

of his having attached in Scotland Samuel Brown's share of the succession, the latter, for his relief, pursued Mr Blackburn, as having intromitted with the effects primarily liable for debts of that sort. In support of this action, the pursuer

No 72.

Pleaded; By the acceptance of a considerable sum as a *surrogatum* in place of the whole free executry, the defender must be understood to have intromitted to that extent with the moveable estate of the defunct; otherwise, it would be in the power of the executors, or residuary legatees, by agreements of this kind, in defraud of creditors, to secure the whole funds to themselves.

Answered; Had the residuary legatee, by the interposition of a third party, intromitted with the moveable funds of the deceased, his situation must in all respects have been the same as if he had taken effects to the same extent directly under the will. But here there were no effects to be the subject of intromission. The bargain, therefore, concerning the eventual profits arising from the bequest in favour of the defender, not having in the least diminished those funds out of which the pursuer could hope for relief, it affords no foundation for the present claim. July 5. 1666, Scots against Affleck, No 50. p. 9694.

THE LORDS sustained the defences. See No 21. p. 5228.

Lord Reporter, Hailes.
Clerk, Home.

Act. Rae.

Alt. Armstrong, Ilay Campbell, Crosbie.

C.

Fol. Dic. v. 4. p. 43. Fac. Col. No 66. p. 104.

1783. February 26. JOHN BLOUNT against JOHN NICOLSON.

BLOUNT was creditor to the father of Nicolson, who died the proprietor of a tenement in the town of Dumfries. In this tenement Nicolson was cognosed heir to his father by the Magistrates of the town *more burgi*. He afterwards disposed the subjects to certain persons, as trustees for his father's creditors; having done so by the direction of a meeting of these creditors.

Blount then instituted an action on the passive titles, against him as having entered heir *more burgi*, and likewise as having granted the disposition above mentioned.

Pleaded for the defender; 1st, By entering *more burgi* heir to his father in a special subject only, he is not universally liable for the debts of the predecessor, but only *in valorem*, in the same manner as if he had been an heir of provision. 2dly, The disposition was *bona fide* granted at the desire, and for the benefit of creditors, and ought not to infer to him the penal consequence of a passive title.

Answered; There is no distinction known in law as to the extent of representation between entering heir *more burgi* and service in the more regular and

No 73.
Passive title, whether inferred, universally, by entering heir *more burgi*, or by *bona fide* disposing the heritage to trustees for the predecessor's creditors.

No 73.

formal manner. If an heir wishes not to represent universally, he may resort to the *beneficium inventarii* introduced by the statute of 1695, c. 24. That is the proper and only resource in such a case; and they who without recurring to it chuse to take upon themselves the general character of heirs, should not pretend to decline an universal representation. With respect to the disposition, as it would be clearly of evil consequence to creditors, if an heir, without subjecting himself to the debts of his predecessor, were at liberty to convey his predecessor's subjects to any person whom he might think proper to nominate in the capacity of trustee; so that conveyance ought to infer a passive title.

This question having been reported to the Court by the Lord Ordinary, the "LORDS, in respect the only passive title acknowledged by the defender was that of being cognosced heir to his father *more burgi* in a tenement in Dumfries, which he conveyed to trustees for behoof of his father's creditors, sustained the defence."

Lord Reporter, *Braxfield*. Act. *Maclaurin*. Alt. *Corbet*. Clerk, *Menzies*.
S. *Fol. Dic. v. 4. p. 42.* *Fac. Col. No 100. p. 159.*

1784. July 7.

The CREDITORS of PROVOST AYTON *against* MARGARET AYTON.

PROVOST AYTON having been vested in an estate, in trust for Mr Colvill, Margaret Ayton, his daughter, agreed, after his death, to grant a reconveyance.

As Provost Ayton had executed a general disposition in favour of his daughter, she might have fulfilled her agreement, without the intervention of a service, or incurring an unlimited representation; but the doer of Mr Colvill, at whose expense the business was carried on, being ignorant of that circumstance, expedite a general service in her behalf, as heir to her father, after which she redispensed the estate to Mr Colvill.

Some time afterwards she was pursued by the Creditors of Provost Ayton, on the ground of the service just now mentioned.

The Lord Ordinary assolizied, "in respect there was sufficient evidence that the general service was not taken in order to vest any right of succession, but merely for the purpose of renouncing a trust, and that the pursuer declined any proof of actual intromission."

The pursuer reclaimed; when it was

Observed on the Bench; To admit the circumstances stated in the Lord Ordinary's interlocutor as a defence, by way of exception, against the known legal consequences of a general service, would be a dangerous innovation

No 74.
General service as heir of line, an universal passive title till set aside by reduction.