1632. *July* 11. LIGHTON *against* MUIRHEAD.

No 3.
A daughter was served heir to her father, supposing her brother dead. He afterwards assigned all that should pertain to him by his father's decease. Found, that the heritage belonged to the assignee, and the moveables to the sister; and that the assignee was liable to find caution to relieve her, and to make the heritage forthcoming to all parties having interest.

THE daughter of a defunct being served heir to her father, she having a brother living, who was supposed to be dead, and thereafter the brother being served heir to his father, who, after his service and retour, having disponed all goods, moveable and immoveable, and whatsoever might pertain to him by his father's decease, to one called Stuart; which singular successor pursuing the havers of some obligations pertaining to the defunct, to deliver the same to him; and after decreet, the haver suspending upon double poinding, as troubled both by the assignee to the brother, and also by the sister, and producing the obligations to be given to any of them who should be found to have right thereto, the LORDS found, That the brother's assignee ought to have the heritable obligations, and that the moveable bond should be given to the sister, who was confirmed executrix to the defunct; which was so ordained, albeit the brother's assignee *alleged*, That the executrix in this process could not come in so summarily to seek the moveable bonds, seeing she had neither obtained any sentence therefor, as executrix against the haver, which ought to proceed ere she seek the same; neither was there any thing here called in question, but which of them, as heirs, had best right to the obligation produced. Notwithstanding whereof, in this same process the LORDS found, That the executrix might desire the bonds produced, so many of them as were moveable, to be given her in this same process, without necessity to intent any new pursuit therefor; seeing the bonds were exhibited, and they could not be ordained to be given back again to the producer, who claimed no right thereto; and the heir or his assignee having no right to the same, the executrix ought to have them. Also the executrix desiring, that the assignee constituted by the heir should find caution to relieve the executrix of all the defunct's heritable debts, for which she, as executrix, might be distressed by his creditors; and this assignee *replying*, That he being a singular successor to the heir, and for onerous causes, he ought not to be burdened with this caution, no more than if he had bought land, or any other particular from the heir, could the haver been compelled to find caution to relieve the executrix, or to make that particular so bought by him, liable to the defunct's creditors, who had done no diligence before the acquiring of his right against the defunct's self, or against the heir his author, which might hinder him to contract with the heir, and to acquire this disposition; notwithstanding of the which reply, which was repelled, the LORDS found, That this assignee and singular successor should find caution to make these obligations heritable, now acclaimed, and decerned to be given to him, or the sums therein, so far as he should uplift the same, furthcoming to all parties having interest, who might claim the same for the defunct's debts *prout de jure*; for they found, That this assignee should therein be liable to all parties having interest, as said is, for these bonds, and sums thereof, to be recovered by him, in that same man-

ner as the heir's self might have been liable, if he had not been denuded; specially seeing the disposition made by him to the heir was universal, of all things whatsoever he might succeed to as heir, and so was *omnium bonorum et totius juris*. No 3.

Act. *Stuart et Mowat.* Alt. *Nicolson et Sandilands.* Clerk, *Hay.*
Durie, p. 643.

1777. *July* 25. ROBERTSON and ROSS *against* BISSETS.

No 4.

THE LORDS refused action on a bill, the drawer of which had died without subscribing it; and the subscription had been adhibited by his heir and representative.

*** See this case, No 18. p. 1676.

SECT. II.

Mutual Relief.

1487. *January* 19. THOMAS SEMPILL *against* F. FORDEL.

HE that is auchtand, or has paid in name and behalf of ony uther that is deceist, ony debt, or sowmis of money, and is desirous to have his relief thairof, aucht and sould first call and persew befoir the spiritual Judge his executouris, to frie and relieve him of the said sowme or debt, at the handis of the creditouris, gif the principal debtour that is deceist had movabill gudis the time of his deceis: Bot gif thair was not sufficient movabill gudis, the air of the principal debtour deceist may be callit and persewit befoir the temporal Judge, for the effect foirsaid; because in all sic caisis the movabill gudis intromettit with be the executouris aucht and sould be first discust, befoir ony gudis, geir, or landis pertening to the air. No 5.

Balfour, (HEIR.) *No* 10. *p.* 221.