

ed against the rigour of an expired apprising upon small sums, no way adequate to the worth of the land.

No 140.

Fol. Dic. v. 2. p. 186. Stair, v. 2. p. 279.

1674. December 10. AUCHINTOUL against INNES.

No 141.

THE LORDS found, That a person being pursued as representing his father, or other predecessors, and denying the passive titles, the same ought to be proved; and that the defender, by proponing a defence *in jure*, as in the case in question, that annuities were discharged by the late proclamation, does not confess the passive titles; but if he should propone a defence founded upon a right in the person of his predecessor, it would conclude him; so that he could not pretend that the passive titles should be proved.

Reporter, *Newbyth.*

Fol. Dic. v. 2. p. 187. Dirleton, No 199. p. 88.

1675. February 6. BURNET against M'CLELLAN.

No 142.

BURNET having pursued M'Clellan for payment of a debt of his son's, as behaving himself as heir to his son, by intromission with the duties of the lands, wherein his son died infeft, and litiscontestation being made, and the cause come to be advised; the defender *alleged*, That he could not be decerned as heir to his son, because he instantly verified, that he had another son, who is now instantly at the Bar, who did exclude him.—It was *answered*, That this defence is not competent in this state of the process, though it be instantly verified, because it cannot be pretended new come to his knowledge, seeing the father could not be ignorant that he had another son; so it was *dolose* omitted, to postpone the pursuer, who hath run a course of probation by witnesses. And the cause being now concluded,

Consequence where a defence has been *dolose* omitted.

THE LORDS, before answer, having proponed to the son, whether he would *suscipere judicium*, and answer in this process, as if he had been cited, which he having undertaken, the LORDS assolizied the father, and allowed the pursuer to insist against the son upon the passive titles, and him to make his answer thereto.

Stair, v. 2. p. 318.

* * * Dirleton reports this case :

A FATHER being pursued, as behaving himself as heir to his son, and litiscontestation being made, and witnesses adduced; the time of the advising, it was *alleged*, That the father could not represent his son as behaving, because