

No 50.  
sued a special declarator, and his gift being posterior to the executor's decree and recovery of payment, the Lords ordained the goods to be divided *pro rata*.

he had recovered as executor, and had got payment thereof before the gift, and seeing he was a just creditor, and ought to be preferred in respect of his diligence.—To which it was *replied*, That the defender deceasing rebel, could have no executor; and seeing, immediately after his rebellion, *jus fuit acquisitum domino regi*; and the pursuer was not only donatar, but creditor also, he ought to be preferred.—THE LORDS ordained the goods to be divided *pro rata*, in respect the defender had got payment, and it was hard to take all back from him.

*Fol. Dic. v. 1. p. 255. Auchinleck, MS. p. 62.*

No 51.  
The Lords preferred an executor-creditor to the donatar of the defunct's escheat, the confirmation being before the gift, and a decree against the defunct's debtors, obtained before the decree of declarator in the gift.

1684. December. M'RAITH against KENNEDY.

CAPTAIN M'RAITH, as executor to Sir John Kennedy, having confirmed certain bygone rents due by the tenants; and having obtained a decret against the tenants for payment; which being suspended, and there being compearance made for William Kennedy of Menumisiam, who had obtained a gift of Sir John's escheat, and alleged that he ought to be preferred, because his gift was prior to the confirmation; and albeit Captain M'Raith had obtained a decret against the tenants before William Kennedy had obtained declarator upon the gift, Captain M'Raith not having received payment, but the same being yet extant in the debtor's hands, the donatar ought to be preferred, as was decided in the case of Sir William Purves against Deans, 18th January 1678, *voce* LITIGIOUS.—*Answered*, That Captain M'Raith having done the first diligence, by confirming himself executor-creditor before the gift, and obtained decret for payment before the donatar obtained a decret of declarator, it ought to be preferred, as is clear by several decisions; and particularly, the 24th February 1637, Pilmor against Gagie, No 39. p. 3644.; and the 19th February 1677, Glen against Home, No 41. p. 3645.; where the Lords found that a creditor was preferred to the donatar of the debtor's estate, upon an arrestment used after the rebellion, but before declarator, being for a debt contracted before the rebellion; and in this case Captain M'Raith's debt was prior to the debt upon which the denunciation proceeded.—THE LORDS preferred the executor, in respect his debt was prior to the debt in the horning, and a sentence prior.

*Fol. Dic. v. 1. p. 256. Sir P. Home, MS. v. 2. No 646.*

No 52.  
Found as above.

1685. November 6. POLWARTH against REOCHS.

POLWARTH, relict of — Reoch, having pursued — Reochs, her husband's children of the first marriage, for implement of her contract of marriage, viz. for payment of bygone jointures, and in time coming, her active title being as executrix creditrix; she insisted against one of them called Thomas, for pay-

ment of 4000 merks; and annualrents due by Sir William Nicolson to the defunct, (which bond he had delivered up to Sir William, and taken a new bond in his own name,) or otherways, to assign Sir William's bond to her; and the libel being referred to his oath, he deponed, and acknowledged he had renewed the defunct's bond in his own name. The oath coming to be advised, it was *alleged*, That the bond was delivered by the defunct to him, for his own behoof, and that accordingly he renewed it when he was on death-bed, as said is, and that it was in satisfaction to him of a debt due to him, by virtue of his contract of marriage, long before the pursuer's contract of marriage, which was the ground of this pursuit.—THE LORDS found, That there being nothing instructed, that the bond was delivered by the defender's father to him, in satisfaction of that debt; and the oath bearing nothing thereof, they found him liable to pay the money contained in Sir William Nicolson's bond, granted to the defunct, or otherways, to assign Sir William Nicolson's bond, which was granted in place thereof to him. They were likewise of opinion, (but it came not to be decided) that although it had been proven, that the defunct had delivered up the bond upon his death-bed, yet it not being a habile way to transmit it, it was not a relevant defence.

It was *alleged, 2do*, for the defender, That he, as donatar to his father's life-rent escheat, ought to be preferred to the bygone rents of Sir William's bond, preceding the defunct's death.—It was *replied*, That the gift was obtained, not only after the pursuer was confirmed executrix-creditrrix, but likewise after she had recovered sentence for this debt before the Commissaries of Edinburgh, against the defenders.—THE LORDS preferred her, as executrix-creditrrix, to the donatar, in regard her confirmation was before the obtaining of the gift.

*Fol. Dic. v. 1. p. 255. Gilmour, No 99. p. 69.*

1710. November 8.

WILLIAM BORTHWICK of Fallahill, *against* MR ROBERT ARBUTHNOT,  
One of the Accountants in Exchequer.

IN the competition betwixt Fallahill, executor-creditor to the deceased Colonel William Borthwick of Johnstounburn, and Mr Robert Arbuthnot, donatar of the Colonel's single escheat, for L. 177: 19s. Scots, of arrears due to him out of the equivalent, the donatar claimed preference upon this ground, That his gift being duly sealed and registered eight months before the other's confirmation, was a legal assignation to the escheat goods, for payment of the debt due by the rebel to the donatar before the rebellion.

*Answered* for Fallahill; He ought to be preferred, his debt being constituted by the rebel's bond long before the rebellion, and his diligence for payment completed before declarator of the gift of escheat; because the confirmation is

No 53.

A donatar of a defunct's escheat having procur'd his gift, and several months thereafter, another creditor confirming before intending declarator of the gift, the Lords preferred the executor-creditor before the donatar.