

to the fisk, and they were not his the time of his decease. This process, in a review, was *de novo* disputed. It was *alleged*, that the English Judges did wrong in finding the allegiance relevant, unless it had been also alleged and proven, that the gift was granted before the intending of the cause, seeing the defender's intromission being *ab initio* vitious, and the pursuer having intended process against him upon the passive titles, no right acquired *ex post facto*, could take away the *jus* and passive title acquired to him by his former citation: And though the rebellion gave *jus* to the King or his donatar, if the gift had been timeously granted and declared, or legal diligence done at the King or his donatar's instance; but there being no such thing done, and the defender being *in culpa immiscere se bonis* that were in the defunct's possession, his own fault and vice make him liable. Likeas, an arrestment used of a rebel's moveables will be unquestionably preferred to the donatar by a gift after the arrestment: Yea, though the gift were prior, unless it were clad with possession, or diligence done by a general declarator before the arrestment, the arrestment will be preferred.

THE LORDS repelled the allegiance, and found, that the subsequent gift could not purge the preceding vitious intromission.

Gilmour, No 29. p. 23.

1667. February 19. ISOBEL GLEN *against* JOHN HUME.

ISOBEL GLEN, as assignee to Mr Edward Jamieson, having obtained decret against the umquhile Earl of Hume, for certain by-run stipends, and thereupon having arrested in my Lord Whitekirk's hands, certain sums due by him, to the Earl of Hume, she now pursues to make forthcoming. Compearance is made for John Hume, who produces an assignation by the Earl of Hume, to the sums due by Whitekirk, and also produces a gift of the Earl's liferent escheat; and *alleges*, 1st, no process at the arrester's instance, because the Earl of Hume being dead, the debt must be first established by a decret against one representing him, who must be called *principaliter*, before the person, in whose hands the arrestment is made, can be decerned to pay that which was the defunct's. 2do, John Hume must be preferred as donatar, because the arrestment was laid on after the Earl of Hume's rebellion, by which his goods belonged to the King, and no sums can be made forthcoming, as belonging to him after the rebellion, because they belonged to the King. It was *answered* to the *first*, That if the Earl of Hume had not died at the horn, the pursuer would have either confirmed as executor creditor, or called the Earl's executors; but that is not necessary, seeing the Earl died at the horn, and could not have one to represent him *in mobilibus*; and that now the donatar who succeeds, compears. To the *second*, the pursuer, as arrester, ought to be preferred, because albeit the arrestment be after the rebellion, yet it is before the gift or declarator; and it is for a debt due by the Earl, before the rebellion,

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Found in
conformity
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ster, No 35.
p. 3641.

No 41.

and so doth exclude the donatar, for which they produced a decision *Pilmour contra Gagie*, No 39. p. 3644. ; in which case the gift was granted by a Lord of a regality, having the benefit of the escheat, whereanent the Lord Advocate represented, that this could not be drawn in consequence, to prejudice the King or his donatar, because the Lord of regality being a subject, *debuir invigilare sibi*, by declaring the rebellion without delay, but the King cannot so soon know, nor is he prejudged by the neglect of his officers.

Yet THE LORDS unanimously preferred the arrester, the Advocate forbearing to vote ; for they thought the case of creditors for debts before rebellion were not to be prejudged, doing diligence before declarator, or if they should poind, arrest, adjudge, &c.

Fol. Dic. v. I. p. 255. Stair, v. I. p. 443.

No 42.

Found in conformity with Kirkness against Forster, No 35. p. 3641.

1671. November 25. CHAMBERS, Advocate against DEANS.

JAMES CHAMBERS Advocate being donatar to the escheat of _____, in the Cannongate, upon his own horning, raised upon a tack for house-mails, and having obtained a general declarator after the rebel's death, pursues special declarator against James Deans, Bailie in the Cannongate, for intromitting with several household-plenishing of the defunct's, and the libel being referred to his oath, he deponed *qualificate* that he meddled only with the particulars contained in the execution of a poinding produced, proceeding upon a decret against the rebel's relict, as intromissatrix with his goods, for payment of debts due to him by the rebel, partly by bond before the rebellion, and partly for drugs furnished to the rebel, and for his funeral charges.

THE LORDS, at the advising of the cause, having refused to admit the quality without probation, the defender offered to instruct the same.

The pursuer *answered*, that though they were instructed, they were not relevant, because the rebellion devolving the property of the rebel's moveables upon the King and his donatar, the same are only burdened with the debts of the rebel contracted before the rebellion, whereupon creditors had done diligence before declarator ; but any diligence done by this defender was not only after general declarator, but after himself was cited to the special declarator, wherein by collusion with the rebel's relict, he obtained this decret against her, without intimation, or citation of the donatar, and whereupon he made this poinding, by which he poinded the defunct's goods, which were in the relict's possession, to which she had no right, but they belonged to the King by the rebellion ; and as to the drugs and funeral-charges, they cannot burden the escheat, being contracted long after the rebellion. It was *answered*, that funeral-expenses was a most privileged debt, and did come in before all the defunct's creditors, albeit he were not solvent ; and though the case of funeral-expenses