

rantable by law (as an executor's is) he was answerable to him for all that the principal debtor would be, were he alive. This allegiance was repelled like wise.

No 173.

*Fol. Dic. v. 2. p. 43. Spottiswood, (UNIVERSAL INTROMITTERS.) p. 350.*

\* \* Durie's report of this case is No 60. p. 522. *vide* ANNUALRENT.

1632. June 28. DALRYMPLE of Waterhead *against* L. CLOSEBURN.

DALRYMPLE of Waterhead pursues Closeburn as universal intromitter with his father's goods, to pay his father's debts, who for the particulars condescended on by him, *alleged* the same to have been delivered by his father to the defender's wife, two years before his father's decease, who by virtue thereof was in possession before his father's death; and the pursuer *replying*, upon the father's retention of the same continually in his possession, until the time of his decease, notwithstanding of the alleged disposition or gifting, which behoved to be reputed simulate betwixt father and son, and the son's wife, and to prejudice creditors; and the excipient *duplicating*, That no retention of possession could be alleged, to prejudice the anterior delivery made by the father, and to bring on all his father's debts on him, seeing the defender and his wife, after the foresaid delivery, became in actual possession of the same whole goods in the father's lifetime, who two years before he died, had neither estate nor means, whereof he might be reputed possessor, but was all this time sick and infirm, and lay bedfast, and remained in house with his son the defender, who entertained him in his family, the father neither having family nor servants, whereas the family was sustained upon the defender's charges, and he only paid the hires and fees of the servants, the father having no means to do the same, seeing his whole estate was evicted and appraised from him by Bryce Sempill; and the pursuer *tripling*, That the father retained the possession, and entertained the family, and paid the servant's fees, and that the son, who had nothing, remained in the house with his father; likeas the father, during all the days of his lifetime, continued still in possession of his lands and living, notwithstanding of the said comprising;—the exception and duply was repelled, in respect of this reply and triply, which was sustained and admitted to the pursuer's probation; and, upon the 3d of July 1632, the defender *alleging*, That the gift of his father's escheat was disposed to — Kirkpatrick, who had obtained thereupon both general and special declarator, who made the right thereof to the defender, by virtue whereof he intromitted, and so he could not be convened as universal intromitter with his father's goods; and the pursuer *replying* upon the father's retention of his goods all his lifetime, and that the defender after his decease intromitted therewith;—the reply was admitted, and the exception repelled.

No 174.  
Found in conformity with the above.

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. &amp; 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