

1698. November 15. HENRY SINCLAIR *against* WILLIAM BAIRNSFATER.

HENRY SINCLAIR of Carloury pursues William Bairnsfather, servant to Sir Robert Sinclair of Stevinson, for delivering to him, as donatar to Mr James Lauder Provost of Haddington his escheat, sundry goods and household furniture the said William had intromitted with, belonging to the said Mr James.—*Alleged* for the defender, That his title of intromission was a disposition from the said Mr James, before he was denounced rebel, and which he got in corroboration of a debt of 2000 merks Mr James Lauder owed him.—*Answered*, The disposition can never compete with the King's donatar, because it bears an express power and faculty to revoke and alter the same any time in his life, which clause *retenta possessione* makes it simulate and fraudulent, and reducible on the act of Parliament 1621; likeas, the goods were to have been valued and appretiated at the sight of some to be named by either party, which was never done in Mr James' lifetime, and so the right was never completed.—*Replied*, The presumption of simulation or fraud can never take place here, for it is neither *inter conjunctas personas*, nor a gratuitous right; but it is among strangers, and for a most onerous cause; and the adjection of that clause was only to stop other creditors from disturbing him on his death-bed, he living only a week or two after it; and this personal faculty, though affectable by creditors, yet can never transmit to the fisk, *contra quem respondendum in dubio, l. 2. D. De jure fisci*; and Dirleton, in his Doubts and Questions, p. 42. denies this transmission; and it was so found, 2d March 1624, Lord Curryhill *contra* the Executors of Curry, No 2. p. 2937.—*Duplied*, By the said faculty of revoking, the dominion of the goods still remained with the disponer, and so fell under his escheat when he came to be denounced thereafter; and consequently the donatar ought to be preferred, and the disposition was but of the nature of a *donatio mortis causa* though for an onerous cause, seeing the disponer retained the possession during life.—*Triplied*, Whatever might be pretended if the disposition had not taken effect; yet here, by virtue of the said right, he had roused and sold the goods, and so his debt was extinct and paid, which is sufficient to give preference to a donatar, where the assignee gets payment before declarator, as it was found, Veitch and Pallat, No 127. p. 1029. and No 13. p. 5083.—THE ORDINARY, who first heard the cause, had reduced the disposition, and preferred the donatar; and this being reclaimed against by a bill, the LORDS, by a plurality, after reasoning, adhered to the Ordinary's interlocutor, and preferred the donatar to the assignee; but ordained the donatar to dispone all his right to the defender for recovering his relief.

No 46.

One got a conveyance to goods from his debtor, *obæratu*, in corroboration of his debt, before the granter was denounced: but the conveyance contained a power to revoke, and possession was retained. The debtor died within a week after, and the creditor then roused the effects. Yet the donatar to the escheat was preferred.

*Fol. Dic. v. 1. p. 555. Fountainball, v. 2. p. 14.*