

No 19. executors, but ordained that execution should pass at their instance only for half of the sum.

Fol. Dic. v. 1. p. 298. Durie.

* * * See this case No 26. p. 3844.

1632. February 2. BARTILMO *against* HASSINGTON.

No 20.

A wife disposed all her goods, gear, &c. to her husband, to be possessed by him and her during their lives, and after their decease to their heirs, executors, and assignees. There being no children alive at the dissolution of the marriage, the husband was found to have the liferent of the whole, and the property only of the half, the subjects being disposed in general; but an heritable right so provided would have pertained to the husband and his heirs, as *personæ digniores*.

IN a contract of marriage betwixt Euphan Hassington and Patrick Bartilmo, the wife disposes her goods and debts, condescended on in the contract, to her said future husband, to be bruiked by him and her, and the longest liver of them two, during their lifetime, and after their decease to their heirs, executors, and assignees; and the wife dying, no bairns being begotten betwixt them being on life, her executors pursue the debtors of the wife, assigned in the foresaid contract for payment thereof; wherein the husband compearing, *alleged*, that the goods pertained to him, in respect of the disposition contained in the contract; and the pursuer *answering*, that he could have no right, but to his own just half thereof, in respect the clause of the contract bore, 'the same to be disposed to their heirs;' which being in the plural number, imports division betwixt the husband's heirs and the wife's; and the husband *answering*, that the clause must be interpreted only of the husband's heirs *tanquam personæ digniores*, and which agrees with the practiques of this country, even as in heritable rights, and infestments granted to the husband and wife in conjunct fee, or liferent, and to their heirs heritably, there is no division *hoc casu* betwixt their heirs, where they have no bairns; but the fee only belongs to the husband's heirs. THE LORDS found, in respect of the foresaid tenor of the contract, that the husband ought to have his liferent of the whole goods contained in the contract, which were extant the time of the wife's decease, and that he had no right to the property, but only to the just equal half thereof, and that the other half pertained to the wife's executors and heirs; for the contract being of goods and gear, and sums of money, and bearing the word, 'their heirs,' ought not to be respected, as infestments of heritable rights, which by that clause imports no division, but pertains only to the husband's heirs, except it be more specially provided otherwise; for albeit the husband, while the wife lived, might have assigned and disposed the whole goods, yet after her decease, he had no more right than he had provided himself unto, by the said contract.

Clerk, *Hay*.

Fol. Dic. v. 1. p. 298. Durie, p. 617.