The decision, as I thought, proceeded chiefly upon this ground,—That the widow, doing diligence within three years of the defunct's death, would be preferred by the Act of Parliament to the creditors of the heir;—that, as in that case the annuities would be reckoned the debt of the tailyier, it would be extremely hard, if, in so favourable a case as this, they should not be reckoned so too.

1739. *January* 17. FRANCIS SINCLAIR *against* SHAW and OTHER CREDITORS of Her Husband.

[Elch., No. 11, *Arrestment;* and No. 10, *Husband and Wife;* Kilk., No. 4, *Arrestment.*]

IN this case there were three questions debated. 1*mo*, Whether, when a wife enters into a submission with respect to a claim which she has as heir to her father, and the arbiters decern in a sum payable to the wife and husband for his interest, that sum be arrestable or not by the husband's creditors?

The Lords found, That the wife in that case was fiar, and the husband had only a right to the annualrents, *jure mariti;* so that the principal sum was not arrestable by his creditors.

2*do*, When a wife makes a donation to her husband, and his creditors afterwards affect the subject gifted, with diligence,—whether, in case of a revocation by the wife, the diligence falls to the ground?

The Lords found, That the maxim, *resoluto jure dantis*, &c. obtained here; that, the husband's right being annulled by the revocation, the rights flowing from him, whether voluntarily or by legal diligence, behoved to fall in course, in the same manner as if the husband's right had been qualified by a back bond.

3*tio*, Whether the *jus mariti* was a subject arrestable; or whether, not only the bygone and current annualrents of the principal sum, mentioned in the first case, were arrestable, but likewise the future?

The Lords ordered memorials to be given in upon this third question; it was found only adjudgeable. As to this last point, and what subjects are arrestable, what adjudgeable,—see *November* 18, 1742, *Creditors of the Robertsons in Glasgow.*

1739. *January* 12. CREDITORS of SIR ROBERT BAIRD *against* RACHEL LIBERTON.

[Elch., *Escheat*, No. 2.]

THE question here was, Whether the donatar of a liferent escheat was obliged

to do diligence? The fact stood thus: Rachel Liberton, being creditrix to Sir Robert Baird, charged him with horning, and denounced him, upon which his single escheat fell; and afterwards, by his continuing year and day unrelaxed, his liferent escheat likewise. The estate being tailyied under strict irritant clauses, and by that means it being impossible for the creditors to affect any more than the moveables and Sir Robert's liferent, Mrs Liberton applied to the Barons of Exchequer, and got a gift of Sir Robert's single and liferent escheat, but burthened with a back bond, wherein she obliged herself to pay certain small debts of Sir Robert's and a certain sum for the maintenance of his family; and further, she binds and obliges herself, after she is fully satisfied and paid, to denude to and in favour of the other creditors, whose names and sums are all particularly enumerated in the back-bond. By virtue of this gift, and the general and special declarator following thereon, Mrs Liberton possesses several years; after which the creditors bring an action against her to denude, and account for her intromissions. Accordingly she produced her accounts, by which it appeared that her debt was satisfied, and a considerable balance in her hands, which she said she was ready to pay, and at the same time to denude, in terms of the backbond. But the creditors insisted farther, that she should be liable for certain omissions, which they said she had been guilty of, during her possession of the estate. She contended that she was not obliged to any sort of diligence; and upon this question ensued the following debate:—

The pursuers argued, that she was liable to do diligence, 1*mo*, As donatrix of Sir Robert Baird's escheat; 2*do*, As bound and obliged by the backbond.

1*mo*, As to the *first* it was pled, That if we consider the original of escheats, and the practice with respect to them, we shall find that all the creditors have a right to operate their payment out of them, and that a gift of escheat is no more than a step of diligence, by which one creditor is preferred to another. As to the origin of single escheat, every body knows there was a time when arms and violence prevailed more in Scotland than law. In those days, an execution either against the debtor's person, or estate, was extremely difficult, the King, as the common father of the country, and as having the power in his hands, when the debtor was charged and denounced, gathered in all his moveable estate for the use and behoof, first of the creditors in the horning, and then of all the other creditors; and, indeed, it would be highly absurd to suppose that, in any civilized country, a creditor, by using the ordinary and legal diligence for recovery of his debt, should be the occasion of the debtor's whole moveable goods being confiscated to the king, and becoming the absolute property of the crown. If a person is charged *ad factum præstandum*, and thereupon denounced, his escheat does not fall; because, in that case, the creditor has no pecuniary interest, and there is no occasion for inbringing the debtor's goods, since there is no debt that can affect them. This example shows plainly that the original of single escheat is not,—what it is commonly thought to be,—the contumacy of the debtor in refusing to pay a debt which perhaps he is not able to pay; for the contumacy is equal when he refuses to perform, as when he refuses to pay; but the true foundation is, as was

