

1629. *March 3.* FLETCHER *against* L. CRAIGIVAR.

No 74.
Found in
conformity
with the
above.

L. CRAIGIVAR being cautioner for one Irvine, and paying the debt to the creditor, being distrest by him therefore, and he being thereafter debtor to Irvine in a proper sum owing to Irvine by him, and Irvine being rebel, the donatar to his escheat seeking payment by special declarator of the sum owing to him by Craigivar, it was found, That Craigivar having paid as cautioner for Irvine a greater sum, before that Irvine, who should have relieved him, was at the horn, by virtue of which horning his escheat was taken, he might compensate with the donatar in the sum owing to the rebel, by the said payment of a greater sum for the rebel; which compensation was received against the donatar, the payment being made, as said is, before the rebellion.

Act. *Fletcher.*

Alt. *Lermonth.*

Clerk, *Hay.*

Fol. Dic. v. I. p. 163. Durie, p. 431.

* * Auchinleck reports the same case :

A DONATAR to a person's escheat, pursues the debtor for a sum of money addebted to the rebel. The debtor *alleges*, That he being cautioner for the rebel, was compelled to pay a greater sum for him than he was owing to the rebel, and that before his rebellion, and therefore ought to have compensation.—It was *replied* by the pursuer, That the King was not bound to pay the rebel's debt, nor to compensate.—THE LORDS allowed compensation of the sum paid before the rebellion.

Auchinleck, MS. p. 29.

1635. *February 3.*

INNES *against* LESLIE.

No 75.
Retention of
a debt due to
a rebel at the
horn, found
competent
to the debtor
against the
donatar, on
account of
the debtor's
being cau-
tioner, and
under dis-
tress for ano-
ther debt, due
by the rebel
before his
rebellion.

ONE INNES being donatar to the escheat of one Douglas, after general declarator, pursues one Lesly for payment of 400 merks, addebted by his bond to the said Douglas the rebel; and the said Lesly *alleging*, That he was cautioner for the said rebel to one of his creditors, before the said rebel's rebellion, for payment whereof he was distressed, and would be forced to pay the same, and therefore that bond ought to compensate the said cautionry; and he has just cause of retention of the same, for his relief of a part of this greater sum, which he was distressed for; and so this relief, *pro tanto*, being in his own hands, it ought not to be taken from him.—The donatar *replied*, That the fisk pays no debt of the rebel's, therefore the defender cannot obtrude this compensation against the fisk, albeit it might have met the rebel's self, if he had been seeking this debt from the defender.—THE LORDS found the exception relevant, and found that the defender might allow in his own hands this debt of 400 merks addebted by

him to the rebel; in satisfaction for so much of the other debt of 11,000 merks *pro tanto*, wherein he was cautioner for the rebel, to the rebel's creditors, he being distressed therefor; and the LORDS admitted this against the fisk and his donatar, albeit *regulariter* in our practice, the fisk pays none of the rebel's debts.

Act. *Gibson.*

Alt. ———.

Clerk, *Gibson.**Fol. Dic. v. 1. p. 163. Durie, p. 749.** * See This case by Auchinleck and Spottiswood, *voce* ESCHEAT.

No 75.

1635. February 24. L. HALLGREEN *against* ———.

RAIF of Hallgreen, as donatar to the escheat of umquhile L. Dunnipace, after general declarator, pursuing a special declarator against certain defenders, for payment of certain bolls libelled, of teinds addèbted by them to Dunnipace, of certain years before his decease; and one of the defenders *alleging*, That the said rebel was debtor to him in sums of money, before the gift granted to the pursuer, so that he had just cause of retention of these teind-bolls libelled, in his own hands, for his own payment *pro tanto*; for it must be to him in that same case as if he had delivered the same to the rebel, and reported his discharge thereupon, before any declarator specially intented against the defender therefor, *quo casu* the gift and general declarator could never have put him in *mala fide*, far less can his retention for a just cause of debt, preceding the gift, be quarrelled. This allegiance was found relevant to liberate the defender. And it being *alleged* for John Livingston, burgess of Edinburgh, another defender; for another quantity of the teind-bolls acclaimed, That the rebel had disponed the same to him for just debt, owing by the laird to the excipient; which being done before the execution of the summons of special declarator, it must be sufficient to him, who is a distressed creditor of the rebel's, and hath no other means of satisfaction, especially seeing the rebel remained still in possession of his own teinds all this time, which might easily warrant the defender to receive this disposition. This allegiance was repelled, seeing the disposition did neither precede the gift of the rebel's escheat, nor the general declarator, but was made after them both. See ESCHEAT.

Clerk, *Gibson.**Fol. Dic. v. 1. p. 163. Durie, p. 758.*

No 76.

A donatar of escheat, after general declarator, insisting in a special declarator, for teind-bolls, addèbted by the defender to the rebel; retention was sustained upon a liquid debt owing by the rebel to the defender before the rebellion.

1669. January 23. MR JAMES DRUMMOND *against* STIRLING of Ardoch.

MR JAMES DRUMMOND being donatar to the escheat of the Laird of Glenegies, pursues exhibition and delivery of a bond granted by George Mushet to James Henderson, containing 2000 merks principal, and by him assigned to

No 77.
Compensation sustained against the donatar of