

## SECT. V.

[How and to whom competent to insist upon this Passive Title.

1617. December 18. LORD GAIRLIES *against* KILPATRICK.

No 185.

IN a reduction pursued by the Lord Gairlies against John Kilpatrick, the LORDS repelled an exception, bearing, that the Lord Gairlies was heir to his goodsire in the lands of Dalswinton, in respect his goodsire was infest as heir to his grandsire in the said lands.

*Item*, they repelled an exception, that the Lord Gairlies' father was universal intromitter with his goodsire's goods and gear, because, that *eo nomine* he could not be obliged to warrant the heritable infestment, notwithstanding that he had not an heir.

*Fol. Dic. v. 2. p. 43. Kerse, MS. fol. 141.*

1630. November 20. PRIDE *against* THOMSON; and STEWART *against* STEWART.

No 186.

ONE Thomson being pursued as heir of provision to her sister, for registration of a bond of L. 500, made by her said umquhile sister to Thomson, her brother, whereto one called Pride was made assignee, and who pursued that registration;—the defender, who was convened as heir of provision to her sister, the debtor, *alleging*, That the general heir ought to be first called and discussed;—this allegiance was repelled, because the cedent, who was creditor, was that person who would have been general heir, and he compeared and renounced to be heir, albeit he was that person, who, in law, would have been general heir, if he had pleased to serve himself general heir to her, and assisted his assignee in this pursuit; so that the LORDS sustained the process against the heir of provision. And it being further *alleged*, That albeit he renounced to be heir, yet thereby he ought not to be free of this debt, but the pursuit therefore was proper not the less against him, and not against this defender, because he had intromitted with the defunct's goods and gear, whereby he being vitious intromitter, he ought to be liable to the defunct's creditors for their debts, in respect of his vice, and consequently he could pursue none other but himself therefore, whereby the same was confounded;—and the pursuer *answering*, That albeit a creditor have action in law against the intrmitters with the debtor's goods, to make him thereby answerable to pay the debts, yet that ought not to be received by way of exception, to allege the creditor, when he is pursuing for his debt, to be intromitter, there-through to exclude his whole

In a process for payment of a bond due by the defunct, at the instance of the heir of line, who had no benefit by the succession against the heir of provision, the defence was, that the pursuer was vitious intromitter with the goods of the defunct, and so the debt was extinguished *confusione*. The LORDS refused to sustain vitious intromission by way of defence, but sustained compensation to the extent of the pursuer's intromission.