

1673. *July 23.* JOHN MITCHELL *against* JAMES MITCHELL.

JAMES Mitchell, having recovered decret against Margaret Cunninghame, for payment of 500 merks, contained in an heritable bond granted to Henry Mitchell, to whom he was heir,—compearance was made for John Mitchell; who ALLEGED, That the said Henry, by his testament, had left 200 merks of that sum to him in legacy, whereof he ought to be answered and obeyed.

It was ANSWERED, That the sum, being heritable, could not fall under legacy.

It was REPLIED, That the said James, who was heir, had confirmed that sum as moveable, and given up that bond in the inventory of the moveable debts, whereby he had homologated the legacy, and could not quarrel the same; it being special out of that same bond confirmed to him.

The Lords, notwithstanding, did prefer the heir; and found, That the confirmation being upon error, and of a bond that could not fall under testamentary confirmation, could not prejudice the heir.

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1673. *November 21.* M'KENZIE *against* M'CLAUD.

IN an action of improbation, at M'Kenzie's instance, against M'Claud;—it being ALLEGED for the defender, That the seasine of the lands produced could be no title, because it only flowed upon a precept of *clare constat*, which was sufficient for a passive title, but not for an active title:—

It was ANSWERED, That, albeit the precept of *clare constat* gave no interest nor title to pursue for any thing that belonged to an heir, besides what was contained in the precept and seasine, yet it was a sufficient title as to the right and interest of these lands therein contained, to pursue either for maills or duties, or an improbation.

The Lords did repel the defence, and sustained the improbation, and found the title sufficient.

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1673. *November 27.* ROBERT RUSSEL, Provost of Stirling, *against* WILLIAM LAMB.

IN an action of poinding the ground of the lands of Southbrae, at the instance of the provost, being infest in an annualrent, to which he had right flowing from Anna and Margaret Wallaces, as heirs to their father, to whom the said annualrent was disposed by his elder brother;—it being ALLEGED for William Lamb, That he had comprised the said lands from the said Anna and Margaret, as charged to enter heir to their father and uncle, and all right that was in their person; which must carry the right of the said annualrent which was due out of the said lands; as was found in a case betwixt the Laird of Craigiehall and the Lord Renton:—

It was ANSWERED, That the comprising, being led for a debt due by the uncle, who was fiar of the lands, and who had dispoſed the right of the annualrent to the ſaid Anna and Margaret's father, they could not be denuded thereof, unleſs they had been ſpecially charged to enter heir to the ſaid annualrent, as being a diſtinct ſeveral right from the lands: no more than, by a ſervice and retour, they could have right to the ſaid annualrent, as being infeft in the lands; which is contrary to our fundamental law as to conveyances of theſe ſeveral rights; having their diſtinct manner, both in their ſervices, retours, and infeftments. And as to the practick, it did not meet the caſe; becauſe the annualrent, as well as the lands, were deduced in the comprising; and all right that the debtor had: ſo that there was a great diſtinction betwixt an annualrenter who had acquired the rights of the lands, againſt whom the comprising was deduced, and this caſe, where the ſaid daughters, annualrenters, had never right to the ſaid lands, nor their father.

The Lords did not decide this point *in jure*, if the comprising the lands did carry the annualrent to which the apparent heirs were not ſpecially charged to enter; in reſpect that they found the ſaid William Lamb to have no right, by his comprising deduced at his inſtance, as heir to his father; whereas he had an elder brother then living, from whom Ruſſel had comprized the right of the ſaid lands. But it ſeems that a comprising, led againſt an apparent heir, both to an annualrenter and to the fiar of the land out of which the annualrent was due, ought not to carry the right of the annualrent, unleſs the right of the fee and annualrent did belong to one and the ſame perſon whom they did repreſent, who was ſole debtor in the ſums of money contained in the comprising: for, notwithstanding of that comprising, a creditor of the annualrenter, charging the ſame apparent heirs to enter ſpecially to the annualrent, and thereupon comprising, the right thereof will be preferred to a prior compriser of the right of the lands only, and not the annualrent.

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1673. November 27. ALEXANDER BEATTIE *againſt* The LAIRD of MORPHIE.

THE deceased Laird of Dunn, being debtor to Robert Beattie, in Montroſe, by bond, in the ſum of two thouſand and odd hundred pounds, which was aſſigned to the Earl of Ethie upon a back-bond; Ethie did tranſact with the Laird of Morphie, who acquired a right to the Laird of Dunn's eſtate, and obtained a bond from him, bearing, that, being ſatisfied of his own debts and cautionaries, he ſhould ſatisfy the Earl of Ethie of all ſums due to himſelf, or as aſſignee to any bonds granted by the Laird of Dunn: and thereafter did grant a new bond to the ſaid Earl, bearing, *per expreſſum*, his aſſignation to Beattie's debt: and, in corroboration of the firſt bond, and but any derogation thereto, of new, became bound and obliged to pay the ſaid debt, and all others due to Ethie, out of the firſt end of the price of the lands of Dunn, he being firſt ſatisfied of his own debts and cautionaries. After which the Earl of Ethie, having made a retroceſſion to Alexander Beattie, as executor to his father, and alſo aſſigned him to both the ſaid bonds granted by Morphie, he did thereupon purſue him, as repreſenting his goodsire, granter thereof, for payment.