No 64.

contract, and found that the donatar, notwithstanding thereof, might crave the price of the land.

November 12.

IN a special declarator, pursued by Alexander Balfour donatar to the escheat of James Futhie of Gund *contra* Henry Futhie of Bysack; the LORDS refused to cause the donatar to produce the horning.

Fol. Dic. v. 1. *p.* 137. *Kerse, MS. fol.* 228.

*** Haddington reports the same case:

January 11.—BALFOUR, donatar to the escheat of James Futhie of Gund, having obtained a general declarator, and thereafter seeking a particular declarator for 2100 merks against Henry Futhie of Bysak, the LORDS fand, that the pursuer could not be compelled to produce in the particular declarator standing, notwithstanding that the defender alleged the practic between Dempster and Ogilvy, and divers other practics, where the donatar was compelled to produce his horning in the particular declarator after a general.

Fol. Dic. v. 1. *p.* 137. *Haddington, MS. No* 2351.

1626. *November* 21. SEATON of MELDRUM, Supplicant.

No 65.
Found, in the last paragraph of this case, in conformity with No 63. *supra.*

A SUPPLICATION being given in at the instance of ——— Seaton of Meldrum, making mention that he had raised brieves for serving of himself heir to umquhile Mr George Seaton; therefore he craved warrand from the LORDS to the persons of inquest, for dispensing with the rebellion of the said umquhile Mr George, and that they should proceed in the service of the said brieves, notwithstanding that he died rebel, and was at the horn; and this was desired, in respect of the common clause of all brieves, bearing, To cognosce that the defunct died at the faith and peace of our Sovereign Lord, &c. This bill was refused, because the LORDS found, that it was not proper to them to dispense with hornings or rebellion, for that was not *suæ jurisdictionis*, but only *imperii et potestatis regiæ;* and that it was only proper to the King to dispense therewith, albeit of reason such dispensations are unnecessarily sought, seeing the persons of inquest are ever in use to serve, notwithstanding that the defunct, to whom the service is sought, died rebel; and if that should be found to be a fault of the service, and of the retour following thereupon, many services would fall; for by this proceeding of the service none is prejudged; but, by the contrary, the heir served is liable to the creditors for the defunct's debt, and for any thing for which he was rebel; only the doubt may be, if an irresponsal person shall be served heir, and yet whether he be responsal or not, that hath no coincidence with the case foresaid, and makes nothing concerning the defunct's rebellion,

either to help or hinder the dispensing therewith, which was desired: So the LORDS thought it needed not to be craved to be dispensed with, in regard of the foresaid clause, by reason that clause was to be understood of forefaultries, which made forefaulted persons to be repute to have died, not at the faith and peace of the King, and not of common rebellion and horning. *See* 19th June 1630, E. Crawfurd, Durie, p. 520. *voce* PERSONA STANDI. No 65.

In special declarators, after the general declarator, the rebel needs not to be called, when the debtors to the rebel are specially convened, because the decreet of general declarator puts the donatar in the rebel's place; and so the same holds when the rebel is dead, that his executors need not to be called to the special declarator, nor no other person who might represent him of the law, as heir or executor. *See* SERVICE of HEIRS.

Fol. Dic. v. 1. *p.* 137. *Durie, p.* 234.

1666. *June* 27. MASSON *against* ———.

No 66.
Declarator of escheat sustained, without calling all parties having interest at the market cross.

MASSON pursuing a declarator of escheat, it was *answered*, That all parties having interest were not cited at the market-cross, conform to the warrant of the letters.—It was *answered*, That was but *stilus curiæ*, long in desuetude, and it is enough that the rebel is cited, and none would be prejudged who were not cited; and any may compear that please for their interest.

THE LORDS repelled the defense, and forefault the amand given thereupon, as being contrary to the common custom.

Fol. Dic. v. 1. *p.* 137. *Stair, v.* 1. *p.* 381.

1682. *December.* LORD ABERDEEN Chancellor *against* ANNE PITCAIRN.

No 67.

FOUND that in a general declarator of a defunct's escheat, all the nearest of kin of the same degree, who had interest in the executry, ought to be called, and that it was not enough to call the relict, who had right in law to the half, there being no children; because some of the nearest of kin might produce a discharge of the debt, the ground of the horning, which would exclude the escheat as to any part of the goods; but the LORDS allowed them to be cited *cum processu*.

Fol. Dic. v. 1. *p.* 136. *Harcarse*, (ESCHEATS.) *No* 426. *p.* 113.