fraud nor dole, and that the comprising was not to his own behoof, yet that the defender ought to be liable to the pursuer's debt, so far as the sum contained in the apprising might extend to; or, otherways, he ought to purge the said apprising, to the effect that the pursuer, who was the father's creditor, might have access to the lands comprised, which was the father's estate, without being incumbered with the foresaid comprising, which proceeded upon the son's debt. No 87.

Fol. Dic. v. 2. p. 33. P. Falconer, No 23. p. 12.

*** Harcarse reports this case.

1682. *December.*—AN apparent heir having granted a bond for a small sum, whereupon his predecessor's estate was apprised from him, as specially charged to enter heir; the apprising happened to expire, and the said apparent heir being charged to enter heir at another creditor's instance, he offered to renounce.

It was *alleged* for the creditor, That *res* not being *integra*, he cannot renounce, till he purge the land of the expired apprising, whereby a great estate is carried away for an inconsiderable sum.

Answered for the apparent heir, That he was willing to pay the sum contained in the bond, on which the apprising proceeded, which had not expired, if the pursuer had redeemed within the legal; and so *per eum stetit.*

THE LORDS repelled the apparent heir's answer, and found, that he ought to purge the apprising, or be liable to a sum equivalent to the worth of the land.

Harcarse, (COMPRISINGS.) *No* 281. *p.* 66.

SECT. XII.

Behaviour upon Act 1695.

1710. *June* 7. WATSON *against* BROWN.

No 88.
An apparent heir's intromission with the mails and duties of his

MY Lord Royston, as Probationer, (in place of Lord Prestonhall, who had demitted,) reported Watson against Brown. Captain Brown in Leith being debtor to Watson of Sauchton in 2000 merks by bond, he pursues Alexander Brown, merchant in Edinburgh, his eldest son, on this passive title, introduced

No 88.
predecessor's lands, after his death, relevant to make him universally liable for the defunct's debts, although the apparent heir intromitted by virtue of a singular title, acquired by him in the defunct's lifetime.

by the 24th act 1695, that his father being debtor to the Kirk Session of Leith, he had given them infeftment in his houses there, which right he had purchased and bought in; and, by virtue thereof, had possessed and intromitted with the mails and duties of the lands after his father's death, and so is liable *passive* by the said act. *Alleged*, My case noways falls under the act of Parliament, which only obviates the fraud of apparent heirs to wrong their predecessor's creditors; but so it is, I purchased in this right in my father's lifetime, and did it *ex pietate filiali* to save him from distress. Likeas, it was not a subject by which I could enter into possession, being only an infeftment of annualrent; and to shew he has no purpose to defraud any creditor, he is willing to renounce his right to any that will pay him what he gave for it, and refund his expenses in repairing the damage done to the brewhouse and kiln by the accidental powder blast in 1702. *Answered*, The act 1695 is opponed; and there is no difference whether it be acquired in his father's lifetime or since, both being alike prejudicial to the creditors. And in a parallel case, where the 62d act 1661 provides, that where apparent heirs buy in debts, affecting their predecessors estates, they shall be redeemable from them within ten years after the acquisition, on payment of what they gave for it, the Lords have extended this to purchases made, when their father is yet alive, as was found on the 19th June 1668, Burnet and Naesmith against Naesmith, No 48. p. 5302.; and if the transacting their debts were once allowed, the act should be altogether elusory and ineffectual; and as to the right's being incapable of possession, it was posisively offered to be proved, that he uplifted the mails and duties of these lands, and was in the natural possession since his father's death; and *esto* it were a correctory law, yet this is no extension, but a plain interpretation of the sense and meaning of the statute. The Lords thought, if it was an infeftment of annualrent, it could not be the subject of possession; but the right not being produced, they determined the relevancy of the allegeance as it was proponed before them; and found it relevant to make him liable *passive* that he intromitted with the mails and duties of the lands, wherein his father died infeft, and that after his father's decease, though he purchased the same in his lifetime; for they considered law had provided him two remedies, and he had made use of neither, *viz.* bringing his father's lands to a judicial roup, where he was as free to bid as another; and the entering heir *cum beneficio inventarii*. And though one is not properly apparent heir, but only presumptive in his predecessor's lifetime, there being no *hæreditas viventis*, yet it may tend as much to the defraud of creditors to buy in rights in his father's lifetime as afterwards; and, therefore, the Lords decided *ut supra*.

