

No 178.

It was *answered*, That the disposition bears, horse, nolt, insight, plenishing, and all other goods and gear, which cannot be extended to any thing of another kind, nor of greater value, as current money, jewels, silver-plate, chains, &c. which never past by such general clauses, unless it be specially dispond. It was *answered*, That albeit there had been such moveables, and the defender had intromitted therewith, though another having a better right, might evict the same, yet the defender had a probable ground to intromit, which is sufficient to purge this odious passive title.

THE LORDS found the disposition and delivery relevant to purge the vitiosity.

Fol. Dic. v. 2. p. 43. Stair, v. 1. p. 394.

1668. December 23.

SMITH against MUIRE.

No 179.

A relict who, by her contract of marriage, had been provided to the liferent use of the moveables, was found saved from incurring the passive title.

JEAN SMITH having pursued Margaret Muire, as vitious intromissatrix with the goods of George Smith her husband, to pay the sum of L. 110 pounds due by bond, by the said George to this pursuer; his sister obtained decret thereupon, and apprised the liferent of the said Margaret Muire; who suspended, and raised reduction on this ground, that she could not be liable as vitious intromissatrix, because she possessed her husband's moveables by a title, in so far as by her contract of marriage she was provided to all the goods and gear acquired during the marriage, for her liferent use, and so she could only be liable for making furthcoming the true value after her death. The charger *answered*, *imo*, That there could be no liferent of moveables *quæ usu consumuntur*, and all liferents of *usus fructus* must be *salva rei substantia*; *2do*, Though a liferent could consist in moveables, yet the meaning of such a clause, of all moveables acquired during the marriage, must be understood the free moveables, deducting moveable debt; and cannot be understood to exclude lawful creditors.

THE LORDS found the clause to be understood only of free gear, and not to exclude the pursuer's debt; but found it a sufficient ground to free the suspender from vitious intromission, and to retrench the decret to the true value.

Fol. Dic. v. 2. p. 43. Stair, v. 1. p. 576.

* * * Gosford reports this case :

GEORGE SMITH having granted bond to Jean Smith for L. 100 immediately before his contract of marriage with Margaret Muire, by which he was obliged to provide the said Margaret to the liferent not only of lands but of all moveables and gear which he should purchase during the marriage;—the said Jean did pursue the said Margaret, as vitious intromissatrix, for payment of the said bond; wherein the LORDS found, that the said liferent provision did free her from being vitious intromissatrix, she finding caution to make her intromission furthcoming after her decease. But they found likewise, that the said liferent

provision did not prejudice any lawful creditor, but gave her right only to the *liquent* of all moveables *deducta ere alieno*, and could only be extended to free goods and gear.

No 179.

Gosford, MS. No 72. p. 26.

1671. June 16.

BOWERS *against* LADY COUPAR.

THE executors of Mr Frederick Bowers, minister, having obtained decret against the Lord Coupar, for some by-gone stipends, did pursue the Lady Lindores, relict of the Lord Coupar, as intromitter with his goods and gear, for payment. It was *alleged*, That the Lady had right by disposition from Lord Coupar to his whole moveables, which ought to defend her ay and while it were reduced, and that the pursuers ought to confirm themselves executors-creditors to the Lord Coupar. THE LORDS did repel the defence, and found that the disposition being made by the Lord Coupar to his Lady, and the goods remaining in his own possession until his death, could not prejudice lawful creditors, who needed not to reduce, nor to confirm themselves executors-creditors; but did decern the Lady only to be liable for the goods disposed and intromitted with, but not as a vitious intromitter.

No 180.

Found in conformity with Chalmers against Dalgarno, No 176. p. 9857.

Fol. Dic. v. 2. p. 43. Gosford, MS. No 451. p. 169.

*** Stair's report of this case is No 68. p. 2734. *voce* COMPETENT.

1674. June 10.

LADY SPENCERFIELD *against* HAMILTON.

FOUND sufficient to elide the passive title, that the defender did intromit either by virtue of a gift to himself, or by warrant from the donatar, though the gift was not declared; for his possession *ab initio* being in virtue of a title, though not perfected, could not be said to be vitious, and *quivis titulus etiam coloratus* purges the vitiosity of the intromission.

No 181.

Fol. Dic. v. 2. p. 43. Stair. Dirleton.

*** This case is No 97. p. 9762,

1674. December 16.

DRUMMOND *against* MENZIES.

IN the process at the instance of George Drummond, for payment of a sum due by Alexander Menzies of Rotwell, as intromitter with the debtor's goods, it was found, (as in diverse cases before) That the pretence, that the defunct was rebel, and his escheat gifted, doth not purge vitious intromission, unless it

No 182.

Found in conformity with Lady Spencerfield against Hamilton, *supra*.