

affect the debtor's estate by a comprising or adjudication upon the apparent heir's renunciation; which reason could not be pretended by this pursuer, to whom he was willing to grant a renunciation, so that he ought to condescend upon a passive title if he would have him personally liable.

Gosford, MS. No 739.

No 60.

1698. December 13. JOHN MOFFAT *against* BROWNS and AITCHESON.

MOFFAT pursuing mails and duties of a tenement and croft of land in Kelso, as being infest on a feu-charter flowing from the Earl of Roxburgh; they defend with a wadset from his father. He repeats a reduction, that it was a *non habente potestatem*, his father being never heritor, but only a kindly rentaller during his life. They oppose a pursuit at their instance against him, as representing his father on the passive titles, and so was bound to warrant his father's deed; and the passive title insisted on was, that he had got the feu-charter from the Earl, his superior, in contemplation that his father and predecessors had, past all memory, been kindly rentallers in that land; and so he having got this benefit by his father, he ought to represent him. *Answered*, His father's right was only a precarious rental, and at best expired with his life; and so the continuation of his son's possession, or the narrative of his charter, imports no passive title, especially seeing it bears payment of sums of money, besides the kindness. THE LORDS were clear this could never infer a passive title. But some of them thought, if a rentaller's son get a feu for paying 500 merks, which the superior would not have granted to a stranger under L. 1000, in that case, though he could not be liable personally, yet the land might be affected *in quantum erat lucratus*. The President was of a contrary opinion; but this was not decided. There was another ground insinuated, viz. that the Earl had entered into a contract with his rentallers to grant them feus at such a rate, and that Moffat's father was one of them. This the LORDS thought relevant; for then his father was a feuer upon the matter, and he succeeds to him therein; but the LORDS appointed them to be farther heard upon this.

Fol. Dic. v. 2. p. 31. Fountainhall, v. 2. p. 24.

No 61.

A feu-charter granted to a young man in contemplation that his predecessors had been rentallers of the lands, found not to infer behaviour.

1715. June 23.

JAMES FORRET *against* The REPRESENTATIVES of JAMES CARSTAIRS.

In a process of aliment at the instance of Forret against the Children of Bailie Carstairs, as representing Mr Thomas Finlay, schoolmaster at Drumeldrie, whom the pursuer, who kept a public boarding-house, had entertained several years; these three points coming to be discussed, viz. 1^{mo}, How far

No 62.

The proposing the peremptory defence of prescription found to infer acknowledgment of the passive titles.