No 21. in *spe*, and therefore alienation of ward-lands to brothers or other collaterals infers recognition, but to descendants it doth not.

THE LORDS found that the disposition by one brother to the other, did not infer him to be lucrative successor. *See* PASSIVE TITLE.

Fol. Dic. v. 1. *p.* 365. *Stair, v.* 2. *p.* 295.

*** Dirleton reports the same case:

IT was found in the case, Sir Alexander Seaton of Pitmedden *contra* Seaton of Blair, that Pitmedden's brother, though he was apparent heir to a baron, he could not have a moveable heirship; because he was not actually *baro*. Some were of opinion, that as to that advantage and privilege of having a moveable heirship, it was sufficient that the defunct was of that quality, that he was one of these estates; seeing a person once *baro*, though he be denuded is *semper baro* as to the effect and interest foresaid; and a prelate, though for age he should become unable to serve, and demit, yet is still a prelate as to that effect; and the apparent heir of a baron, who has right and *in potentia proxima* to be a baron, and is peer to barons, and may be upon the assize of noblemen and barons, if he should be prevented with death before he be infeft, it were hard to deny him the privilege foresaid, that his heir should have his moveable heirship; and if his heir would have the benefit as to a moveable heirship, his intromission with the same ought to import a behaviour.

Reporter, *Lord Forret.*

Dirleton, No 209. *p.* 96.

1678. *November* 21. DOCTOR JAMESON *against* THOMAS WAUGH.

No 22.

A MARRIAGE dissolving within year and day *sine prole*, the LORDS found the gift given by the wife's friends fell to her executors, and by the husband's friends fell to the husband's executors, and the rest in *unoquoque genere* belonged to the heir, because he died infeft in an annualrent, (though it was only a trust) which made him *baro*, he never being denuded.

Fol. Dic. v. 1. *p.* 365. *Fountainhall, MS.*

1695. *December* 25. COCHRAN *against* The DUCHESS of HAMILTON.

No 23.
A lady who was daughter to an Earl and wife to a churchman,

ARBRUCHELL reported Cochran of Kilmaronock against the Duchess of Hamilton, in a reduction, the title whereof was an adjudication of the barony of Evandale, out of which Lady Margaret Kennedy had an heritable bond from the Duke for 50,000 merks, but was never actually infeft thereupon. *Alleged*,

The adjudication is null, because it does not adjudge the right of the sum contained in the said bond, (as it ought to have done,) but only the lands of Evandale, on a false supposition, as if she had stood infeft therein, (as she did not,) and so it can be no title for a reduction. *Answered*, The said bond was mentioned in the narrative of the decreet, and the conclusion, which was sufficient to sustain the diligence. *Replied*, The conclusion could not exceed the premises, and it being omitted in the subsumption, it was altogether defective and unformal; which the LORDS found, though generally the diligence of creditors are more favourable than to be overthrown on small quiddities and omissions in exact libelling. In this process there was also another member, wherein he insisted to have his right declared to the said Lady Margaret's moveable heirship. *Alleged*, by the act 53d Parl. 1474, she could have none, being neither baron, prelate or burgess. *Answered*, She was an Earl's daughter, and so a baroness; she was wife to a minister, viz. to Doctor Gilbert Burnet, afterwards a bishop, and she had a bond bearing infeftment in lands, though not actually taken. THE LORDS found none of these sufficient to give her heirship-moveables, unless infeftment had truly followed, though the brocard has been much extended from its original design; for now any tradesman infeft in lands will be reputed a baron *quoad* the effect of moveable heirship, or of being a baron's peer, to pass upon his assize; so much have we sunk and deviated from the meaning of that old maxim, when first introduced from the *pares curiæ* of the feudal law.

No 23.
possessed an heritable bond, on which she was not infeft. Found that all these circumstances did not entitle her to have an heir.

Fol. Dic. v. 1. *p.* 365. *Fountainhall, v.* 1. *p.* 692.

1698. *November* 22. CUMMING *against.* CUMMING.

No 24.
There can be no heirship moveables where the defunct possessed an heritable bond without infeftment.

A defunct, heir to an actual burgess, who might have entered when he pleased, had borne stent in the town as a trafficking burgess. This was found sufficient to entitle his heir to heirship moveables.

ONE gives an assignation to an heritable debt, but he afterwards dying without coming to kirk and market, the heir reduces the assignation *ex capite lecti*; whereupon the assignee intents a process against the cedent's executor, to pay the sum assigned out of the moveables, on this ground, that *legatum rei alienæ scienter legatæ* makes the executors liable to make it effectual *quoad valorem*, both by the Roman law, § 4. *Institut. de legat.* and ours, 2d Dec. 1674, Cranston *contra* Brown, *voce* QUOD POTUIT NON FECIT. *Alleged* for the Executor, That this cannot be called *res aliena*, for the heritable bond was his own. 2*do*, Neither can it be called *legatum*, for it is conveyed by assignation, which is a deed *inter vivos*, and so the brocard does not meet. THE LORDS found the executor not liable to make up this debt.

He had another process for the moveable heirship. *Alleged*, There can be no heirship save where the defunct was a prelate, baron, or burgess, none of which he was. *Answered*, He had an heritable bond, which was sufficient, though no infeftment was taken thereon. 2*do*, The defunct was the son of an actual burgess, though he was not entered himself. *Replied*, Wadsets or other