1629. *July* 16.

MURRAY *against* ROSS, CHALMERS *against* BOSWELL, and WHITELAW *against* RUTHVEN.

No 58.
Proponing a defence of payment is not such a *gestio* as to make the defender liable in another process.

WALTER MURRAY pursued an action of registration against Walter Ross, as behaving himself as heir to his father, by payment of his debt, in so far as John Monro having obtained a decreet of registration against the defender as lawfully charged to enter heir to his father, and having charged him thereupon, he suspended upon a reason of payment made by his father to John Monro, which he referred to John's oath, and next he offered to renounce. In which suspension the term was circumduced for not producing the renunciation, and likewise the letters were found orderly proceeded, in respect the charger declared that Walter's father had made him no payment. In respect of this exception of payment, in proving whereof the defender succumbed, the pursuer contended he was heir to his father *in sempiternum*, especially he having made payment conform to the said decreet of suspension. *Replied*, These sentences being recovered against him only as lawfully charged to enter heir, the furthest they could work was only in favours of the obtainers of the decreet, and for payment of the debts therein contained, but could never work in favours of the pursuer, who was a third party. *Duplied*, The exception of payment and sentence following thereupon, he compearing and succumbing, makes him heir to all the world, that had any just action against him. THE LORDS found that it were hard to make a man heir for payment of his father's debts, and so assoilzied him from that action.

1631. *January* 26.—THE like was adjudged betwixt James Chalmers of Gatgirth and David Boswell of Auchinleck, against whom he sought to have a bond of 1000 merks transferred as heir to his father by intromission with his heirship goods, for proving whereof he produced a decreet given against him for null defence, and could only work in his favours that obtained it; but now against this pursuer he would allege that his father was such a person that could not have an heir. The exception was sustained and received.

1630. *July* 10.—The same was found betwixt Patrick Whitelaw and the Laird of Ruthven, That a decreet obtained at a party's instance against another as lawfully charged to enter heir, can work in no other's favours but only his that obtained the decreet.

*Fol. Dic. v.* 2. *p.* 32. *Spottiswood*, (HEIRS.) *p.* 141.

*** The first of these cases (Murray against Ross) is reported by Auchinleck:

1629. *July* 16.—If a decreet be obtained at the instance of a creditor against an apparent heir charged to enter heir, the decreet will not prove him to

No 58. be heir if he be pursued at the instance of a third person, but he must first be charged *de novo* to enter, as was done by the other party.

*Auchinleck, MS. p.* 4.

*** The same case is also reported by Durie:

The defender being charged for payment of his father's debt, as behaving himself as heir to him, *hoc medio*, in so far as he being lawfully convened to enter heir to his said father by another creditor, in that process he compeared and took a day to renounce to be heir, and at the term assigned thereto having failed to produce a renunciation, decreet is given against him, and the same decreet being thereafter suspended upon a reason alleged by him, bearing payment to have been made by his father of the said debt, wherein having succumbed, the letters were found orderly proceeded against him, for obedience whereof he had paid that debt, whereby he had behaved himself as heir; but the Lords found, that this proved him not to be heir, and that sentence could not be given against him in any matter betwixt other parties, besides those contained in the former sentence against him, wherein he being only decerned as lawfully charged to enter heir, that decreet so given was found would not prove in any other process against him, but that the like charges to enter heir ought to be used by any person who would pursue *super hoc medio*, neither did the succumbing in that reason of suspension, or the preceding failzie to renounce, or payment conform to the sentence to the creditor, make him liable to other creditors, as if he had behaved himself as heir to his father.

Act. ——. Alt. *Gibson.*

*Durie, p.* 463.

