

1697. February 2. RAMSAY of Cairnton *against* CARNEGIE of Phineven.

No 171.

Found in conformity with Johnston against Ker, No 166. p. 9848.

CROGERIE reported Ramsay of Cairnton against Carnegie of Phineven, for payment of a debt due to him by Kinfauns, with whose moveables Phineven intromitted. *Alleged*, Any intromission he had was as tutor to his brother's daughter, and who was executrix confirmed *qua* creditrix on her bond of provision to her father, which was sufficient to purge an odious passive title of vitious intromitter. *Answered*, The defence ought to be repelled, because he offered to prove the intromission was prior to the confirmation, and the goods and plenishing so intromitted with were never confirmed, but a sham-confirmation of some other particulars made up; so that here was not only a vitious super-intromission, but likewise a fraudulent omission and concealment, which, by the principles of law and reason, must make him *passive* liable to the whole. *Replied*, Any intromission made prior to the confirmation was necessary; and the new act of Parliament 1696, declaring that the confirmation of an executor-creditor shall not defend another intromitter farther than the subject confirmed, shews it was a total exception before that act.—THE LORDS having considered the tract of decisions, that fraudulent concealment inferred this universal passive title, and that a dative *ad omnia* was only allowed to make them liable *in quantum* the value of their intromission extended, if it was not omitted *dolose*; therefore they found it relevant to make him liable *passive*; especially seeing it was offered to be proven, that he had raised his process, and used citation before the confirmation, though after the decerning him to be executor; though the intervening of a creditor's citation betwixt the two, if there were not a considerable distance of time, or delay in confirming after the obtaining themselves decerned, would not be much regarded; yet here the Lords found Phineven in this case a vitious intromitter. See 13th February 1627, Kneeland *contra* Bailie's Relict, No 167, p. 9848.

Fol. Dic. v. 2. p. 42. Fountainhall, v. 1. p. 762.

1697. February 17.

MARQUIS of TWEEDDALE *against* The RELICT and CHILDREN of ROBERT DEMPSTER, his Chamberlain.

No 172.

Found again in conformity with Johnston against Ker, No 166. p. 9848.

IN the Marquis of Tweeddale's pursuit against the Relict and Children of Robert Dempster, his chamberlain, for clearing his accounts; *alleged*, Absolver, because she was executrix confirmed *qua* creditrix upon her contract of marriage. *Answered*, This could not purge the passive title of vitious intromitter, because they offered to prove super-intromission. *Replied*, That could

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*.

No 172.

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*,

No 173.
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.