

1663. February 26.

JAMES CUTHBERT of Dragacres against ROBERT MONRO of Foulis.

No 24.

Found in conformity with Straiton against Chirnside, No 22. p. 9664.

THE said James pursues the said Robert Monro, as heir to his predecessor the Laird of Foulis, for payment of a debt due by him, and insists against him as behaving himself as heir by intromission with the moveable heirship. The defender *alleged* absolutor, because it was not condescended that the defunct was a person who could have an heir as to heirship moveables, as being prelate, baron, or burgess; and, if the lands of Foulis be condescended on, it is offered to be proved, that he was denuded by apprising before his death, to which apprising he had right before he was apparent heir, being tutor to another who was apparent heir for the time; and therefore the defender has neither behaved himself as heir by intromission with the moveable heirship, nor the rents of the defunct's lands. *2do*, The defender died rebel and his escheat gifted and declared, and so *nihil habuit in se bonis*, and could have no moveable heirship. It is *answered* for the pursuer, to the first, *Non relevat*, that the lands were appraised from the defunct, unless the legal had been expired, yet *semel baro semper baro*. *3tio*, The pursuer having taken right to the apprising while he was tutor *ipso facto*, it accresced to the pupil and thereby was extinct, and cannot defend his intromissions. *4to*, It was for a small sum and satisfied by intromission of a year or two, so that the continuance of the apparent heir in the possession after he was satisfied is *gestio*. *5to*, The gift and declarator if it was done during the rebel's life, it was simulate *retenta possessione*, and so null.

THE LORDS found the apprising not to purge the intromission unless the legal had been expired, in moveable, and his apparent heir might behave himself as heir by intromission with the rents of the appraised lands; but if the legal was expired, they found it sufficient, and that *semel baro semper baro* is only to be understood *presumptive, nisi contrarium probetur*; as also they found the defender his taking right to the apprising, while being tutor, or continuing in possession after satisfaction thereof by intromission, not to infer the passive title, and that the gift and declarator did take away the heirship moveable, unless it were offered to be proved *simul* or *retenta possessione* during the rebel's lifetime. See PRESUMPTION.

Fol. Dic. v. 2. p. 28. Stair, v. 1. p. 188.

*** A similar decision was pronounced, 22d December 1674, Seaton against Seaton, No 21. p. 5397, *voce* HEIRSHIP MOVEABLES.