

No. 35. Alleged for the defender, That James the heir was excluded by the several deeds at Cramond and Buoy of Nore; *1mo*, By that at Cramond, wherein he is passed over, and his heirs-male called next after the heirs of elder and younger Orbiston's bodies; *2do*, By the settlement at the Buoy of the Nore, not only by instituting another, but by a positive exheredation of him and his posterity, as said is; in which case, it is the same thing whether the heir instituted repudiate or not, since, still, the heir is excluded by the clause above mentioned.

Answered for the pursuers: *1mo*, That the first was not a subsisting deed, but totally innovated and altered by the posterior deed at the Buoy of the Nore; *2do*, That since Sir David Hamilton, the heir instituted in the second deed, did not accept, the heir was not excluded, because the deed remained a deserted deed, and the heir of blood might, notwithstanding thereof, enter to the estate, and possess it; for, otherwise, in such a case, an estate behoved to remain in perpetual non-entry. In short the effect of repudiation by our law is, that it makes way for the heir of blood, not for the substitutes in the settlement; neither will our form of transmission by service and retour suffer it to be otherwise, since no man can be served upon a repudiation, but only upon a failure.

“ The Lords found, That the heir of line, and his issue, were not excluded from the succession by the clause in the said second tailzie.”

Act. *Sir Walter Pringle.*

Alt. *Boswel.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 399. Bruce, v. 2. No. 2. p. 2.

No. 36. 1725. *January 12.* M'KAY *against* ROBERTSON.

Bond secluding executors descends by service in a perpetual channel of heirs, so that executors are excluded, not only at the first devolution, but for ever, till the destination be altered.

Fol. Dic. v. 2. p. 401. Rem. Dec.

* * * This case is No. 47. p. 3224. *voce* DEATH-BED.

No. 37. 1727. *January.*
MARQUIS of CLYDESDALE *against* The EARL of DUNDONALD.

A charter proceeding upon a resignation *in favorem*, the grant whereof was to the resigner, *et hæredibus quibuscunque, hæredes quicunque* were interpreted to be the heirs of the former investitures, which, in this case, happened to be heirs-male.

Fol. Dic. v. 2. p. 401. Rem. Dec.

* * * This case is No. 3. p. 1262. *voce* BASE INFERTMENT.