

1683. *March.* BAILIE GARSHORE *against* WEIR of DALRYMILLS'S RELICT.

THE Lords reduced a wife's provision, that was somewhat exorbitant, in her contract of marriage, *post contractum debitum*, to an annuity suitable to the husband's free estate.

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1683. *March.* The MARQUIS of MONTROSE, DONATOR of BUCHANNAN'S ESCHEAT, *against* His RELICT.

IN a contract of marriage, the general clause of parks was restricted to such parks as were not set for rent, but only used for pasturing the husband's own goods.

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1683. *March.* THOMAS CARGILL *against* JOHN TULLOCH and EARL of MARSHALL.

FOUND that a clause in the procuratory of resignation of a vassal's charter, That, how oft this escheat fell, it should be gifted to him gratis,—or a general clause therein relative to the provisions in a contract, whereof this was one,—is real against singular successors in the superiority. The like found, the same month; *vide* No. 431, [Earl of Marshall and John Tulloch against Thomas Cargill, March 1683.]

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1683. *March.* MR MATTHEW M'KELL *against* SANDILANDS and OTHERS.

IN a process for payment of a bond, at the instance of an assignee whose assignation was granted, without an onerous cause, by the cedent on his deathbed, and intimated before his decease;—it was alleged for the debtor, (with whom the cedent's nearest of kin and the commissaries concurred,) That the gratuitous assignation granted on deathbed, though it bears no *cogitatio mortis*, or *instans periculum*, must be reputed *donatio mortis causa*, and be confirmed; for, if such assignations on deathbed were sustained, without confirming, the bishop would be prejudged of the quot, and creditors would want the benefit of caution, in case the assignation were reducible upon the Act of Parliament 1621; whereas, if they be confirmed, the assignee confirmed executor would find caution, and other creditors would be allowed to compete with him. 2. If gratuitous deathbed assignations were allowed, dying persons would dispose of all their estate by assignations. 3. It was found, in the case of Rickart against Rickart, that money delivered in specie, *in lecto*, must be confirmed; and, for the same reason, sums assigned on deathbed are liable to confirmation. Ans-

wered for the pursuer, This assignation being *per actum inter vivos*, and not in a testamentary way, nor bearing *mortis causa*, needs no confirmation; and what is done in sickness, not making mention of death in general, or in special, are deeds *morientis*, not *mortis causa*, and are not to be regulated as testamentary-deeds, or donations *mortis causa*, which are null if the party or creditor predecease before the granter, and liable to revocation: for the time of sickness is *æque habile* as *liege poustie*, to grant deeds not prejudicial to relicts or children; and it were a great charge to the lieges to confirm particular assignations, and rights made *in lecto*, wherein dole is not presumed, as in dispositions *omnium bonorum*. The Lords found there was no necessity of confirmation in the case. And here the defunct had no relict or children, who must be prejudged.

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1683. *March.* BAILIE GARSHORE, &c. *against* BRAND, Relict of Weir.

NOT only do commissaries prefer wives for their provisions to the office of executors; but even in a competition between a relict and other creditors, where the children were nominate and confirmed executors in a testamentary, the Lords would not bring in the parties *pro rata*, but preferred the relict *primo loco*, seeing the debt exceeded the estate. But the parties did afterwards settle, and the point was not fully considered. *Vide* No. 478, [Keith against Keith, 17th February 1688, Dict. 11,833.]

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1683. *March.* SMITH *against* SIR DAVID CARNEGIE.

IN a reduction of a horning, at the instance of one Smith, upon these reasons; 1. The party was charged to pay an illiquid sum, *viz.* the remainder of his rent, over and above what paid the annual-rent condescended on in the charge, which was due upon infestment: and so the charge was in the case of general letters. 2. The execution of the denunciation did not bear copies to have been left at the cross. Answered, 1. The annual-rents due upon infestment being condescended on in the charge, and known to the rebel by his use of payment, the surplus was sufficiently special, and the rebel ought to have suspended *debito tempore*, though the charge had been unjust or informal; and, not having suspended, his escheat falls, *propter contemptum*. 2. Though copies of executions of inhibitions and interdictions are left at the cross, for acquainting the lieges with the thing, it is not usual to leave copies of denunciations of horning. The Lords reduced the horning upon the first reason, and gave no answer to the second. *Vide* No. 520, [Douglass of Earnslaw against Sir Patrick Hume, 20th July 1688.]

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