1711. *January* 17.—In the cause mentioned *supra*, 7th June 1710, pursued by Watson of Sauchton against Alexander Brown, for payment of a debt contained in his father's bond, upon sundry deeds of *gestio pro hærede*, by lifting

the mails and duties, building houses, &c. and an act of litiscontestation being extracted upon these acts of possession, and a probation led;—but Sauchton, the pursuer, being diffident of overtaking him on these heads, calls of new his process, and insists against him on the other passive titles libelled, as lawfully charged to enter heir, as vitious intromitter, &c. It was *contended* for Brown, the defender, That there being an act of litiscontestation already made in the cause and extracted, with diligence raised thereon, and witnesses examined upon his intromission, and the term circumduced *quoad ultra*, that must terminate the process; and he cannot be permitted to recur to his libel, and insist on the other passive titles not debated in the act, and so were *simpliciter* passed from, unless he had declared he insisted *primo loco* on the behaving, and that the rest had been reserved; and if it were otherwise, then there might be more acts of litiscontestation in one cause, and a *progressus in infinitum*, contrary to all good order and form, so that on every article of the libel a new act may be extracted, and there shall never be *finis litium*, nor termination of pleas; whereas, an act of litiscontestation is a novation, *et quasi contractus inter partes litigantes*, and they lay the whole cause on the points therein contained, to which they circumscribe themselves. And the Doctors, speaking of litiscontestation, call it the *basis et fundamentum totius judicii, cui omnia innituntur acta quæ sunt quasi vehiculum ad sententiam, et adeo partes obligat ad instantiam ut ab ea quis discedere ampliusque pœnitere non possit, Vide l.* 25. *D. De rei vindicat. l.* 52. *D. De judic.* So that after it, *libellus mutari seu emendari nequit.* And Hope, in his Lesser Practiques, cap. 1. lays it down as a principle, that, after litiscontestation, no new defence can be proponed, unless it be *noviter veniens ad notitiam*; so also Stair, B. 40. T. 4. says, litiscontestation fixes all the points in debate betwixt the parties; so they may not return to allegeances there omitted. *Answered*, There is nothing more ordinary in our stile than to cumulate more actions in one summons, as exhibitions, delivery, reductions, declarators, count, reckoning, and payment, mails and duties, constitutions and adjudications; and the insisting in one of these *media concludendi* never absorbs nor precludes the other;—and the Roman litiscontestation and ours are *toto cælo* different; and the feudal, canon, and municipal laws, have quite altered these ancient forms. None will say an act extracted exhausts the libel, so as they cannot be insisted for in a new summons. Now, *quorsum* should we multiply actions? Is it not more the lieges' interest to receive it as a part of the first libel? THE LORDS found the extracted act of litiscontestation did not debar the pursuer from returning to the other branches of his libel, and his insisting therein; and so repelled Brown's allegeance of incompetency *in hoc statu*.—*See* PROCESS.

No 88.

Fol. Dic. v. 2. *p.* 34. *Fountainhall, v.* 2. *p.* 574. & 626.

*** Forbes reports this case.

No 88.

1710. *June* 7.—In a process at the instance of James Watson of Sauchton, as heir to his father, against Alexander Brown, the defender was found liable upon the 24th act Parliament 1695, to pay to the pursuer 2000 merks, with annualrents and penalty, contained in a bond granted to his father, by Captain Brown, maltman in Leith, father to the defender, upon this ground, that the defender had intromitted with the mails and duties of his father's lands, after his decease, notwithstanding of a singular title of intromission, acquired by him in the father's lifetime; in respect the act 1695 declares, that any apparent heir entering to possess his predecessor's estate, or purchasing any right thereto, by himself, or any other way than as highest offerer at a public roup, without collusion, shall be liable as if he were heir served; albeit it was *alleged* for the defender, That the statute for obviating the fraud of apparent heirs relates only to rights purchased by them after their predecessor's decease; and he got the right in his lifetime, when he could not serve heir to him; seeing *nulla est hæreditas viventis.*

