

## SECT. V.

[How and to whom competent to insist upon this Passive Title.

1617. December 18. LORD GAIRLIES *against* KILPATRICK.

No 185.

IN a reduction pursued by the Lord Gairlies against John Kilpatrick, the LORDS repelled an exception, bearing, that the Lord Gairlies was heir to his goodsire in the lands of Dalswinton, in respect his goodsire was infest as heir to his grandsire in the said lands.

*Item*, they repelled an exception, that the Lord Gairlies' father was universal intromitter with his goodsire's goods and gear, because, that *eo nomine* he could not be obliged to warrant the heritable infestment, notwithstanding that he had not an heir.

*Fol. Dic. v. 2. p. 43. Kerse, MS. fol. 141.*

1630. November 20. PRIDE *against* THOMSON; and STEWART *against* STEWART.

No 186.

ONE Thomson being pursued as heir of provision to her sister, for registration of a bond of L. 500, made by her said umquhile sister to Thomson, her brother, whereto one called Pride was made assignee, and who pursued that registration;—the defender, who was convened as heir of provision to her sister, the debtor, *alleging*, That the general heir ought to be first called and discussed;—this allegiance was repelled, because the cedent, who was creditor, was that person who would have been general heir, and he compeared and renounced to be heir, albeit he was that person, who, in law, would have been general heir, if he had pleased to serve himself general heir to her, and assisted his assignee in this pursuit; so that the LORDS sustained the process against the heir of provision. And it being further *alleged*, That albeit he renounced to be heir, yet thereby he ought not to be free of this debt, but the pursuit therefore was proper not the less against him, and not against this defender, because he had intromitted with the defunct's goods and gear, whereby he being vitious intromitter, he ought to be liable to the defunct's creditors for their debts, in respect of his vice, and consequently he could pursue none other but himself therefore, whereby the same was confounded;—and the pursuer *answering*, That albeit a creditor have action in law against the intromitters with the debtor's goods, to make him thereby answerable to pay the debts, yet that ought not to be received by way of exception, to allege the creditor, when he is pursuing for his debt, to be intromitter, there-through to exclude his whole

In a process for payment of a bond due by the defunct, at the instance of the heir of line, who had no benefit by the succession against the heir of provision, the defence was, that the pursuer was vitious intromitter with the goods of the defunct, and so the debt was extinguished *confusione*. The LORDS refused to sustain vitious intromission by way of defence, but sustained compensation to the extent of the pursuer's intromission.

No 186.

debt, albeit he had intromitted (which is not granted) with a small quantity, which could not satisfy the half of his debt;—the LORDS found this allegeance of intromission relevant, only for such quantity as the excipient would condescend upon, and prove was intromitted with by the creditor, to compensate the debt acclaimed *pro tanto*, and no further; and found, that it could not be received thereby, to make him as a vitious intromitter liable for the whole, if the intromission would not extend to so much, albeit he might be pursued that way by another creditor of the defuncts *in solidum* for the whole, by way of action, which was found ought not to be received by way of exception. See July 21. 1630, Fairly *contra* Fairly, No 3. p. 3560.

Act. Gibson.

Alt. Dunlop.

Clerk, Hay.

\* \* \* Under the above case Durie has the following note :

Upon the 17th January 1632, Stuart *contra* Stuart, one of two daughters, only bairns to their father, of two sundry wives, having pursued her elder sister, as charged to enter heir to her father, and upon her renunciation having intended adjudication against her, the process of adjudication and the said decret were sustained, albeit the eldest sister was only called, seeing the other sister pursuer could not pursue herself, and she renounced to be heir also; which was found upon both their renunciations; this being proponed by another creditor of their father, who was seeking adjudication also against them, in which process the said creditor compeared; and it was found, that her process should go on with this creditor's *pari passu*.

Fol. Dic. v. 2. p. 44. Durie, p. 540.

No 187.

1671. January 21. CAPTAIN RAMSAY *against* WILLIAM HENDERSON.

CAPTAIN RAMSAY, as assignee constituted by Eupham Scot, to a sum of 2000 merks, addebted by umquhile Mr Charles Henderson, pursues his heir for payment, who *alleged*, *Absolvitor*, because this debt being due originally by Mr Charles Henderson, and by the said Eupham Scot, who being vitious intromissatrix with his goods and gear, and having been assigned to this sum herself, she became creditrix as assignee, and debitrix as vitious intromitter, *et confusione tollitur obligatio*, and this pursuer having right from her, can be in no better case than she. It was *answered*, That vitious intromission was not competent by way of defence.

THE LORDS found that whatever might be said, if the vitious intromitter had been pursuing, whether the defence might have been competent, yet found it not competent against the assignee, seeing the cedent was not *in campo*, and probation behoved to be used against her.

Fol. Dic. v. 2. p. 44. Stair, v. 1. p. 705.