

and, as a rebel making voluntary payment of debt, the same can never be repeated by a donatar; who hath a posterior gift; so here he is in as strong a case, the debt being innovate, and Douglas made debtor *proprio nomine*, as hath been often decided, in case of voluntary payment; and, if it were otherwise, it would interrupt all commerce and trust, it being impossible for creditors to trust merchants or others, especially strangers, who are in exercise of their trade, seeing they may be denounced and registered at the horn in many remote places; and the creditors are not obliged to look all registers upon all occasions when they deal with trafficking merchants; and here the case was most favourable, because Jackson's bond, whereupon he arrested, is dated within ten days of the denunciation. *2do*, It was offered to be proved, that this bond was for that same debt which was due by a contract prior to the rebellion, whereupon decret was recovered against Vanderstraiton; as likewise, by a discharge of the date of this last bond, which came in place thereof, and which was given to save from present execution upon the decret.—It was *answered*, That notwithstanding Simpson ought to be preferred, because, as to the *first*, it being granted that Douglas was debtor to the rebel the time of the arrestment, which was after rebellion, it did properly belong to the King, there being yet no payment made; and the law giving right to all moveables that belong to the rebel the time of his rebellion, to the King or his donatar, all who contract with them thereafter ought to look to their security, and know their condition; the act of Parliament ordaining all hornings to be registered, which all creditors may have inspection of; and if it were otherwise decided, it would be against law and the King's prerogative royal.—It was *answered* to the *second*, That it being granted by the discharge, that the first contract was quite taken away, and the debt in question was only due by the second bond, which was after the rebellion, the donatar ought to be preferred upon the foresaid reason.—THE LORDS did long debate upon the first reason of preference, as being of general concernment, both to the King and lieges, and public trust and commerce; but finding that the second reason was most relevant, that the bond came in place of a proper contract before the rebellion, they did prefer Jackson the arrester, and did reserve to determine the first point of the debate should stand singly betwixt donatars and creditors, who had done diligence by arrestments, and got decret before the gift.

Gosford, MS. No 843. p. 533.

1697. February 12. BURNET against AUCHTERLONY and OGILVIE.

In the competition between Mr George Burnet and Auchterlony, and Ogilvie in Montrose, the Lady Halgreen, by her husband's order, had delivered some blank bonds to these defenders, wherein they had filled up their own names; and being pursued for the money at the instance of Mr George, as donatar to

No 49.

A party was creditor to a person before he was put to the

No 49.
horn. After rebellion, he granted to his creditor a back-bond. Another creditor, who had obtained a gift of escheat, was preferred.

Halgreen's escheat, they *alleged* that they were anterior lawful creditors to Halgreen, as well as the pursuer, and that they had received these blank bonds in part of payment; and the filling up their names was equivalent to an assignation.—*Answered*, Though their debts were anterior, yet their bonds are granted after the rebellion, and year and day was expired; and so the donatar must be preferred, unless they had received actual payment before the gift and declarator; in which case, *favore solutionis*, the creditor so getting payment is secure against the donatar, as has been oft found; and particularly, Veitch against Pallat, No 91. p. 2874, No 127. p. 1029, and No 159. p. 1073. THE LORDS preferred Burnet the donatar.

Fol. Dic. v. 1. p. 556. Fountainball, v. 1. p. 767.

S E C T. III.

Whether litigiosity bars payment, and other acts of ordinary management.

No 50.
A creditor after citation against him, in a process of adultery, which carries escheat of moveables, accounted and cleared with his debtor and gave him a discharge. The discharge found good against the donatar of escheat, the creditor deponing that the account was fair.

1630. July 10.

SHAW *against* The Duke of LENNOX.

THE deceased Sir James Stuart having sold the wood of Methven to one Younger for 12,000 merks, to be paid at three several terms; to the price whereof, John Shaw being made assignee for payment of furnishing made by him to the said Sir James, and then the said John Shaw giving a back-bond to Sir James that he should refund the said sum to him, he being satisfied for his own furnishing in the first end thereof; and thereafter, the said Sir James being convicted of adultery, and his escheat disposed to the Duke of Lennox, who disputing with the said John Shaw, which of them had best right to the said price, which the Duke claimed by virtue of the escheat and the foresaid back-bond, and the said John Shaw claimed by virtue of the assignation foresaid, and that his back-bond derogated not to his right thereof, seeing the said Sir James had granted to him a discharge thereof, confessing that the furnishing made to him by the said John Shaw exceeded that sum;—to the which it was *answered* by the Duke, That that discharge could not prejudice him as donatar, seeing it was granted after that the said Sir James was cited for a capital crime, wherefore he thereafter came in will, and whereby his escheat fell; after which citation he could do nothing to prejudice the King; and the other *alleging*, That he might then take a discharge for furnishing made before, the particulars whereof he could not now instruct, being all given back at the time of the discharge;—the Lords preferred John Shaw to the Duke, albeit the