No 29. son could have just interest to have intromission with the same. To this was *answered*, partly be reasoning among the Lords, partly at the bar, That the horning of the defunct took not away the intromission and deed of him *qui se gessit pro hærede*, for albeit a man be at the horn *non privatur jure, ab intestato succedendi active et passive*, and a man may be at the horn and have no heir, and being at the horn, others may succeed to him. *Hæc est opinio Baldi, in L.* 1. *C. De hæredibus instituendis, ubi loquitur, de et deportat. qui fictione juris idem est cum eo quem nos dicimus* at the horn.——THE LORDS found be interlocutor, That the horning took away all intromission with heirship goods, and that the party could not be heard to allege *pro hærede gerere*, in respect of the said horning.

Colvil, MS. p. 388.

1629. *June* 27. ROBERTSON and TRAQUAIR *against* DALMAHOY.

No 30.
A relict having intromitted with the heirship, was allowed deduction for the maintenance of her children, altho' never entered heirs to the defunct.

A DEFUNCT dying, leaving two bairns and his wife behind him, which two bairns were entertained by the relict their mother during their lifetimes; likeas she intromitted with the goods of her husband, and such as were heirship after the decease of the bairns, who died never being served, nor entered heirs to the defunct, the defunct's brother being served heir to him makes another assignee to the heirship, thereby pertaining to him; which assignee pursuing the relict, as haver of the heirship, for delivery of the same to him; it was found that the relict's entertaining of the bairns ought to be allowed to her, and defalked off the first end of the price of the said heirship, which was so found, albeit the pursuit was moved by the assignee to the heir, and albeit the bairns entertained by her were never served heirs, and so had no right themselves to claim the heirship, and albeit the entertainment was made by the mother of her own bairns, and so thereby presumed to have been done *ex pietate materna*, albeit neither the entertainment was liquidate nor any action intented therefor, notwithstanding whereof, the said exception was sustained.

Durie, p. 452.

1667. *November* 2. POLLOCK *against* POLLOCK.

No 31.
A son having renounced to be heir to his father, found that the heirship moveables belong to the father's executor.

JOHN POLLOCK having granted a bond of 5000 merks to James his second son of the first marriage, the said James intented and pursued for payment both Robert eldest son of the same marriage, heir of line, and John eldest son of the second marriage, and heir of provision, as charged to enter heir respective. It was *alleged* for the heir of the first marriage, That he offered to renounce; and for the heir of provision, That the heir of line ought to be first discussed by adjudication; and condescended upon moveable heirship, which might be ad-

judged. It was *answered* for the heir of line, that his father, having provided him, had taken from him a renunciation of all that could belong to him as heir, so that he could have no right to the moveable heirship, which, in respect of his renunciation, would be considered as other moveables and fall under executry. It was *replied* for the heir of provision, That by the renunciation, the heir of line had renounced his kindness, to the effect his father might have power to dispose of the heirship; but his father not having disposed thereof, the right returned to the heir of line again, the renunciation being in favours of him and his heirs; as in renunciations of that nature as to lands, if the father does not dispose of the same, they will notwithstanding belong to the heir. Some of the LORDS thought, there should be a difference betwixt lands and moveable heirship; in respect the right of lands, whereof the father died infeft, cannot be settled in the person of any other but the heir, who therefore ought to have right notwithstanding of the renunciation; but the moveables which should fall under heirship by the renunciation of the heir, cease to be heirship; and may be confirmed as other moveables: Others thought, that the effect of such renunciations should be the same as to moveables and lands; the father's intention being one and the same for both; and therefore, as the right in the construction of the law returneth to the heir of the father, who doth not otherwise dispose of his lands, there is the same reason as to moveable heirships; and as to the pretence foresaid, it is of no weight, seeing if it were the intention of the father, that by such renunciations the son should be denuded, without return, though the father should not dispose of his lands, the son may be pursued and forced to denude himself, that his renunciation may be effectual in favours of the nearest of kin. No 31.

THE LORDS, before answer, ordained the renunciation to be produced, that they might consider the tenor of it.

1668. *January* 17.—THE LORDS having considered the renunciation mentioned above, found, that it being in favours of the second marriage, and in effect an assignation, could not accresce to the granter.

Dirleton, No 107. *p.* 45. *& No* 138. *p.* 57.

*** Stair reports the same case:

UMQUHILE John Pollock in the Cannongate, having given a bond to James Pollock his son of 5000 merks, he pursues Robert Pollock the heir of line, and —— Pollock, heir of the second marriage, for payment. The heir of line compearing, renounced; whereupon the pursuer insisted against the heir of provision, who *alleged* no process, till the heritage befalling to the heir of line were first discust, and condescended upon the heirship moveables. The pursuer *answered*, There could be no heirship in this case, because the heir of line had

No 31. renounced all he might succeed to by his father, heritable or moveable, in favours of his father, his heirs and executors, bearing expressly, that his wife, and his bairns of the second marriage, should have the whole right; *ita est*, Rutherford, the wife, had confirmed the whole moveables *promiscue*, without exception of heirship, and therefore the heir of line himself (if he were entered) could claim none. It was *answered*, That the renunciation of the heir apparent of line being in favours of his father, after his father's death, it returned back to him from his father as heir of line again, and could go to no other person, neither thereby could the heritable moveables belong to the executor.

THE LORDS found the renunciation sufficient to exclude the heir of line from the heirship moveable, and that they did thereby belong to the father's executor; therefore found no further necessity to discuss the heir of line, and decerned against the heir of provision.

Stair, v. 1. p. 510.

1668. *December* 8. AGNES GOODLET *against* GEORGE NAIRN.

No 32.
A wife predeceasing, her third of her husband's moveables found not to comprehend the best of each kind which were set aside as heirship moveables. *See* No 33. *infra*.

AGNES GOODLET, as representing the umquhile wife of George Nairne, pursues for the third of the moveables belonging to him the time of his wife's decease. It was *alleged* for the husband, That, before division, the heirship moveables behoved to be drawn. It was *answered*, That there could be no heirship of a man that was living: It was *answered*, That albeit there was no actual heirship, yet the best of every kind was heirship moveable, wherein the wife had no interest.

Which the LORDS sustained, and ordained the heirship to be first drawn.

Fol. Dic. v. 1. p. 366. *Stair*, v. 1. p. 568.

*** Gosford reports the same case:

IN a pursuit at the instance of Agnes Goodlet, as executrix and nearest of kin to Elizabeth Goodlet, against George Nairne, bailie in St Andrews, for delivering of a bond of 1000 merks granted to the said Elizabeth, and of a decreet recovered thereupon, upon this ground, that the bond bearing an obligement to pay annualrent, by act of Parliament the husband could have no right thereto; the defender was assoilzied from delivery, because there being a decreet recovered against the debtor upon the bond at the wife's instance, and the defender, who was her husband, for his interest, and a precept for payment, the LORDS found that the debt did belong to the husband *jure mariti*, being made moveable, as said is. In the same action it being craved by the pursuer, that she might have right to a third of the whole moveables which were possessed in