1671. *November* 23. ALEXANDER RORISON *against* SINCLAIR of Ratter.

No 44.

UMQUHILE William Sinclair of Ratter, being debtor to Alexander Rorison, he pursues this Ratter, as representing his father, to pay the debt, and condescends that he has behaved himself as heir by intromission with the rents of the lands of Ratter, wherein his father died last vest and seized, as of fee, and produces his infeftment. The defender *alleged* Absolvitor, because his intromission was upon a precept of *clare constat*, as heir to his grand-father, which was sufficient to purge his general passive title, though it cannot defend against the pursuer in time coming, seeing the defender was *in bona fide*, and knew not his father's infeftment. It was *answered*; That he cannot pretend ignorance of his father's infeftment, having his writs in his hands, and it is but a mere pretext to immix himself in his father's heritage, without representing him according to law, which would be a common road, if it were once allowed.

THE LORDS repelled the defence, and found the defender liable, as behaving as heir.

Fol. Dic. v. 2. p. 30. Stair, v. 2. p. 8.

1673. *January* 22.

JAMES CHALMERS Advocate, *against* FARQUHARSON of Inverey, and AGNES GORDON, his Mother.

No 45.
Found in conformity with No 43. p. 9686.

JAMES CHALMERS having been cautioner for Farquharson of Inverey's father, and forced to pay the debt, did obtain an assignation to the bond, and thereupon pursued this Inverey, as representing the father, upon the passive titles, and the said Agnes Gordon, as vitious intromitter with her husband's goods and gear. The passive title against Inverey, was that he had acquired right to a comprising not expired, and had intromitted with the rents of his father's lands, which was not found relevant to infer a passive title; but it was allowed to the defenders to condescend and produce the comprising, and to the pursuer to prove, *scripto vel juramento*, which being done the pursuer, without intenting any new process, might have the benefit of the act of Parliament anent debtor and creditor. It was *alleged* for the said Agnes Gordon, That she could not be liable as vitious intromitter, because she was donatar to her husband's escheat, and thereupon had obtained a decreet of declarator. It being *replied*, That she had intromitted long before her gift, there was litiscontestation in the cause. Probation being led and ready to be advised, notwithstanding whereof, there being several for reforming the allegeance as having proceeded upon wrong information, the procurator did condescend upon this allegeance as relevant, viz. that she being married to a second husband, who had obtained the gift of her first husband In-

No 45. verey's escheat, and thereby had right to the whole moveables that belonged to him the time of the rebellion, she could never be convened as vitious intromitter with her husband's goods which belonged to him as donatar. It was *replied* for the pursuer, that the defence ought to be repelled, *first*, because the donatar's gift was not declared before citation of the defender; 2*do*, It was offered to be proved, that she had intromitted with her husband's moveables long before the second marriage with the donatar, which being vitious, ought to make her liable for the debt, and the subsequent right, gotten by a second husband, could defend the same. The Lords did sustain the defence, and found, that the apparent heir's intromission within the legal, was no passive title to make him liable to all his father's debt, but that the creditor had only power to redeem, by payment of such money as he did pay to the compriser for his right.

Fol. Dic. v. 2. p. 30. Gosford, MS. No 741. p. 454.

*** Dirleton reports this case:

The Lords found, that a person being pursued as intromitter, and having alleged, that before the intenting of the cause she had obtained a gift of her husband's escheat, the said defence is relevant; and that after intromission, there being an executor confirmed before intenting of the cause, or the intromitter obtaining a gift though not declared, there being no necessity to declare the same against herself, that the same doth purge even intromission before the gift. Some of the Lords were of another opinion upon that ground, that *ipso momento* that the parties intromit, there is a passive title introduced against them, which doth not arise upon the intenting of the cause, but upon their own act of behaving; and *jus* being *semel quæsitum* to creditors cannot be taken from them, except in the case of an executor confirmed before the intenting of the cause; against whom the creditor may have action; and that there is a difference betwixt a donatar having declared and an executor having confirmed, in respect the executor is liable to creditors but not a donatar; and an apparent heir having become liable by intromitting with moveable heirship, and behaving as heir, his intromission is not purged by a supervenient gift, seeing his immixing is *aditio facto*; and there is *eadem ratio* as to intromitters, who are executors *a tort* (as the English lawyers speak) and wronguously; and in effect by their intromission *adeunt passive*, and are liable to creditors.

Reporter, *Strathurd.*

Dirleton, No 224. p. 105.

*** This case is also reported by Stair:

James Chalmers having become cautioner for Farquharson of Inverey in a sum of money, for relieving of him from under caption, and necessitated to pay the same, pursues his son, and Agnes Gordon his relict, for payment, and

insists against her as vitious intromissatrix with the defunct's whole stock and plenishing; and she having compeared, proponed a defence, denying intromission, and that any intromission she had, was by virtue of a gift of her husband's escheat. No 45.

