

No 19.

successor, the disposition was *præceptio hæreditatis*, and THE LORDS had already found that a disposition to an oye made him lucrative successor, albeit his father who was immediate apparent heir, was living.

THE LORDS sustained not the libel upon that member, for they found it was not alike, to dispoñe to a brother, as to a son or a brother's son, as to an oye, because a brother is not apparent heir, nor *alioqui successurus*, seeing the dispoñer has *hæredes propinquiores in spe*; and therefore cannot be presumed to have dispoñed to his brother, or brother's son, in fraud of his creditors, seeing that by that disposition, he does also prejudge his own son, if he should have one; and this but prejudice to the pursuer, to reduce the disposition upon the act of Parliament, as accords.

*Fol. Dic. v. I. p. 247. Stair, v. I. p. 310.*

No 20.

1698. *January II.*COLQUHOUNS of Kermuir and Craighton *against* STIRLING of Law.

In a process against an heir of entail, found that the heir of line was sufficiently discussed, by the obtaining a decree against him upon a renunciation.

CRAIGHTON and his assignee pursue Law for payment of 5000 merks of tocher, resting by Stirling of Law to him, by his contract of marriage with Law's daughter; *super hoc medio*, that you are his heir of tailzie, and expressly burdened with the payment of all his debts. *Alleged*, I have the benefit of discussion of the heirs of line, ere you can reach me, the heir of tailzie; and Craighton's Lady, and Law the defender's mother, being the debtor's two daughters, they must be first discussed. *Answered*, There is no need of insisting against the lineal heirs here, unless you can condescend on an estate belonging to them which I may discuss; for the heir of tailzie is expressly burdened with the whole debts, and so *in eventu* is bound to relieve the heirs of line. *Replied*, If Craighton will pass from his reduction quarrelling the tailzie, and will ratify the same, and assign me to the debt then the heir of tailzie is willing to pay it; but it is hard to leave him the power of quarrelling the tailzie, and yet cause the heir of tailzie to pay the whole. *2do*, There is not so much as a renunciation yet given in by the heirs of line, which is the least discussion that can be, before you come upon the heir of tailzie. THE LORDS found the heirs of line sufficiently discussed by obtaining a decreet *cognitionis causa* on their renunciation to be heir, and that the heir of tailzie could not be insisted against till that were done; and whereas the late case between Kennedy of Auchterfardel and Menzies of Raw was urged, where the heir-male was allowed to be discussed before the heir of line; THE LORDS remembered that was not in a process for payment of a sum, but for implement of a tailzie, where there is no order for discussing, but the heir of the investiture must fulfil. *See* TAILZIE.

*Fol. Dic. v. I. p. 247. Fountainball, v. I. p. 811.*