No 14. a prelate; because the Lords had fand, that he who was infeft in any lands or annualrent might have an air, albeit he were na baron, but only an heritor.—In respect whereof the LORDS repelled the allegeance, and fand, that he being provided to a parsonage might have ane air.

Haddington, MS. No. 2938.

1628. *February* 23. DUNBAR *against* LESLIE.

No 15.
An heir cannot be pursued upon the passive title of behaving himself as heir, by intromitting with heirship moveables, where the father ceased to be *baro*.

Found that a defunct's son could not be liable *passive* for intromitting with the heirship goods, because his father, though a burgess, was not alleged to be an actual resident, using trade, but only an honorary burgess.

IN a reduction betwixt Dunbar and Leslie, of a decreet obtained by James Leslie against one Dunbar, as charged to enter heir to his umquhile father, who was cautioner for a sum of money owing to the said James Leslie by the Laird of Mochrum, principal party obliged; which decreet was desired to be reduced, because it was given only against the son of the cautioner, as lawfully charged to enter heir, he being then minor, and as yet is; likeas he, with consent of his curators, produced a renunciation to be heir, subscribed by them and him, and so desired to be reponed. This reduction was raised by the minor, and also by one who was cautioner for him in a suspension, raised by the minor of that same decreet, upon that same reason, and wherein protestation was admitted; and therefore the reduction was also raised at the instance of the cautioner in that same suspension, against which the said protestation was admitted, and because the minor was dead since the intenting of the reduction, and the day of compearance in the second summons, the LORDS found, That the said cautioner could not use the said renunciation, the minor, maker thereof, being dead, as he might have claimed the benefit thereby, if the minor had been living, and therefore assoilzied from that reason at the cautioner's instance; but thereafter the parties were ordained to be further heard, this being thought to be an hard decision.

This action being again called in presence of the Lords, upon 26th June 1628, this decision was altered, and found that the cautioner might produce the minor's renunciation, and use it for his own liberation, albeit the minor was dead, and the reason of his reduction was sustained.

July 8.—IN the reduction Dunbar against Leslie, mentioned 23d February 1628, the defender alleging that the minor could not renounce to be heir, because *res non fuit integra*, seeing he was successor to his father's lands *post contractum debitum*, and also had behaved himself as heir to his father, by intromission with his father's heirship goods, and uplifting of the mails and duties of the lands wherein his father was infeft, and that his father was a burgess of the King's burgh-royal, and that he thereby was a person who in law had an heir; the defender condescended upon sundry alternatives, whereby he *alleged*, that *res non erat integra* to the minor to renounce; which alternatives being consi-

dered by the Lords, they found, That a charter granted to the minor of the lands, whereof his father was heritor before the said charter, flowing from no deed done by the father to the son, but proceeding from the disposition of the superior, upon another party's resignation made in favour of the son, having no dependance nor relation to the father's right, made not the son to be successor to the father in these lands, albeit the sasine given to the son upon the foresaid charter, was after the contracting of the debt controverted; for he could not be successor in his father's right of these lands, the right whereof he had acquired *aliunde* as said is; for, seeing the father's right stood in his person, and the son claimed no right to these lands, whereby the creditor might claim the same right by adjudication or otherwise, and therefore the pursuer's answer, to elide that member of the condescendence, viz. whereby the defender had alleged, that the minor succeeded to his father's lands foresaid, was found relevant to elide that alternative; and also where the defender condescended that he had succeeded to his father in some other lands, whereon he was special, that alternative was found elided also in that part by this reply, viz. that the superior had obtained decreet against his father, decerning all his evidents of these lands to make no faith; after which decreet, he had for sums of money obtained to himself a new right of the same lands; which the Lords found relevant, seeing there was nothing qualified to detect, that that infeftment after the said decreet, was obtained by the procurement and travels of the father; and where the defender condescended, that the minor had meddled and intromitted with the evidents of the said lands wherein his father was infeft, and so alleged that by that deed he had behaved himself as heir, that was repelled, and the intromission with the evidents, (no other deed being done thereon,) was not sustained *ad hunc effectum*; neither was it sustained that it was alleged, that the minor had, since the decease of his father, in some writ and evident subscribed as heir, and so professing himself; for the Lords found, that the subscribing of the writ, bearing that designation of the party, was not enough to make him heir, not being done in *re hæreditaria*, specially the pursuer subscriber being then and yet minor; and where the defender condescended, that the minor had intromitted with the mails and duties of the lands, wherein his father was infeft, that was elided, because the father's relict had a tack thereof for her lifetime, by whose tolerance he had intromitted; which the Lords found relevant, and declared that the tack being proven by writ, the tolerance might be proven by witnesses against this party; also the Lords found, That the defunct being denuded of the heritable right of his lands by a decreet, decerning the evidents thereof to make no faith, if he had no other lands wherein he stood infeft the time of his decease, he was not such a person who might have an heir, so as if because he was once *baro*, he so continued, *quia semel baro, semper baro*, which rule holds but *presumptive*, viz. that where one is *baro* shown, it is presumed he so continues; and which presumption holds, except it be contrarywise shown, that he was really denuded, and then the presumption ceaseth,

No 15.

No 15. *quia præsumptio cedit veritati;* and where the defender condescended, that the father was a burgess of some royal burgh, the LORDS found not that relevant, because it was not alleged that he was an actual resident burgess, indweller within burgh, and using the exercise of a burgess by trade; which not being alleged, but only that he was *civis honorarius*, the LORDS found that made him not to be of such a quality, as that thereby he had an heir, who might be convened as heir, for intromitting with the best moveable goods pertaining to the defunct.—*See* PASSIVE TITLE.—PERSONAL and TRANSMISSIBLE.—PROOF.

Act. *Stuart & Gibson.* Alt. *Nicolson & Mowat.* Clerk, *Scot.*

Fol. Dic. v. 1. *p.* 365. *Durie, p.* 349. & 383.

*** Auchinleck reports the same case:

HE behaves himself as heir who is infeft in his father's lands, or any part thereof, *titulo lucrativo post contractum debitum*, or he who intromits with his father's heirship goods, or uplifts, after his father's decease, the farms and duties pertaining to his father.

Auchinleck, MS. p. 2.

*** Spottiswood also reports this case:

JAMES LESLIE having obtained a decreet against Hugh Dunbar, as lawfully charged to enter heir to his father, and having charged thereupon, Dunbar suspended upon a renunciation produced by him, subscribed with consent of his curators.—*Alleged* by Leslie, He could not renounce, because he had intromitted with certain heirship moveable goods belonging to the father.—*Answered*, That his father was not such a person who could have an heir, being neither prelate, baron, nor burgess.—To which it was *replied*, That he offered to prove he was burgess of some burgh royal.——It was found by the LORDS, That it was not enough to be *civis honorarius* of any burgh, but that one behoved to be an actual trafficking merchant, otherwise he was not one of those persons comprehended under that maxim, whose heir might be burdened for intromission with any of the moveable heirship.

Spottiswood, p. 138.

1629. *July* 2. A. *against* B.

No 16.

A PRELATE, baron, or burgess, may have an heir; but if one who had heritage was denuded of his heritage in his own time, and died not infeft in lands, he can have no heir, which is an exception from the rule.

Fol. Dic. v. 1. *p.* 365. *Auchinleck, MS. p.* 3.