1692. *December* 20.
The HEIRS of THOMAS CRAWFORD *against* The EARL of TRAQUAIR.

No 84.
Found in conformity with the above.

THE case was, if a bond secluding executors was moveable, when the creditor died before the term of payment, either of the principal sum or annualrent. It was *alleged*, That, before the term, it was to be reputed as money lying beside the defunct in specie, in which case it would be certainly moveable; yet the LORDS found, where the defunct creditor expressly excluded executors, that it was his meaning and design, that the sum should belong to his heirs *in omnem eventum*, whether he died before or after the term; though *regulariter*, all sums are moveable before the term. This had been variously decided; but at last the Lords fixed on this, that though such a bond, secluding executors, were loosed by a charge of horning, yet it should still continue heritable.

Fol. Dic. v. 1. *p.* 370. *Fountainhall, v.* 1. *p.* 534.

SECT. XV.

Of Sums Moveable notwithstanding of real Security.

1631. *February* 3. HENDERSON *against* HENDERSON'S RELICT.

No 85.
An executor confirmed a sum in a bond. Although heritable, being given up by the executor, he was found liable.

MR JOHN HENDERSON, and umquhile James his brother, being confirmed executors to their umquhile sister, in which testament James gives up a debt of L. 500, addebted by himself to the defunct, to whom he was one of the two executors confirmed; and the said James being deceased, nothing being done before his decease upon the said testament, Mr John the other executor, pursues the relict of the said James, as executor to him, to pay the said sum; who *alleging* the said sum to be heritable, and so not to come under the testament to be confirmed, except the pursuer would otherwise instruct, than by the testament, that the said sum was confirmable; the LORDS found, That this sum being given up by the executor himself, as a debt owing by him, he not making mention that he was owing it by bond, it could not be alleged by himself if he were living, nor now by his executors to be heritable, except that the excipient would qualify, and show that it were heritable; which if she did not, the LORDS found the testament so purporting, given up by the debtor's self,

No 85.

ought to work against the defender, as it would have done against himself. And here it was questioned, if the whole sum would pertain to this pursuer, the sole executor surviving, the other not having executed before his decease, seeing it was alleged by this executor, that there needed no more execution thereof, he being executor, and also debtor, whereby it was in his own hands, and so the debt confounded for the equal half, as executor; but the pursuer insisted only for the one equal half thereof, and no further.

Clerk, *Gibson*.

Durie, p. 564.

1676. *February* 18. WAUCH *against* JAMIESON.

No 86.
A party having granted bond for a sum, part of which related to a back-bond granted in consequence of an heritable right, only *that* part of the sum which related to the back-bond was found to go to heirs; the residue to executors.

UMQUHILE DR BONAR being to go out of the country, granted a disposition of his lands, and an assignation to certain bonds, in favour of Mr John Smith, who granted back-bond, bearing, 'That the said disposition and assignation was in 'security of the sum of 2400 merks then due to him by the Doctor, and for 'relief of cautionry, and partly in trust to the Doctor's behoof, and therefore 'obliged himself to denude, he being paid of the said sum of 2400 merks, 'and other sums due to him, for which he was engaged, or which should be 'borrowed from him, or be engaged for.' Long thereafter, there is a bond of 5000 merks granted by the Doctor to the said Mr John, bearing annualrent, payable to heirs and executors in common form. There is now a competition betwixt Dr Jamieson, heir to Mr John Smith, and Thomas Waugh, as having right to a legacy left by him, by which he legates the said sum due to him upon the lands.—It was *alleged* for the heir, That this sum could not be legated nor fall under executry, because it was secured by infeftment, viz. by the disposition granted by the Doctor, to which disposition his heirs only can have right, and will not be obliged to denude himself till the condition of the back-bond be fulfilled, by payment of this sum to him, though contracted after the disposition.—It was *answered*, That a security in land or annualrent doth not make all that is secured thereby belong to their heirs, but that the same may belong to executors, who may have the benefit of the heritable right, as is clear in the case of infeftment of annualrent, the bygones whereof belong to executors, for which they have real action for poinding of the ground upon the infeftment; and likewise it is frequent in wadsets to adjust qualifications and provisions to the reversion, that there shall be no redemption till all sums that shall be thereafter due to the wadsetter be paid, and till the principal sum of the wadset, and all bygones be consigned. And it was never controverted, but that the annualrent belonged to the executors, who might make use of the real right to seclude any other; and though the reversion were qualified, that such moveables should be delivered before redemption, it would not change their na-