heir of conquest, the right did return to himself, and not to Thomas, who was only heir of line.

The Lords having considered the provision in the disposition made to Archibald; albeit it did appear that the intention of the father was, That Archibald, the second son, succeeding to the estate, should denude himself of these lands, in favours of Alexander; or if he died, in favours of any other younger brother; yet the question being anent lands and heritage, and betwixt minors, they continued to give their interlocutor until they should be majors: But, in the meantime, ordained the profits of the lands of Carraway to be paid to Thomas, by the tutors, for his aliment,—they not being above 1000 pounds Scots of yearly rent.

Page 127.

1670. *July* 13. WILLIAM JAMIESON *against* GEORGE SEATON of MINNES.

JAMIESON, as having right to a bond granted by William Seaton of Minnes, having pursued George his son, as representing his father, upon this passive title,—That he had pursued for payment of an heritable bond granted to his father;—

It was ALLEGED for the defender, That, albeit the bond was heritable, yet he had either confirmed the same as moveable, or gotten a license; and that his *medium concludendi* against the debtor, was upon a promise to make payment to him; which, *de facto*, was never made.

The Lords did sustain the defence; and found, That an apparent heir, having only intented action, and never received payment of an heritable sum, and not having libelled, that it did belong to him as heir, could not infer *gestionem pro hærede;* which being a passive title to make him liable to his predecessor's whole debts, there ought at least to be proven that he had *animum adeundi*, or did actually intromit.

Page 132.

1670. *July* 14. The LORD RENTON *against* The EARL of HOME.

IN a declarator, at Renton's instance, against the Earl, to hear and see it found, that his right to a contract, *in anno* 1631, betwixt James, Earl of Home, and John and Francis Stewart, whereby the Earl was to possess the estate of Coldinham in satisfaction of £19,220, which was due for arrears of £4000 sterling, contained in a prior contract, which was extinct; in so far as the Earl had entered to the said estate, upon a decreet, *in anno* 1643, and had ever bruiked the rent since; which would extend to more than the foresaid sum:

It was ALLEGED for the Earl, That, the time of his entry, he had right from the heirs of line of the Earl of Home to another contract, and a decreet *in anno* 1630, ordaining the said James, Earl of Home, to be put in possession of the said lands, for the annualrent of £1000 sterling, *fructibus in horreum non computandis;* and that in law he might ascribe his possession to that decreet,—it be-

ing the more ancient right; and it being in his option to ascribe his possession to any of the two rights he pleased.

The Lords did, notwithstanding, find, That he could only ascribe his possession to the decreet *in anno* 1643; and that in respect that the first decreet, *in anno* 1631, was never settled in his person by transferring, either at his own instance, or at the heirs of line, who were his authors: But, withal, the Lords declared, that the pursuer having forced the Earl to ascribe his possession to that decreet, he should never be heard thereafter to quarrel the same by way of reduction or declarator.

Page 133.

1670. *July* 14. GARDENER *against* The LADY LETHAM.

IN a spuilyie, pursued at Gardener's instance against the lady,—It was ALLEGED Absolvitor; because the corns were lawfully poinded; and that, before any diligence done by the pursuer, the defender had arrested the corns upon the ground. It was REPLIED, That, before the defender did poind, the pursuer had poinded upon his letters, and was in possession of the corns.

The Lords did repel the defence, in respect of the reply; and found, That a naked arrestment could not hinder another creditor to poind; and that the corns, being poinded, were not affected with the prior arrestments, albeit it be a real diligence.

This interlocutor was indeed conform to prior decisions; yet there appears to be much reason against it, in respect that real diligences affect singular successors.

Page 133.

1670. *July* 19. SCOTT, Bailie of Aberdeen, *against* THOMAS BOYES.

BAILIE Scott being heritor of a tenement in Aberdeen, whereof Margaret Forbes was liferenter; the said Margaret did assign her liferent to Robert Smith, bearing in satisfaction of 400 merks paid to her; as likewise upon a backbond to repone her to the possession, how soon the said Robert should be satisfied of the said sum: Which assignation being transferred to Thomas Boyes, the said Thomas dispones his right in favours of Scott the heritor, who did pay him the said 400 merks, and 70 merks beside: Which translation Boyes did oblige himself to warrant from his own, and the facts and deeds of Smith the cedent; as likewise became obliged to refund the said 400 merks, at the first term after Scott should be distressed. Thereafter, Margaret Forbes, the liferenter, having distressed Scott, and recovered decreet against him, for three years' possession, Scott did pursue Boyes for warrandice of his translation, upon these two grounds:—*First*, That, in the translation made by Boyes, he was obliged for Smith, his author's fact and deed: but so it is, that the ground of his distress was a backbond granted by Smith, which was not mentioned in the translation made by Boyes to Scott, but was concealed.