

that the rebellion transmits not the property. The defender *answered*, That these instances do only show that the King prefereth creditors, and takes but the benefit of what the rebel had *deductis debitis*, or what was contracted with him *bona fide*, but doth not say, that the property of the goods was not in the fisk, but in the rebel.

No 169.

THE LORDS repelled the defence. The defender further *alleged*, That not only was the defunct rebel, but that he had a gift of his escheat. The pursuer *answered*, *Non relevat*, unless it had been before the vitious intromission, or at least *ante motam litem*.

THE LORDS repelled the defence, unless the defender would allege that the gift was *ante motam litem*; for they thought, that the taking of the gift was like the confirmation of an executor, which purged vitious intromission, being *ante motam litem*.

1662. February 27.—Marjory Chalmers pursues William Dalgardno, as vitious intromitter with a defunct's goods, to pay his debt, who *alleged*, Absolvitor, because the rebel died at the horn, and so had no goods; *2dly*, The defender hath the gift of his escheat, and also is executor-creditor confirmed to him; *3dly*, The defender had a disposition of all the defunct's goods, albeit he possessed not thereby during his life, yet he might enter in possession after his death, and not be vitious intromitter.

THE LORDS found this defence relevant to elide the passive title, but prejudice to either party to dispute their right as to the simple avail of the goods; and they repelled the first defence, and found the second and third defences relevant only if the gift was before the intending of this cause.

*Fol. Dic. v. 2. p. 42. Stair, v. 1. p. 92. & 109.*

1678. January 23. ANDERSON against ANDERSON.

No 170.

If he, as executor to his brother, could deduce a third of the legacies for his pains in executing the office, conform to the act in 1617? *Alleged, imo*, The act speaks of strangers, which he is not; *2do*, It allows deduction from off legitims, but not off legacies, as is clear by Durie.

1678. January 28.—THE LORDS found the defenders having omitted to confirm some moveable sums lying in Holland, which he knew of by the count books, and intromitted therewith, they found it *dolose* omit, and they made him liable for that super-intromission, without putting the pursuer to take a dative *ad omissa*; so that the LORDS inclines to find such super-intromission no less a passive title than vitious intromission.

*Fol. Dic. v. 2. p. 43. Fountainhall, MS.*