SECT. III.

In what cases not claimable.

1480. *June* 27. JOHN JOHNSTON *against* GAWIN JOHNSTON.

No 27.

GIF ony man alledgeand him to be air to ony uther, clamis ony airschip gudis, and it happin the exceptioun of bastardrie to be objectit aganis him befoir the temporal or secular judge, the judge sall refer the knawledge thairof to the spiritual judge: And gif bastardrie be sufficientlie provin aganis him befoir the spiritual judge, the temporal judge sall decern na airschip to pertene to him, because ane bastard may not be ane air, nor crave airschip gudis.

Balfour, (AIRSCHIP GUDIS.) *No* 6. *p.* 236.

1540. *March* 8. JANET SCOT *against* N. BLAIR.

No 28.

ALBEIT that ane be servit air general to ony of his predicessouris, as to prelat, baron, or burges, zit nevertheles gif he be not servit air to him of sum landis, or sum immovabill gudis, he may not clame ony airschip gudis; because in this cais all the movabill gudis pertenis to the executouris, without ony deductioun or defalcatioun of airschip.

Balfour, (AIRSCHIP GUDIS.) *No* 5. *p.* 236.

1583. *February.* LAIRD of CRAIG *against* LAIRD of POWRIE, OGILVIE.

No 29.
A person who dies at the horn, will have no heirship moveables.

THE Laird of Powrie, Ogilvie, being pursued by the Laird of Craig, for deliverance of ane house, and fortalice of the Craig, it was *alleged* be Ogilvie, That Roger Wood, father to the Laird, and to whom he was heir, *aut saltem pro hærede se gessisset*, had set to him tack and assedation of the Mains of the Craig, with the tower and fortalice of the same, *et sic quem de evictione tenet actionem eund, &c.* he qualified *pro hærede gerere*, that the said Laird of Craig had intromitted with the heirship goods, such as beds, boards, ploughs, harrows and horse, with the place pertaining to his umquhile father, called ————. It was *answered*, That the excipient could not be heard to allege intromission with any heirship goods, because the father of the pursuer, Roger Wood, deceased the King's rebel, and at the horn; and so if any goods he had, the same pertained to the King's Majesty and his treasurer, and na other per-

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-