

No 31. renounced all he might succeed to by his father, heritable or moveable, in favours of his father, his heirs and executors, bearing expressly, that his wife, and his bairns of the second marriage, should have the whole right; *ita est*, Rutherford, the wife, had confirmed the whole moveables *promiscue*, without exception of heirship, and therefore the heir of line himself (if he were entered) could claim none. It was *answered*, That the renunciation of the heir apparent of line being in favours of his father, after his father's death, it returned back to him from his father as heir of line again, and could go to no other person, neither thereby could the heritable moveables belong to the executor.

THE LORDS found the renunciation sufficient to exclude the heir of line from the heirship moveable, and that they did thereby belong to the father's executor; therefore found no further necessity to discuss the heir of line, and decerned against the heir of provision.

Stair, v. 1. p. 510.

1668. December 8. AGNES GOODLET *against* GEORGE NAIRN.

No 32.
A wife predeceasing, her third of her husband's moveables found not to comprehend the best of each kind which were set aside as heirship moveables.
See No 33. infra.

AGNES GOODLET, as representing the unquhile wife of George Nairne, pursues for the third of the moveables belonging to him the time of his wife's decease. It was *alleged* for the husband, That, before division, the heirship moveables behoved to be drawn. It was *answered*, That there could be no heirship of a man that was living: It was *answered*, That albeit there was no actual heirship, yet the best of every kind was heirship moveable, wherein the wife had no interest.

Which the LORDS sustained, and ordained the heirship to be first drawn.

Fol. Dic. v. 1. p. 366. Stair, v. 1. p. 568.

* * Gosford reports the same case:

In a pursuit at the instance of Agnes Goodlet, as executrix and nearest of kin to Elizabeth Goodlet, against George Nairne, bailie in St Andrews, for delivering of a bond of 1000 merks granted to the said Elizabeth, and of a decret recovered thereupon, upon this ground, that the bond bearing an obligation to pay annualrent, by act of Parliament the husband could have no right thereto; the defender was assoilzied from delivery, because there being a decret recovered against the debtor upon the bond at the wife's instance, and the defender, who was her husband, for his interest, and a precept for payment, the LORDS found that the debt did belong to the husband *jure mariti*, being made moveable, as said is. In the same action it being craved by the pursuer, that she might have right to a third of the whole moveables which were possessed in

common by the husband and wife at the time of her decease, without respect to the moveable heirship, which they alleged could not be considered till after the death of the husband, the LORDS found, notwithstanding, that the moveable heirship ought to be set aside before division; and that, as to moveable heirship, there was no communion betwixt husband and wife.

Gosford, MS. No 56. p. 20.

No 32.

1680. November 12. STEVENSONS against PAUL.

STEVENSONS, as creditors to umquhile ——— Cruickshank, having arrested the heirship moveables drawn by Sir John Paul his heir, pursue to make further coming. It was *alleged* for Cruickshank's relict, That, by her contract of marriage produced, 'the half of all her husband's estate, heritable and moveable, ' was to belong to her, if there were no children,' and therefore she had right to the half of the moveable heirship; and as to the other half, it was extant *ipsa corpora* entire, and she could be decerned in no more but to deliver the same, which the arrester could not crave till the price were liquidated.—THE LORDS sustained the defence for the one half, and decerned for the other, and ordained the Magistrates of Aberdeen to roup the same, and take an instrument upon the roup, and deliver the money to the pursuer. It was then further *alleged*, That seeing the relict had the one half of all, there behoved to be an alteration of what fell under heirship; for instance, if there were a dozen of silver spoons, the heir would get them all; but now coming to half a dozen, the heir would get but one, because the defunct had no more himself but the half, and the relict had right to the other half. It was *answered*, That the drawing of heirship was ever of the whole moveables, before any division; and albeit the relict by law has right to a half, or third, which must be as strong as any right by provision in a contract, yet it was never pretended that she should draw her share of moveables first, and that the heirship should only be drawn out of the remainder, as solely belonging to the defunct.

THE LORDS found the heirship was to be drawn, and separated from the moveables, before any division by law or paction, and that the relict might claim the half both of the heritage and heirship moveables, as heir of provision to her husband; but if there were a dozen of silver spoons, for instance, the whole would fall in the heirship, and not one spoon only, as if there were but six, because of the wife's right to the half.

Stair, v. 2. p. 795.

No 33.
Heirship
moveables are
to be drawn
off the whole
head before
the relict's
share. See
No 32. *supra*.