

No 11. therefore they only insist against William Smith, who doth represent his mother as one of the three heirs-portioners, for the third of their provision, in which he must be liable, as having purchased the foresaid adjudication.

*Duplied* for the defender; That a service in indefinite terms is an universal representation, and therefore a total extinction of the pursuers claims, which must certainly take place, unless they had cognosced themselves heirs of provision, or of the second marriage, in which case only the extinction would have been partial. Further *alleged* for the defender, That he could not be liable in behaviour, being minor, and not capable to accept a disposition, which was necessary to infer behaviour; and, *2do*, That he did not possess the land adjudged.

*Answered* for the pursuer, to the *1st*; That nevertheless the defender must be liable in the terms of the act, unless he repudiate or renounce the benefit of the said adjudication; because, by purchasing it, he had acquired a right to a legal diligence affecting his predecessor's estate, which is all that the act requires to infer behaviour; just as it holds in the case of a successor *titulo lucrativo*. To the *2d*, *answered*, That the foresaid clause in the act of Parliament establishes a behaviour in two cases, viz. if the apparent heir either possesses his predecessor's estate, or acquire and purchase any right thereto, or to any legal diligence affecting the same.

'THE LORDS found the defender liable in the passive titles according to the act of Parliament 1695, unless he renounce the right purchased for him to the tenements and acres belonging to his predecessor; and sustained the defence of extinction of the debt by confusion, in virtue of the general service for two-third parts to which the pursuers succeed as heirs-portioners; but repelled the same as to the other third part.'

Act. *Fleeming*.

Alt. *Ila Ferguson*.

Clerk, *M'Kenzie*.

*Fol. Dic. v. 1. p. 356. Bruce, v. 2. No 17. p. 21.*

No 12.

1717. July 12. MAXWELL of Monreith *against* HOUSTON of Calderhall.

AN heir male evicting the estate from the heirs of line who had entered, and upon the faith that the estate was their own, had paid several debts; the question occurred, if relief was competent to them against the heir-male. It was *pleaded* for them, That he ought to be ultimately liable who enjoyed the defunct's estate, seeing it is most rational, that the defunct's debts should be paid out of his effects; upon this footing stands the relief betwixt the heir and executor.—THE LORDS found no relief competent.

This was reversed by the House of Lords. See APPENDIX.

*Fol. Dic. v. 1. p. 356.*