

No 53. some considerable matter of her carriage; and however, it is not a suspensive condition, hindering the payment of the legacy, but obliging the legatar thereafter.

'THE LORDS found the legacies constituted, and in terms foresaid valid; and as for Magdalen's legacy, declared, that in case Magdalen miscarried, and took not the pursuer's advice, that she should be liable to refund the legacy to the pursuer, but would not put her to find caution for that effect, the condition being so general. See LEGACY.

Fol. Dic. v. 1. p. 369. Stair, v. 1. p. 135.

* * * The case Dickson against Young, No 3. p. 3944, was decided in the same manner.

1687. February. ALEXANDER YEAMAN against YEAMAN and OLIPHANT.

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FOUND that from a bond secluding executors being put in the register, a charge is not presumed to make it moveable, either *quoad* executry or escheat. 2. That legitim transmits without confirmation. 3. That quot and confirmation are debts privileged, and preferable to legacies. 4. That obligations (to) infest in liferent are prestable by executors, whereof heirs have relief. See LEGITIM.

Fol. Dic. v. 1. p. 369. Harcasse, (EXECUTRY.) No 442. p. 119.

* * * Fountainhall reports the same case:

1686. March 12.—THE case of Marjory Yeoman and Oliphant her husband *contra* Alexander Yeoman, was reported by Lord Redford, and the LORDS find her legacy must bear a proportional abatement with the rest of the legacies; and find, that the children surviving the father transmit their legitim to their nearest of kin, though they died without establishing it in their person by confirmation.

The case of Bell against Wilkie, 12th Feb. 1662, *voce* NEAREST OF KIN, was cited from Stair's Instit. B. 3. T. 8. § 51. and *Perez. ad tit. Cod. de his qui ante apertas tabulas hereditatem transmittunt*. And the 12th act 1540, and 14th act 1617.

1687. February 1.—THE case of Marjory Yeoman and Oliphant her husband, against Alexander Yeoman her brother, mentioned 12th March 1686, was reported by Drumcain; he as executor craved allowance against his sister's legacy of the annualrent of L. 10,000 Scots, payable to their mother for her liferent use, by her contract of marriage. *Allèged*, The clause of this obligation was heritably conceived, to be waired on annualrent or land, and so could not affect the moveables, but the heir. *Answered*, It never having been actually

employed heritably, it was no more but a destination, and a personal obligation; which the Lords found to be so. The interlocutor upon this, and other points was: Repone Alexander the minor against the decret, in respect instruments were taken against the extracting; and find the obligation in the contract of marriage to be moveable, and to affect the executry; and find that the house, and any sums of money the relict was provided to, must be ascribed in implement of the obligations *pro tanto*; and find that the additional jointure and mortification does affect the heir, in respect of the clause in the contract of marriage, and the testament; and as to the objection against the confirmation of the Earl of Errol's and Randerston's bonds, ordain the tutors to give their oaths of calumny, if they have reason to deny that there was a charge of horning given on these bonds by the defunct; and grant diligence for recovery of Randerston's bond. As to the modifications of the mournings, funerals, and other expenses contained in the former decret in 1671, remit to the Lord Reporter to consider if there was any exorbitancy in these former modifications; and ordain the relict to depone as to her intromissions with lying money, *ad hunc effectum*, to affect her liferent, and what she may have right to *jure relictae* after her husband's decease; and refused to allow annualrent for the legitim and the legacy, though it be a minor's money, the defender being also minor: And whereas the charger craved she and her husband may have up the whole sums, they finding caution for payment to the relict of her jointure; the LORDS remitted it to the Reporter to settle the parties as to that point.

