

ed against the rigour of an expired apprising upon small sums, no way adequate to the worth of the land.

No 140.

Fol. Dic. v. 2. p. 186. Stair, v. 2. p. 279.

1674. December 10. AUCHINTOUL against INNES.

No 141.

THE LORDS found, That a person being pursued as representing his father, or other predecessors, and denying the passive titles, the same ought to be proved; and that the defender, by proponing a defence *in jure*, as in the case in question, that annuities were discharged by the late proclamation, does not confess the passive titles; but if he should propone a defence founded upon a right in the person of his predecessor, it would conclude him; so that he could not pretend that the passive titles should be proved.

Reporter, *Newbyth*.

Fol. Dic. v. 2. p. 187. Dirleton, No 199. p. 88.

1675. February 6. BURNET against M'CLELLAN.

No 142.

BURNET having pursued M'Clellan for payment of a debt of his son's, as behaving himself as heir to his son, by intromission with the duties of the lands, wherein his son died infeft, and litiscontestation being made, and the cause come to be advised; the defender *alleged*, That he could not be decerned as heir to his son, because he instantly verified, that he had another son, who is now instantly at the Bar, who did exclude him.—It was *answered*, That this defence is not competent in this state of the process, though it be instantly verified, because it cannot be pretended new come to his knowledge, seeing the father could not be ignorant that he had another son; so it was *dolose* omitted, to postpone the pursuer, who hath run a course of probation by witnesses. And the cause being now concluded,

Consequence where a defence has been *dolose* omitted.

THE LORDS, before answer, having proponed to the son, whether he would *suscipere judicium*, and answer in this process, as if he had been cited, which he having undertaken, the LORDS assolizied the father, and allowed the pursuer to insist against the son upon the passive titles, and him to make his answer thereto.

Stair, v. 2. p. 318.

* * * Dirleton reports this case :

A FATHER being pursued, as behaving himself as heir to his son, and litiscontestation being made, and witnesses adduced; the time of the advising, it was *alleged*, That the father could not represent his son as behaving, because

No 142. the defunct had a brother, who was produced, and at the Bar: Whereto it was answered, That, *in hoc statu*, the defence was not receivable; and it could not be said to be *noviter veniens*, seeing the father could not be ignorant that he had another son.

THE LORDS, in respect of the state of the process, would not receive the defence, though verified *instanter*, unless the son would *suscipere judicium*, and be content that the process should proceed as against him; which appears to be hard; seeing that which was to be proved was not only that the defender intromitted, but that he was apparent heir; and *in casu notorio*, no probation was to be respected to the contrary; and though the father could not but know that he had a son, yet he might be ignorant that his son would be preferred to himself, as to the succession of his own son; and *in damna vitando, ignorantia juris* is excusable.

Clerk, Jo. Hay.

Dirleton, No 246. p. 117.

1676. February 22. The LAIRD OF INNES against GORDON.

No 143.
Exceptio falsi omnium ultima hinders not action of improbation and reduction, both on falsehood and nullity.

GORDON of Buckie having granted a bond of L. 1000 to Walter Ogilvie, his half-brother, *in anno* 1626, and he having assigned the sum to the Laird of Innes, he pursues this Buckie, as representing his goodsire, granter of the bond, who proponed a defence upon two discharges, one of 300 merks, and the other of 1200 merks. Innes raised reduction and improbation of the last discharge; *1mo*, As being null by the act of Parliament, as wanting the writer's name; *2do*, As being false; and before litiscontestation Innes having petitioned that Buckie might abide by the bond, and that some old witnesses might be examined, to remain *in retentis*, for proving that Walter Ogilvie neither was, nor could be at Banff (where this discharge bears to be subscribed) upon the 22d day of January 1629 years, because he was at Edinburgh upon the 26th day of January 1629 years, as appears by a letter of Slains, subscribed by him of that date, wherein Philorth and one Gardner are witnesses; who being examined, did depone, that Walter Ogilvie was several weeks before the letter of Slains in Edinburgh, agreeing about the slaughter of his brother. Innes now insisting upon the nullity in the foresaid article in the indirect improbation, the witnesses inserted being dead; it was *alleged* for the defender, That the pursuer could not insist upon the nullity, having once insisted upon the improbation, which is *omnium exceptionum ultima*, and having put the defender to abide by, and examined witnesses upon the indirect articles.—The pursuer answered, That though improbation be the last exception, it is not here proponed by way of exception, but by way of action; and when the same libel contains both improbation and reduction, the pursuer may insist jointly upon both;