

1630. July 21. FAIRLIE *against* MAXWELL and FAIRLIE.

No 3.

The heir of line, as creditor to the defunct, may insist directly against the heir of conquest, provided he himself renounce to be heir.

By contract betwixt umquhile James Fairlie and William Fairlie brethren, every one of them is obliged, that in case they die without heirs of their bodies, the survivor should succeed to the lands and heritage of the deceased; and James being deceast without bairns, William, who was the youngest immediate brother, craves this contract to be registrate against the daughter and heir of umquhile John Fairlie, who was immediate elder brother to the said James, and so who was heir of conquest to him; wherein the LORDS found, that the heir general and of line, needed not to be called in this registration, as use is in all pursuits against heirs of conquest, which are not sustained, except the heir of line be first called, and discust; but it was not found necessary in this pursuit, seeing he himself, who pursued the registration, was that person who would be general heir, and of line, he being the younger brother, and so he could not call himself, because he renounced to be heir to him; therefore the process was sustained at his instance against the eldest brother's daughter, who was heir of conquest; whereas, if he had not renounced, he could not have pursued this action, being heir himself, and so that person who ought to fulfil the contract to himself, whereby it would have been confounded.

Act. Nicolson et Aiton.

Alt. Advocatus et Stuart.

Fol. Dic. v. I. p. 245. Durie, p. 533.

1638. November 20. PROVOST OF STIRLING *against* HEIR OF LIVINGSTON.

No 4.

The heir of entail renouncing, has no interest to plead the benefit of discussion.

THE Provost of Stirling, as assignee to Bruce, having obtained decret against the heir of line of Livingston, as being lawfully charged to enter heir, in which process the heir of tailzie being also convened, as lawfully charged to enter heir, he renounced to be heir, whereupon he was assoizied, and the other heir of line was decerned; the pursuer thereupon intents process of adjudication against the heir of tailzie, in respect of his said renunciation, wherein he comparing, *alleged* that this process of adjudication should not proceed against him as heir of tailzie, while the heir of line be first discussed, according to the order in such cases. THE LORDS repelled the allegiance, and found the process of adjudication might competently be prosecuted against the heir of tailzie, albeit the heir of line was decerned and not discussed, seeing the heir of tailzie having renounced to be heir, he had no interest to propone this exception, after his renunciation; and the LORDS respected not, where the defender *alleged* that this defence was *in jure*, and although no party should propone it, yet it was in law inherent in the nature of such processes, to discuss the heir of line first; and the Judge ought to find so, by the consuetude and practise of the realm, although it were not *alleged*; and albeit the heir of tailzie had renounc-