

No. 42. a reduction ; a distinction approved of in all our law books. Now, as the exclusive clause is recited in the retour itself, as the reason why Mary was not served heir-portioner to her brother, as well as her two nieces, and that the said clause is inept and ineffectual ; it is just the same as if an inquest had served a second son heir of line to his father, in respect that his elder brother had renounced to be heir in a process at the instance of one of his father's creditors, which, it is believed, is a nullity that could be objected at any time.

The Lords found, that the exclusion of Mary was effectual, and that the service of the grand-daughters could not now be quarrelled.

*Fol. Dic. v. 4. p. 304. C. Home, No. 188. p. 313.*

No. 43.

1742. June 2.

ROBERTSON *against* KER.

A father having left his whole moveable estate to his son, and the heirs of his body ; whom failing, to his own wife ; upon the death of the son, an uncle, as heir *in mobilibus*, was found to have a right to the son's legitim in preference to the substitute in the testament.

*Fol. Dic. v. 4. p. 304. Rem. Dec. Kilkerran. C. Home.*

•• This case is No. 34. p. 8202. *voce* LEGITIM.

No. 44.

1756. June 16.

MACKINNON *against* MACKINNON.

The estate of Mackinnon stood disposed to John Mackinnon younger, and the heirs-male of his body ; whom failing, to any other son of the body of John Mackinnon elder ; whom failing, to John Mackinnon, tacksman of Mishinish. On the death of John Mackinnon younger, without issue-male, Mishinish served as nearest and lawful heir-male of provision, and was infest. Afterwards a son being born to old Mackinnon, the tutors of the child brought an action against Mishinish, to denude of the estate in favour of their pupil. Pleaded for Mishinish, That he being nearest heir to the deceased at the time, the possibility of a nearer heir's existence was no bar to his service ; and as the entering heir is a *modus acquirendi domini*, it must be perpetual in its effects, and no contingency happening afterwards will overturn it. The Lords found, That the heir-male of old Mackinnon had right to the estate from the time of his birth, and decerned the defender to denude in his favour.

*Fol. Dic. v. 4. p. 304. Fac. Coll. Sel. Dec.*

•• This case is No. 20. p. 6566. *voce* IMPLIED OBLIGATION.