

1715. June 16. JOHN WIGHTMAN *against* The Earl of DALHOUSIE

JOHN WIGHTMAN being a creditor to the last Earl of Dalhousie, raised a process against my Lady Hawley's son, as sister's son and heir of line, and William now Earl of Dalhousie, the deceased Earl's cousin-german and heir-male; and having insisted against the Earl, it was *alleged*, That being the heir-male, he could not be obliged to answer, till the heir of line were discussed; especially seeing he condescended upon a considerable estate, which did belong to the defunct, and devolved to the heir of line, and not to the heir-male.

It was *answered*; The defender could not plead the benefit of the order of discussing; *Imo*, Because, by a transaction betwixt the heir of line and the defender, he had undertaken to relieve the heir of line of all the defunct's debts, at the least, had undertaken to relieve him of the pursuer's debt, which was offered to be proven. The reason why the heir of line, who is heir in general, must be first discussed, is, because the heir-general is liable to relieve all other heirs; and where that reason ceases, as in the present case, by the defender's undertaking to relieve the heir of line, it is not competent to him to claim the order of discussing. *2do*, The pursuer insists upon the passive title, of behaviour as heir, which also excludes the benefit of the order of discussing. And *3tio*, In like manner, he insists upon the passive title, introduced by the act of Parliament 1695, in as far as the defender passing by the last Earl, who was three years in possession of the estate, has served himself heir to the last Earl's father, a more remote predecessor; which passive titles do make the defender liable, without the order of discussing, in the same way as vitious intromission.

It was *replied* by the defender to the first; That *esto* he had granted a bond of relief to the heir of line, it is not relevant to elide the defence, because it cannot be alleged, that he has made a total transaction with the heir of line for all that could descend to him from the defunct: seeing he condescends upon the lands of Carridden, of considerable value, to which the defender hath no right, either of apparency, as heir to the defunct, or by transaction with the heir of line; so that he is noways in the case of *emptor hereditatis*, who transacts upon the whole subject of the succession. And *esto* the defender had, upon any particular agreement, granted a bond of relief to the heir of line, that obligation would be personal, and operate nothing to the defunct's creditors. The heir of line has his proper defences against the debt, besides the benefit of inventory; and if, after all, he should be overtaken, then the heir of line will use any such obligation at his pleasure, wherein the creditor is not concerned. And it was found, in a far less favourable case, Allan against the Earl of Lauderdale, No 16. p. 3566, that the Earl being pursued as heir-male to the Duke his uncle, was not liable till the heir of line should be discussed, albeit the heir of line was decerned to denude of all that could descend to him by the Duke's

NO 21.

In an action against an heir-male, it was not sustained as a good answer to an exception founded on the benefit of discussion, that the heir-male had granted an obligation to the heir of line, to relieve her of the debt pursued for.

No 21. decease, and that the heir-male was bound to relieve the heir of line of all debts; yet, because the heir of line was not actually denuded of the subject condescended on, it was found, that the creditor was bound to discuss the heir of line, and affect that subject.

As to the *second*; Behaviour as heir in general, is not relevant, without condescending on the qualifications from which behaviour may be inferred. *2do*, *Esto*, the pursuer should condescend on relevant qualifications to infer behaviour as heir-male, yet the order of discussing is still competent; because behaviour as heir-male cannot be further extended than a service as heir male, which yet affords the defence of order of discussing. *3tio*, The like is to be said as to the passive title founded on the act of Parliament 1695; and neither of them are like vitious intromission, because an executor confirmed is liable immediately without any order of discussing; therefore a vitious intromitter is liable in the same way; but heirs are only liable in their order.

'THE LORDS found the defender had the benefit of the order of discussing, notwithstanding of what was alleged, upon the defender's granting a bond of relief; and found the allegiance upon the passive titles of behaviour as heir, and the act of Parliament 1695, not relevant to exclude the defender from that benefit.'

[*Fol. Dic. v. 1. p. 247. Dalrymple, No 145, p. 199.*]

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## SECT. V.

Real burdens follow the heir who succeeds to the lands burdened.

No 22.

Though an heir of conquest or tailzie must first be discussed with respect to debts affecting the conquest or tailzied lands; yet, if the debt exceed the worth thereof, the heir general must first be discussed *pro reliquo*.

1607. June 18.

EARL OF KINGHORN *against* LESLIE.

THE Earl of Kinghorn pursued the general heir and heir of conquest of umquhile Mr William Leslie of Warthill, to hear and see a decret of violent profits obtained by him against the said Mr William, as cautioner in a removing for John Arbuthnot of Lintuch, transferred in the said heirs. It was *alleged* for the heir of provision; that it could not be transferred in him, at least could have no execution against him, till first the general heir was discussed, in respect of the daily practice, and *alleged* the decision betwixt Durie and Rosyth, and diverse others. It was *answered* by the general heir; that the decret behoved to have execution against the heir of provision, because the said umquhile Mr William having in his own time comprised the said John Arbuthnot's lands for his relief of the said cautionary, and his heir of conquest and provision having succeeded to the said lands, he behoved to bear the burden of the said