

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

hath not come to be debated, yet being so privileged, and being a debt of humanity, for burying the dead, the same cannot but be preferred, as to the donatars, as well as to the creditors. It was *answered*, that in the strictness of law, the defunct's means were the King's, without paying any debt, in the same manner as the lands of forefault persons do fall to the King, not only without the burden of debts, but even of real rights granted by them, not being authorised by law, or confirmed by the King: And though custom has allowed the diligence of creditors before declarator, yet only upon debts before rebellion; and though funeral expenses be a privileged debt, which custom hath preferred to other creditors, yet custom hath not preferred the same to the King or his donatars.

THE LORDS repelled the defence upon the anterior debt, in respect the defender's diligence was after the general declarator, and after he was cited in the special; but as to the funeral-charges, THE LORDS were of different opinions, and before answer ordained the defender to condescend upon the particulars thereof. See PRIVILEGED DEBT.

*Fol. Dic. v. 1. p. 255. Stair v. 2. p. 12.*

\* \* \* Gasford reports the same case.

James Chalmers being donatar to the escheat of ———, his debtor, having obtained a general declarator, did pursue a special against Bailie Deans as intrmitter with the goods of the rebel. It was *alleged*, that any intromission he had was by virtue of a decret and poinding following thereupon, and that for true and lawful debts, whereof a part was contracted before the rebellion, and the rest was for funeral-expenses and apothecary's accounts, when the rebel was on death-bed. It was *replied*, that *ipso memento* the rebel was denounced, his whole moveables did belong to the King and his donatar, who having done diligence, and obtained a general declarator, and likewise cited the defender in a special before any pursuit or diligence done by him, which was only before the Bailie of the Cannongate, which the donatar could not know, it could not prejudice him, who was likewise a lawful creditor, and had done the first diligence; and for funeral expenses and what was given to apothecaries they were not privileged debts after the rebellion. THE LORDS did prefer the donatar only as to expenses bestowed upon him on death-bed; and for funeral-charges, they did debate that case in general amongst themselves, but finding that Bailie Deans's account did only bear that he had lent the defunct money to give the apothecaries, they had no regard thereto. But if the rebel had died in any house not being his own, seeing funeral-charges are necessary and privileged, they inclined to allow the same.

*Gasford, MS. No 407. p. 205.*