1705. *February* 13. JOHN THREIPLAND *against* JEAN ANDERSON.

RANKEILLOR reported John Threipland, late bailie in Perth, against Jean Anderson, relict of John Christie, tailor there. Christie being debtor by bond to Threipland in a certain sum, he pursues Anderson, his relict, as vitious intromitter with his goods, for payment. And though she produces a confirmed testament, as executrix-creditrix, on a debt of her husband to which she had purchased an assignation, he contended that ought not to defend her, because her intromission is immediately after her husband's death, and the buying in this extrinsic debt and confirming thereon is not till two years thereafter; and, that debt having no preference nor privilege in itself, the acquiring it was merely to palliate her vitious intromission.

ALLEGED for the relict,—That my confirmation being before the citation in your process, it has always been sustained to purge the passive title; and it is all one whether the confirmation be on her contract of marriage, or other debt due to her *proprio nomine*, or as assignee thereto; so there is neither fraud nor partiality, and the creditor was *in mora* that did neither confirm nor pursue sooner, but suffered her to confirm first.

ANSWERED,—Her confirmation can never excuse her, because the debt confirmed might be a retired bond lying beside her husband with a blank assignation; and it is known that relicts have access to the defunct's papers. *2do*, Her confirmation is fraudulent, for she omits £40 of lying money, and some other particulars; and the law is clear that such omissions make them liable, notwithstanding confirmation; so there is a plain *dolus* in not making a full inventory, and omitting her superintromission.

REPLIED,—If there were any omissions, the pursuer has a remedy and access in law by taking a dative *ad omissa*. And her not giving up that L.40 of lying money was not fraud, because the most part of it was expended in burying her husband, which was *officium humanitatis*, and could not carry a confirmation, but behoved to be instantly done; and so, her *initium possessionis* being necessary, there can be no doubt but it was warrantable; and what remained after his funeral being so small, it can never infer an universal passive title, but only make her liable *in valorem* of the L.20 remaining; which she is willing to make forthcoming. And this passive title being of the nature of a delict, any thing is able to excuse it; and it was so found, *6th November* 1622, *Dundas* against *Livingston*, where a small intromission with a caldron, and lying in the defunct's bed, and eating at his table, were not found sufficient to infer this passive title.

DUPLIED,—The value of the intromission is not so much considered as the *animus immiscendi*; for *justitia non consistit in quantitate*; and, in a late case betwixt my *Lord Yester* and the *Relict of Robert Dempster*, his chamberlain, the Lords found her superintromission with some cart-wheels, though not worth L.30 Scots, made her liable, though she was confirmed executrix-creditrix. And, though she disbursed the funeral charges, yet she should have cognosced them by a decreet of constitution; otherwise, relicts will never want pretences *brevi manu* to intromit, and then apply it to funerals and the like; which is of dangerous consequence to all creditors: and the using a pair of pistols has been found to import a behaviour as heir.

The Lords here considered that the intromission was very small, and much of it applied to her husband's funeral and maintaining the family till the next term; and that the creditor was negligent, two years being elapsed before he intented his pursuit, and had suffered her to establish the title by confirmation before he interpelled her by citation; therefore, by a scrimp plurality of seven against six, they found her confirmation sufficient to purge the passive title, and found her only liable *in valorem.* *Vol. II. Page* 268.

1705. *February* 20. ROBERT LESLIE, and DICK of GRANGE, *against* KATHARINE DICK and JAMES CHRISTIE of NEWHALL.

CAPTAIN Robert Leslie, and Dick, now of Grange, against Katharine Dick, and James Christie of Newhall, her husband. Sir James Leslie having acquired the right of sundry infeftments of annualrent out of the lands of Grange, belonging to Dick, his brother-in-law; he, in 1697, tailyied these rights to the heirs of his own body; which failing, to James Dick, Grange's second son, procreated by him with the said Sir James's sister, and the heirs-male of his body; which failing, to the said James Dick his heirs-female, the eldest succeeding without division; all which failing, to the said Sir James's heirs and assignees whatsoever. Both Sir James and James Dick of Grange died without heirs of their body; whereon Katharine Dick, Lady Newhall, only sister-german to the said James, claims the succession as his heir-female, and took out brieves for serving; but, the same being stopt, the Lords heard the point of right debated.

It was CONTENDED for Captain Leslie and Dick of Grange,—That Sir James's meaning was very clear, that James Dick's *heir-female* was not his heir-female whatsomever in the general, but only his heir-female procreated of his body, (though these words, by the carelessness and inadvertency of the writer, are omitted.) For, 1*mo*, The narrative of the tailyie must regulate and expound his meaning: Now, there he expressly mentions James Dick, and the heirs of his body, which comprehends either male or female descending of his body, but will not extend to his collateral heirs-female. 2*do*, To interpret these words, "his heirs-female," in general, whether descended of his body or not, were to make him do a deed both incongruous, absurd, and irrational; for, by that sense, if the said Katharine Dick, Lady Newhall, died without issue, then Sir James Leslie's estate had devolved to her sisters-consanguinean, daughters to Grange, by a former marriage, who were not a drop's blood to Sir James Leslie, but wholly strangers to him: and can any body think he was so ridiculous and senseless, that, failing of James Dick, his sister's son and his children, he would put his estate by all the rest of his sister's children, (she being the bond, *nexus, et copula*, tying his affection to them,) whereof there were three or four behind, and that ever he intended to let his estate go to Grange's children of his first marriage, with whom he had no sort of relation any manner of way.

ALLEGED for Katharine Dick, Lady Newhall,—That, in tailyies and last-wills, the thing to be inquired is, What was the defunct's will and pleasure? and, if that be clear and apparent from the words, without ambiguity or dubiety, there is no room left for descanting whether it was the most rational, just, and ex-