

No. 35. Alleged for the defender, That James the heir was excluded by the several deeds at Cramond and Buoy of Nore; *1mo*, By that at Cramond, wherein he is passed over, and his heirs-male called next after the heirs of elder and younger Orbiston's bodies; *2do*, By the settlement at the Buoy of the Nore, not only by instituting another, but by a positive exheredation of him and his posterity, as said is; in which case, it is the same thing whether the heir instituted repudiate or not, since, still, the heir is excluded by the clause above mentioned.

Answered for the pursuers: *1mo*, That the first was not a subsisting deed, but totally innovated and altered by the posterior deed at the Buoy of the Nore; *2do*, That since Sir David Hamilton, the heir instituted in the second deed, did not accept, the heir was not excluded, because the deed remained a deserted deed, and the heir of blood might, notwithstanding thereof, enter to the estate, and possess it; for, otherwise, in such a case, an estate behoved to remain in perpetual non-entry. In short the effect of repudiation by our law is, that it makes way for the heir of blood, not for the substitutes in the settlement; neither will our form of transmission by service and retour suffer it to be otherwise, since no man can be served upon a repudiation, but only upon a failure.

“ The Lords found, That the heir of line, and his issue, were not excluded from the succession by the clause in the said second tailzie.”

Act. *Sir Walter Pringle.*

Alt. *Boswel.*

Clerk, *Gibson.*

*Fol. Dic. v. 2. p. 399. Bruce, v. 2. No. 2. p. 2.*

No. 36. 1725. *January 12.* M'KAY against ROBERTSON.

Bond secluding executors descends by service in a perpetual channel of heirs, so that executors are excluded, not only at the first devolution, but for ever, till the destination be altered.

*Fol. Dic. v. 2. p. 401. Rem. Dec.*

\* \* \* This case is No. 47. p. 3224. *voce* DEATH-BED.

No. 37. 1727. *January.*  
MARQUIS of CLYDESDALE against The EARL of DUNDONALD.

A charter proceeding upon a resignation *in favorem*, the grant whereof was to the resigner, *et hæredibus quibuscunque, hæredes quicunque* were interpreted to be the heirs of the former investitures, which, in this case, happened to be heirs-male.

*Fol. Dic. v. 2. p. 401. Rem. Dec.*

\* \* \* This case is No. 3. p. 1262. *voce* BASE INFERTMENT.