

1676. July 19. & December 13.

- NEVOY against LORD BALMERINO.

No 85.

IN the case Glendinning against Earl of Nithsdale, *supra*, an apparent heir having granted a simulate bond, in order to lead an adjudication of his predecessor's estate, his intromission, by virtue of this title, was not reckoned a behaviour; but, upon that occasion, the LORDS made the act of sederunt, 28th February 1662, declaring, that it should be *gestio pro hærede* to intromit upon such simulate title, whether the apprising was expired or not. This act was extended to intromission had in virtue of an apprising led upon the apparent heir's just and true debt, contracted by him before he became apparent heir, without any view to be the foundation of an apprising against the predecessor's estate.

Fol. Dic. v. 2. p. 33. Stair. Dirleton. Gosford.

* * * This case is No 51. p. 9694.

1676. November 8.

JEFFRAY against MURRAY.

No 86.

A PARTY being pursued upon the passive titles, and in special upon that of charged to enter heir; and having offered to renounce, it was *replied*, That he could not, seeing *res* was not *integra*, in respect he had granted a bond, of purpose that thereupon the estate might be adjudged; the LORDS found, that, albeit he had not granted the bond upon the design foresaid, yet, the estate being adjudged and incumbered by his deed, he ought to be liable to the defunct's creditors *pro tanto*, or to purge.

It is thought, that if the apparent heir should *dolose* grant a bond, that the defunct's estate might be thereupon adjudged, he ought to be liable *in solidum*; but if he grant a bond which is a lawful deed, and thereupon his creditor adjudge, which he could not hinder, it is hard to sustain a passive title against him; unless his creditor, having adjudged, were satisfied by that course; in which case, seeing the defunct's creditors are prejudged, it is reason he should be liable *pro tanto*.

Fol. Dic. v. 2. p. 33. Dirleton, No 380. p. 185.

Clerk, Gibson.

* * * Stair reports this case.

No 86.

In a process betwixt Jeffray and Murray, the defender being pursued as lawfully charged to enter heir for a defunct's debt, offered to renounce; the pursuer *answered*, That a renunciation is not relevant, unless it were made *re integra*. But, in this case, the defender hath granted bond for her proper debt, whereupon the defunct's heritage is appraised or adjudged, and whereby the pursuer will be excluded or postponed. It was *replied*, That the granting of the bond by an apparent heir, though apprising or adjudication followed, doth not infer the passive title of behaviour, unless the apparent heir take right to, and intromit by the said adjudication or apprising, as is clear by the act of sederunt upon the Earl of Nithsdale's case, No 84. p. 9738. the 28th day of February 1662. It was *duplicated*, That the general passive title of behaviour, making the apparent heir liable to the defunct's whole debt, is not here insisted upon, but the passive title of charged to enter heir, which reaches only to the debt, whereupon the charge is raised, and which is elided by a renunciation *re integra*, which cannot be where the defunct's heritage is affected for the apparent heir's proper debt.

THE LORDS found the reply relevant, that the defunct's heritage was affected for the apparent heir's proper debt, by apprising or adjudication, to exclude the apparent heir's renunciation, and to make her liable for this debt, unless she purge the apprising, or adjudication of the defunct's heritage for her own debt, it not having been the defunct's debt.

Stair, v. 2. p. 460.

1682. November 3.

HENRY BLYTH against JAMES LAWSON.

No 87.

MR HENRY BLYTH being a creditor of umquhile James Lawson of Brotherstones, intents process against James Lawson, as lawfully charged to enter heir to umquhile James Lawson, his father, the debtor, and as he who being liable to his brother and sister for L. 1000, and also, as having granted bond to one Dunlop for a certain sum of money, upon both which grounds, there was a comprising of his father's lands of Brotherstones led against him; the ground of this action was, that he had suffered his father's estate to be comprised for his own debt, and so Blyth, a creditor of the father's, was secluded. It was *alleged* for the defender, That the Earl of Nithsdale's practise (*supra*) was only in the case where bonds were granted by the apparent heir, whereupon comprising of the defunct's estate was deduced for the heir's behoof; but, in this case, the comprising was not to the defender's behoof, neither has the pursuer done diligence to affect the estate *debite tempore*. THE LORDS found, that, albeit there was no