

1684. November —. TROTTER of Mortonhall against EUPHIN SCOTT

No 29.

AN apparent heir's giving back a disposition of lands that his predecessor had got without paying the price, and taking a new one, found to be *gestio*, and to make the apparent heir universally liable for his predecessor's debt.

Fol. Dic. v. 2. p. 29. Harecarse, (PASSIVE TITLE.) No 48. p. 11.

* * * Sir P. Home reports this case :

HARY TROTTER of Mortonhall, and Sir Laurence Scott, being bound cautioners conjunctly for the deceast Mr Alexander Spottiswood Advocate, to Sir Archibald Primrose late register, for the sum of 10,000 merks, and Mortonhall having paid the hail sum ; he pursues Euphin Scott, as representing Sir Laurence her father upon the passive titles, for payment of the half of the sum and bygone annualrents ; and she having *alleged* upon a disposition granted to her by her father, of the lands of Eymouth, to purge the passive title, and Mortonhall having reduced the disposition *ex capite inhibitionis* ; and thereafter having insisted against the said Eupin Scott, as behaving herself as heir to her father, by intromitting with the rents of the lands, after the disposition was reduced ;—*alleged*, That she could not be liable as behaving as heir, because she intromitted by virtue of a wadset of the lands, granted by the Laird of Wedderburn to Mr Patrick Home Minister at Hatton, for the sum of 5000 merks, which was dispoed to Linthill, from whom the defender had acquired right. *Answered*, That the defender acquiring right to that wadset, could not liberate her from that passive title of behaving as heir, because Sir Laurence her father did acquire right to that wadset in his own time, and after his deceast, the defender having colluded with Linthill, she gave back her father's right, and took a new right of the wadset from Linthill, in her own person, which was done of design to possess the lands by virtue of that right, and defraud her father's creditors. *Replied* for the defender, That albeit, the right of wadset had been dispoed to her father, yet she might lawfully give it back, and take a new right in her own person, because the price was not paid, but only her father gave bond for the same, and she having paid the price with her own money, which her father should have given for that right, she might justly give back her father's right, and take a new right to the wadset, in her own person. *Duplied*, That the pursuer's title as behaving as heir, being the intromitting with the rents of the lands, and others belonging to the predecessor ; and seeing this right of wadset was dispoed to the defender's father, whether the price was paid to him for the same, or not, it does not alter the case, but the intromission with the rents of the lands that were dispoed to her father, must infer the passive title against her, and she was in *mala fide* to give back her father's right, and take a new right in her own person ; for if that were allowed, it were

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easy for apparent heirs to defraud all the predecessor's creditors, by giving back, or abstracting of the rights of the lands, and taking new rights from the authors; and seeing the law has made the intromitting with the father's charter-chest, rights of lands, or other papers, and things of very little moment, that belonged to the predecessor, to infer a behaviour as heir; much more ought the giving back a right of lands granted to the predecessor, and taking new rights in the apparent heirs own name, infer a behaviour; seeing in that case there is not only an intromitting with the rights of the predecessor's estate, but there is *dolus* and fraud in giving back these rights in the apparent heirs own person, of purpose to defraud the predecessor's creditors; and seeing the least intromission in law without a lawful title, will infer a behaviour; much more ought such a deed which is both intromission and fraud; and the defender her paying of the price, that her father should have given for that right, with her own money, will not liberate her from the passive title, because the lands were her father's, albeit the price was not paid. And if any man should buy a barony of land, and give bond for the price, if his apparent heir should intromit with the rents of the lands, he would be liable as behaving as heir, albeit he paid the price of the lands, after his predecessor's decease. THE LORDS repelled the defence proponed for the defender, bearing, that her intromission was by virtue of a right acquired by her from Linthill; in respect of the reply proponed for the pursuer, bearing, there being a right formerly granted by Linthill in favour of the defender's father, the defender gave back that right of wadset to Linthill, and took a new right from him in her own name, which they admitted to the pursuer's probation.

Sir P. Home, MS. v. 2. p. 629.

1687. January 26.

JOHN JOLLY Merchant in Edinburgh against The VISCOUNT of KENMURE.

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THE debate, John Jolly merchant in Edinburgh, against the Viscount of Kenmure, on the passive titles, was advised; and the LORDS found it a passive title, that he had given back a tack of teinds which was for years to run, and had taken a new one in his own name. See the like found before in Stair's Institutes, B. 3. T. 7. But they found the Viscount's allegiance relevant to purge this passive title, that he bruiked by an expired comprising, providing always that the comprising expressly mentioned and contained tacks of teinds; which was thought too favourable for apparent heirs.

Fol. Dic. v. 2. p. 29. Fountainhall, v. 1. p. 443.