

## S E C T. VI.

Effect of the Backbond, which the Donatar was by statute bound to grant.

No 33.

1626. November 25. KINGHORN against WOOD.

A PRIOR donatar's backbond bearing, that he should use the gift by advice of the Lord Treasurer, he being refunded all his charges, to the effect that no creditor should be prejudged; this donatar nevertheless was found to have good right to the rebel's goods, as long as there was not a creditor to claim the benefit of the bond, although another posterior donatar, who was not a creditor, offered to satisfy him all his charges.

*Fol. Dic. v. 1. p. 348. Durie.*

\*\*\* See this case, No 8. p. 5072.

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The surreptitious taking out a gift of escheat, without a backbond, after the acts of exchequer, by which gifts are prohibited to be expedite till the donatars grant backbond, was found not to benefit the donatar; but that the gift was qualified even against singular successors as if a backbond had been granted

1672. February 22. TREASURER-DEPUTE against LA. AYTOUN.

ANDREW PATERSON having obtained the gift of escheat of the Laird of Craig, and thereupon having obtained decret against the Earl of Dundee, as intro-mitter with Craig's moveables, whereupon the Earl of Dundee's estate was apprised; Aytoun having the gift of *ultimus hæres* of the estate of Dundee, and having obtained a second gift of the escheat of the Laird of Craig, he pursues a reduction of the decret against the Earl of Dundee, and infestment following thereupon, upon this reason, that Paterson's gift was granted by the Exchequer not gratis, but with a backbond, that being satisfied of the debt of the horning, and of his own debt, and of the expenses of the gift, there should be place for a second gift. Likeas there is an act of Exchequer in *anno* 1661, and another in *anno* 1663, whereby backbonds to be granted by donatars are appointed to be seen by the Treasurer, and gifts are prohibited to be expedite till that be done; yet, contrary thereto, Paterson's gift was surreptitiously taken out without backbond; whereupon the pursuer did pursue the said Andrew Paterson before the Exchequer, decerning him compearing to give a backbond, and declaring it to be of the same effect as if it had been given of the date of the gift. It was *alleged* for Aytoun, That whatever might be pretended against Paterson the first donatar, upon his unwarrantable and surreptitious taking out of the gift, without the backbond, the same cannot be relevant against Aytoun his singular successor, who was not called to the decret of the Exchequer, but who con-

tracted with Paterson *bona fide*. *2do*, The acts of Exchequer alleged do not bear any clause irritant, that the gift shall be null, or be in the same condition as if the backbond had been granted; but do only prohibit the clerks to expedite them; and if, on that ground, parties acquiring rights from donatars *bona fide* for onerous causes, may lose their sums and diligence, it would be of great inconvenience to the lieges, who, if upon search into the Exchequer, and no backbond granted, are *in tuto* to contract. *3tio*, The Lords of Session are only judges in the point of right, and are not to be determined by decreets of Exchequer. It was *answered*, That where gifts in Exchequer are for the donatar's merit, or special consideration given gratis, and without backbond, the act of Exchequer takes no place; but only in the case where backbond is appointed to be granted, and yet the donatar doth surreptitiously expedite the same, without giving the backbond; which being his fault, affects his deed, and affects the singular successor, even *ex natura rei*, though there were neither act nor decreet of Exchequer. *2do*, Though the Lords of Session are judges in the point of right, yet the Exchequer are the givers and qualifiers of gifts; and as to these, their acts regulate the gifts; as, though gifts of ward and non-entry bear expressly, ay and while the entry of the next and lawful heir, yet there are acts of Exchequer declaring that the non-entry shall only extend to three terms after the ward: And though in these acts there be no clause irritant, yet the expediting of the gift contrary thereto, being vicious and unwarrantable, *et sprete auctoritate judicis*, it is *vitium reale*; and singular successors cannot be ensnared thereby, seeing they know that it is most ordinary to give backbonds; so unless upon search they find that the gift was granted free, and without backbond, the sole finding no backbond extant or recorded is not sufficient, in respect of the said acts of Exchequer, which evidence that backbonds are ordinarily granted.

THE LORDS found the reason of reduction relevant, notwithstanding of the defences, and that the surreptitious taking out of a gift without a backbond, after the said acts of Exchequer, did qualify the gift as if the backbond had been granted, even against singular successors.

*Fol. Dic. v. 1. p. 348. Stair, v. 2. p. 75.*

\* \* Dirleton reports the same case:

THE LORDS of Exchequer having given the escheat of the Laird of Craigie Carnegie to Andrew Paterson, and the gift being assigned to the Laird of Aytoun by the said Andrew, a decreet was thereupon obtained against the Representatives of the Earl of Dundee, for his intromission with the goods belonging to the rebel; whereupon adjudication or comprising followed of the said Earl's estate in Argyle, which was disposed by the said Laird of Aytoun to the Earl of Argyle; thereafter my Lord Hattoun, Treasurer-depute, having gotten a second gift, pursued the said Andrew Paterson before the Exchequer upon that

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ground, that, by acts of Exchequer, it was ordained that no gifts of escheat should pass without backbonds, and the clerks are discharged to give out the same otherways; and nevertheless, *viis et modis*, the said Andrew had surreptitiously gotten out the said gift; and ought to give a bond, that being satisfied of what he can pretend to be due to him by the rebel, and of the expenses in passing the gift, he should denude himself in favours of the second donatar: And that it should be declared that the said gift should be affected with the said bond, as if it had been given *ab initio*: And accordingly the Exchequer did decern and declared: Whereupon the Treasurer-depute pursued a reduction of the said apprising against Aytoun and the Earl of Argyle, upon that reason, viz. that the said gift, which is the ground thereof, is restricted and qualified, and that the said Andrew Paterson is fully satisfied of what is due to him:

It was *alleged* for the defenders; That the gift was pure and simple without any backbond; and therefore the assignee finding it was such, and there being no backbond upon record, was in *bona fide* to take a right to the same; And the said decret of Exchequer being supervenient, and *res inter alios acta*, could not be obtruded against a singular successor, but the pursuer may have action against the cedent:—THE LORDS repelled the allegiance, and found that the decret and backbond do qualify the gift both as to the donatar and to his assignee.

The said decision appears very hard upon the grounds above-mentioned, and because backbonds are only personal obligements upon the granters, and do not qualify rights, being *extra corpus juris*: And his Majesty, in granting gifts of escheat single or liferent, is in no other case than other superiors; as Lords of regality having right to single escheats, whose gifts cannot be qualified in prejudice of a singular successor, but by provisions contained in the body of the right; and the import of backbonds is only, that the granters being satisfied should be countable for the surplus; but there is not thereby any tie upon them not to dispose upon the same, being countable for the price or value of that which they dispone. Colingtoun reporter, having heard the cause at the side bar.

*Dirleton, No 162. p. 66.*

\* \* \* This case is also reported by Gosford:

IN a reduction at my Lord Hattoun's instance, as *ultimus hæres* to the Earl of Dundee, against the Laird of Aytoun, for reducing of a comprising, led at his instance, of the lands of Glassary, upon this reason, That his right of comprising was as assignee by Andrew Paterson of Dunmore, who was donatar to the escheat of David Carnegie of Craig; and thereupon had obtained a decret against the Earl of Dundee, as intromitter with the rents of the lands of Craig; for which he did comprise the lands of Glassary and others, belonging to the Earl of Dundee: Which donatar, by a decret of the Exchequer, was decerned

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,

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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.