

No 163.

would belong to the King, and he would ordain the distribution thereof to the poor.

Fol. Dic. v. 2. p. 225. Stair, v. 2. p. 22.

* * * Gosford reports this case :

IN a pursuit at Moffat's instance against the minister and elders, as intromitters with the species of money, extending to L. 158, which William Moffat had by him when he died, it was *alleged*, That intromission with money above L. 100 was not probable by witnesses, seeing it constituted the defenders debtors. It was *replied*, That albeit by our law, no persons can be constituted debtors, either by paction or promise for a sum above L. 100, yet intromission with the species of money being *factum quod cadit sub sensum* is probable, as is intromission with any other goods or gear. THE LORDS did find the intromission probable by witnesses.

Gosford, MS. p. 212.

No 164.

An heir being served, and possessing by infestment, to continue till a sum was paid, his intromissions were found to extinguish his infestment.

1675. December 2. THOMSON against MOUBRAY and ALEXANDER.

JAMES FRANK having borrowed 3000 merks from James Porteous, gave him an infestment for security thereof, in some tenements in Edinburgh, and having married his daughter, who is his only child, to John Moubray, by contract of marriage with him, he disposed the said tenements and others; and by contract Moubray became obliged to pay all his debts; upon which obligation, Porteous as creditor to Frank incarcerates Moubray, and for obtaining his liberation, he granted a bond of corroboration to Porteous, relating the contract of marriage, and his obligation to pay Frank's debts, with this reservation, that he might impugn the validity of the debt, or that it was not resting unsatisfied, except Porteous's infestment, which he obliged him never to quarrel, till it were satisfied at two terms exprest in the bond. Porteous died in possession of Frank's tenements, and there succeeded to him, one Porteous who is served heir in general, and continued to possess. John Alexander, writer, having apprised Frank's right, pursued a count and reckoning against the apparent heir of the second Porteous, and obtained decret upon probation by witnesses, that James Porteous in his own time was satisfied of the whole sum, except 300 merks, and that his heir had intromitted with more than 3000 merks, and therefore the security was declared satisfied and extinct. James Thomson, one of the clerks of the Exchequer, obtained a gift of bastardy of James Porteous's whole rights, as falling in the King's hands through his bastardy, dying without lawful children, and upon the gift was infest in the tenements of the said James Frank; whereupon he did reduce the service of the said Porteous, as heir to James Porteous, and obtained decret of mails and duties against John Moubray, son-in-law to Frank, who possessed the tene-

ments. John Moubray, and John Alexander, having apprised from him and Frank, raiseth suspension of this decret, which was in absence, on this reason, that James Thomson the donatar was but substitute by the King as last heir to Porteous, and could be in no better case than Porteous, or the heir of his body, who if they were pursuing upon Porteous's right, would be excluded by the decret of declarator finding Porteous's right extinct by intromission. It was *answered* for the donatar; That the decret could not exclude him who was not called thereto, albeit he was then publicly infeft upon his gift. *2do*, Moubray, who was Alexander's author, had ratified Porteous's right shortly before he died, and obliged himself to pay the 3000 marks at two terms, yet this decret proceeds upon Porteous's own intromission, which is past from by the bond of corroboration. *3tio*, The probation in the decret was proving the intromission by witnesses, to take away an infeftment, which was not competent. It was *replied* for the suspenders; That albeit the donatar was publicly infeft, yet it was of course, and they were not obliged to call him in the declarator of extinction, seeing he was not in possession, but it was sufficient for them to call Porteous's heir served and retoured, or his apparent heir, who appeared in the process; and albeit his service was thereafter reduced, yet what he possessed *bona fide* under that title, he was not countable for, and his satisfaction by intromission was equivalent as if payment had been made to him *bona fide*, which would liberate Frank, and exclude the donatar; and as to Moubray's bond of corroboration, it was null, as extorted *metu carceris*; neither did it exclude, or discharge Porteous's intromission, nor had any mention thereof, but only acknowledged the right to be valid till it were satisfied; and witnesses were very competent to prove intromission, though to take away the infeftment, for witnesses are only excluded to take away writ, in cases where the writ is accustomed to be taken and neglected, as in discharges upon payment, which reaches not to intromission.

THE LORDS found, That the donatar was not necessary to be called in the declarator, but allowed him any competent objection against it, but repelled the objection of proving the intromission by witnesses, though to extinguish the infeftment. They found also Moubray's bond of corroboration to be valid, albeit granted in prison for a civil debt, and that it was not force; but they found the bond of corroboration did not exclude the import of Porteous's intromission.

Fol. Dic. v. 2. p. 225. Stair, v. 2. p. 373.

* * Similar decisions were pronounced, 4th February 1671, Wishart against Arthur, No 3. p. 9978. *voce* PAYMENT; and 25th January 1711, Baillic against Menzies, No 15. p. 9990. *IBIDEM.*