No 17. taken away, and may be sought for and claimed by the creditor, after what legal manner he thought most expedient, whereof the LORDS thought that in reason he ought not to be prejudged. *See* PASSIVE TITLE.

*Fol. Dic. v.* 1. *p.* 365. *Durie, p.* 791.

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1664. *July* 19. SCRIMZEOUR *against* EXECUTORS of MURRAY.

No 18.

ONE dying infeft in an annualrent, has heirship moveables; for as the annualrent is a *feudum*, an annualrenter may be esteemed a *baro* as well as a petty feuar.

*Fol. Dic. v.* 1. *p.* 365. *Stair.*

*** See this case, No 4. p. 463.

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1666. *January* 27. COLONEL JAMES MONTGOMERY *against* STUART.

No 19.
Heirship moveables cannot be, where the defunct had only a disposition without infeftment.

IN the declarator betwixt these parties, mentioned the 24th instant, *voce* HERITABLE and MOVEABLE, it was *alleged*, That the plenishing and moveables could not be declared to belong to the pursuer, by virtue of Dame Elizabeth Hamilton's disposition, in so far as concerns the moveable heirship, in respect it was done on death-bed, and could not prejudge the defender, who is heir, even as to the heirship moveables.—It was *answered*, That the said Dame Elizabeth being infeft neither in land nor annualrent in fee, could have no heirship.—It was *answered*, That her husband and she were infeft in certain lands by Home of Foord, which were disponed to her husband and her in conjunct-fee, and to the heirs of the marriage; which failing, to whatsoever person the said Sir William should assign, or design; and true it is, he had assigned that sum to his Lady, whereby she had right of the fee, and so might have heirship.

THE LORDS found, That this designation made the Lady but heir apparent or of tailzie, whereupon she was never infeft; and by the conjunct-fee, she was only liferenter; and that the assignation to the sums and right, gave not her heirs any heirship moveable.

*Fol. Dic. v.* 1. *p.* 365. *Stair, v.* 1. *p.* 345.

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1668. *February* 1. —— *against* SCOT and MUIRHEAD her Husband.

No 20.
A man taking to himself lands in liferent, and to

MR HARY SCOT's daughter, and her husband Mr John Muirhead, for his interest, being pursued as representing the said Mr Hary, for a debt due by him, the pursuer insisted on the title of behaving as heir by intromission with his

moveable heirship.—It was *alleged*, That he could not have an heirship, being neither prelate, baron, nor burgess.—It was *answered*, That he had acquired the land condescended upon to himself in liferent, and to his daughter in fee; which was equivalent as if she had succeeded to him in the said lands.

No 20. his daughter in fee, is not a baron, and has no heirship moveables.

THE LORDS assoilzied from that title, in respect he had no right in his person, in which she could have succeeded. Some were of opinion, That if the right had born the ordinary clauses, and a power to dispone and wadset, notwithstanding the fee in the person of the daughter, that in law he ought to be considered and looked upon as a baron; being in effect, and upon the matter a fiar.

Clerk, *Hay*.

*Fol. Dic. v.* 1. *p.* 365. *Dirleton, No* 151. *p.* 60.

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1674. *December* 22.

The HEIRS PORTIONERS of SEATON of Blair *against* SEATON.

No 21. No heirship moveables in the case of a person who died not infeft in lands, altho' he possessed them as heir apparent, and might have been infeft.

JOHN SEATON of Pitmedden did apprise the lands of Blair in *anno* 1638, and was thereupon infeft; after his death, James Seaton, his eldest son, did dispone the right of the lands to George Seaton, eldest son to the debtor, with warrandice; but in respect that the said apparent heir was never served heir nor infeft, Sir Alexander Seaton, the second son, now becoming apparent heir to his father, grants a bond, wherupon the rights of the lands of Blair are apprised from him as charged to enter heir, whereupon the heirs of George Seaton pursue Sir Alexander Seaton as representing his brother James Seaton, upon the clause of warrandice in James's disposition, and insist against him as behaving as heir to his brother by drawing of his heirship moveables, or getting a composition therefor, or intromitting therewith; 2*do*, As lucrative successor to him by a disposition granted by the said James his brother to the said Sir Alexander. The defender *alleged*, That the first member of the condescendence ought to be repelled; 1*mo*, Because the defunct was never infeft in any lands, and so could have no heirship, being neither prelate, baron nor burgess; 2*do*, The defunct was rebel, and his escheat was gifted and declared during his own life, long before the intenting of this cause, which doth purge the defender's intromission, who thereby is comptable to the donatar, and to no creditor, in the same way as confirmation of executors purgeth vitious intromission.

Both which the LORDS found relevant.

And as to the second member, the defender *alleged*, That it is not relevant, for albeit a disposition to an apparent heir who is *alioqui successurus* be *præceptio hæreditatis*, and infers a passive title, yet that is only extended to descendants and never to collaterals who are not apparent heirs, so long as descendants are