

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.

1672. July 30.

FOWLIS against FORBESSES.

ROBERT FOWLIS Bailie of Edinburgh, having obtained decret 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 infest as heir-portioner, nor Tolquhoun infest, nor hath he paid her any money, but suspended; *2do*, Albeit she were actually heir-portioner she can only be liable for the third part of the debt. It was *answered*, That she having disposed 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.

1675. January 20.

CARFRAE against TELFER.

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

No 59.

An apparent heir disposed his father's lands, taking the dispoinee bound to relieve him of debts, for which the dispoinee granted him bond for a certain sum. This was found a behaviour, though nothing followed thereupon; neither the apparent heir having been infest, nor the bond paid.

No 60.

No 60.

not such a deed as could infer the passive title of behaving, unless it were administered with intromission or otherwise.

Reporter, *Newoy.*

Clerk, *Hamilton.*

Fol. Dic. v. 2. p. 32. Dirleton, No 223. p. 104.

* * * Stair reports this case :

1675. *January 21.*—JAMES TELFER, as assignee to a disposition granted by Mr John Corsan, pursues John Corsan, his oye, for implement thereof, and insists upon this passive title, that the said John Corsan being pursued by another creditor of his goodsire's, did propone a defence of payment and made litiscontestation thereupon, and at the term assigned failed in probation, and so was decerned, which a behaving as heir, and an owning and immixtion in the inheritance; seeing in all processes against apparent heirs, if they propone payment, they liberate the pursuer from proving the passive titles; because by proponing upon the defunct's right they behave as heirs. It was *answered*, That albeit custom hath exempted pursuers from proving the passive titles when the defenders proponed payment, because they ought not to delay the pursuer, if they will not represent; yet that never was, nor can be extended as a general passive title to other processes.

THE LORDS found the condescence upon this passive title, as aforesaid, not relevant.

Stair, v. 2. p. 307.

* * * This case is also reported by Gosford :

IN a pursuit at the said James's instance against John Corsan, for implement of a disposition made to his father, upon this passive title, that he being pursued by other creditors of his father's as representing him, he did propone peremptory defences of payment, for not proving whereof he was decerned; it was *alleged*, That albeit he had proponed peremptory defences against another creditor, which, if he had succumbed to prove, would infer a passive against him to make him liable for that debt; yet that being *res inter alios acta*, and he not being liable upon any of the passive titles, could not be extended to another, unless they could condescend upon some other passive title of behaviour. THE LORDS did sustain the defence, and found that the title of behaviour as heir, not being any otherwise offered to be proved than by proponing a defence in one process, ought not to be extended against the apparent heir, to make him liable to his predecessor's whole debts due to other creditors against whose titles he proponed no defence at all;—the only reason of finding him liable upon proponing of a peremptory defence being, that thereby he secluded that creditor pursuing from having a present decret whereby he might

affect the debtor's estate by a comprising or adjudication upon the apparent heir's renunciation; which reason could not be pretended by this pursuer, to whom he was willing to grant a renunciation, so that he ought to condescend upon a passive title if he would have him personally liable.

Gosford, MS. No 739.

No 60.

1698. December 13. JOHN MOFFAT *against* BROWNS and AITCHESON.

MOFFAT pursuing mails and duties of a tenement and croft of land in Kelso, as being infest on a feu-charter flowing from the Earl of Roxburgh; they defend with a wadset from his father. He repeats a reduction, that it was a *non habente potestatem*, his father being never heritor, but only a kindly rentaller during his life. They oppose a pursuit at their instance against him, as representing his father on the passive titles, and so was bound to warrant his father's deed; and the passive title insisted on was, that he had got the feu-charter from the Earl, his superior, in contemplation that his father and predecessors had, past all memory, been kindly rentallers in that land; and so he having got this benefit by his father, he ought to represent him. *Answered*, His father's right was only a precarious rental, and at best expired with his life; and so the continuation of his son's possession, or the narrative of his charter, imports no passive title, especially seeing it bears payment of sums of money, besides the kindness. THE LORDS were clear this could never infer a passive title. But some of them thought, if a rentaller's son get a feu for paying 500 merks, which the superior would not have granted to a stranger under L. 1000, in that case, though he could not be liable personally, yet the land might be affected *in quantum erat lucratus*. The President was of a contrary opinion; but this was not decided. There was another ground insinuated, viz. that the Earl had entered into a contract with his rentallers to grant them feus at such a rate, and that Moffat's father was one of them. This the LORDS thought relevant; for then his father was a feuer upon the matter, and he succeeds to him therein; but the LORDS appointed them to be farther heard upon this.

Fol. Dic. v. 2. p. 31. Fountainhall, v. 2. p. 24.

No 61.

A feu-charter granted to a young man in contemplation that his predecessors had been rentallers of the lands, found not to infer behaviour.

1715. June 23.

JAMES FORRET *against* The REPRESENTATIVES of JAMES CARSTAIRS.

In a process of aliment at the instance of Forret against the Children of Bailie Carstairs, as representing Mr Thomas Finlay, schoolmaster at Drumeldrie, whom the pursuer, who kept a public boarding-house, had entertained several years; these three points coming to be discussed, viz. 1^{mo}, How far

No 62.

The proposing the peremptory defence of prescription found to infer acknowledgment of the passive titles.