

within year and day thereafter; and found that defence not only competent to a second donatar, but to the debtor, being exclusive of the pursuer's right.

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Sir P. Home, MS. v. 1. No 606.

. Harcarse also mentions this case :

IN a special declarator for payment of a sum due to a rebel, at the instance of the donatar of his single escheat; it was *alleged*, That the money was acquired by the rebel after he had been year and day at the horn, and so fell not under the single escheat.

Answered; The pursuer's gift carries him to all goods and gear that shall belong to the rebel before his decease. *2do*, The pursuer has also a gift of the liferent escheat. *3tio*, It is *jus tertii* to the defender, who has no second gift, to propone such an allegiance.

Replied; The clause of all goods and gear that shall belong to the rebel before his death, is but style; and by act of Exchequer, and decisions, such gifts are restricted to the rebel's goods and gear the time of the rebellion, and what he acquires within year and day after. *2do*, The liferent escheat cannot carry the sum, but only the annualrent thereof, if any be. *3tio*, The defender has interest to quarrel the pursuer's want of title.

THE LORDS sustained the allegiance and reply made for the defender. See **JUS TERTII.**

Harcarse, (ESCHEAT.) No 432. p. 115.

1685. December 9. M'INTOSH and SOMERVILLE against PRIMEROSE.

BAILIE M'INTOSH and the Laird of Drum-Somerville having recovered a decret for making arrested goods furthcoming against Sir William Primerose, as he who was debtor to the Laird of Humbie in certain sums of money, as the price of the lands of Crichton, sold by Humbie to him; and Sir William Primerose having suspended upon multiplepoinding; and the suspension being called, there was compearance for Hepburn of Randerstoun, Humbie's brother; and it was *alleged*, That Humbie having resigned his whole estate, whereof the lands of Crichton were a part, in favour of himself, and the heirs-male of his body; which failing, in favour of Randerstoun and his heirs-male; which failing, in favour of the Lady Tarras, with this express provision, 'That it should not be lawful to Humbie to alienate the said estate, or to contract debt, without consent of certain friends therein-mentioned, or such of them as should be on life; as also, that it should be lawful to the said persons to name other persons to succeed in their room, in case of their decease, declaring, that deeds without the consent of their friends should be null;' likeas, upon the foresaid clause, there was inhibition served at the instance of the foressaid

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Found that a donatar of single escheat, had no interest in the price of an heritable subject, which did not exist at the time of the gift, or for year and day thereafter.

No 16.

persons; and *alleged*, that Sir Robert Hepburn, who did consent to the disposition in favour of Sir William Primerose, did make application of the price towards the payment of the particular creditors named in the list; and that this pursuer's debt was unwarrantably contracted against the nature of the tailzie and inhibition. It was *answered*, That Sir Robert having consented to the vendition of the lands, he was *functus*, and had no power to apply the money to the payment of these creditors more than others, especially not having adjected that quality to his consent to the alienation, neither having incontinently made that application, but *ex intervallo*; seeing, by the consent, there was a security made out to the buyer, wherethrough, by the articles of agreement, the price came due to Humbie the seller, and consequently was affectable by his creditors; likeas the price being moveable, could not be affected by an inhibition or interdiction.—THE LORDS found, that Sir Robert having consented to the alienation without any qualification, and not with the same breath, having made application, he could not *ex intervallo* prefer any personal creditor to the pursuer's diligence, and therefore preferred the arrester, the money being moveable, and so fell not under the inhibition.—See INHIBITION.

But thereafter it was *alleged*, That although the disposition was anterior in date to Sir Robert's destination foresaid of the price, yet they offered to prove, by the writer of the disposition, and other friends and comuners, that the disposition was consigned in Sir John Cunninghame's hands, not to be given out to Sir William Primerose until the destination by Sir Robert should be drawn and subscribed. It was *answered*, That the disposition being now registered, and not in Sir John Cunninghame's hands, and the articles of agreement making no mention of any application of the price, to be made by Sir Robert in behalf of these creditors more than others, the consignment and conditions thereof could not be proven but *scripto vel juramento*.—THE LORDS found, that the depositions and condition thereof could only be proven *scripto vel juramento* of the arrester.—See PROOF.

Thereafter it was *alleged* for Randerstoun, That he ought to be preferred as having the single and liferent escheat of his brother Humbie, declared before the arrestment.—THE LORDS found, that, as donatar to the single escheat, he could have no interest in the price albeit moveable, because the subject was not existent, neither the time of the gift, nor within year and day thereafter, and that, as donatar to the liferent, he had consented to the alienation, and had gotten from Sir William 30,000 merks.

Fol. Dic. v. 1. p. 347. P. Falconer, No III, III2, III3. p. 77, 78, 79.