THE LORDS sustained both the libel and defence, and admitted both to probation; and after probation led by the pursuer, the defender gave in a bill desiring the act to be rectified, which by inadvertence of the clerk was extracted otherways than it was proponed and sustained, seeing the act bears the defence to be proponed, that she had obtained gift before her intromission, whereas she neither did nor needed say further, than that she had obtained gift of her husband's escheat, which purged her vitious intromission, unless the pursuer had replied that it was obtained *pendente processu* after his citation; but it is clear the gift was before citation, and hath been found relevant in these terms frequently, and lately; which doth appear by the act itself, wherein the pursuer in his reply offers to prove the intromission anterior to the gift, and the LORDS sustain the defence, without expressing whether anterior or posterior to the gift; so that the act being unclear, the Lords ought to interpret the same according as in law and justice it might have been sustained, *2do*, Albeit the defence had been expressly proponed and sustained, that the gift had been anterior to the intromission, yet at any time before sentence a distinct relevant allegeance, if instantly verified, is competent; so this defence, that the gift albeit not anterior to the intromission, yet being anterior to the intenting of this cause, it purgeth the vitiosity, which is instantly verified, is relevant and receivable. The pursuer *answered*, That he opponed the state of the process, wherein litiscontestation being made, and probation adduced upon an act of litiscontestation extracted, the same can neither be quarrelled now upon injustice, nor upon any allegeance then competent and omitted, although instantly verified, unless it had been emergent, or at least *noviter veniens ad notitiam*; for an act of litiscontestation is a judicial contract of parties, putting the event of the cause upon the probation therein agreed upon, so that nothing then competent is receivable thereafter, though it were intantly verified; and as to the tenor of the act, it bears expressly, that the intromission was by virtue of a gift, which necessarily imports that the gift was anterior to the intromission; and it will not be sufficient to alter acts upon pretence of the clerk's mistakes, unless the same were proven by the acknowledgment of the Judge, or oath of the clerk.

THE LORDS found that the act not being special and clear as to the time of intromission, that it ought to be explained *in terminis juris*, and therefore found that the defender having a gift before intenting of the cause, although after the intromission, it did purge the intromission in the same way as the confirmation of executors, or declarator of escheat, though obtained by third parties after intromission, but before citation, did exclude vitious intromission, for the gift to the intromitter was effectual without declarator; but the LORDS did not

No 45. dip upon that point as to distinct exceptions instantly verified after litiscontestation, albeit competent and known before.

Stair, *v.* 2. *p.* 308.

1685. *January.* MAXWELL *against* CORSAN.

No 46.
Found in conformity with Rorison against Sinclair, No 44. p. 9687.

JOHN MAXWELL of Barncleugh having pursued John Corsan of Milnehole, as representing Thomas Corsan his uncle, for payment of a debt, and having insisted upon that passive title, that the defender had behaved himself as heir to his uncle, by intromitting with the rents of a tenement of land wherein he died infeft;—*alleged* for the defender, That he stood infeft in the lands as heir to his grandfather, and not as heir to his uncle. *Answered*, That the defender's infeftment, as heir to his grandfather, could not be represented, because Thomas Corsan his uncle, who was the debtor, was infeft as heir of conquest and provision to the grandfather; so that the defender was *in mala fide*, to pass by his uncle and enter heir to his grandfather; especially seeing the time of the defender's service, his uncle's sasine was produced, and instruments taken thereupon in the clerk's hands; and upon that ground, had raised a reduction of the defender's service and infeftment. *Duplied*, That, however that must be a ground to reduce the defender's infeftment, yet so long as it stands unreduced, he must lawfully intromit with the rents, which cannot infer a passive title against him; as also, Thomas Corsan the uncle's sasine is null, being the assertion only of the town clerk, without any warrant. THE LORDS repelled the defence, and found the reason of reduction relevant, the pursuer producing the warrant of the uncle the debtor's sasine *cum processu*, and found the defender liable for repetition *in quantum lucratus*, and assigned a term to the pursuer to prove the defender's possession and quantity of the rent, and to produce the warrant of the uncle's sasine, and to prove that protestations were taken against the defender's service, and that the defender's sasine was then produced.

Fol. Dic. v. 2. *p.* 30. *Sir P. Home*, *MS. v.* 2. *No* 669.

No 47.
A person had two dispositions of his father's whole estate, the one of heritage, and the other of moveables. He having intromitted with the heirship

1707. *July* 1. INGLIS *against* ELPHINSTON.

THERE was a bond due by Elphinston of Quarrol to Bruce of Powfoulis, whereto Alexander Inglis writer in Edinburgh has now right, who pursues this Elphinston of Quarrol upon the passive titles; wherein an act being made, there was a clear probation led, that he had intromitted with his father's whole estate, both heritable and moveable, and entered to the possession immediately upon his death, and had likewise meddled with the charter-cest; which coming this day to be advised, Quarrol alleged his father was but cau-