1670. *July* 7. JANET TRAN *against* The LAIRD of DUNLOP.

IN a beforementioned suspension, raised at the instance of the said Janet, against the Laird of Dunlop, who had charged her upon a bond, granted by her to Robert Brown, for the sum of £1200 or thereby, to which he was assigned, upon this reason,—That her bond granted to Robert Brown, was only for liberating Allan Dunlop, her son-in-law, out of prison; who was incarcerated at Robert Brown's instance, for the like sum: and that the charger had confessed, by his oath, that he had satisfied Robert Brown, at the desire of the suspender, and upon promise to procure an assignation to Allan Dunlop's bond, whereupon Brown had led the first comprising of Allan's estate:

It was ANSWERED, That the charger, before that time, having an heritable right, from Allan, of his lands and estate for sums equivalent to the worth thereof; albeit he had confessed, that he had satisfied Brown at the said Janet's desire, yet that could not oblige him to assign Brown's bond with the comprising led thereupon, it being prior to his own right, and to his prejudice and hurt; and that he was content to give his oath, that he never intended to satisfy Brown upon any other reason but to liberate Allan, and to acquire the apprising for bettering his own security.

The Lords, notwithstanding, did suspend the letters *simpliciter*; unless Dunlop would assign the bond granted to Brown, with his apprising led thereupon, to the suspender, that she might get her relief: for they found, that Dunlop's oath was an acknowledgment that he was intrusted by the suspender to satisfy Brown, and to procure an assignation; which, in law and reason, could not be interpreted but that it was to have been procured for her behoof and relief, and not for Dunlop's behoof, who was to be satisfied by the suspender for the sums of money paid by him to Brown for the said assignation.

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1670. *July* 8. THOMAS KENNEDIE *against* COLANE, his ELDEST BROTHER, and his TUTORS.

THE deceased Laird of Colane having made a disposition of the lands of Carraway to Archibald, then his second son, with this provision,—That, in case he should succeed to his elder brother, and to the estate of Colane, that then he should denude himself in favour of Alexander, his third son, who was appointed to succeed to him in the said lands, notwithstanding of any law to the contrary; the said Archibald having succeeded to the estate of Colane, by the decease of his elder brother, and Alexander, who was substitute to him in the lands of Carraway, being likewise deceased; Thomas Kennedie, the fourth brother, being served heir to Alexander, did intent action against the said Archibald, for resigning the said lands of Carraway in his favours.

It was ALLEGED for the defenders, That he could not be decerned to resign in favours of the said Thomas; because, by the provision of his right, he was only obliged to resign in favours of Alexander, without mention of his heirs. *2d.* Albeit there had been mention of his heirs, yet the defender himself being

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.

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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.

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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-