

died without bairns, and intestate, against the executors of umquhile Thomas Paterson, debtor to the said James Hunter, son to the said bastard, in a special sum of money, for the which they were convened, by a special declarator, to make payment to the donatar: The said Thomas Paterson's executors *alleged*, That they had made payment of the sum and debt libelled, to the said umquhile James Hunter, son to the bastard, his executor confirmed, before the intending of this cause, or granting of that gift to the donatar: Which the LORDS found relevant to liberate the defender at the donatar's hand, seeing the defender had no necessity to inquire or to know the condition of the creditor, if he was the son of a bastard or not, or if the king would have right, as *ultimus hæres*; but that there being a testament confirmed, by the which an executor dative was decerned to the son of the bastard, the debtor was *in bona fide* to pay the debt to the said executor confirmed, notwithstanding that the executor was not nominate by the defunct's self, who died intestate and within the age of pupillarity. And the LORDS sustained the said payment made to the said executors confirmed; albeit it was voluntarily done, and without any sentence recovered against them to that effect, by the said executors, before the payment, as the donatar alleged ought to have preceded before they could have paid; which the LORDS repelled, and found no necessity of a sentence; but that the debtor might lawfully pay to the executor confirmed voluntarily, without any process or sentence. THE LORDS nevertheless reserved to the donatar his action for the said sum against the executor, to whom the payment was made *prout de jure*.

A.G. ———.

Alt. Burnet.

Clerk, Hay.

Fol. Dic. v. I. p. 113. Durie, p. 193.

1628. January 30. DONATAR of L. CLEGHORN'S Escheat *against* TENANTS.

IN a special declarator by the donatar of L. Cleghorn's liferent, after a general declarator, against the tenants of certain of the rebel's lands, for payment of certain farms of the lands possessed by them, of all years since the rebel was year and day at the horn:—THE LORDS found the payment made by the said tenants, defenders, to the rebel himself, of all years preceding the citation of them, in this special declarator and summons, to be sufficient to liberate them at the hands of the donatar, seeing they were *in bona fide* to pay their farms and duties to their master, to whom they were in use to pay before his rebellion; whose rebellion they might excusably not know before it was intimated by citation to them particularly: And albeit the pursuer *replied*, That this payment could not be admitted for any terms since the decret of general declarator, seeing that sentence put all the lieges *in mala fide* to deal with the rebel, in prejudice of the king and his donatar, seeing all parties having interest were cited thereto: Yet the reply was not sustained, but the payment made after the general declarator was allowed, for all terms preceding the special citation of these

No 16.

of kin to the creditor, the same was sustained, though the creditor was a bastard, and could have no nearest of kin, which the debtor was not bound to know.

No 17.

The debtors of a rebel, whose liferent escheat had been gifted, were found *in bona fide* to pay him before special declarator. A general declarator, which is executed only at market cross, does not put the rebel's debtors *in mala fide*.

No 17. parties, even for the terms intervening, after the general declarator, and before the special citation.

A& Mowat.

Alt. —

Fol. Dic. v. 1. p. 113. Durie, p. 336.

* * The same case is observed by Spottiswood :

A GENERAL declarator puts not the rebel's tenants in *mala fide* to pay their farms to him, found in a special declarator pursued by Cleghorn younger against his father's tenants, who alleged that they had paid *bona fide* their farms to his father the rebel, as they were wont to do, and that before the mention of the pursuer's special declarator : Which exception was sustained.

Spottiswood, p. 99.

1628. December 9.

MACKIE against DUMBAR.

No 18.
A relict having no direct action against her husband's debtors, unless confirmed, it was found unwarrantable to pay her a third without sentence; and the debtors were obliged to pay the whole, notwithstanding, to the executor.

IN an action Mackie against Dunbar, the executors of a defunct pursuing the intromitters with the goods and gear of another defunct, for payment to them of a debt owing by that defunct to him, to whom the pursuers were executors, and they *alleging*, That they had paid the third of that debt to the relict of the defunct, to whom they were executors; for the which they craved defalcation : This allegation was repelled, and no defalcation was admitted for the relict's third, seeing no sentence was obtained by the relict against them therefor, without which they could not have been compelled to pay the same, seeing the debtor remains only obliged to the executor, and the executor to the relict, in those things which she hath not in possession in her own hands, and the relict hath her direct action against the executors, and not against the debtors to her husband. See EXECUTOR.

Fol. Dic. v. 1. p. 113. Durie, p. 407.

1661. December 14.

HOMES against JOHN BONNAR.

No 19.
A debtor having transacted with the supposed creditor, and obtained his discharge, his *bona fides* was found relevant only for what was truly paid.

MARY and — Homes, as donatars to the escheat, and liferent, of umquhile John Home, pursued John Bonnar, for count, reckoning, and payment of the sum of 16,000 merks due to the rebel, for the price of a house. The defender *alleged* absolutor, because he had *bona fide* made count, reckoning, and payment to Mr Alexander Home, assignee constituted by the rebel, before any citation or diligence done against him, to put him in *mala fide* so to do, and produced the assignee's discharge, bearing, that the defender had made count with