

of annualrent, to be paid to Violet during her lifetime, out of a tenement in Edinburgh, pertaining heritably to the said daughter, spouse of Pitelpie; at which time of the said infestment Pitelpie was at the horn year and day, and his escheat being gifted and declared to William Cochran donatar, he, in a special declarator for the mails of the lands, claims to be answered thereof, by virtue of the husband's escheat; which mails, during their marriage, he claims, as pertaining to the donatar, by the husband's rebellion. And the said annual-renter *alleging*, That she ought to be preferred to the donatar in the mails of the land, in so far as concerned her annualrent, in respect that the wife, who was her debtor, was never at the horn, and the cause of her debt was anterior to the horning; likeas the wife and her husband had given this infestment of annualrent for obedience of a preceding sentence given against the wife before she was married; which being done *ex necessitate*, and not *ex mera voluntate*, the falling of the husband's liferent could in no reason extend to prefer the fisk to the lawful creditor *ex anteriore causa*, who had done such lawful diligence, as said is; and superinducing of a husband, who was the time of the marriage rebel, cannot prejudice her of that which was justly due to her by her lawful debtor, who had not failed, and was never at the horn, and who was but a consentor to that deed, done by his wife the principal debtor, and by him only for his interest;—THE LORDS found, That the donatar ought to be preferred to the annualrenter, during the lifetime of the rebel and his wife, being on life together; for by this marriage, as the husband had right to the mails, so the King by the rebellion had that right, and whatever deed the husband hath done since he was rebel, being married, albeit for a preceding necessary cause of his wife's debt, and for satisfying thereof, yet the fisk could not be prejudged in the fore-said casualty by that deed, especially seeing neither the wife nor her father were before obliged to grant such infestment of an annualrent out of the lands libelled, controverted *per expressum*, but only were generally obliged to pay to her an annualrent of L. 200 yearly so long as she lived.

Act. *Advocatus & Nicolson.*Alt. *Gilmer & Neilson.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 555. Durie, p. 865.*

1667. June 12.

LUMSDEN against SUMMERS.

IN a declarator of escheat it was *alleged*, That the goods libelled were disposed to the defender.—It was *answered*, That the disposition was *stante rebellion*.—It was *replied*, That in fortification of the disposition, it was offered to be proved, that the disposition was made for the price of corn and straw, and other goods disposed to the rebel; and whereby his Majesty and his donatar had benefit, in respect the same was employed for the entertainment of the beasts and sowing the ground, whereof the encrease fell under escheat.

No 44.

A donatar of escheat found to be in no worse case than a creditor pouding or arresting, and therefore not bound to enquire, upon what

No 44.  
subsequent  
account the  
debt had been  
diminished.

THE LORDS repelled the defence, and found, That the rebel being liable only personally for the price of the goods alleged disposed, and the property of the goods in question being his, the same belonged to the King; and the King and his donatar were not obliged to debate upon what account and occasion the rebel was debtor to the defender, or what use he made of the goods disposed to him by the excipient; and is in no worse case than a creditor pouding or arresting, or any other person acquiring right to the property of goods, who would be preferred notwithstanding such pretences, there being no such hypothec that can be pretended by the law of Scotland. Diverse instances were adduced by me to this purpose, not only in behalf of the King, but of other superiors and heritor, as *v. g.* if a superior should pursue declarator of a liferent, and it should be alleged that after the rebellion the rebel had disposed a part of his lands, and that it should be offered to be proved that the money for which the disposition was given, was lent for acquiring the right of the lands, so that thereby the superior had benefit thereby; or, if the master were pursuing by virtue of the legal and tacit hypothec competent to him, and it should be alleged that the tenant was debtor to another for the price of corns furnished for sowing the ground; in which cases the superior and master could not be frustrated upon any such pretences. See RECOMPENCE.

Act. Birnie.

Alt. Thoirs & Fraser.

Clerk, Hamilton.

Fol. Dic. v. I. p. 555. Dirleton, No 75. p. 30.

1669. February 24. COUNTESS OF DUNDEE against STRAITON.

No 45.  
Escheat not  
burdened  
with debts  
contracted  
after rebel-  
lion.

THE Countess of Dundee, as donatrix to her husband's escheat, pursues Straiton for a sum due to her husband.—The defender *alleged* absolvitor, because that same day this bond was granted by him to the Earl, a creditor of the Earl's arrested, to whom the defender had made payment, and obtained his assignation; and therefore, as assignee craves compensation, and preference as arrester.—It was *answered*, That this debt being contracted by the late Earl, after he was rebel, it cannot burden his escheat in prejudice of the King and his donatar; for though creditors, whose debts were due before rebellion, arresting after rebellion, may be preferred, yet no debt, contracted by the rebel after rebellion, can burden his escheat, neither by arrestment nor compensation;

Which the LORDS found relevant, and preferred the donatrix, except as to what was due to the defender by herself, or for drugs to her husband, which she was content to allow.

Fol. Dic. v. I. p. 554. Stair, v. I. p. 612.