*** Durie reports this case :

No 19.

IN a redemption of lands, wherein the son was infeft by the father under reversion, the reversion bearing, 'whensoever the father should redeem from 'him,' not making mention of his heirs; the father, after decease of his son, redeeming from the apparent heir to his son, no party defender compearing, and the Clerk advising with the LORDS, if this reversion of this tenor should be effectual, to redeem from the apparant heir of the son; the LORDS found, That albeit the reversion made mention of a power to redeem from the son by the father, and bore not these words 'from the son's heirs and assignees,' yet that the father had power by the said reversion after the decease of the son, albeit there was no redemption used by the father, while the son lived, to redeem also thereby from his apparent heir, and that the reversion was not personal, so as it became extinguished by the son's decease.

Clerk, *Hay*.

Durie, p. 490.

1662. *February* 19. LORD CARNEGIE *against* LORD CRANBURN.

No 20.
A declarator of recognition may be pursued after the vassal's death.

THE Lord Carnegie being infeft in the barony of Dirleton, upon a gift of recognition by the King, pursues a recognition against the Lord Cranburn, because the late Earl of Dirleton, holding the said barony ward of the King, had, without the King's consent, alienated the same to Cranburn, and thereby the lands had recognized.—The defender *alleged*, *first*, No process, because he is minor, *et non tenetur placitare super hæreditate paterna*; *2dly*, The recognition is incurred by the ingratitude and delinquency of the vassal; yet *delicta morte extinguntar*; so that there being no other sentence nor litiscontestation against Dirleton in his own life, it is now extinct, which holds in all criminal and penal cases, except in treason only, by a special act of Parliament.

THE LORDS repelled both the defences, the first, in respect that the defender is not heir, but singular successor, and that there is no question of the validity of his predecessor's right in competition with any other right but the superior's; the other, because recognition falls not as a crime, but as a condition; implied in the nature of the right, that if the vassal alienate, the fee becomes void.

Fol. Dic. v. 2. *p.* 74. *Stair, v.* 1. *p.* 103.

1666. *July* 14. CRANSTON *against* WILKISON.

No 21.
Vitious intromission not sustained after the in-

BETWIXT Cranston and Wilkison it was found, That a person being convened as representing his father, who was alleged to be vitious intromitter to the pur-

No 21.
tromitter's death, against his representatives, to render them liable universally.

suer's debtor, the title being passive and penal, could not be a ground of action against the defender, to make him liable for the whole debt; but only in so far as should be proved the defunct did intromit, and was *locupletior, quia actio pœnalis non transit in hæredem*; and the defunct, if he had been pursued in his own life, might have purged the said title.

Reporter, *Newlyth.*

Fol. Dic. v. 2. *p.* 74. *Dirleton, No* 16. *p.* 9.

*** Stair reports this case:

IN a pursuit betwixt Cranston and Wilkison, the defender being convened as heir to his father, who was vitious intromitter with the pursuer's debtor's goods and gear;

THE LORDS having, of their own proper motion, taken this passive title to consideration, as to this point, whether vitious intromission, as it is an universal passive title, died with the intromitter, or if it might be pursued against his representatives, they ordained the parties to be heard thereupon; which being reported this day, the LORDS found, that no person, as representing a defunct, could be liable *universaliter* upon that defunct's vitious intromission, but only for the true value of his intromission, and that either by action or exception; upon this consideration, that albeit such titles have been oft-times libelled, and sometimes sentence thereupon, when none opposed, yet there had never been a decision nor interlocutor for it; and that the passive title being pœnal, *sapiens naturam delicti, non transit in hæredes delinquentis in quantum penale*; for they thought it were of dangerous consequence, if persons might be liable, not only to their immediate predecessor, but to their goodsire, grandsire, or foregrandsire's vitious intromission; but, if the vitious intromission had been established against the defunct in his own time, it would be sufficient against all his successors; otherways, after his death, they could not be put to purge the vitiosity, or to shew the manner or the warrant of his possession. But it was not determined, if action had been intented against the defunct, and he died before sentence, whether his heir would be liable, there being different cases as to that point, which required different considerations, as if the defunct died after probation, or if after litiscontestation, when at least the particulars were condescended on, and the defunct compearing, alleged nothing to purge; or if the pursuit were *de recenti*, and not long delayed, but the defunct died, the pursuer doing all diligence; or if diligence were not used, but the matter lay over; in which case, it seems little respect could be had to the intenting the action only; and it would be as little questionable, that, if probation were led, the defunct compearing, it would be as valid against him as if sentence were obtained; the middle cases are more dark, but none of them were comprehended in this decision.

Stair, v. 1. *p.* 391.