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

No 96.
A cautioner having paid a debt, and comprised the principal debtor's lands; the comprising was found to make the sum heritable.

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 allegeance, 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.

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.

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 decreet, 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 decreet. *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 97. and particularly *Voet. cap.* 7. *de natura mobilium et immobilium*, that *actiones ad res immobiles tendentes pro immobilibus habentur, nam qui actionem habent, rem ipsam habere censentur, quia per eam non stat;* and Stair, *lib.* 2. *tit.* 1. § 3. shews that destination can *ipso facto* render a moveable sum heritable; and all know that a requisition or charge of horning makes an heritable debt moveable, and all because of the indication of the creditor's mind, even so here. *Answered*, Every incohate act does not alter or change the nature of things, neither is it always the party's design to have his money when he raises an adjudication, but oft times it is rather to secure it: yea the declared intention of calling for a sum in a bond secluding executors by a charge of horning has been found not to make the sum moveable. See M'Kenzie's Instit. book 2. cap. 1. and the act 32d Parliament 1661 excepts no bonds from being moveable as to children's succeeding therein, save only bonds bearing clauses of infeftment, or expressly secluding executors. THE LORDS found the raising, executing and insisting in a process of adjudication, where the creditor died before he obtained sentence, did not alter the nature of the debt from what it was formerly, so as to render it heritable or make it fall to the heir.

Fol. Dic. v. 1. *p.* 372. *Fountainhall, v.* 2. *p.* 81.

No 98. 1723. *November* 12. REIDS *against* CAMPBELL.

AN adjudication led upon a moveable bond, makes it become heritable so as not to be alienable upon death-bed. *See* APPENDIX.

Fol Dic. v. 1. *p.* 372.

1738. *December* 1. RAMSAY of Wylieclengh *against* BROUNLIE.

No 99.
An apprising, and all annualrents due thereon, belong to the heir, and not to the executor.

FOUND that an apprising, and whole sums therein contained without distinction between principal sum and annualrents, accumulate sum and annualrents thereof, or accessories thereto, do belong to the heir, and no part thereof to the executor, notwithstanding the appriser died within the legal.

The question arose upon the allegation of the reverser, That the apprising was extinguished by the possession of the appriser's heir within the legal; which depended upon this, Whether the bygone annualrents at the appriser's death belonged to his executors or to his heir? If to his executors, the apprising was extinguished by the heir's possession within the legal.

It had been a received notion, that the bygone anuualrents, at the appriser's death, fell to his executors, and there were several instances condescended on of confirmations of such bygones; and so much was the Court of that opinion,