

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 decret, 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 burges. *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 assizé; 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.

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

1698. November 22.

CUMMING against CUMMING.

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 legata* 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. *2do*, 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 burges, none of which he was. *Answered*, He had an heritable bond, which was sufficient, though no infeftment was taken thereon. *2do*, The defunct was the son of an actual burges, though he was not entered himself. *Replied*, Wadsets or other

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.

No 24.

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

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

No 24. heritable rights never make one a baron in the sense of moveable heirship, without they be completed by infeftment; and though it is the degree and quality that must be regarded in this case, yet even an infeftment of annualrent has been sustained to infer heirship, *Scrymzeour contra the Executors of Murray*, No 18. p. 5396. And as to his being a burghess's son, *non relevat*, for an honorary burghess's son gives no right to heirship, much less one unentered, *Lesly contra Dunbar*, No 15. p. 5392. THE LORDS found the heritable bond whereon infeftment had not followed did not give his heir right to claim moveable heirship; but found he had right thereto by the defunct's being heir to an actual burghess, who might have entered when he pleased, and bore stent in the town of Glasgow as a trafficking burghess. See QUOD POTUIT NON FECIT.

*Fol. Dic. v. 1. p. 365. Fountainhall v. 2. p. 16.*

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No 25. 1730. February. MONRO against MONRO.

A MAN having purchased an estate, took the infeftments of the same to himself and spouse in conjunct-fee and liferent, and the heirs of the marriage in fee; whom failing, to the longest liver of him and his spouse and their heirs and assignees. There happened to be no heirs of the marriage, whereby the wife surviving, fell to have right to the lands in virtue of the said provision; but she also dying without being served heir of provision, it was questioned betwixt her heir and executor, Whether she could have heirship moveables? It was *argued* for the heir, That a conjunct-fee in the person of a relict, has all the effects of a simple and absolute fee, excepting the power of alienation. It was *argued* on the other side, That such a conjunct-fee resolves merely into a liferent which is but a servitude; and with respect to which, there can neither be an heir nor heirship moveables.—The LORDS found no heirship moveables due. See APPENDIX.

*Fol. Dic. v. 1. p. 365.*

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No 26. 1744. December 15. IRVINE against IRVINE.

A PERSON infeft in some houses in a village, was found to have heirship moveables.

*Fol. Dic. v. 3. p. 264. D. Falconer.*

\*.\* See this case, No 49. p. 2304.