No 11. his decease that was free.—It was *alleged* be the defender, That the said persewar had na right to airship, nor half guids foresaid, because she was but ane woman, and spousit the said defender, and could have no gear, because he being her husband, was *dominus omnium bonorum;* and also had no right to the half of the gear, as said is, in case she had any, because the said Rutherford made ane testament, and left certain legacies, and her husband only executor and intromitter, to dispone upon the rest of her gear be the legatars, as he would answer to the High Judge.—It was *replyit* be the said persewar, That he had gude right to the said airship, because she was ane lady of heritage, and sua differed fra another woman, being no heretrix; and also, howbeit she made ane testament, as said is, she might not leave in legacy the airship pertaining to the air; and albeit she made ane testament, in the whilk she made her husband executor, to dispone upon the remanent gear by her legacy, as he would answer to the High Judge, yet that takes na right fra the persewar to the half of the gear; because there were na bairns, and he was nearest of her kin; and the executor had no power to dispone be reason of his office at his pleasure, but conform to the law of God and man, whilk will that the nearest of kin to any person that is deceast, should have the haill gear, and not to be disponit at the pleasure of the executor, notwithstanding the words of the testament bearing in effect, I left my gudes to be disponed be my executors, as they will answer to the High Judge.—It was *alleged* be the defender, That albeit the said persewar should have right to the said gear, lang or he persewed the same, and soon after the decease of the said lady, it being war with England, because he dwelt near to the border, and had na strength, he put the said gudes and gear in keeping with his ain, in the Laird of Cranshaw's house, with the Laird of Swinton, where the Englishmen, be invasion with a great army, came to the said house, where the said gudes and gear were, and *per vim majorem*, spulziet and tuik away the haill gear foresaid, together with the defender's ain gear libellit, be reason foresaid. This matter depending before the said Sheriffs, and the Sheriffs, be their request, desired the Lords to give their counsel to them in the said matter, because it was an noveltie; and to that effect the Sheriffs and the party persewar purchesit ane writing direct fra the Queen's grace, desiring the Lords to give counsel in the said matter, to the whilk the said Lords grantit; whilk Lords fand be interlocutor, that the said persewar should have ane airship of the best of all things that pertained to the said Lady; and as to the remanent gear, and exceptions made thereupon, the parties agreed or the said exception was discussit, and sua the matter endit.

Maitland, MS. p. 140.

No 12. 1615. *January* 21. & 26. TODRIG *against* PRIMROSE.

IN an action betwixt George Todrig, and Mr David Primrose and his spouse, the LORDS fand, That a woman who was infeft in an annualrent by her father,

which was renounced the time of her marriage, or any time before her decease, could not have an heir. No 12.

Kerse, MS. fol. 137.

1619. *December* 17. KEITH *against* MENZIES.

No person may have an heir, but he who is either a prelate, or burges in fee undenuded. See No 16. p. 5394. No 13.

Fol. Dic. v. 1. *p.* 365. *Kerse, MS. fol.* 138.

1623. *November* 29. WILLIAM RIGG *against* ROSS or M'KENZIE.

FOUND, That a parson provided to a benefice may have an heir. No 14.

Fol. Dic. v. 1. *p.* 365. *Kerse, MS. fol.* 139.

*** Durie reports the same case:

IN an action pursued by William Rig Baillie of Edinburgh, against the eldest son of Mr John M'Kenzie, parson of Dingwall, who was convened as behaving himself as heir to his father, by intromission with his father's heirship goods; it being *alleged* that he could not be convened *hoc nomine*, seeing his father was not a person of that quality who could have an heir, and consequently he could not be convened as intromitter with his heirship, and so to make him heir to a person who could not have an heir; seeing his umquhile father was neither prelate, baron, nor burgess, which were the three degrees of all the subjects who might have heirs. This allegeance was repelled, seeing the defunct was parson of Dingwall; for the LORDS found, That parsons provided to the like benefices, albeit they were not of the degree of prelates, yet that they might as lawfully have heirs as persons who were infeft in any small annualrent, or in any small piece of land heritably, and who being comprehended under the name of barons or freeholders, had heirs, as also as burgesses, who, albeit but mean craftsmen, and of mean substance, yet they also had heirs.

Act. *Pearson.* Alt. *Mowat.* Clerk, *Gibson.*

Durie, p. 84.

*** This case is also reported by Haddington:

IN the action pursued be William Rig, against the aires and executors of umquhil Mr George M'Kenzie parson of Dingwall, it was *alleged*, That the defunct could have no aires, because he was neither prelate, baron, nor burgess.—It was *answered*, That being a beneficed man, he behoved to be reputed to be as