

1697. July 21.

JOHNSTON *against* JOHNSTON:

No 8.

A person having appraised lands on a bond granted by the apparent heir, and the apprising coming afterwards into the next heir's person, who was liable *passive*, this heir assigning the apprising to a third person, and he excluding the creditors by it, the Lords found that the apprising having been once in the apparent heir's person, it was thereby extinguished, so that he could not transmit it to a third party.

IN a cause between Mr William Johnston, son to Westerraw, against Sarah Johnston, the LORDS decided this point, which was new: Jardine of Apple-girth appraised the lands of Lockerby, on a bond granted by the apparent heir. This apprising afterwards comes into the next heir's person, and who, by his contract of marriage, so far represents as to undertake his father's debts. This heir assigns the apprising to Mr William Johnston, and he excluding the creditors by it; it was *alleged*, The apprising was extinct by confusion *ipso momento* it came into the person of the heir, so he could make no valid conveyance of it; for he being both debtor and creditor *confusione tollebatur*, that being *inter modos dissolvendi obligationem*. *Answered*, By the act of sederunt 28th February 1662, in Glendinning against Nithsdale, *voce* PASSIVE TITLE; *that* conveyance was found a passive title, but did not declare the debt extinct; and so adjudications on such bonds have been commonly made use of to be a title for apparent heirs to quarrel their predecessors' deeds by reductions. *Replied*, The inferring a passive title is a greater penalty and certification, than to declare the right null, and these conveyances have proven a seminary of fraud, whereby apparent heirs have created vexation to their predecessors creditors. Therefore the LORDS found it an extinction so as he could not transmit it to Mr William Johnston. But in the case of Hugh Neilson, the LORDS found no extinction, though he had acquired a right to a debt of his father's, because his representing his father was no otherways proven against him, but that he being out of the kingdom and pursued in a *cognitionis causa* for a debt of his father's, he gave not in a renunciation and so *presumptione juris* became personally liable; for the LORDS thought it reasonable to repon him against this passive title, by allowing him yet to give in his renunciation, unless they could instruct that he truly represented some other manner of way: so as it be a real addition or immixion, and not a presumptive one. See PASSIVE TITLE.

Fol. Dic. v. 1. p. 195. Fountainball, v. 1. p. 788.

1726. January 4.

CUMING of Coulter *against* IRVINE of Crimond, &c.

No 9.

A person tailzied his lands to heirs male. Afterwards he granted a bond of provision to his second son;

IN the year 1683, Alexander Irvine of Drum made a tailzie of his estate in favour of himself, and the heirs male of his body; which failing, to certain other heirs male named. In the year 1687, the said Alexander Irvine executed a bond of provision for the sum of L. 80,000 Scots to his second son Charles, and the heirs male of his body; which failing, to the other heirs male of the persons nominated and designed by him to succeed in his lands and heritages.

The heirs male of the entailer's body having failed, the succession, both of the entailed estate and of the bond, devolved upon Alexander Irvine of Murthill, who was accordingly served heir of tailzie to the said estate, but did not expedate any service to the said bond of provision. After his decease, his son and apparent heir granted a bond for L. 10,000 Sterling to a trustee, who thereupon charged him to enter heir of provision to Charles, in order to make up a title by adjudication to the L. 80,000 bond; and having thus established the bond in his person, he again charged the apparent heir of tailzie in the estate of Drum, and obtained an adjudication against the estate for the said debt of L. 80,000. In a process at the trustee's instance against the heirs of entail, concluding that the bond of L. 80,000 Scots was a subsisting debt, and did effectually burden the entailed estate of Drum; the LORDS found, That the heir male of Murthill being served heir to the estate of Drum, his service did not state him in the right to the L. 80,000 bond, so as to operate a confusion in his person; and that this Drum being charged to enter heir in special to Charles, and adjudication having thereon followed, did not operate a confusion of debtor and creditor in this Drum's person; and therefore found, that the said bond of provision is not extinguished, but is still a subsisting debt upon the estate of Drum. See APPENDIX.

No 9.
whom failing, to the heirs of tailzie. The heirs of the entailer's body failed; and a more remote heir of tailzie succeeded, to both the estate and the bond. The bond remained a distinct and subsisting debt upon the estate.

Fol. Dic. v. l. p. 196.

1728. January 27.

JOHN MURRAY against NEILSON of Chapel, and LANIRK of Ladylands-

IN a competition betwixt these parties, about the lands of Conheath, Neilson and Lanirk's titles, being apprisings deduced against the lands of Conheath, bought in by Elizabeth Maxwell the apparent heir, and conveyed from her to these purchasers; it was *objected* against the apprisings, That they were extinct *confusione*, being bought in by the apparent heir, during the legal, after she had behaved as heir, liable thereby to all her predecessor's debts, and to these apprisings among the rest; whereby there came to be a *confusion* of debit and credit in her person.

To which it was *answered*, That apprisings were never thus understood to be extinguished; witness the noted case of an apparent heir, possessing by virtue of an adjudication led upon his own bond, which was never understood to be an extinction, though a stronger case than that in dispute. See Lord Stair, l. 1. t. ult. § 9. in med. And though such a possession, since the act of sederunt 1662, did infer a passive title, nevertheless the adjudication was a good title, whereupon to possess the estate, and even to dispose upon it by sale, which could never be quarrelled by a succeeding heir. And indeed the same thing continues to be law still, even after the act 1695; for that law only makes the heir possessing upon such a diligence *passive* liable to the debts, but does not

No 10.
An apparent heir, liable *passive* upon behaviour, having purchased an apprising upon his predecessor's estate, while the legal was current, and conveyed the same to a singular successor; the same was found effectual in a competition, and not extinguished *confusione* in the apparent heir's person.