

to give backbond *in communi forma*, that, being satisfied of his true debts, he should have no further right; and that he having declared, that he was noways creditor to the Earl of Dundee, the Exchequer had found, that there was place for a second donatar, and his gift was extinct. It was *answered*, That any decret given in Exchequer against the donatar, could not prejudice the Laird of Aytoun his assignee, it being *res inter alias acta*; and the gift being given to the donatar without any backbond, Aytoun was in *bona fide* to take right from him; and finding by the records of the Exchequer that he had gotten the gift freely without any registered backbond: So that, albeit by a decret of Exchequer, after he was denuded in favours of Aytoun, he was decerned to give a backbond, which should affect his right as if it had been granted *ab initio*, yet that could never prejudice a singular successor; otherwise parties never could be *in tuto* who had *bona fide* contracted for an onerous cause.—THE LORDS did sustain the reduction, notwithstanding of the answer, not only in respect that there was a decret of the Exchequer standing unreduced, wherein this allegiance was proponed and repelled, so that the Lords could not give a contrary decret until that was reduced; but likewise they found, that the decret of Exchequer was in itself just, in respect of an act of Exchequer discharging all gifts to be given out to donatars until their backbond should be registered: Which seemed hard, seeing these acts might make their servants be questioned if they contravened, but could not make the gift null in prejudice of a third party who had gotten a valid assignation thereto for an onerous cause.

Gosford, MS. No 480. p. 250.

1724. February 28.

The REPRESENTATIVES of the LORD BOWHILL *against* The CREDITORS of GALA.

THE Lord Bowhill having obtained from the Court of Exchequer, to himself, his heirs and assignees, a gift of the single and liferent escheat of Sir James Scot of Gala, he granted backbond, by which he became obliged, after paying the expenses of the gift, and of a debt due to himself, and certain other debts with which the gift was particularly burdened, 'to convert and apply any further benefit from the gift, to the utility and behoof of the rebel's remanent creditors, at the sight of the Lords of Treasury.'

The donatar having, in his own lifetime, intromitted with as many of the subjects falling under the gift as satisfied the primary and special ends of it, his representatives insisted in a process of exoneration, in which they craved, that it might be found and declared, 'That although Sir James Scot survived the Lord Bowhill many years, yet they were only accountable for such of the subjects falling under the gift as were recovered during the donatar's life.'

It was *pleaded* for the Creditors, with whose debts the gift was not particularly burdened, That the gift in favours of the Lord Bowhill was not a mandate,

No 34.

No 35.

A donatar granting back-bond to be accountable for the surplus, was not considered to be liable in diligence, as if he had been a trustee for the other creditors.

No 35.

or trust of such a kind as to terminate by the death of the mandatar; but was a conveyance from the Crown to the rebel's whole creditors, established in the person of one for the benefit of the rest; which being once accepted, must remain a charge upon the acceptor and his representatives, till the ends and purposes for which it was granted were implemented.

It was *answered* for the pursuers; That though the gift was a mandate in trust, yet it appeared, by the tenor of the backbond, that it was only *in rem suam*, or at most for such creditors with whose debts the gift was expressly burdened; but could never be construed to infer either trust or mandate betwixt the donatar and the other creditors, so as to have obliged him to account to them without a warrant from the Treasury, though there had been more in the donatar's hand than answered the special ends of the gift. The known method in such a case was, that when the creditors apprehended that the preferable debts in the backbond were paid, they should have applied for a second gift, which would have entitled them to immediate intromission against the debtors; but the first donatar could only be bound to intromit with as much as would satisfy the debts particularly mentioned in the gift, and if he had intromitted with more, he was accountable to the Treasury.

THE LORDS found, that the heirs of the Lord Bowhill were not liable to diligence.

Act. *Ja. Graham, sen.*Alt. *Ja. Boswell, & A. Hay.*Clerk, *Justice.**Edgar, p. 43.*

* * * This case is reported by Lord Kames, *voce* TRUST.

 S E C T. VII.

Powers of the Barons of Exchequer with regard to Gifts of Escheat.

1697. December 28. HOWISON *against* BRUCE.

No 36.

The Barons issued a gift burdened with a sum. They issued a second gift, in which the burden was restricted. Found that

ARNISTON reported Mr Richard Howison, minister at Musselburgh, and Margaret Darleith his spouse, against Bruce of Kinnaird and his Lady, and Mary Bruce, Lady Thornydikes. When Kinnaird was broke with Clackmannan's cautionry, Mary Bruce, his sister, being a creditor, got the gift of his single and liferent escheat in 1677; but the Exchequer burdened it with the payment of 2000 merks to Kinnaird's Lady, which was the jointure she had by Mr George