

(DUE TO CAUTIONERS, &amp;c.)

1628. July 10. L. MORISTON *against* L. FRENDRAGHT.

## No 6c.

The act of  
federunt  
1590, was ex-  
tended against  
the executors  
and represen-  
tatives of the  
principal  
debtor.

IN an action, Moriston *contra* Fren draught, as heir to his father ; which father was intromitter with the defender's goodfir his whole moveable goods and gear, and which goodfir was bound to pay 500 merks, and Moriston's father, to whom he was heir, was cautioner for the said goodfir, and the said goodfir obliged for his relief, the bond being heritable, and consequently the defender being conveened, as representing his goodfir in manner foresaid, viz. by being heir to his own father, and his father being univerval intromitter with his goodfir's gear, immediately after his decease, for re-payment to Moriston, who was heir to the cautioner, of the said sum, with the annualrent thereof, continually since his father paid the same, and ay and while he were re-paid of the principal sum.—THE LORDS found, That the party being conveened, *super hoc medio*, as univerval intromitter by the foresaid progress to the goodfir, who was debtor, was subject to pay the annualrents, ay and while the principal sum were re-paid, and sustained this action against the univerval intromitter ; albeit the defender *alleged*, That neither an executor to a defunct, nor an intromitter, could be conveened for any more than that which was addebted by the defunct at the time of his decease ; and no action can be granted against them for any annualrent, which should run for terms after the debtor's death ; which annualrent running thereafter, was only due to be sought from the heir of a defunct, and not from his executor or intromitter with his goods ; for it is the creditor's own fault, who, after the decease of his debtor, seeks not his debt, which being timeously sought, immediately after the defunct's decease, either will force the executor or intromitter to pay the just sum, owing by the debtor at his decease ; or if they do not, then, for their own cessation, they may be conveened for the annualrents thereafter running ; but if the creditor ly off, and seek not the executor or intromitter many years thereafter, he cannot claim the annualrents for terms after the debtor's decease from them, but should seek the same from the heir. This allegiance was repelled, and the action sustained for all the annualrents since the defunct's decease, from the time of the payment made by the cautioner, unto the term of payment, to be made to him against the univerval intromitter, who intromitting *sine titulo*, behaved to be esteemed a vicious intromitter, and so could not have the benefit of an inventar, which is competent to an executor : And in this process, as in all the like cases, pursued against parties as univerval intromitters, the LORDS are ay in use to find, That one conveened as univerval intromitter, if he be proven to have any intromission with the defunct's goods, albeit he be not proven to have intromitted with all, is liable to pay the debt for which he is conveened, if he cannot purge his intromission, before there be an executor confirmed to the defunct, who may have *beneficium inventarii* ; for his vicious intromission produces that effect ; and this is ordinarily observed, albeit before the commissaries it be

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not so, where more being proven to be intromitters, every one is subject *pro parte* for the debt, and not one for all; likeas the LORDS thought that an executor, (albeit that was not the case now controverted,) would be subject in the like, if the defunct's goods would extend to so much, and were not otherways exhausted; for the LORDS thought, That a creditor could not be prejudged of that annual-rent, whereof he had lawfully provided himself by his heritable security, if his debtor should want an heir, and have executors or intromitters with his goods; as was in the same case, where none was heir to the goodfir, and that the same person, who in law should be his heir, was intromitter; neither was there any testament of his given up, or executors confirmed to him, so that the pursuit was sustained, as said is; and the LORDS found, That the defender might yet give up a testament, and the debt libelled being satisfied, he may obtain exoneration thereby against any other creditor of the defunct's, if there be no more gear than which would satisfy his debt, or if there were, by making of the same forthcoming to the other creditors; and where the defender *alleged*, That any intromission which his father had with his goodfir's goods, the same was only by buying of the same from the defender's father's own younger brother, who in law would have been the goodfir's executor; and which younger brother, after the father's decease, meddled with the whole goods, and the defender's father bought the same from him in an open rousing, in the house where the goodfir died, and paid the price therefor to him, which deed cannot make him intromitter. And further, he also *alleged*, That the goodfir's escheat was gifted to the L. Lesmoir, not only of all goods which he then had, (the same being gifted in *anno* 1599,) but also of all goods which he should acquire, during his remaining rebel; likeas he died rebel, and which gift of that tenor was also declared against the rebel *in foro contentiosissimo*, conform to the which gift and declarator, the defender's father being then administrator to the defender, he being then an infant, intromitted with the said goods as escheat-goods, in name of the defender, who was made assignee thereto by the L. Lesmoir, donatar thereto, as said is; so that his said intromission being by virtue of the said title, and in name, and to the behoof of the defender, assignee thereto, and to his son's use, the same cannot be burdenable to him. These allegances were repelled, and the action sustained against the defender, as heir to his father, who was intromitter, in respect of this reply, viz. That the pursuer offered to prove, that the goodfir remained in possession of his whole goods, notwithstanding of the escheat and declarator, which was in *anno* 1599, to the time of his decease, which was in *anno* 1612, at the which time immediately after the goodfir's decease, the defender's father, who was his eldest son, intromitted therewith, and used the same at his pleasure; and the said gift and declarator, which was thirteen years before the rebel's decease, cannot extend to the goods which were in his possession at the time of his said decease. This reply was sustained, for eleiding both the foresaid exceptions,

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which were repelled in respect thereof. (See PASSIVE TITLE, Vicious Intromission.)

A&amp;. Nicolson &amp; Craig.

Alt. Advocatus &amp; Oliphant.

Clerk, Gibson.

Fol. Dic. v. I. p. 43. Durie, p. 389.

No 61.

A cautioner who, upon distress, pays the debt, has right to annualrent of annualrent, paid by him for the principal debtor, from the time of the payment.

1662. February 7. LOCKERBIE against APPLGIRTH.

JOHNSTON of Lockerbie having obtained decret against Jardine of Applegirth, for a sum paid by the pursuer's author, as cautioner for the defender's father,

THE LORDS found annualrent due by the principal to the cautioner, by an act of Sedernt 1613, and that from the year 1619, until now, in respect the cautioner had paid upon distress, by decret of transference, and a charge of horning thereon.

Fol. Dic. v. I. p. 43. Stair, v. I. p. 93.

1706. June 27.

GILBERT M'ICKEN of Glenwhilly, against ALEXANDER KENNEDY of Glenoure.

No 62.  
Found as above.

IN the charge at the instance of Gilbert M'icken of Glenwhilly, against Alexander Kennedy of Glenoure, the LORDS found, That a distressed cautioner paying annualrents, had right by the clause of relief, to require annualrent of the annualrents from the time of payment. 2do, That acts of usury anterior to the Queen's indemnity were thereby discharged, and the informer could have no share or benefit, upon the account of information given after the proclamation. 3tio, That the writer of a bond being designed notary, the designation was sufficient; for that is not like the general designation of writer, which every body assumes at pleasure; a notary having a public office, that requires a previous trial and admission by the Lords of Session, and an act to be extracted thereon, by a clerk appointed for that effect, who keeps a particular record of the name, diary, and manner of subscription of the person admitted. 4to, That a creditor taking assignation from his debtor, to mails and duties not expressly in satisfaction, and intimating the same to the tenants, is not obliged to impute the rents in his payment, or instruct exact diligence; unless he had debarred either the debtor or his creditors from intromitting. (See WRIT, what Designation sufficient.—See DILIGENCE, Prestably by Assignees.—See INDEMNITY.)

Fol. Dic. v. I. p. 43. Forbes, p. 112.