

sal passive title, and therefore repelled the defences: Found the defender bound to fulfil the agreement entered into with the pursuer, in terms libelled."

No 94.

Lord Ordinary, Swinton.

Act. Lord Advocate Dundas, A. Campbell junior.

Alt. Solicitor-General Blair, Geo. Fergusson.

Clerk, Home.

D. D.

Fac. Col. No 221. p. 518.

S E C T. XIII.

Behaviour how purgeable?

1629. February 14.

STEVEN against PATERSON.

INTROMISSION with heirship goods, found purged by the heir's obtaining warrant from the Lords, directed to the Bailies of Edinburgh, to make inventory of the goods in his father's house, and which inventory was accordingly made before process against him at the instance of his father's creditors.

No 95.

Fol. Dic. v. 2. p. 34. Durie. Spottiswood.

** This case is No 19. p. 9663.

1633. February 15.

JAMES BANE against HUGH MITCHELL.

JAMES BANE, as assignee constitute to a bond of 1200 merks granted by the Earl of Tullibardine as principal, and John Mitchell, one of his cautioners, pursued Hugh Mitchell, as son and heir to the said John, at the least behaving himself as heir, by intromission with his father's heirship goods. *Alleged, He cannot be convened as intromitter, &c. because his father died rebel, and his escheat was disposed, and declarator obtained thereon long before the intending of this cause; and for any intromission he had, he is countable to the donatar and none other, like as he has right from the donatar to the said particulars intromitted with by him. Replied, Not relevant, except it were alleged, that the gift and declarator were before the excipient's intromission; for his intromission before the same being vitious, cannot be purged by the subsequent right gotten from the donatar, which may make him bruike the same heirship goods as his proper goods, but will never free him at any of his father's creditor's hands. THE LORDS repelled the allegiance, in respect of the reply, in*

No 96.

An apparent heir's intromission with the heirship moveables of his predecessor who had died at the horn, found not purged by a declarator of escheat afterwards obtained and purchased in by the heir, although before process moved against him on the passive titles.

No 96. regard that the defender was apparent heir to his father, and so his intromission being once vitious, could not be purged thereafter.

Fol. Dic. v. 2. p. 34. Spottiswood, (HEIRS.) p. 142.

1674. June 10. LADY SPENCERFIELD *against* HAMILTON.

No 97.

It was afterwards found, that if the declarator of escheat was obtained before the heir was attacked upon his intromission, this was relevant to purge the intromission.

THE Lady Spencerfield pursues Hamilton of Kilbrackmount for payment of a debt of his predecessors, and insists against him as behaving as heir by intromission with the heirship moveables, viz. the plenishing of the house, and as lucrative successor by a disposition. The defender *alleged, 1mo*, that the defunct could have no moveables, because he was rebel at the horn when he died, whereby the property of his goods were devolved to the King. *2do*, It was offered to be proved, that the defunct's escheat was gifted before the defender's intromission. *3tio*, His intromission was by warrant of the LORDS, allowing him to possess the house, so that any plenishing that was therein being yet extant, can import no passive title. It was *answered*, That it was not relevant that the defunct died rebel, or his escheat was gifted, unless it had been also declared before the intromission, for the declarator is equivalent to the confirmation of a testament, which only purges vicious intromission; and the LORDS' warrant imports no power to dispose, or make use of any of the moveables of the house.

THE LORDS found it not relevant, that the defunct was rebel, or his escheat gifted, unless it were declared before intenting of the cause, or that the gift were in favours of the defender, or that he had intromitted by warrant from a donatar.

Fol. Dic. v. 2. p. 34. Stair. v. 2. p. 270.

* * * Gosford reports this case :

IN a pursuit at the Lady's instance against Kilbrackmount, as vicious intromitter with the moveable heirship which belonged to his uncle, who was debtor to the Lady; it was *alleged absolutor* because it was offered to be proved, that the defender's uncle died rebel at the horn, and his escheat gifted in favours of a donatar, to whom he could only be liable, and that before any intromission had by the defender. It was *replied*, that the defence ought to be repelled, unless it were farther alleged, that the gift was declared before the defender would intromit; or that the defender himself was donatar; and if neither of these can be alleged, he ought to be liable as vicious intromitter, just as in the case where it is alleged, that there is an executor to whom the intromitters with moveables can only be liable, which is never sustained, unless the testament be confirmed. THE LORDS did repel the defence in respect of the reply, and found, that an intromitter with moveables, cannot purge his *vice*, unless he allege that he had