

## PASSIVE TITLE.

### DIVISION I.

#### Behaviour as Heir.

#### SECT. I.

Relates only to the Apparent Heir.

1618. *June 11.* HALIBURTON *against* LORD BALMERINOCHE.

No 1.

**I**N an action betwixt Haliburton and my Lord Balmerinoch, the LORDS found the Lord Balmerinoch could not be convened as successor to his father, because he was forfault, and the gratuitous restitution made him capable of rights disponed, but could not make him heir to any but to the Prince.

*Kerse, MS. fol. 142.*

1626. *December 21.* IRVINE *against* L. MONYMUSK.

No 2.

**I**N an action pursued by Irvine *contra* L. Monymusk, who was convened to pay a debt owing by his father, as behaving himself as heir to him; in this manner qualified, viz. in so far as, the pursuer offered to prove, that Monymusk had sold a tenement of land since the decease of his father, in the which land his father had died last infest and seised; which qualification was repelled, in respect of this exception proponed, viz. that the defender, the time when he sold this land, had then an elder brother living, so that, *per rerum naturam*, he could not then have been heir to his father, and so that deed could not make him to be heir, there being another then living who would have been heir. This

Behaviour not inferred from a second son selling land belonging to his father, tho' his eldest brother was an idiot declared, and he was his curator, and had got the price,

No 2.  
and his elder  
brother died  
before the  
commence-  
ment of the  
process.

exception was admitted to elide the said qualification, notwithstanding it was *replied*, That the elder brother was an idiot declared, and that the defender was his curator; and that he had succeeded to him, and that he was now deceased, so that the appearance of that succession by the elder brother had evanished; and also, that it was *answered*, That the defender had received the price of the land sold by him, and had the same yet in his hands; which all was repelled, and the exception sustained; for the Lords thought, that that land sold by the defender might yet be sought to be adjudged to the pursuer for satisfying of the defunct's debt ~~libelled~~, notwithstanding of the alienation thereof by the defender, seeing the defunct died rfeft therein, and the defender has qualified no right in his person ~~thereto~~ *iunde*

Act. Baird.

Ab. Latentib

Clerk, Hay.

Fol. Dic. v. 2. p. 26. Durie, p. 252.

1665. January 12. WALLACE against WALLACE.

No 3.  
What import-  
ed by the  
terms (heirs  
or bairns,) as  
regarding  
liability.

WILLIAM WALLACE, only son and bairn, of the first marriage, procreated betwixt William Wallace his father and his mother, pursues Hugh Wallace, his brother of the second marriage, as executor confirmed to their father, for employing of 5000 merks, which their father received in tocher with his mother, and was obliged, by their contract of marriage, to employ in favours of himself and his wife, and the heirs or bairns to be procreated betwixt them. Compears Margaret Kennedy the second wife, in whose favours the defunct is obliged to employ a sum of money, and to perform certain other obligements contained in her contract of marriage, and *alleges*, That no process can be sustained at the pursuer's instance as bairn, unless he were heir served; and, in that case, he would be obliged to fulfil the second contract of marriage, and be also liable to his father's debt. Likeas, that clause conceived in the pursuer's favours can be interpreted no other ways, than it would have been if his father had employed the sum in his own time, conform to the destination thereof; now, if he had employed the same, by infestment or otherways, in favours of himself and wife, and the heirs or bairns of the marriage, he himself would have been fiar, and the pursuer behoved to have been served heir of the marriage thereto, and consequently liable *ut supra*. It was *answered*, That the obligement being conceived in favours of the heirs or bairns, it is equivalent as if the word bairns had only been set down; and it is conceived the word bairns is exegetic of the word heirs, and imports no necessary part of a service or retour; for, if there had been more sons of the marriage than one, all of them would not have been heirs, and yet the obligement is in all their favours; and there is a great difference betwixt a personal obligement in these terms, and an employment by an infestment; for, where there is an infestment, there is a real right,