equity, though not by the subtlety of our law, belonged to the defunct. *3tio*, The example from the Roman law will not apply to this case, which never could have existed according to the principles of that law.

To this it was REPLIED,—That there does not appear to be any difference at all betwixt being liable to the debts, and obliged not to quarrel the deeds of the predecessor, since the obligation not to quarrel is founded upon the obligation to warrant, which is a debt as much as any other.

The Lords found, that the heir could not quarrel the disposition made by his predecessor. It carried narrowly. *Dissent. Elchies.*

November 17. This interlocutor was altered, by a great majority, against the President, Arniston, and Drummore.

In this case there were several other points determined worth noticing: *1mo*, That a person serving heir to a remoter predecessor was not liable to the gratuitous debts and deeds of the interjected predecessor, because the statute 1695 was intended for the relief and security of onerous creditors. This was before decided in the case of *Clydesdale* against *Dundonald*, 1726. *2do*, The Lords found that a service as heir-male, or heir of line, in general, does not carry a provision in a contract of marriage to the heirs of that marriage, but that the same devolves to the next heir of provision; because there may be heirs of a former marriage, so that the heirs of that marriage may be neither heirs-male nor heirs of line in general. This was determined the same way in a late case, *Edgar* against *Maxwell*, in which the Lords likewise found that an heir of provision, by a contract of marriage, who is thereby put under no limitations or restrictions, being at the same time heir to the estate by former settlements, may, if he pleases, neglect the provision in the contract, and make up his title to the estate directly upon the former settlement thereof, after which no substitute, by the provision in the contract, can, by taking up that title, impugn the deeds of that first heir, who made his election betwixt two titles that were equally competent and open to him, and, on pretence of the neglected title, disquiet his successors or disponees.

1742. *February* 9. ALEXANDER BLAIR *against* PRESBYTERY of KIRKCUDBRIGHT.

THE defunct James Blair of Senwick disponed and mortified to the Presbytery of Kirkcudbright, for the use of the poor of twenty-four parishes, 15,000 merks, to be raised and made effectual out of the readiest of his effects at his death; which sum he obliged himself, his heirs, executors, and assignees, to pay at the first term after his death, under a penalty, with interest during the not-payment; and, for further security, he assigns to the trustees all his debts due, or that shall be due to him at his decease, and particularly certain debts there mentioned, amounting to the sum of 20,000 merks. To these provisions is subjoined a clause, that if his means and estate, hereby disponed, shall fall short, or exceed the sum of 15,000 merks, in that case each of the parishes shall suffer a defalcation or addition proportionally; after this

comes a reservation of a power to alter; and, last of all, an obligation on him and his heirs to warrant this disposition and mortification. After making this deed, Senwick bought a considerable land estate, the price of which did more than exhaust all the subjects mortified; and accordingly he gave a general order to his doer to uplift all the money due to him, and apply it to the payment of the price of the estate, and for that effect he put several bonds and obligations into his hand; but he died when only a small part of the money was uplifted. This being the *species facti*, the Presbytery brought an action against Alexander Blair, the heir and executor of Senwick, upon that clause of the deed of mortification, mortifying a precise sum, and obliging Senwick and his heirs to pay it at a precise term. Alexander Blair's defence was, that this clause was explained, by the after clauses, to import no more than a donation *mortis causa*, or legacy, of the particular debts mentioned in the deed, subject to diminution in case of these debts being diminished; and therefore the uplifting of the debts disponed, or any part of them, was in so far an extinction of the legacy. Which the Lords unanimously found.

But, as there was only a small part of the money actually uplifted, the question came next, How far the giving orders to uplift implied a revocation of the mortification?

For Alexander Blair it was argued, That the giving orders to uplift the money, was as much a declaration of Senwick's will to revoke, as if the money had been actually uplifted; nor can either his doer's delay to demand, or his debtor's delay to make payment, any way alter the case. This was supported by the authority of *Voet, Tit. Legat. p.* 23; and by our own practice, according to which, if a reverser consign a sum of money for redemption of a wadset, and die before the money is accepted, or declarator obtained, yet the money will go to his heir, not his executor.

To this it was ANSWERED,—That the only way of revocation, *rebus ipsis et factis*, known in our law, was the actual uplifting of the money, and not the demanding of it. In the case of a bond taken by a husband to himself and wife, in conjunct fee and liferent, the charging for the sum is not understood to be a revocation of the wife's liferent; and in this case it may reasonably be presumed, that, if the mortifier had lived to have seen the sums uplifted, he would have mortified other subjects instead of them, perhaps given a security upon the estate he purchased. As to Voet, it is only the opinion of a private lawyer, not supported by any authority from the text.

REPLIED,—That in this case Senwick not only gave orders to uplift the money, but directed that it should be applied to other purposes, *viz.* the payment of the price of the estate, so that the presumption above mentioned cannot take place; nor is the case similar of the bond liferented by the wife, in respect the husband, by the charge, only denotes his will to uplift, not to apply to other purposes.

The Lords first found that the order to uplift was not a revocation. Afterwards they found that it was,—*Dissent. Preside et Elchies.*