*** Whitelaw against Ruthven is also reported by Durie:

1630. *July* 10.—The Lord Ruthven being pursued by the said Patrick, to pay his father's debt, as lawfully charged to enter heir to him; who offering to renounce, and the pursuer *contending*, That he could not be heard to renounce, because there was a decreet obtained against him, as charged to enter heir at another creditor's instance of before, which decreet standing unsuspended or taken away, behoved so to work against him, that he could never be heard to renounce to any other creditor so long as that decreet stood; for if this were permitted, that he might renounce against one creditor, and let sentence pass against him in favours of another, as lawfully charged to enter heir, by collusion, or favour of preferring one to another upon any other respect, then he might take back again upon such conditions as the parties could agree upon, the land which the creditor whom he favours should comprise for a debt possibly not owing, and bruik the same to the prejudice and defraud of other creditors, which were unjust; notwithstanding whereof, it was found that he

might renounce, for the foresaid inconvenience was not to be respected; seeing an adjudication upon a party's renunciation to be heir, is more summarily expede than a comprising upon a sentence against the party as lawfully charged; seeing there must another special charge precede before comprising, which is not needful in adjudications; and if there be any collusion or unjust ground of the sentence, or no just debt, the parties interested thereby have action of the law against the same. No 58.

Clerk, *Gibson.*

But the same day, in a process wherein Hay was clerk, a sentence betwixt a defender and another pursuer, obtained against this same defender convened as intromissatrix to pay her husband's debts, proceeding upon lawful probation wherein she was proved intromissatrix, was sustained in this process to prove her intromissatrix, she being so convened by another creditor; and it was not found necessary to prove her intromissatrix *de novo* again; but this sentence, as said is, proceeded upon probation by witnesses; whereas if it had proceeded upon contumacy to give her oath, it could not have proved out of that process betwixt other parties. See RENUNCIATION TO BE HEIR. RES INTER ALIOS.

*Durie, p.* 529.

*** Chalmers against Boswell is also reported by Durie:

1631. *January* 26.—L. GADGIRTH pursuing the L. Affleck, for transferring of a bond registrate against his father in the defender, as behaving himself as heir to him by intromission with his heirship goods, and for verifying thereof, produces a decreet given against him at another party's instance, *hoc nomine* as behaving himself by the said intromission with the said heirship goods as heir, which being proved in that process by sufficient probation of witnesses, and so found and decerned, that decreet standing unreduced, the same must prove him heir in all other processes pursued against him *eo nomine*; and the defender *alleging*, That that decreet cannot prejudge him, but in that process only, where it is so found, and cannot prejudge him of his defence to allege here, or in any other action, that his intromission cannot make him heir, because his umquhile father being such a person that in law would nor could have any heir, which was not proponed in that process wherein he compeared not, and decreet was given against him then absent;—the LORDS found that that decreet, albeit done upon probation, should not prove the defender heir *extra illum processum*; and therefore permitted the defender to purge that alternative, whereby he was convened as behaving himself as heir; which the LORDS found he might do, notwithstanding of that sentence; for, seeing he might reduce that sentence, if there was reason so to do, against the obtainer thereof, much more might he oppone that reason by way of exception against another party, user of the same against him; and, albeit that decreet, while it stands,

No 58. might prove the defender to have intromitted with these goods, which might have been heirship goods of any person, who in law might have an heir, yet the same will not thereby prove him heir, if he may qualify that he was not that person who might have an heir, albeit he had intromitted therewith.