said above, the satisfaction of the creditors, for whose behoof and advantage the moveable goods of the debtor are gathered in by the king.

As to liferent escheats, the absurdity is the same as in single escheats, to suppose that any one creditor, by doing the ordinary diligence for recovery of his debt, should bestow on the superior the absolute right to the vassal's whole liferent, to the prejudice of all the other creditors but himself. It is true indeed, by our custom, liferent escheat is reckoned a casualty of superiority; but that is a stain and reproach upon our law which yet remains to be taken away: All our lawyers acknowledge it is no proper feudal delinquency arising from the feudal contract, or the nature of the feu, but that it is peculiar to this country, and merely introduced by custom, which, however barbarous and absurd, has been in a great measure corrected by later practice, according to which liferent escheats, as well as single, are applied for the payment of creditors. Particularly where the king is superior, this practice has been so uniform, that the creditors may be said thereby to have acquired a right, which, though it cannot be prosecuted by legal methods, because there lies no compulsitor against the crown, yet it is a *debitum justitiæ* which the king or his officers never refuse. In the same manner, there is no law by which the crown is obliged to grant a charter of adjudication; and yet I believe there is no body doubts but every creditor adjudging has a right to demand it, and that he might, very justly, think himself wronged if it was refused. As therefore all the creditors have a right to be paid out of the single and liferent escheats of the debtor, (with preference indeed to the creditor in the horning,) the obtaining a gift of escheat is no more than a step of diligence, by which one creditor gets into possession of his debtor's estate, in order to operate his payment out of the first and readiest of the effects. In so doing he excludes the other creditors from a subject which they have a right to as well as he, and consequently, by the common principles of law, ought to be liable to do diligence in the same manner as an adjudger entering into possession, or an executor-creditor confirming his debtor's effects. And, *2do*, and *separatim*, suppose by the nature of the gift there were no obligation at all to do diligence, yet the donatrix, by the backbond, has made herself liable for omissions in her administration. The gift was first for her behoof, and then for the rest of the creditors, and as she was obliged to denude, after having paid herself, so at the same time she was obliged to pay herself as soon as possible. In that case she is just like a *mandatarius sua et aliena gratia*, and, as such, obliged to do diligence.

For the defender, it was argued, That she was liable to do diligence neither by the nature of the gift nor the tenor of the back-bond.

1mo, As to the first, it was pled, That however ingenious what was said on the other side may be, with respect to the nature and origin of escheats, yet it was neither agreeable to our law, as it stands at present, nor to our ancient practice. That by all the Acts of Parliament, with respect to escheats, from the most ancient times to this day, the king is supposed to be absolute proprietor of the single escheat, with the burden only of the debt in the horning; —that this is likewise the opinion of our most eminent lawyers, particularly

Craig, and Stair: that what was said of the debtor's escheat not falling by a denunciation upon a charge *ad factum præstandum*, was not true in fact; that the escheat of a person denounced, upon a charge to exhibit writs, fell; and that, by our ancient practice, it was only upon such charges that the debtor was denounced, and his escheat fell, for, in other cases, where there was a liquid sum, the proper diligence was poinding and apprising. See Craig, *De Appretiatione, lib. 3, De Feud., cap. 2*: That this obtained till about the end of the sixteenth century, when an Act of Sederunt was made, (by the suggestion of the king's advocate,) by which, upon all decreets of their Lordships, whether *ad factum præstandum*, or for a liquid sum, the debtor should be denounced, and his escheat belong to the king: That at present, by all denunciations, upon whatsomever charges, the escheat falls, except upon diligence granted *incidenter* by their Lordships, for citing of witnesses and other things of that nature: That it will not appear extraordinary that a person should be denounced rebel for not paying a civil debt, which perhaps he cannot pay, if we consider there was a time, in Scotland, when credit was low; and by consequence, very few debtors, and those few in those lawless times betook themselves to arms, violently resisted legal execution, and so in effect were rebels; and this in all probability gave rise to the denunciations for civil debts. As to the absurdity of a creditor, by using the legal and ordinary diligence, being the occasion of his debtor's effects being confiscated to the king or superior, that was no new thing in our law: That the same thing happened when a creditor took an infeftment of annualrent for security of his debt beyond the half of a ward-fee; for then the whole fee recognosced to the superior, and not only the other creditors were defrauded of their debts, as in the case of a denunciation, but even the creditor himself who took the infeftment: That there was not always, in Scotland, the same regard had to creditors that there is now; and there was a time when the prerogative of the crown, and the emolument of superiors, were thought considerations more valuable than the security of any creditor.

