

No 45. dip upon that point as to distinct exceptions instantly verified after litiscontestation, albeit competent and known before.

Stair, v. 2. p. 308.

1685. *January.* MAXWELL *against* CORSAN.

No 46.

Found in conformity with Rolison against Sinclair, No 44, R. 9687.

JOHN MAXWELL of Barncleugh having pursued John Corsan of Milnehole, as representing Thomas Corsan his uncle, for payment of a debt, and having insisted upon that passive title, that the defender had behaved himself as heir to his uncle, by intromitting with the rents of a tenement of land wherein he died infest;—*alleged* for the defender, That he stood infest in the lands as heir to his grandfather, and not as heir to his uncle. *Answered*, That the defender's infestment, as heir to his grandfather, could not be represented, because Thomas Corsan his uncle, who was the debtor, was infest as heir of conquest and provision to the grandfather; so that the defender was *in mala fide*, to pass by his uncle and enter heir to his grandfather; especially seeing the time of the defender's service, his uncle's sasine was produced, and instruments taken thereupon in the clerk's hands; and upon that ground, had raised a reduction of the defender's service and infestment. *Duplied*, That, however that must be a ground to reduce the defender's infestment, yet so long as it stands unreduced, he must lawfully intromit with the rents, which cannot infer a passive title against him; as also, Thomas Corsan the uncle's sasine is null, being the assertion only of the town clerk, without any warrant. THE LORDS repelled the defence, and found the reason of reduction relevant, the pursuer producing the warrant of the uncle the debtor's sasine *cum processu*, and found the defender liable for repetition *in quantum lucratus*, and assigned a term to the pursuer to prove the defender's possession and quantity of the rent, and to produce the warrant of the uncle's sasine, and to prove that protestations were taken against the defender's service, and that the defender's sasine was then produced.

Fol. Dic. v. 2. p. 30. Sir P. Home, MS. v. 2. No 669.

No 47.

A person had two dispositions of his father's whole estate, the one of heritage, and the other of moveables. He having intromitted with the heirship

1707. *July R.* INGLIS *against* ELPHINSTON.

THERE was a bond due by Elphinston of Quarrol to Bruce of Powfoulis, whereto Alexander Inglis writer in Edinburgh has now right, who pursues this Elphinston of Quarrol upon the passive titles; wherein an act being made, there was a clear probation led, that he had intromitted with his father's whole estate, both heritable and moveable, and entered to the possession immediately upon his death, and had likewise meddled with the charter-cest; which coming this day to be advised, Quarrol alleged his father was but cau-

tioner in this debt for one Nisbet, and that he bruiked the estate by singular titles, viz. a disposition both to the lands and moveables prior to the contracting of this debt, to which he ascribes his intromission and meddling with the charter-chest. *Answered*, This can never purge his vitious intromission, because, before he opened his father's charter-chest, and meddled with his papers, he ought to have obtained the warrant of a Judge, to have inventoried the same, as the Lords found in the case of Innes of Coxton and Duff of Drummore, No 28. p. 9670. *2da*, He has disposed of the visible heirship, which is expressed and contained in none of his dispositions, and so he must be still *passive* liable, especially seeing he possesses 5 or 6,000 merks by year by his father, the debtor in this bond. *Replied*, Where a son has the whole heritage disposed to him, he needs seek no warrant to open the charter-chest, and intromit with the evidents of the lands disposed, as was decided in the case of Urquhart against Sharp, No 31. p. 9673. And as to the second of the heirship, he had two dispositions, one of the heritage, and another of the executry; and certainly it behoved to be carried and comprehended under one of the two, though not *per expressum* and *nominatim* disposed. THE LORDS waved the first anent the charter-chest, as not so clear, and laid hold upon the second anent the moveable heirship; and found it was a separate subject, and not expressly conveyed, and therefore his intromission therewith made him liable *passive*. Some doubted if this would hold, where the debt exhausted both the moveable heirship and the rest of the executry; but others thought, even in that case, his intromission was unwarrantable.

No 47.
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The Lords
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sion made him
liable *passive*.

Fol. Dic. v. 2. p. 30. Fountainball, v. 2. p. 376.

S E C T. VII

An apparent heir discharging or renouncing any right competent to him.

1636. February 24. L. MEIDHOPE against SIR ROBERT HEPBURN'S SONS.

THE general heir of unquhile Sir Robert Hepburn, and the heir of the second marriage, being both convened for payment of a debt owing by their unquhile father to the goodman of Meidhope; and the general heir offering to renounce, the heir of provision *answering*, That he could not, seeing he had behaved himself as heir to him, in so far as he had granted to his father a discharge of all heirship goods and gear which might befall to him, and which he

No 48.
A presump-
tive heir re-
nouncing in
his father's
favour, his
interest in the
heirship
moveables
will not im-
post behavi-