1687. July 5.—MARJORY YEOMAN, and Laurence Oliphant her husband, having got a decret against Alexander Yeoman her brother, making him personally liable for her legacy and legitim, as mentioned 1st February 1687, a bill was given in by him, *alleging*, That he being only executor, *ex natura officii* he he could be allenary liable *ad diligentiam* in discussing the inventory, and to assign her to a proportion over head of the debts, *tale quale*, good and bad as they stood. THE LORDS, on advising this bill and answers, find the defender is only liable to assign where sufficient diligence was done; and ordain the defender's procurators to condescend upon the debts for which diligence was done, and also upon the diligence that was done for the same; and remit to Lord Drumcairn, who heard the cause, to consider thereon.—So where he does not produce and instruct diligences, *quoad* these, he must be personally liable, because either he has got them, or might have got them; either they are solvent, and then he takes them in his own hand; or they are insolvent, through his not doing diligence, and these also must fall upon him.

Fountainball, v. I. p. 408. 444. & 463.

* * Sir P. Home Home also reports this case :

MR ALEXANDER YEAMAN, Doctor of Medicine, by his contract of marriage with Margaret Ramsay, having provided her to the annualrent to L. 10,000 in

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liferent, which he obliged him and heirs to secure upon land, for her payment, and did farther burden his heirs with the payment of what additional jointure he should leave to his wife, and what mortification he should leave *etiam in articulo mortis*, and the wife was excluded from any share in his moveables except only a part of the household plenishing; and by his testament he having named Alexander Yeaman his only son, to be his executor and universal legatar, and provided his wife to 3000 merks yearly, during her lifetime of additional jointure, and mortified the sum of 3000 merks to the College of St Andrew's, and left a legacy of 10,000 merks to his daughter Marjory Yeaman, and other sums to the rest of his children, and several other legacies; and Marjory Yeaman, the eldest daughter, and Laurence Oliphant her husband having pursued her brother the executor for payment of the 10,000 merks of legacy, and her share of the moveables as her legitim and annualrent, for the legacy and legitim, in respect the defender kept the same long after they were due; *alleged* for the defender, That the sum due by the Earl of Errol, and the other by the Laird of Randerston, which were a part of the sums confirmed being heritable and confirmed *per errorem*, must be deducted, and the moveables being liable to the relict's annualrent of the L. 10,000, and her additional jointure of 3000 merks, and the sums mortified to the College of St Andrew's, and the expenses of the relict's lying in of a posthumous child, and for her own and the children's mournings, funeral charges, and the alimentering the family to the next term after her husband's decease, and the expenses of quot and confirmation, which are preferable debts and will exhaust the executry; and as to the legitim the pursuer will only have the share with the other two children, who were living in family with the father the time of his decease; and seeing the legitim is transmissible *jure naturæ*, without confirmation, the defender as nearest of kin to the two children, has right to the half of the legitim, and what sums of money should be due upon the account of the legacy and legitim cannot bear annualrent, because annualrents are only due *ex pacto vel lege*, and there is no law for making a legacy or legitim to bear annualrent. *Answered*; That the Earl of Errol's bond being registered before the defunct's decease, it is presumed that horning has followed thereupon, and so made moveable, and Randerston's bond is not produced, so that it does not appear whether it was heritable or moveable, and the wife's liferent provision, and the legacy to the College of St Andrew's, cannot be deducted out of the moveables; because by the contract of marriage the husband did oblige him and his heirs to employ the L. 10,000 to his wife in liferent upon land, as also his heirs were burdened with the other additional liferent provisions, and legacy to the College, and the defender being heir is liable for the liferent provisions and the College legacy, and so must relieve the executor; and for the same reason, they cannot be deducted off the legitim, and the articles of the expenses of the mournings, and of alimentering the family until the next term, and of the relict's lying in of the posthumous child, cannot be deducted off the moveables confirmed, be-

