

**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.*

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### 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

discharge was after citation, but ordained to take Shaw's oath, if that furnishing was all truly made before the citation; which being sworn to be so, the LORDS found, that the discharge ought to be sustained, albeit dated after the citation, and found it not necessary to prove the preceding furnishing otherwise than by his oath, in respect of the discharge.

No 50.

Act. Mowat.

Alt. Burnet.

Clerk, Gibson.

Fol. Dic. v. 1. p. 556. Durie, p. 530.

1635. February 10.

MOSSMAN against LOCKHART.

No 51.

A DISPOSITION of certain goods and gear made by a rebel after his rebellion, but before the gift of escheat was disposed to a lawful creditor who qualified his debts, sustained against the donator of the rebel's escheat.

Fol. Dic. v. 1. p. 548. Auchinleck, MS. p. 180.

\*\*\* Durie reports this case:

1635. Feb. 10.—ONE Mossman, relict of James Nisbet, being donatrix to her umquhile husband's escheat, after general declarator, pursues Lockhart and Laing, who had certain of her husband's goods and gear in their hands, by a special declarator, for delivery of the same to her; and they *alleging*, That the said defunct being their debtor, delivered the said goods to them in his own lifetime long before the purchasing of this gift from the King, by virtue of which delivery they became in possession, proceeding upon a just cause of debt; and the donatrix *answering*, That it was not relevant, except that the defenders alleged that the delivery was made before the rebellion; for, after he was at the horn, he might do no deed which could prejudice the King, no more than a rebel year and day at the horn might dispoise his lands after the year expired in prejudice of the superior's right to his liferent;—THE LORDS found the allegation relevant; and found it not necessary to the defender to say the delivery was made before the horning, being done before the gift was disposed, as said is.

1635. Feb. 14.—IN this cause, mentioned February 10. 1635, the defenders *alleging*, That the rebel was their debtor, and qualifying the same by the disposition made to them by the rebel of the goods therein contained, made by him to them for satisfying of his debt contained in that disposition, and which he therein confessed was owing by him, and which they alleged was sufficient, for, if they had had a preceding bond, it could have borne no more than that disposition bore, viz. 'That he was their debtor in that sum,' and when they received that payment made by the disposing of these goods, they destroyed