

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 disposed 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

No 77.
 an esheat,
 on a debt
 due by the
 rebel before
 rebellion.

umquhile Glenegies, and thereby falling under his escheat; and the bond being produced by Ardoch, the donatar craves the same to be delivered by Ardoch.—It was *answered* by Ardoch, That the bond ought not to be delivered to the donatar, because it cannot belong to him, in respect that Mushet, who by the assignation became debtor to Glenegies, had two bonds granted by him to Glenegies containing 3000 merks, wherein Ardoch is cautioner; whereby this bond of 2000 merks, due to Glenegies, was compensated long before Glenegies' rebellion.—It was *answered* for the pursuer, That compensation is not relevant, unless it had been actually proponed in judgment, or extrajudicially stated by the parties offering and accepting the compensation; *2dly*, That the allegiance is nowise relevant against the donatar, who has right to the debts due by the rebel; *3dly*, Ardoch had no interest to allege the compensation, which could only be proponed by Mushet the creditor, and not by Ardoch, who is cautioner to him.—The defender *answered*, That compensation is competent *ipso jure*, from the time that the sums be mutually due by the debtor and creditor, in the same way as if they had granted mutual discharges to each other; and therefore, when an assignee pursueth or chargeth, compensation is always sustained against him upon debts due by the cedent before the assignation, albeit the compensation was not actually stated before the same; neither is the donatar here in better case than an assignee; so that when he pursues Mushet, debtor to the rebel, Mushet may allege compensation upon the like debt, due to him by the rebel before the rebellion; and the defender hath good interest to propone the compensation, because he is cautioner to Glenegies for Mushet; and if Mushet be forced to pay the donatar, without allowing compensation, Ardoch will be necessitated to pay Mushet, to whom he is cautioner; and therefore hath good interest to propone that by the concurrence of the two debts, they are both extinct, and he is not obliged to deliver up to the donatar the bond constituting Mushet's debt.

THE LORDS found the allegiance proponed by Ardoch relevant and competent, and that compensation was relevant against the donatar upon debts due by the rebel before rebellion.

Fol. Dic. v. 1. p. 163. Stair, v. 1. p. 590.

* * * Gosford reports the same case:

MR JAMES DRUMMOND, as donatar to the Laird of Glenegies' escheat, pursuing for delivery of a bond granted to Glenegies by one Mushet, for the sum of 2000 merks; it being *alleged*, That Mushet being assignee, constitute by one Henderson, to a bond of Glenegies, before the donatar's gift, he ought to have compensation;—THE LORDS did sustain the compensation, and found no necessity to allege that the assignation was lawfully intimate before the donatar's gift, albeit the compensation was only proponed for Stirling of Ardoch, who was only cautioner for Mushet, and not by himself.

Gosford, MS. p. 33.