

1715. *January 28.*ANDREW HOUSTON of Calderhall *against* Sir ALEXANDER MAXWEL of Monreith.

THE infestment of the lands of Cultreoch being conceived to heirs whatsoever, Sir Alexander Maxwell agreed with the four sisters of Cultreoch younger, daughters to Cultreoch elder, apparent heirs to both, and obtained from them a disposition to the lands of Cultreoch, with a procuratory to serve them, and to all heritage or moveables whereunto they could succeed as heirs to their father or brother; upon which Sir Alexander intromitted with writs, heritage, and moveables, and paid the debts.

Sir Alexander having taken out brieves for serving his authors, compearance was made for the heir-male, who produced a bond of tailzie by old Cultreoch to his son and his heirs-male, whereupon resignation had been made, and infestment expedite after Cultreoch's death; and thereupon the heir-male being preferred, Sir Alexander pursued the heir-male for payment of the debts, who repeated a declarator that the debts were extinct in his person, in as far as he was vitious intromitter.

It was *answered*, Vitious intromission is not relevant to be alleged for the heir-male; because that passive title operates only in favours of creditors, as was lately found in the case of John Ewing *contra* William Rowan, (*See APPENDIX*). *2do, Et seperatim*, The heir-male had no pretence to object against heritable debts in the person of the vitious intromitter; because an executor confirmed paying heritable debts has relief against the heir. Our law favours creditors so far, as to subject all representatives, whether in heritage or moveables, to the payment of debts; and again provides relief from one representative against another, according to the nature of the debt. An executor is liable to relieve the heir of moveable debts *secundum vires inventarii*: *E. contra*, the heir is bound to relieve the executor of heritable debts; and a vitious intromitter is only *hæres* or *prohæres in mobilibus*; but in respect of unwarrantable intromission, the law presumes that the moveables were sufficient to pay all the debts, and does not allow any proportion betwixt the creditors' debts and the intromission; but as an executor having a full beneficial executry, would nevertheless recur upon the heir for heritable debts, so must a vitious intromitter have the same benefit.

It was *replied*, That the creditors have indeed access to pursue either vitious intromitter or heir, the executor *secundum vires*, and a vitious intromitter *in solidum*, and without all relief; and if the creditor pursue the heir, it may indeed be questioned how far the heir might recur against a vitious intromitter, whether *in solidum* or *valorem*. In the case of Ewing against Rowan, it was found, that the heir could not pursue the vitious intromitter for relief. But this is most certain, that the defunct's moveable debts being stated in the person of a vitious intromitter, the same became extinct *ipso facto*. If it were not so, there would be no hazard in vitious intromission, where the defunct had an

No 188.

A defence of vitious intromission, proposed by an heir, sustained to extinguish moveable debts, but not heritable debts, in the person of a vitious intromitter.

No 188. heritable estate ; and vitious intromission being oft-times by persons who have access to meddle without witnesses, and being always without authority, inventory, or record, it is seldom possible to prove either quantities or value ; and therefore the law has most justly introduced a presumption *juris et de jure*, that the moveable were sufficient to pay the debts, and consequently the same became extinct *ipso facto*. 2do, There is not any law or precedent to distinguish heritable from moveable debts in this case, which cannot but have happened frequently.

“ THE LORDS found, That a vitious intromitter was entitled to pursue the heir for relief of heritable debts ; but sustained the allegiance of vitious intromission to extinguish moveable debts in the person of the vitious intromitter.”

Fol. Dic. v. 2. p. 43. Dalrymple, No 133. p. 185.

No 189. 1729. December 5. LOCH against MENZIES.

Sir WILLIAM MENZIES granted a bond of aliment to his daughter, upon death-bed, for payment of which process was raised against Sir William's representative, upon the passive title of vitious intromission. The defence was, That though this obligation was conceived *per modum actus inter vivos*, yet being granted upon death-bed, and not declared till after death, it was *donatio mortis causa*, which the granter did not design to be binding upon him if he reconvalesced ; and therefore, she had not the benefit of the passive title of vitious intromission, which was introduced in favour only of proper creditors of the defunct, such who could have compelled him by way of process to implement ; and it was added, that a *donatio mortis causa*, in whatever terms conceived, is more properly a legacy than an obligation. THE LORDS found this bond to be a debt relevant to subject the defender as vitious intromitter. See APPENDIX.

Fol. Dic. v. 2. p. 44.

S E C T. VI.

Vitious Intromission Purged by Confirmation, or by declarator of escheat.

THOMSON against THOMSON'S EXECUTORS.

No 190.

CONFIRMATION of the defunct's moveables, before process is commenced at the creditor's instance for vitious intromission, purges the vitiosity whoever be the executor. The administration of moveables, after the death of the pro-