

1631. December 20. MENZIES of Castlehill *against* DOUGLAS of Cashogill.

THE deceased ——— Menzies of Castlehill being cautioner for ——— Douglas of Cashogill, and for his relief of the sums paid by him as cautioner, comprising Cashogill's land; after the said cautioner's decease, his heir pursues the said principal for payment of this sum, and annualrent thereof, ay and while the re-payment, and of all years since his father's decease; and the defender *alleging*, that this relief pertained not to the heir of the cautioner, seeing it was sought, not by virtue of the comprising deduced by the cautioner in his lifetime, but by a personal pursuit, at the instance of the heir of the cautioner; which relief so sought was not proper to him, but pertained to the defunct's executors, who pursued not therefor;—the LORDS repelled this allegation, seeing they found this defender, who was debtor, could not competently propone the same, and the executor distressed him not; likeas the heir offered caution to warrant him at the executor's hands, which the LORDS found sufficient.

Act. Burnet.

Alt. ———.

Clerk, Scot.

*Fol. Dic. v. 1. p. 372. Durie, p. 611.*

\* \* Auchinleck reports the same case:

If the defunct, in his time, comprised lands for his relief, the same will pertain to his heirs, who must find caution to warrant at the executor's hands.

*Auchinleck, MS. p. 15.*

1700. January 16. CARNEGIE *against* CARNEGIES.

IN the competition betwixt Carnegie of Boisack and the daughters of Carnegie of Braiky, it came to be debated, where one raises a summons of adjudication upon a moveable personal debt, and dies before decret, whether the raising and executing the summons of adjudication in the father's lifetime did sufficiently intimate his purpose and design to make it heritable, so as to fall to his heir, or if it still retained its former nature of a moveable right till it was confirmed by a decret. *Alleged* for the heir, That the style of the summons made for him, craving the lands to be adjudged to him heritably, in payment and satisfaction of his sum, which was a legal and habile intimation of his design to nail the sum to the ground and make it real; and before the act of Parl. 1641, (1661) even sums only bearing annualrent were heritable, their yearly fruit being their annualrent; and this is analogous to what the Doctors teach,

No 96.

A cautioner having paid a debt, and comprised the principal debtor's lands; the comprising was found to make the sum heritable.

No 97.

Found, that the raising, executing, and insisting in a process of adjudication, where the creditor died before sentence, did not alter the nature of the debt from what it was formerly.