

DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

SIR JOHN GILMOUR OF CRAIGMILLER.

1661. *July.* The LAIRD of NIDDRIE *against* JOHN BOYD.

THE Laird of Niddrie having given a bond of 7000 merks to umquhile ——— Edmonstoun of Wolmett, which truly was given for James Raith of Edmonstoun, for satisfaction and assythment of the mutilation of Wolmett's hand, which Edmonstoun had cut off; and this bond, with a letter of slains, being consigned in the Marquis of Argyle's hand, they were both lost; whereupon the tenor of the bond was made up and proven. This bond was assigned by this Wolmett to John Boyd, merchant; and Niddrie, having raised a multiple-pounding against Wolmett, John Boyd, and Jean Douglass, relict of old Wolmett, and David Cuninghame, now her husband; it was alleged, in the reason of suspension, That the money could not be paid, because there was no letter of slains granted to Edmonstoun by this Wolmett, and by the relict and the rest of the children, but only by this Wolmett, as heir. It was answered, That the letter of slains by the heir was sufficient, in a matter of mutilation; seeing the

relict had no loss thereby, nor the rest of the children: especially seeing it was notour that a letter of slains was granted by the defunct, consigned and left, and that the bond was heritably granted and made to the defunct, to whom this Wolmett is heir, and so only pertaining to him as heir. The Lords repelled the reason of suspension in respect of the answer; *in præsentia*.—It was alleged by the relict and her husband, That they ought to be preferred to the assignee; because, the mother being tutrix to her son, she had a process depending against him for tutor counts, wherein divers articles are found relevant, more than to exhaust that sum; and, upon the said process, an arrestment was used, before the assignation made to John Boyd. It was answered, *1mo*. That the arrestment being upon a dependance only, is loosed. *2do*. The assignation is for an onerous cause; whereupon the assignee having charged, and the suspension being now ready to be discussed, is preferable to an arrester, whereupon nothing can follow so long as the principal cause is undetermined; and, though there may be sundry articles past, *non constat* what the event of this process may be; and so, the assignation being made to a creditor, who, if he had not gotten the assignation, would have arrested, and pursued to make the sums forthcoming, the assignee can be in no worse case than if he had arrested at the same time when he got the assignation, in which case he would have been preferred, notwithstanding of a prior arrestment upon the dependance. The Lords preferred the assignee. *In præsentia*.

No. 1, Page 1.

1662. January 15. NICOL HARPER against COLONEL HOME.

NICOL Harper pursues Colonel Home, brother to the deceased Alexander Home of Plenderguest, as behaving himself as heir to him, and successor to him *titulo lucrativo*; in so far as he intromits with the mails and duties of the lands of Plenderguest, wherein his said deceased brother died infest. It was alleged by the defender, That he bruiked by a right from William Home of Linthil, who was infest in the property by the said Alexander. It was answered, and offered to be proven, That Linthil's right and infestment was to the behoof of the excipient, and so in the same condition as if the right had been immediately granted to the excipient by his said deceased brother; in which case he would have necessarily been successor *titulo lucrativo*. It was duplied, That though Linthil's right was to the behoof of the excipient, yet it cannot infer, against him, *gestionem pro hærede*; seeing his brother was legally denuded, and that *gestio* imports *animum adeundi* or *intromittendi pro hærede*. Neither can a right from a mediate person, derived to him, make him successor *titulo lucrativo* to his brother; because, in our law, such a succession is only sustained against a person who is *alioqui successurus*, as he who *præcipit hæreditatem*; but, when a right made to a stranger is derived to an apparent heir, his taking thereof cannot be said to be *præceptio hæreditatis*, the heritage being in the person of him to whom he could not be heir. The Lords assoilyied the defender from the passive titles; but found the right made to the defender made him liable to the debt, according to his intromissions bygone, and in time coming.

No. 19, Page 15.