devolved stands good against posterior rights.

1624. *January 23.*

DONATAR of MELDRUM'S Liferent Escheat *against* His SUPERIOR.

ANDREW MELDRUM being heritor of the lands of Old-Ley, holden by him of another superior, by contract disposes the lands to John Meldrum, and obliges him to give to the said John two infeftments, one to be holden of himself, and the other to be holden of his Superior; likeas, he subscribes and gives him a charter of the lands to be holden of himself, whereupon, and by virtue whereof, he is seased, and also at the same time subscribes a procuratory of resignation in favours of John, for resigning of the lands in the Superior's hands, by virtue whereof John might resign, and procure himself infeft, to be holden of the Superior when he pleased. John being at the horn after the sasine taken by

No 71.

A purchaser, who got procuratory and precept, having infeft himself base, his liferent was found to fall to the disponent, and found not evacuated by the rebel's obtaining a public infeft.