1649. *December* 21. BALVARDE *against* AUCHINLECKE.

IN a suspension, Balvarde against Auchinlecke, the decreet for heirship is sustained, because the defunct was a burgess, wherein the custom of heirship-drawing is set down according to the roll in commissariat's or the town-clerk's books, where a yoke of oxen will be taken of seven, or of fewer; *item*, a dozen of silver spoons; but, if they be more or fewer, only one is due.

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1649. *December* 21. ALEXANDER ELEIS *against* JAMES LOCHE.

IN the suspension, Mr Alexander Eleis against James Loche, who had charged for 6000 merks; the reason offered to be proven for this first part,—that he never borrowed any from the said James, but that it belonged to Janet Loche, spouse to Mr Nicoll Edward, and so to her husband *jure mariti*, for whom he had paid much more,—was not found relevant, but the letters decerned to be put to farther execution, for principal and penalty. Neither would the Lords have the said James burdened with production of an alleged backbond; since the said Janet got this 6000 merks for quitting her infeftment, that her husband's creditors might be satisfied.

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1649. *December* 21. The MASTER of FORBES *against* SIR WILLIAM DICKE.

IN the reduction of a bond granted by the Master of Forbes, as cautioner for his father, to Sir William Dicke; the Master, being *in libello*, craved prelation to prove minority; and the defender craved to be preferred, in fortification of his bond, and that majority was more affirmative. The Lords would hear a farther reasoning; but the Master did not care much, providing the witnesses were honest men, so that his father, for whom he was alleged cautioner, and who might tine and win in the cause, was not admitted witness.

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1649. *December* 25. PINKILL, Younger, *against* The LORD BALCARRAS.

IN the pursuit of Pinkill, younger, as executor to his wife, who died within the year, against the Lord Balcarras, her brother, for £10,000, which was her provision, conditioned to her in a former bond which contained more provisions to her sister and brethren, all bearing mutual substitutions, in case of death;—upon that, that the Lord Balcarras had obliged himself, by the contract of marriage of his sister, to pay the foresaid sum, in satisfaction for paying the former

bond of provision;—the Laird of Pinkill alleged, The foresaid bond made moveable by the contract, and innovate, and so ought to belong to him, as her executor. To leave the subtile dispute anent innovation and delegation to the minutes of the process, the Lords found, That there was no innovation in this case. And the reason of my opinion herein was, that, if the common course of drawing up of a contract of marriage had been followed, there had been no place to any controversy, because the *gentlewoman* might have assigned this her bond of provision without any farther, except my Lord would have obliged himself in satisfaction of the said former bond. Neither think I, that the debt contained in the former bond was, to her, *debitum purum, sed modificatum*, qualified by a substitution; et lex 2 *Cod. de Novat.* non vult, in contractu creditæ pecuniæ, actionem inefficacem dirigi; nisi delegatione ritè facta, novationis jure, vetustior contractus evanuerit. But so it is, that delegatio hic non fuit ritè facta; the persons substitute not delegating with her; especially seeing the father's mind, who provided them, was, that his bairns should carry that which she was provided to than any stranger, whether husband or other executor, she deceasing within the year without children; for Ulpian, *lib. singul. tit. 6. de Dot.* distinguishes so inter dotem profectitiam et adventitiam; that profectitia revertitur ad patrem, matrimonio quocunque tempore soluto; ut est etiam in L. Dos a Patre 4 cod. Sol. Matr. Jure, enim succursum est patri, ut amissa filia solatii loco cederet; et dos ei redderetur, ne et amissæ filiæ et pecuniæ damnum sentiret; ut est in L. jure succursum, 6. ff. de Jure Dot. quæ fuit Bulgari sententia, quamvis liberi ex illo matrimonio extarent: Quod non admisit Martinus et ejus sectatores; quorum opinio prævaluit, ut liberi dotis reditum excluderent, quasi liberorum procreatio sit parentum commune votum. L. si vicinis, 9. cod. de Nup. Et dotis causa perpetua esse dicetur; quia, cum voto ejus qui dat, ita contrahitur, ut semper apud maritum sit; L. 1. ff. de Jure Dot. Et alia est ratio, quod scil. publice intersit dotatas esse feminas, ad sobolem procreandam, replendamque liberis civitatem. L. 1. ff. Sol. Matr.—Additque Terentius Clemens legem reipublicæ utilem, sobolis scil. procreandæ causa, latam interpretatione adjuvandam. L. hoc modo sexagesima quarta ff. de Condit. et Demon.; quia partus non tantum parenti, cujus esse dicitur, verum etiam reipublicæ nascitur. L. 1. § 15. ff. de Ventre. In poss. mitt. atque hinc est quod successio sit etiam ex voto, L. nam etsi 15. de Inoff. Test. l. nihil interest 5. § 2. de Bon. Libert. L. Scripto. 7. unde Liber. ff. To apply this to our purpose, our inviolable consuetude has obtained, that the large time granted by the civil law for returning of that sort of dote to the father, shall be restricted to year and day, if she decease within the same, not leaving children behind her; so that, if the father in our case, had constitute a dote to his daughter, she deceasing within year and day without children, the dote would have returned to him, without any doubt, *in solatium amissæ filiæ*. Even so, it returns in our case by the substitution of the sister and brethren whom he puts in his place; so that neither husband nor heir, or executor of the defunct, can get it, except it were children procreate within the year.

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