

only make her liable in law to any who should take a dative *ad omissa*, but could not infer an universal passive title.—THE LORDS thought her defence good, if the super-intromission was subsequent to the confirmation; for that would only infer restitution of the value; but, if it was prior, then the fraudulent concealment makes them certainly liable *in solidum*.

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Fol. Dic. v. 2. p. 42. Fountainhall, v. 1. p. 767.

S E C T. IV.

Any colourable title of intromission found to elide the passive title.

1628. July 12.

CRANSTON of MORESTON *against* The LAIRD of FRENDRAUGHT'S GRANDCHILD.

ALEXANDER CRANSTON of Moreston, having paid as cautioner for umquhile Sir James Crichton of Frendraught, 500 merks at Whitsunday 1611, sought his relief of the Laird of Frendraught's grandchild, whom he convened as heir to his father James Crichton of Auchingoul, who was universal intromitter with the goods and gear of Sir James his father, and grand-father to the defender. *Alleged*, He could not be convened to represent his grand-father *ex illo medio*, as heir to him who was universal intromitter with his goods and gear, because Sir James, the time of his decease, had no goods nor gear, in respect he died at the horn, and the gift of his escheat was disposed to Lesmoir, who obtained declarator thereupon, to which gift and declarator Lesmoir had assigned the defender; so that any intromission the defender's father had with Sir James's goods and gear, was as administrator of the law to the defender, to whom the goods belonged by virtue of the gift and assignation foresaid. *Replied*, He could not be heard to purge his father's intromission by that pretended administration, because the gear he intromitted with after Sir James's decease, were either acquired by Sir James after the gift, and so fell not under it, or before, in which case the donatar's suffering the rebel to remain in continual possession for ten or twelve years till his decease, evicts the gift to be simulate and null by the act of Parliament 1592. *Duplied*, As to the first part of the reply, his gift and declarator were of all goods belonging to Sir James the time of the gift, or which he should happen to acquire during the rebellion; and true it is that he died rebel, and unrelaxed from the same horning whereon the gift proceeded. As to the second part of the reply, bearing that retention of possession among conjunct persons renders the gift null by the act of Parliament; *imo*,

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Found to be vicious intromission, altho' the defender alleged he had intromitted in virtue of a gift of escheat, upon which declarator had followed, because the gift was simulate, the rebel having been allowed to continue in possession until his death, 13 years after the declarator.

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That is where the rebel remaineth in possession of his whole goods, or the most part thereof, but not when the donatar has apprehended possession of the most part, and leaves only a mean quantity thereof for the rebel's maintenance; *2do*, The act of Parliament maketh the gift null only in favours of a second donatar, but not in favours of a creditor; for the most that a creditor can seek is to be preferred to the donatar in these goods, to have them made furthcoming to him, but it will never work that effect to make the donatar universal intromitter, if he has meddled therewith; *3tio*, The pursuer cannot allege retention of possession by the rebel, because it is offered to be proved, that the defender's father as administrator to him, conform to the gift and declarator, apprehended possession of the place of Fren draught, and of all the plenishing within the same and upon the mains thereof, uplifted the mails and duties to the defender's behoof, and that during all the days of Sir James his life, who never received back possession thereof again. *Triplied* to the first part, That the gift is extended to goods acquired by the rebel *stante rebellione*, it is only *stilus curiæ*, notwithstanding whereof such gifts are ever restricted to the goods belonging to the rebel the time of the denunciation, or year and day after. Next to that, that in the act of Parliament is meant only where the rebel retains his whole goods in his possession, the pursuer is contrary; for albeit he had suffered the rebel to keep still any thing of his, never so small, yet after his decease he could not intromit therewith, but with the hazard of undergoing his debts. The LORDS repelled the exception, and found that his intromission with any part whatsoever of the rebel's goods after his decease was vitious, notwithstanding of the right he had to the rebel's escheat, in respect he had suffered him to remain in possession thereof all his lifetime.

The same found between John Dalrymple of Waterside and the Laird of Clossburn, *infra*.

Secundo, *Alleged* by Fren draught, His father could not be convened as universal intromitter with Sir James his goods and gear, because he offered to prove, that after Sir James his decease his second son George Crichton intromitted with his whole goods, and transported the same to his own house, where they were in his possession diverse months, till they were roup'd and sold by George; and any intromission the defender's father had with them, was by buying the same, as others did, from his brother at the prices they were appraised at. *Replied*, This allegiance was contrary to his libel. In respect whereof this allegiance was likewise repelled.

Tertio, *Alleged*, He ought to be assolizied from the annualrent from the time of the rebel's decease, till the intending of the summons; because he was only subject in payment of that which the defunct himself was owing the time of his decease; for he behaved to be in the same case with an executor, who would not be obliged either for penalty or annualrent, before there was sentence recovered against him. *Replied*, That intromission being vitious, and not war-

rantable by law (as an executor's is) he was answerable to him for all that the principal debtor would be, were he alive. This allegiance was repelled like wise.

No 173.

Fol. Dic. v. 2. p. 43. Spottiswood, (UNIVERSAL INTROMITTERS.) p. 350.

* * Durie's report of this case is No 60. p. 522. *vide* ANNUALRENT.

1632. June 28. DALRYMPLE of Waterhead *against* L. CLOSEBURN.

DALRYMPLE of Waterhead pursues Closeburn as universal intromitter with his father's goods, to pay his father's debts, who for the particulars condescended on by him, *alleged* the same to have been delivered by his father to the defender's wife, two years before his father's decease, who by virtue thereof was in possession before his father's death; and the pursuer *replying*, upon the father's retention of the same continually in his possession, until the time of his decease, notwithstanding of the alleged disposition or gifting, which behoved to be reputed simulate betwixt father and son, and the son's wife, and to prejudge creditors; and the excipient *duplicating*, That no retention of possession could be alleged, to prejudge the anterior delivery made by the father, and to bring on all his father's debts on him, seeing the defender and his wife, after the foresaid delivery, became in actual possession of the same whole goods in the father's lifetime, who two years before he died, had neither estate nor means, whereof he might be reputed possessor, but was all this time sick and infirm, and lay bedfast, and remained in house with his son the defender, who entertained him in his family, the father neither having family nor servants, whereas the family was sustained upon the defender's charges, and he only paid the hires and fees of the servants, the father having no means to do the same, seeing his whole estate was evicted and appraised from him by Bryce Sempill; and the pursuer *tripling*, That the father retained the possession, and entertained the family, and paid the servant's fees, and that the son, who had nothing, remained in the house with his father; likeas the father, during all the days of his lifetime, continued still in possession of his lands and living, notwithstanding of the said comprising;—the exception and duply was repelled, in respect of this reply and triply, which was sustained and admitted to the pursuer's probation; and, upon the 3d of July 1632, the defender *alleging*, That the gift of his father's escheat was disposed to — Kirkpatrick, who had obtained thereupon both general and special declarator, who made the right thereof to the defender, by virtue whereof he intromitted, and so he could not be convened as universal intromitter with his father's goods; and the pursuer *replying* upon the father's retention of his goods all his lifetime, and that the defender after his decease intromitted therewith;—the reply was admitted, and the exception repelled.

No 174.
Found in conformity with the above.