

No 38.

put to the horn ;—THE LORDS, in respect that the creditor had obtained sentence for his debt against the Lady, before she was rebel, albeit the arrestment and decret thereon were after the rebellion year and day, whereby the farms controverted were affected, and that the donatar's gift and declarator were long after the sentence upon the arrestment, yet the LORDS preferred the creditor in respect of his diligence.

Clerk, *Gibson*.

Fol. Dic. v. 1. p. 255. Durie, p. 519.

* * See This case by Spottiswood, *voce* GIFT OF ESCHEAT.

1637. February 24. PILMUIR against L. GAGIE.

No 39.
Found in conformity with
No 35. p.
3641.

ONE being at the horn, who was debtor to Pilmuir, his creditor, for satisfying of which debt, the creditor arrests some moneys owing to his said debtor ; which arrestment was made after the horning, but before the escheat of the rebel was gifted by the E. Angus, Lord of the regality within which the rebel dwelt ; and the Laird of Gagie acquiring the gift of escheat from the Earl after the arrestment, and *contending*, that he should be answered as donatar, because he alleged, that his gift should be drawn back *ad suam causam*, and the rebel's goods, *hoc ipso momento* that he was rebel, pertained to the fisk, who pays none of the rebel's debts ; and albeit it was not declared the time of the arrestment, yet that could not be respected, seeing the declarator finds that the rebel was then at the horn, and that all the goods and gear pertaining to him, at that time of his denunciation, pertained to the Lord of the regality, *ergo* there was no place to any, either creditor or other, to claim any of that rebel's goods thereafter, which, by the rebellion, pertained to the fisk.—THE LORDS preferred the arrestment made before the gift, albeit after the horning, to the donatar who had acquired the escheat after the arrestment ; which gift, so acquired, the LORDS found did not derogate to the preceding diligence done by the creditor arresting as said is.

Fol. Dic. v. 1. p. 255. Durie, p. 830.

* * See This case by Spottiswood, *voce* GIFT OF ESCHEAT.

1662. January. CHALMERS against DALGARNO.

No 40.
The same rule of preference followed as above.

MARJORY CHALMERS, as executrix confirmed to Patrick Gray her husband, having pursued the deceased William Keith for payment of a debt, she recovered sentence ; and after his death she pursues William Dalgarno, as intromitter with his goods before the English Judges. In which pursuit it was *alleged*, that the defender was donatar to the defunct's escheat, and so could not be convened as vitious intromitter with the defunct's goods ; his goods, by the rebellion, falling

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 intenting of the cause, seeing the defender's intromission being *ab initio* vitious, and the pursuer having intented 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 arresster'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. 2^{do}, 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 arresster, 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,

No 40.

No 41.
Found in
conformity
with Kirkness
against For-
ster, No 35.
p. 3641.