

1636. January 27. STRATON against CHIRNSIDE.

ONE Straton pursuing Alexander Chirnside, son to umquhile L. Eastnisbet, for payment of 500 merks addebted to his father, as behaving himself as heir to him, by intromission with his heirship goods, or as successor to him *titulo lucrativo post contractum debitum*, in so far as he was infest in his father's lands after the date of this bond libelled, granted to the pursuer; upon the which two alternatives, the parties being heard to dispute, the LORDS found the first purged, and that he could not be subject to pay the debt libelled, as behaving himself as heir, by intromission with his father's heirship goods, seeing it was alleged, that his father's whole lands were comprised from himself by his creditors, and the legal reversion expired before his decease, whereby he ceased to be *baro*, and consequently could not have heirship, by intromission wherewith any could be convened as heir: Likeas it was alleged, that he died at the horn, and his gift of escheat was gifted and declared, whereby the donatar would have right to all the moveable heirship; which two exceptions were found relevant to purge that first alternative; and for purging of the other, where he was convened as successor by the foresaid infestment granted to him, he *alleged*, that that infestment was reduced *in foro contentioso*, by a creditor to his father, which creditor had comprised the lands. And it being *replied*, that that reduction cannot make the defender to cease to be successor to his father, in so far as, since the said sentence of reduction, he had received great sums of money to ratify and approve the said decret; and seeing he had gotten so great sums, *quocunque nomine* the same were given, yet in effect and in truth the same being given to him, who was apparent heir of the debtor, and for no other cause, but under the name of an act composed and accorded to, for the purpose to defraud the debtor, albeit it was truly given to renounce all his right, and to ratify the compriser's heritable right, therefore he behoved to be reputed successor.—THE LORDS found this allegiance also relevant to purge the alternative, and in respect thereof, that he could not be convened as successor, notwithstanding of the reply, which was not respected, but was repelled; for in effect what money was alleged given to the defender, to ratify the decret of reduction of his right, was in effect received and delivered, that he might not be reputed successor, likeas if he had renounced to be heir, and had received money to ratify that renunciation, he could not be found to be heir thereby; and the LORDS found, That if the creditor pursuer could qualify any prejudice, which he could sustain by the defender's ratifying of the decret reductive, and that there was any ground subsisting in his person, whereby his heritable right might be sustained, and the decret reductive taken away, from the which he is debarred by the defender's ratification of the sentence reductive, *eo casu*, the LORDS would consider thereof as a reason, which might make the defender liable to the creditor; but if that could not be shown, (as it was not shown by the pursuer) then the right competent to the defender is yet standing to the fore, un-

## No 17.

A son cannot be pursued upon the passive title of behaving as heir, by intromitting with the heirship moveables, where the father ceased to be *baro*, by having all his lands comprised, and the legal expired before his death. See No 15, p. 5392.

No 17. taken away, and may be sought for and claimed by the creditor, after what legal manner he thought most expedient, whereof the LORDS thought that in reason he ought not to be prejudged. See PASSIVE TITLE.

*Fol. Dic. v. 1. p. 365. Durie, p. 791.*

1664. July 19. SCRIMZEOUR against EXECUTORS of MURRAY.

No 18.

ONE dying infest in an annualrent, has heirship moveables; for as the annualrent is a *feudum*, an annualrenter may be esteemed a *baro* as well as a petty feuar.

*Fol. Dic. v. 1. p. 365. Stair.*

\* \* See this case, No 4. p. 463.

1666. January 27. COLONEL JAMES MONTGOMERY against STUART.

No 19.

Heirship moveables cannot be, where the defunct had only a disposition without infestment.

IN the declarator betwixt these parties, mentioned the 24th instant, *voce* HERITABLE and MOVEABLE, it was *alleged*, That the plenishing and moveables could not be declared to belong to the pursuer, by virtue of Dame Elizabeth Hamilton's disposition, in so far as concerns the moveable heirship, in respect it was done on death-bed, and could not prejudice the defender, who is heir, even as to the heirship moveables.—It was *answered*, That the said Dame Elizabeth being infest neither in land nor annualrent in fee, could have no heirship.—It was *answered*, That her husband and she were infest in certain lands by Home of Foord, which were disposed to her husband and her in conjunct-fee, and to the heirs of the marriage; which failing, to whatsoever person the said Sir William should assign, or design; and true it is, he had assigned that sum to his Lady, whereby she had right of the fee, and so might have heirship.

THE LORDS found, That this designation made the Lady but heir apparent or of tailzie, whereupon she was never infest; and by the conjunct-fee, she was only liferenter; and that the assignation to the sums and right, gave not her heirs any heirship moveable.

*Fol. Dic. v. 1. p. 365. Stair, v. 1. p. 345.*

1668. February 1. — against SCOT and MUIRHEAD her Husband.

No 20.

A man taking to himself lands in life-rent, and to

MR HARY SCOT's daughter, and her husband Mr John Muirhead, for his interest, being pursued as representing the said Mr Hary, for a debt due by him, the pursuer insisted on the title of behaving as heir by intromission with his