That, as to the liferent escheat, it is declared by express statute to be a casualty of superiority, Parl. 1535, cap. 32, and is founded much upon the same principles with Ward, Nonentry, or Recognition: That though generally the Crown, especially of late years, has applied these escheats for the behoof of all the creditors, as well as the creditor in the horning, yet that gracious benignity of our Sovereign will give no right to the other creditors: That it is true in no case there lies a compulsitor against the Crown; but put the case where a subject is superior, sure against him there may be a compulsitor, and yet I believe nobody ever heard of an action intented against a superior to oblige him to apply the liferent escheat of his vassal for the behoof of any other creditor but him in the horning: That therefore, as no one of the creditors had a right in either single or liferent escheat, but the creditor in the horning, the obtaining a gift of escheat could be no step of diligence, because none of the creditors had a title to claim it. For even the creditor in the horning could only desire, that whoever obtained the gift should be burthened with his debt, but could not insist positively for the gift to himself: That, consequently, no argument can be drawn from an adjudger's being obliged to do

diligence, which can apply to the present case. A prior adjudger, by entering into possession, excludes a second adjudger, who has a right to the subject as well as he; but no creditor has any right to the debtor's escheat but the creditor in the horning, who, by entering into possession, excludes nobody; and so, by no rule of law, can be obliged to do diligence.

2do, As to the backbond, the donatrix was only bound to denude in favour of the other creditors, so soon as she was paid; which she was now ready to do; that there was no mention of diligence, or of the gift being in trust, or for the behoof of any body; that Mrs Liberton is the first grantee, and so must be supposed to be more favoured than the other creditors, who are only reversional grantees; but, according to the pursuer's construction of the backbond, the gift would be so far from being a favour to the defender, that it would be highly detrimental and prejudicial to her; for, if any body else had got the gift, she would have been secure of her payment without trouble and risk, whereas, by being herself donatar, the only thing she gains is, to be made factrix and manager for the other creditors, liable to do diligence, and to account for omissions.

The Lords declined to give their opinion upon the general point, whether a donatar of a liferent escheat, in such a case, is obliged to do diligence at all, or if he is obliged to do diligence, what diligence? But the majority were of opinion, that the obtaining a gift of liferent escheat was no step of diligence; that the King was absolute proprietor of the escheats which fell to him, either *jure coronæ* or as superior, with the burthen always of the debt in the horning; and that the other creditors had no right at all in the escheats. They seemed all, however, to be of opinion, that the donatar, in such a case, was obliged to some diligence, though some thought that he was only liable for gross negligence, *præstare latam culpam quæ dolo comparatur*. As to the particular case of Mrs Liberton, they found she had done sufficient diligence, and so assoilyied from the pursuit.

1739. *January* 12. Lord Wigton, and Lockhart of Carnwath, *against* Proprietors of the Muir of Biggar, and Others, having servitudes upon the said Muir.

[Elch., No. 2, *Commonty*; Kilk., No. 2, *ibid.*]

This was a question about the division of a commonty, in terms of the statute 1695.

The Lords found, 1*mo*, That, as there were several proprietors here, a division was competent; and the servitude heritors would be obliged to accept of property instead of their servitudes; whereas, if there had been only one proprietor, no division would be competent, and the servitude heritors would not be obliged to that exchange. See *December* 23*d*, *Lieut. Robert Stuart* contra ———. *2do*, That the muir was first to be divided among the joint proprie-