

## S E C T. V.

## Competition Single Escheat with Arrestment.

1611. February 6. TENANTS of KIRKNESS *against* FORSTER, &c.

IN a triple poinding, pursued by the tenants of Kirkness against Foster, relict of umquhile George Douglas on the one part, Balfour *alleging*, That umquhile George, by his registrate bond, was addebted to him in sums of money, whereupon he had charged and denounced him, and had arrested the sums, mails, and duties of his lands, for payment of his said debt, and had obtained decret adjudging the same to have been competent to him on the second part. And Philp, donatar to the said Sir George's liferent of the said lands, constitute by the Earl of Morton superior of the samen, contending for the mails, sums, and duties, of the saids lands, the LORDS found, that Balfour should be answerit and obeyed, in respect of his registrate bond, arrestment, and pursuit, to make the sums forthcoming to him, and litiscontestation made in his cause, before the donatar obtained declarator; albeit the corns controverted were of a crop long after the rebel had remained year and day at the horn; and that the donatar had gotten his decret of general declarator of the said liferent before the arrester, and the corns to be made forthcoming. My Lords President, Chancellor, Nelston, and almost the hail rest, voted all for the arrester, except the Clerk of Register, myself, and one or two more. The direct contrary of this practic was decided betwixt Mellestoun and Archibald Hume of Bassendene.

*Fol. Dic. v. 1. p. 255. Haddington, MS. No 2146.*

1623. February 27. THOMPSON *against* HALIBURTON.

THOMPSON, assignee to a bond made by the Laird of Murthill for a thousand merks, to be paid at Whitsunday 1620, and if he failed to pay at the term, binding him to pay ten for the hundred termly, as well not infest as infest, with power to the lender to crave his money at any term;—Thompson arrested Murthill's farms, and summoned him and his tenants to make them furthcoming. Compeared Mr George Haliburton, *alleging*, That he had an anterior bond registered, and had arrested after Thompson, and had denounced Murthill, obtained the gift of his escheat, and a general declarator, and so should be preferred. Thompson *replied*, That he had affected the goods by arrestment before Haliburton's arrestment, and so should be preferred, being a lawful creditor preventing the other in affecting their farms; that Haliburton's bond

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The gift of escheat is equivalent to an assignation, of which general declarator is the intimation; and, therefore, in a competition with arrestments, the donatar or arrester is preferred according as the general declarator or arrestment is prior in time, provided the arrestment be upon a debt prior to the rebellion.

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A donatar of escheat declared in general, was preferred to one arresting after the gift, before declarator, for a debt due before the rebellion, upon this specialty, that the donatar's gift proceeded upon his own horn, and he obtained de-

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wrought only against the debtor's person ; that the gift of escheat could not prejudice his arrestment, which preceded the intending of the declarator. Notwithstanding all which reasons, the LORDS found, that Haliburton should be preferred, being anterior in debt, and having the gift of escheat, albeit posterior in arrestment, and because Thompson had not charged the party, nor sought payment before his arrestment.

*Fol. Dic. v. 1. p. 255. Haddington, MS. No 2791.*

\* \* Durie reports the same case :

IN an action pursued by Mr George Haliburton, against the debtors of the Laird of Murthill, who was debtor to Mr George, for making arrested goods furthcoming, wherein compeared George Thompson, as another creditor to the Laird of Murthill, who had arrested the same debt acclaimed before Haliburton's arrestment, and who had also long before him intented action to make the same furthcoming, and so was long anterior to him in diligence, the LORDS preferred Mr George Haliburton to Thompson, notwithstanding of Thompson's first diligence, because Haliburton was donatar to Murthill's escheat, and had intented declarator thereupon, which titles he conjoined ; and so he being both donatar and creditor, he was found to be answered, and not the other ; albeit it was *alleged* by Thomson, that the two titles ought not to be conjoined, to be sustained in his prejudice, and that the gift of escheat could not be derogative to his diligence, and to establish the right to the donatar, who was alleged to be creditor, as said is, seeing he was anterior in diligence, as said is, which is only respected in these and the like cases when they occur, and the gift of escheat ought no more to be regarded, being but lately acquired since the intending, and during the dependence of this excipient's action ; which allegiance was repelled, and the gift conjoined with the pursuer's right as a creditor was preferred.

In this same action, no respect was had to an allegiance proponed for Haliburton against Thompson's pursuit, where he *alleged*, that the bond made to Thompson was heritable, and so no arrestment could be made thereupon while it had been made moveable by a preceding charge against the party obliged to make payment, seeing, in the bond, it was provided, that notwithstanding it was heritable, yet the creditor might ask payment at any term when he pleased, and so as he might seek execution, so he might arrest, which was a part of the execution, as pouding is. See LEGAL DILIGENCE.

Act. Per Se.

Alt. Mowat.

Clerk, Gibson.

*Durie, p. 52.*