cause the relict intronitted with as much money lying by the defunct the time of his decease as would have paid the same, which is to be proved by her oath, and albeit they were due, yet they could only affect the dead's part, but not the legitim, and are exorbitant and ought to be modified; and if the foresaid two bonds be found to be confirmed *per errorem*, as being heritable, the expenses of the quot and confirmation, must be deducted proportionally; and albeit annualrent be not due for a legacy or legitim by law, yet seeing the defender has kept the sum so long after it became due, it is just and reasonable that large expenses should be modified, upon the account of damage equivalent to the annualrent. *Replied*, That the registrating of the Earl of Errol's bond might have been for conservation, and so it can be no presumption that there was a horning raised and executed thereupon; and as to Randerston's bond, executors are excluded, which makes it heritable as to the executor; and albeit by the contract the husband obliges him and his heirs to employ L. 10,000 to his wife upon lands in liferent, yet being but a personal obligation, the executor is liable to perform the same, and employ the sum; and the mentioning of heirs in such obligations must be understood *in terminis juris*, that the executor, who is heir *in mobilibus*, should perform such personal obligations, which albeit they be heritable as to the creditor, yet they may be moveable as to the debtor, and the heir ought to perform all heritable obligations; and albeit the husband by the contract of marriage does oblige the heir to pay what additional jointure he should leave his wife, and any mortification he should give, yet seeing the power and faculty reserved by the contract of marriage was exercised by way of testament, it can only be understood as a legacy, and suffer a proportionable deduction with their other legacies, and the relict's oath cannot be taken that she intronitted with as much lying money as would have satisfied the expenses of the relict's lying in of the posthumous child, mournings and funeral charges, because she is cled with a husband, who will not suffer her to depone; and the defender having paid these expenses to the relict by virtue of a sentence, there can be no part thereof deducted or modified and ought not to be restricted to the dead's part, but must come off the hail head before there can be any division as to the legitim, and no expenses can be modified upon the account of damage in place of the annualrent; for that takes only place in the case of trafficking merchants, who keep up and detain another, grossly calumnious in his allegiance, and litigious without any ground, and so postpone the pursuer's payment, which is not in this case. THE LORDS found the obligations in the contract of marriage for the L. 10,000 to be moveable to affect executry; but that the house and any sum of money that the relict was provided to, was to be ascribed in implement of the obligation *pro tanto*, and that the said additional jointure of 3000 merks, and the mortification, behoved to affect the heir in respect of the clause in the contract of marriage and the testament; and as to the objection against the confirmation of the Earl of Errol's bond, and Randerston's bond, ordained the tutors to give their oaths of calumny, if they have

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reason to deny that there was a charge given by the defunct upon the Earl of Errol's bond, and granted diligence for recovery of Randerston's bond ; and as to the modification in the former decret, remitted to the Lord Reporter to consider if there was any exorbitancy in the former modifications, and ordained the relict to depone as to her intromission with lying money *ad hunc effectum*, to affect her liferent, and what she may have right to *jure relictæ*, after her husband's decease, and refused to allow annualrent for the legitim and legacy.

Sir P. Home, MS. v. 2. No. 867.

SECT. X.

Sum destined to be laid out on Heritable Security.

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Altho' sums in bonds were destined by contract of marriage to an heritable use, they were found to belong to executors, because the destination was not contained in the bonds and the sums had not been uplifted.

1615. February 8.

STEWART *against* MOWAT.

IN an action betwixt Sir James Stewart and Alexander Mowat, concerning certain moveable bonds pertaining to James Stewart of Jerusalem, rebel, it was *alleged*, That the said James, rebel, being obliged by his contract of marriage to lay 10,000 merks upon land to him and his wife, and to his heirs to be procreated betwixt them ; the said James made Mr John Wardlaw assignee to these bonds, whilk Mr John made Mr Alexander Mowat assignee *ad hunc effectum*, that the said sums might be uplifted and laid upon lands for fulfilling of the contract of marriage ; for fulfilling whereof, the said Mr John Wardlaw, became cautioner, and so being destined to an heritable use, they could not be compted moveable ; which allegiance the LORDS repelled, in respect of the said destination not being contained in the body of the bonds, and that the sums were not yet uplifted nor employed.

Fol. Dic. v. 1. p. 369. Kerse, MS. fol. 133.

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1617. June 18.

EXECUTORS OF RUSSEL *against* SANDILANDS.

IN an action pursued by the Executors of William Russel *contra* Mr James Sandilands, in the which the relict was admitted for her interest, the LORDS found the sum moveable, notwithstanding of Mr James's will, whereby he declared that the money was given him to be employed by the man and wife