No 78.

1629. *February* 14. DOUGLAS *against* LAWSON.

IN an action pursued by Henry Douglas against John Lawson, Boghall's brother, whom he pursued as heir to his brother, &c. he verified him to be heir, in so far as Mr Lewis Stuart being infeft in wadset in a tenement in Edinburgh belonging to Boghall, he set a back-tack of the same to Boghall and his heirs, for payment of so much as effeired to his annualrent, of which back-tack duty the said John Lawson had taken discharges from Mr Lewis since his brother's decease.—THE LORDS found this relevant to make him heir.

Fol. Dic. v. 2. *p.* 32. *Spottiswood*, (HEIRS.) *p.* 140.

*** Auchinleck reports this case:

AN apparent heir, who received a discharge of the duties contained in a back-bond, set by a wadsetter to his predecessor, to whom he is apparent heir, is found *gessisse pro herede*.

Auchinleck, MS. p. 3.

No 79.

1632. *December* 18. A. *against* B.

IF an executor, being minor, and after the confirmation of the testament become major, and in his majority pay as executor, or transact with any party for a legacy left to them in the said testament, by his deed he undertakes the said testament, and subjects himself to pay the rest of the legacies, so far as the defunct's free gear will extend.

Auchinleck, MS. p. 148.

No 80.

1682. *December* 16. THOMSON *against* ANDERSON.

AN apparent heir being convened upon his passive title, that, by a letter to the defunct's debtor, he desired him to pay what he owed the defunct, to one of his, the defunct's creditors, and obliged himself to warrant the payment; because an apparent heir's uplifting heritable debts to pay the defunct's debt, is a behaviour; and any body's uplifting of moveable debts for such an end, is vitious intromission; and the appointing of a debtor to apply the payment such a way, is equivalent to the so uplifting and applying;

Answered for the defender; Intromission only with something in the defunct's possession at his death, doth infer a passive title, which cannot be charged upon the defender, who did not intromit with or give up the debtor's

bond, or discharge the debt, but only interposed with him to satisfy such a creditor, by obliging himself to warrant secure the debtor; so that the money paid was not properly the defunct's, seeing the debtor's remained after the payment. No 80.

THE LORDS assoilzied from the passive title.

Fol. Dic. v. 2. p. 32. Harcarse, (HEIRS GESTIO and PASSIVE TITLES.) *No 38. p. 9.*

SECT. X.

Serving Heir inchoated, but not completed.

1594. *November* 26. A. *against* B. No 81.

A RETOUR extracted and subscribed by the Sheriff-clerk, albeit it be not past the Chancellory, will prove a man heir to his predecessor *passive.*

Fol. Dic. v. 2. p. 33. Haddington, MS. No 433.

*** Similar decisions were pronounced, 7th December 1621, Clark against Balgony, No 56. p. 2728.; and 16th February 1627, Simpson against Balgony, No 57. p. 2729. *voce* COMPETENT.

1628. *November* 22. GOODLET *against* ADAMSON.

No 82.
A sentence of Court within burgh, whereby the defender was recognosced by testimony of witnesses, to be eldest son and heir to the defunct, was found not to prove him to be heir *passive.*

IN an action Goodlet against Adamson, one being convened as heir to his father, and for verifying him to be heir, a sentence and ward of court of the town of Glasgow being produced, whereby he was recognosced in their court, by testimony of witnesses, to be eldest son and heir to the defunct; this act was found not to prove him to be heir, albeit it was used to prove *passive* against him; seeing there was no sasine following upon the said act given to the defender produced in this process; for, without sasine had followed upon the act, the same alone was found not to prove, likeas the defender was minor the time of that act; but that was not the cause of the decision, seeing the act stood against him, if it had been otherways in itself lawful, for it was alleged that he had then curators. See PROOF.

Fol. Dic. v. 2. p. 33. Durie, p. 400.