Act. *Miller.* Alt. *Nicolson.* Clerk, *Gibson.*

1631. *July* 13.—The deceased L. of Affleck, as cautioner for the L. of Lesmore, being debtor by bond to one Campbell in 1000 merks, the right of which addebted bond, by progress, being assigned to Gadgirth, he pursues transferring *active* in himself, and *passive* in this Laird of Affleck, as behaving himself as heir to his umquhile father, by intromitting with his heirship goods; and the defender *alleging*, That he could not be convened *hoc nomine*, because his father when he died was not that person who could have an heir, seeing he was not then prelate, baron, nor burgess; for he was lawfully denuded of the property of all his lands before his decease in the defender's favours without any reservation of his liferent; and the pursuer *replying*, That notwithstanding thereof, he ceased not to be a person who might have an heir, seeing he offered to prove that his said umquhile father retained the possession of all his lands to the hour of his decease, notwithstanding of the right made to his son; likeas, the defender acknowledged him to be such a person as might have an heir, and that he was his heir, in so far as, immediately after his father's decease, he and the rest of the defunct's bairns, having intromitted with the whole moveables, the defender then put apart and distinguished the moveable heirship from the rest of the moveables, and the rest of the bairns intromitted with all the rest except the heirship; which heirship so distinguished, was intromitted with then by the defender's self, which being then done by him being *major et sciens*, makes him liable as heir; likeas, there is a decreet standing obtained against him, albeit at another party's instance, as behaving himself by intromission with his father's heirship proved in that sentence; and the defender *alleging*, That this intromission foresaid with goods cannot be found as intromission with heirship where the owner was not a person who might have an heir in law for the reason alleged; but the most he could thereby be subject in, was to make the same forthcoming to the creditor, and not to make him liable to all the defunct's debts; and the decreet ought not to be respected, being given against him, not compearing; and now he compears and propones this defence, which would have elided that pursuit; and this is a decreet at the instance of another party, which cannot prove at the pursuer's instance nor work in his favour;—the Lords, nevertheless, repelled the exception in respect of the reply, which they admitted to the pursuer's probation and to be proved *conjunctim*; for they found the father's retention of possession, and the eldest son's separating and meddling with the heirship *scienter*, when he was major, and the decreet foresaid standing upon probation,

was enough to make him liable for his father's debt, as he who had behaved himself as heir. See RES INTER ALIOS. No 58.

Act. *Stuart.* Alt. *Nicolson & Gibson.* Clerk, *Gibson.*

*Durie, p.* 559. & 595.

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1672. *July* 30. FOWLIS *against* FORBESSES.

No 59.
An apparent heir disponed his father's lands, taking the disponee bound to relieve him of debts, for which the disponee granted him bond for a certain sum. This was found a behaviour, though nothing followed thereupon; neither the apparent heir having been infeft, nor the bond paid.

ROBERT FOWLIS Bailie of Edinburgh, having obtained decreet against the three daughters and heirs-portioners of Mr William Forbes, advocate; one of them being married to Mr John Strachan, suspends, and *alleges* that she does not represent her father; and, albeit there be produced a right granted by her to Tolquhoun of her proportion of her father's lands, and of all right she can succeed to, and that he is obliged to relieve her of all debts she can be liable to, and hath given her bond for 3000 merks, yet there hath nothing followed thereupon; for neither is she infeft as heir-portioner, nor Tolquhoun infeft, nor hath he paid her any money, but suspended; 2*do*, Albeit she were actually heir-portioner she can only be liable for the third part of the debt. It was *answered*, That she having disponed her father's heritage, and gotten bond for a sum of money therefor, she has unquestionably behaved herself as heir, and hath apprised Tolquhoun's land upon the 3000 merks; and therefore should be liable, not only for her proportion, but in so far as the benefit of her succession reacheth to, and she may pursue the rest for her relief, rather than put the pursuer, who is a stranger and a creditor, to divide his action or execution against many heirs-portioners.

THE LORDS found the suspender liable upon the rights betwixt her and Tolquhoun for her third part of this debt, as one of the three heirs-portioners; and declared, that if the pursuer using diligence, should not recover payment through their insolvency, the Lords would take it into consideration, how far the suspender should be liable more than for her third part.

*Fol. Dic. v.* 2. *p.* 31. *Stair, v.* 2. *p.* 114.

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1675. *January* 20. CARFRAE *against* TELFER.

No 60.

A PERSON being pursued as representing a debtor, upon that passive title, that he had behaved himself as heir to the defunct, in so far as, being convened at the instance of another party, he had proponed a peremptory defence; the LORDS found, That the proponing of a defence upon payment or such like, was