1711. *January* 16.—In the action at the instance of James Watson of Sauchton against Alexander Brown, as representing his father, for payment of 2000 merks, owing by the father to the pursuer; he, the pursuer, repeated the common passive titles, and particularly insisted against the defender upon the act of Parliament 1695, as liable for intromitting with his predecessor's estate, without bringing the same to a roup; and the Lords, 7th June last, having sustained his intromissions subsequent to his father's death, relevant to make him liable *passive*, the pursuer extracted an act upon that point; but finding it hard to prove the intromission, did put up the cause in the hand-roll of my Lord Cullen, who pronounced the act, and, at calling, insisted upon the other passive titles libelled, which he referred to the defender's oath.

Alleged for the defender, There being an act already extracted upon one passive title, the pursuer could not now recur to the rest, though libelled; because, in ordinary actions, there is but one act of litiscontestation; and, if the pursuer were now suffered to recur to other passive titles, there might be multiplicity of acts of litiscontestation, and no *terminus litis*. After an act of litiscontestation, the Ordinary is *functus*, and cannot review or return to the libel, conform to *L.* 25. *D. De Rei Vindicatione*, *L.* 52. *D. De Judiciis*, *L.* 3. § 11. *D. De Pecul. L.* 57. *D. De Solut. L.* 20. *D. De Petit. Hæred.* Hope's *Pract. Min. Tit.* 1. Stair, Instit. B. 4. T. 40. § 16.

Replied for the pursuer, 1*mo*, The insisting in one of several *mediums* in a libel did not exclude the pursuer from insisting afterwards upon the rest; for the act of litiscontestation doth circumscribe the parties only in so far as litiscontestate; whereas, here, the act of litiscontestation is only concerning the

clause in the foresaid act of Parliament, which the pursuer desires no review of. Yea, there is nothing more ordinary than to libel not only several conclusions in one summons, but also separate actions; and, as insisting in one of such accumulative actions cannot hinder to insist in the other; far less can the insisting particularly upon one of several *media concludendi*, in one summons, cut off the rest. 2*do*, It is unnecessary to answer the defender's citations out of the civil law, since the form of process among the Romans differs from ours. And the citations out of Hope and my Lord Stair, about the effect of litiscontestation, doth only concern what is litiscontestate, which the pursuer doth not quarrel. No 88.

THE LORDS found, that the pursuer may yet insist upon the other passive titles; and remitted to the Ordinary to hear parties thereon.—*See* PROCESS.

Forbes, p. 405. & 476.

1714. *November* 24. THOMAS MERCER *against* ROBERT LEITH.

No 89.
An apparent heir accepting a disposition to heritable sums from his father, found liable to his father's creditor, conform to the 24th act, Parl. 1695.

THOMAS MERCER pursues Robert Leith, as representing James Leith his father, for payment of the sums contained in two bonds, granted by Dickson of Westbinnie, Mr John Montgomery, and the said James Leith, to which the pursuer has right by progress; and insisted on this passive title, that the defender accepted a disposition from his father to certain heritable sums of money, and thereby became liable conform to the act of Parliament 1695; which the Ordinary having sustained, the defender offered a reclaiming bill, on these reasons; 1*mo*, The defender's father's disposition was only an inconsiderable heritable sum; 2*do*, The act of Parliament relates only to purchases made by apparent heirs, that is, heirs to whom the succession is devolved by the death of his predecessor: Although the acquisition had been from a stranger, and to a much more valuable right, made in the father's lifetime, it would not have been in the case of the act of Parliament, which bears. 'That if any apparent heir without being lawfully served, &c.' which, and all the cases there related do only concern apparent heirs to whom the succession is devolved. And the act of Parliament 1661, prorogating the legal of apprisings purchased by apparent heirs, was never extended to such purchases made in the lifetime of the predecessor. It is true, in the case the 7th June 1710, Watson against Alexander Brown, No 88. p. 9743. observed by Mr Forbes, it was otherwise found; but that decision is marked very short, and being the interpretation of a correctory law, deserves to be the more maturely considered.

It was *answered*; The disposition made by the defender's father, is not of a small subject, but of many sums, and indeed the substance of what his father had, and reserving his father's liferent; so that although the acquisition was in his father's time, yet the possession was calculated to begin after his father's de-