

1662. June 19.

ISOBEL DRUMMOND against JEAN SKEEN.

No 6.

ISOBEL DRUMMOND pursues Jean Skeen, as behaving herself as heir to her brother James Skeen, by uplifting the mails of the lands, wherein he died infest, to fulfil her contract of marriage with James. The defender *alleged*, Absolvitor; because she uplifted those duties by virtue of her infestment, being served heir to John Skeen, son to James Skeen, the pursuer's debtor, who was infest, not as heir to his father James, but as heir to her goodsire. The pursuer *answered*, In respect to the defender's sasine, or to John Skeen's, which were evidently null, seeing James Skeen was infest, and so John could not pass over him to his goodsire; and if any regard were had to such infestment, it would open a door to all fraud, and abstracting of defunct's creditor's evidents.

THE LORDS found the defence relevant to purge this vitious passive title, seeing the failzie was not in this defender, but in John Skeen, his brother's son, but prejudice to reduce as accords; but ordained her to renounce to be heir to James, that adjudications might be obtained.

*Stair, v. 1. p. 111.*

1663. February 21.

HARY HAMILTON against WILLIAM HAMILTON.

No 7.

HARY HAMILTON pursues his brother William, as behaving himself as heir to their father, John Hamilton, apothecary, to pay 6000 merks of provision by bond, and condescends that William intromitted with the rents of the lands of Ulistobe, whereunto his father had heritable right. The defender *answered*, That his father was not infest; because he infest the defender therein before his death, reserving only his own liferent. The pursuer *answered*, That the infestment was under reversion, and was redeemed by the father, which order, though not declared, gave him the right to this land, and was more than equivalent to an heritable disposition, clad with possession, which would make the apparent heir's intromitting infer behaving as heir, for the declarator *non constituit sed declarat jus constitutum*.

THE LORDS repelled the defence and duply, in respect of the condescendence, and reply of the order used.

2dly, The defender *alleged*, Absolvitor; because those lands were appraised from the defunct, and thereby he was denuded; and so the defender could not be heir therein, at least he could have nothing but the right of reversion, which reacheth not to mails and duties.

THE LORDS found, that, unless the defender had title, or tolerance from the appriser, the legal not being expired, but the debtor in possession, his heir in-

An apparent heir intromitting with the rents of lands, which had been wadset by the defunct, but which were redeemed by him, and in his possession at his death, though there was no declarator of redemption, was found to infer behaviour. It was also found behaviour, that the apparent heir intromitted with rents of lands appraised from the defunct, but of which the legal was not expired.