

No. 174.

July 4.—In the cause of Dalrymple of Waterhead, mentioned June 28 1632, it being *alleged*, That the annualrent of one of the debts, for which the defender was convened, was paid, which he offered to prove by witnesses, and which he alleged was probable by witnesses, seeing the quantity of the said yearly annualrent was but the second part of an hundred merks, which was only the pursuer's part for the whole annualrent, being only an hundred merks yearly, the pursuer had only right to the second part yearly, which was within the sum which was probable by witnesses;—the LORDS found, that seeing this annualrent was constituted by writ, and that the party was obliged by writ to pay the same, albeit the quantity yearly belonging to the pursuer was within an hundred merks, and that it was alleged, that it was yearly paid, whereas there were many years pursued for; that therefore the payment could not be proved by witnesses, but only by writ, or oath of party, and no otherways.

Clerk, Hay.

Fol. Dic. v. 2. p. 43. Darie, p. 637. & 639.

1638. December 15.

OGILVIE against —

No 175.
Found again
in confor-
mity with
Moreston a-
gainst Fren-
draught, No
173. p. 9853.

ONE Ogilvie, servitor to Mr John Fletcher advocate, pursuing — as intromitter with his father's goods and gear, for payment of a duty of a tack of the lands of — set to him in tack by —, and which duty was resting unpaid the years libelled by the defender's umquhile father; and the excipient *alleging*, That he could not be convened *hoc nomine*, as intromitter with his father's goods, because his father died rebel, and at the horn; likeas, the gift of his escheat was disponed to a donatar, who obtained declarator, and thereafter disponed the right thereof to this defender, by virtue whereof he intromitted, which cannot make him liable to pay his father's debt;—the other *replying*, That that gift cannot prejudge the pursuer, nor defend the excipient, because notwithstanding thereof the defunct remained continually in peaceable possession of all his own goods diverse years unto the time of his decease, at the which time the defender immediately entered, and possessed himself therewith; likeas, he yet bruiks the same lands, set in tack to his father: THE LORDS found this reply relevant *in hoc casu*, to make the defender liable for the tack-duty of the years by-past, owing by his father *ad hunc effectum*. The reply was sustained, notwithstanding the defender alleged, he bruicked the tack by virtue of the said escheat, as said is, and that he was content to pay the tack-duty of all the years since his father's decease; for the LORDS thought, the reply being proved, he ought to pay sicklike the duty of that tack owing by

his father, who retained the possession of his own goods, during his life, seeing he entered thereafter to the possession both of tack and goods.

No 175.

Act. *Fletcher*.

Alt. ———.

Fol. Dic. v. 2. p. 43. Durie, p. 867.

1662. February 27.

GRAY OF CHALMERS *against* DALGARNO.

No 176.

A GENERAL disposition of moveables, though an incomplete right without confirmation, was sustained to defend the disponee from being liable as vitious intromitter.

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

*** This case is No 169. p. 9850.

*** A similar decision was pronounced 15th June 1681, Baird *against* Robertson, No 42. p. 3856. *voce* EXECUTOR.

1664. July 6.

BROWN *against* LAWSON.No 177.
Found in conformity with the above.

ALEXANDER BROWN having obtained a decret *against* William Lawson as vitious intromitter with the goods of umquhile Willam Lawson of Newmills, he suspends, and *alleges* the decret was unjustly given, because it bears, that he excepted upon a disposition, made by the defunct for an onerous cause, and an instrument of possession of the goods before his death. The charger *answered*, That the decret did bear, that the suspender did judicially acknowledge, that there was no true delivery of the goods.

THE LORDS found this colourable title sufficient to purge the passive title of vitious insromission, providing the defender confirmed within four months; for they thought the defunct's disposition *in articulo mortis*, was rather as a testament or legacy, in satisfaction of the defenders debt, than as *actus inter vivos*.

Fol. Dic. v. 2. p. 43. Stair, v. 1. p. 209.

1666. July 12.

JOHN SCOT *against* SIR ROBERT MONTGOMERY.

No 178.

JOHN SCOT pursues Sir Robert Montgomery, as vitious intromitter with the goods and gear of Sir James Scot of Rossie, to pay a debt due by Sir James to the pursuer. The defender *alleged* absolvitor, because any goods he intromitted with, were disponed to him for onerous causes, by the defunct, and delivered conform to an instrument of possession produced.