

riage *per verba de presenti*, with an obligation to free the same from debts, put the relict in a special case from other creditors for liquid sums; for thereby the relict is a creditor upon the particular subject, and as a special legatar has preference to other legatars, so the wife has the same ground of preference to common creditors.

It was *replied*: The wife by law has interest in the half of the husband's moveables where there are no children, as in this case; but with the burthen of the half of the moveable debts, which often times reduces her share in effect to nothing; and the provision in the contract imports no more but an obligation to relieve these moveables of the husband's debts, which can only state her in the case of a common creditor; if there be sufficiency either of heritage or moveables, she will want nothing, if not, she ought to bear a share.

The Lords found the relict had no preference. See HUSBAND and WIFE.

It was *alleged* for the onerous Creditors; That the commissaries had committed iniquity in conjoining the defunct's grand-daughter *pari passu* with them, because her bond was gratuitous and on death-bed.

It was *answered*; That the defunct had a sufficient unincumbered estate to satisfy all his debts heritable or moveable, and thereby was in capacity to give a gratuitous bond, which is no defraud of creditors, there being a fund sufficient for paying all. *2do*, Neither was the reason of death-bed competent to the creditors to quarrel the bond, because that was only the privilege of the heir; and therefore any deed on death-bed, with consent of the apparent heir, or ratified by the heir, is good from the date; or from the ratification; and suppose that the creditors who can by their diligence be in place of the heir, could in other cases quarrel deeds on death-bed, yet in this case the bond is ratified and corroborate by the heir.

The Lords found the Commissaries had committed iniquity, there being a sufficient unincumbered estate in heritage and moveables for payment of the whole debts, and the bond quarrelled being corroborate by the heirs; but if the creditors called the sufficiency of the defunct's estate in question, reserved reduction upon the act of Parl. 1621, as records.

Fol. Dic. v. l. p. 213. Dalrymple, No 110. p. 153.

SECT. VI.

Death-bed Deeds are Effectual, and afford *jus exigendi*, unless Challenged by the Heir.

1581. January 16. THOMAS DICKSON *against* JOHN C.—.

THERE was one Thomas Dickson, son to Allan Dickson, burghess of Edinburgh, who being made assignee to ane decret obtained be his father against

No 27.
An heritable
bond, without

No 27.
infestment,
was alienated
on death-bed.
As our ancient
laws mention
only *terre et
tenementa*, it
was found not
to fall under
the law of
death-bed.

umquhile John C., the whilk decreit was obtained against the said umquhile John, decerning him to infest the said Allan in certain annualrents heritable, persewit John C., as nearest and lawful heir to the said umquhile John his father, to hear and see the said decreit transferred *active et passive*. It was *alleged* be the defender, that the persewar could have no action as assignee to the decreit to pursue for the translation of the same, because the assignation was null in itself, being made be the said umquhile Allan Dickson, eodem die quo fecit testamentum, et sic in lecto ægritudinis. Et secundum jus regni prout in rubrica c. l. 2. in fine legum burgorum, ubi fit mentio de consuetudine partium in Scotia; nullus burgensis potest terras, quas hereditarie possidet, in lecto ægritudinis alienare, vel quas in sanitate sua acquisivit ab herede, nisi ære alieno esset oneratus, et heres non potest eum in necessitate sua relevare. But so it was that the said assignation of the decreit to infest heritable in annualrents was equivalent to heritage, et sapiebat naturam movabilium, et alienationis terrarum. To this was *answered*, that the law of the Majesty could not be extended to assignations and debts, but only to heritage, where infestments or sasines were obtained of the same. THE LORDS, after long reasoning among themselves, voted for the most part and would not give process upon the said assignation, and admitted the allegiance that it was made *in lecto ægritudinis*.

Fol. Dic. v. 1. p. 213. Colvil, MS. p. 316.

1626. July 12.

L. CRAIGIE-WALLACE *against* WALLACE.

No 28.
An assigna-
tion being
challenged as
done on
death-bed,
the exception
was not re-
ceived, being
proponed by
the debtor,
although the
bond assigned
was heritable,
and he alleg-
ed, he was
not *in tuto* to
pay to any
except the
heir; but
the Lords or-
dained the as-
signee to find
caution to
warrant the
debtor at the
heir's hands.

LAIRD Craigie-Wallace borrows from David Fullerton 8,000 merks; David, on his death-bed, makes Wallace of Menford assignee, which assignee having obtained the bond registrate at his instance, charges for payment; which charges are suspended, and the said assignation also by action desired to be reduced, both upon one reason, viz. 'That the assignation was made by the defunct, upon his death-bed;' this bond being heritable, and so in prejudice of the heir, who could not be prejudged by the defunct on his death-bed; and the suspender could not be *in tuto* to pay to this assignee, seeing he would be compelled to pay the same again to the heir, who hath the only right thereto. This reason was not sustained at the debtor's instance, seeing the assignee was ordained by the Lords, to find good caution to warrant the suspender at the heir's hands; likeas the cedent, by his missive letters written to the same assignee before his sickness, confest the money to pertain properly to the assignee, and that his name was only borrowed thereto; and in the same letters promised to make the charger assignee; whereby the LORDS found, that this reason was not competent to this debtor, he being also put *in tuto* by caution to warrant him at the heir's hands, as said is. And where the assignation was quarrelled in this same process by the debtor, as not sufficient, because it was subscribed by two notaries, whereas the maker thereof could write himself; this was repelled,