DUPLIED,—There could not be two decreets of cognition; and, by the custom of the Commissariot, none were the contradictors in such processes but the nearest of kin.

The Lords found the design of these actions was principally to affect the moveables; and, therefore, none but such as would be executors are in use to be called. But, if it were stretched against the heir, he behoved to be also convened: and therefore sustained this decreet of cognition against the heir, *tanquam libellus* only, that he might be heard on his defences against the constitution of the debt.

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1695. *December* 11. JOHN CHANCELLOR *against* SARAH WILSON.

WHITELAW reported John Chancellor, bailie of Edinburgh, donatar to James Alston's escheat, against Sarah Wilson, wife to the said James, competing for a sum due by one Boswel, taken to her father and mother in liferent, and her in fee; which fee the donatar contended that it accresced to her husband *jure mariti*, and consequently fell under his escheat. ANSWERED,—The sum lent was never the rebel's, but the wife's father's; and the term of payment being his decease, and that existing before the Rebellion, it thereby became heritable *quoad fiscum et maritum*, and so no more could fall under the husband's escheat but the annualrents *stante matrimonio;* and the wife only bruiked the fee by a clause of substitution. Which the Lords accordingly found, and preferred the wife.

The donatar also contended, That 1000 merks, payable by the father-in-law to the said James Alston the rebel, at his decease, fell under the compass of his gift of escheat. ANSWERED,—His father-in-law had paid it to him two years before his decease, as appears by the discharge produced. REPLIED,—That anticipation was collusive, and done industriously to prejudge his creditors. DUPLIED,—That, terms of payment being introduced in favours of debtors, they may renounce the same. Then ALLEGED,—By the 75th Act of Parliament 1579, and 145th Act 1592, one at the horn can grant no bond to prejudge his creditors. ANSWERED,—This clause cannot extend to discharges of debts; for debtors are not concerned to try what condition their creditor is in; and *non refert* whether he be at the horn or not, unless it be arrested in their hands, or otherwise affected with diligence. The Lords found the payment warrantable and lawful, and repelled the donatar's claim.

Then he ALLEGED,—This transaction was null by the Act of Parliament 1621; Mr Alston being, the time of the discharge, bankrupt. ANSWERED,—They offered to prove he was then a trading merchant; and there was a correspondence then running between this same donatar and him. The Lords, in respect of the great favour of liberation, sustained the answer, that he was then habit and repute in a sufficient solvent condition.

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