

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-