to which some must be served heir in special for transmitting the infeftment in the heir's person, either as heir of line, or heir of tailzie and provision; but, in this case, there is no necessity of a service or retour, being only a personal obligement in favours of the heir or bairn, which the heir or bairn may pursue without a service. No 3.

THE LORDS sustained the process at the instance of the bairn as bairn, reserving consideration, in its own due place, how far the pursuer might be liable to creditors; and, in the mean time, found, that the relict should be preferred to the pursuer, as to the liferent of any thing provided to her in liferent, by contract of marriage, but not what she might claim of the moveables *jure relictæ*.

Gilmour, No 126. *p.* 91.

1682. *November* 28.

EARL of MIDDLETON *against* Sir JAMES STANFIELD.

No 4.
An apparent heir was not subjected to the passive title of behaviour, by granting a factory to one to uplift rents of lands, when his father's whole estate was provided to a liferenter, and to the children of a second marriage.

IN the suspension pursued by the Earl of Middleton against Sir James Stanfield, of a decreet recovered at Sir James's instance against the Earl, as lawfully charged to enter heir to his father, the Earl having *alleged*, That the time of the pronouncing of the decreet he was absent *reipublicæ causa*, being Ambassador for the King to the Emperor, and that he produced now a renunciation; it was *replied* for Sir James, That he could not renounce; because he had behaved as heir, by granting a factory to William Cooper, for uplifting the rents of his father's estate the year 1674, and bygones preceding his father's death; and that, accordingly, his factor had uplifted and counted with him, and remitted several sums of money to him by bills. It was *duplied* for the Earl, That the factory produced, being dated in December 1674, his father having deceased before Whitsunday that year, it was only in general terms to uplift the rents of the defender's estate in Scotland, and that the defender had an estate, properly belonging to himself, before his father's decease, *viz.* the lands of Grashe, to which the factory might be applicable: Likeas, the defender could not behave as heir, by granting a factory for uplifting the rents of his father's estate, whereto it was impossible he could have right, as heir of line, seeing his father, in his own time, did resign his whole estate in Scotland, in favour of his second Lady in liferent, and the children of the marriage in fee; whereupon there was a public infeftment, wherethrough the Lady had right to the mails and duties, after her husband's death: Likeas, he had a tack from the Lady, which did commence from the deceased Earl's death: And albeit the same was after the factory, yet seeing the factory before that tack could not be effectual, the granting thereof could not infer a behaviour as heir.—THE LORDS found that allegeance relevant for the Earl, that his father's whole estate was provided in favour of the Lady, and the heirs of that second mar-

No 4. riage, relevant against the passive titles of behaviour as heir, and allowed him to renounce.

Fol. Dic. v. 2. p. 26. P. Falconer, No 33. p. 17.

*** Harcarse reports this case.

The Earl of Middleton, Lord Secretary, being pursued for his father's debts, as *se gerens pro hærede*, in so far as, immediately after his father's decease, he renewed a factory to William Couper, his father's factor, for uplifting the rents of his lands in Scotland, whom he counted with for these rents of several years preceding and subsequent to his father's death, and got money remitted to him out of them by bills of exchange.

Alleged for the defender, That the factory cannot infer a passive title, seeing it is not special as to any of his father's lands, but general as to his own lands, and the defender had a piece of land to which it was applicable; 2*do*, *Esto*, the factor had counted for and paid to him rents due before the father's death, that could not import *gestionem pro hærede*, seeing these fell under executry; nor yet vitious intromission, there being an executor confirmed before commencing of his process; and any intromission with rents of years after the father's decease, could as little infer behaviour as heir, because the fee of the lands was provided to the children of the second marriage, who were infeft therein; so that the defender, as heir general, had neither right thereto, nor could have *animum adeundi*.

The Lords sustained the defender's several allegeances relevant to assoilzie from the passive titles.

Harcarse, (Aires Gestio, &c.) *No* 36. *p.* 8.

*** Fountainhall also reports this case.

Sir James Stamfield of Newmilns *contra* the Earl of Middleton, now one of the Secretaries; "The Lords, upon Forret's report, found it no passive title against Middleton to cause him pay his father's debt, that he had granted a factory to William Couper, his father's old chamberlain, to uplift the rents; and that two years after his father's death he had counted with him and given him a discharge; which they found no gestion; because he stood infeft in some lands before Sir James's debt, and the factory was general, without condescending, and so might be applied to these lands; and that he had a right to intromit from his mother-in-law, who was liferentrix of the lands, and stood infeft in L. 10,000 Sterling for the behoof of her children; which was sufficient to palliate, cloak, and purge his intromissions, and make him only accountable to her."

