

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-