Fountainhall, v. 1. p. 197.

*** This case is also reported by Sir Patrick Home.

No 4.

1682. *December.*—SIR JAMES STAMPFIELD having obtained a decreet against the Earl of Middleton, as representing his father upon the passive titles, for payment of a debt assigned to him by Lindsay, merchant in London; and the Earl having raised suspension and reduction, and being reponed against the decreet upon that ground, that he was absent *reipublicæ causa* the time of the obtaining of the decreet, he being then at Vienna as Ambassador from the King to the Emperor, and that he was content to renounce to be heir to his father, and gave in a renunciation;—*answered* for the pursuer, That the Earl could not be free by granting of a renunciation, because he behaved himself as heir to his father, in so far as he did grant a factory in the year 1674, immediately after his father's decease, to William Couper, who was formerly chamberlain to his father, for uplifting of the rents of the lands; and, accordingly, he counted with the factor for the rents of the lands, both for years preceding and after his father's decease. *Replied*, That the granting of the factory could not infer a passive title, because it was only a general factory for intromitting with rents of his lands, and annualrents of sums of money due to him; so that he having both lands and sums of money due to him in Scotland, beside those that belonged to his father, *viz.* the lands of Loresslie, acquired from the Earl of Strathmore, and several sums of money due by Sir James M'Donald to the Earl himself; so that the factory can only be understood of the rents and annualrents of these lands, and sums of money, and not of rents of lands or sums of money belonging to his father; especially seeing all the lands in Scotland belonging to his father were liferented by his mother-in-law, and any intromissions he had with the rents of these lands, was by virtue of a tack from his mother-in-law, for which he paid her a considerable tack-duty; and albeit the factor did count to the Earl for the rents of the lands belonging to his father, yet that cannot infer the passive title of vitious intromission against him, because there was an executor confirmed, *viz.* the said William Couper, before the intenting of this process, which is always relevant to purge vitious intromission, seeing the Earl is countable to the executor. *Duplied*, That, albeit the right of the lands of Loresslie be taken in the Earl's name, yet it appears, by William Couper's accounts, that there was a part of the price paid out of the rents of the lands that belonged to his father; and it appears likewise, by the accounts, that the factor sent several sums of money to the Earl, by bills of exchange, and the Earl did count yearly with the factor, and stated the balance that was due, even for the rents of these lands that belonged to his father, before he had the right to the tack from his mother-in-law. *Triplied*, That, albeit there was a part of these lands belonging to the Earl's father employed for payment of the price of a part of the

No 4. lands of Loresslie, seeing there was an executor confirmed; and albeit the Earl received several sums of money from the factor, upon bills of exchange, before he got the tack from his mother-in-law, yet these sums can only be ascribed to the rents of the lands of Loresslie, and other sums of money belonging to the Earl himself, especially seeing the sums contained in these bills, preceding his right from his mother-in-law, do not exceed the rents of his own lands, and the annualrents of the sums of money that belong to himself, and the stating the accounts with the factor cannot infer a behaviour as heir, not only for the reasons above mentioned, but also for this reason, that, albeit there be a balance stated as due to the Earl, yet he never received it, but it is yet resting; so that behaviour as heir being *majus animi quam facti*, it cannot be understood that the Earl designed to behave as heir, seeing he has not reaped any advantage of any rents of the lands belonging to his father, but which he had right to from his mother-in-law.—The Lords found, that the late Earl being denuded of his estate, in favour of his Lady, from whom this Earl hath a tack, and that the factory given to William Couper being general, it could not infer particular behaviour; and that the vitious intromission was taken off by the confirmation of an executor, before the intenting of this cause.

Sir Pat. Home, MS. v. 1. No 290. p. 431.

SECT. II.

Intromission with the Predecessor's Rents is a Behaviour. What understood to be the Predecessor's Rents.

1628. *March* 22. Farquhar *against* Campbell.

No 5.

Intromission by an apparent heir with the rents of a subject, whereof his father died in possession, found not to infer behaviour, it being afterwards understood, that the defunct had no right to the subject, but a third party, to whom the apparent heir behoved to account for his intromissions; and, therefore, the creditors were not prejudged by the apparent heir's intromission with a subject which did not belong to their debtor.

Fol. Dic. v. 2. p. 27. Durie.

*** This case is No 152. p. 9022. *voce* Minor.