

No 19. heirs, and not to his executors, who could not have right to sums for which annualrent was running to be paid in time coming; and so the relict could not claim a third thereof; likeas the defunct, before his decease, had made David Johnston assignee thereto, and to his said relief, to the effect he might comprise the principal party's lands, to the use of his bairns, whereby he had expresst his own intention, that he willed that the said sums should be heritable; all which was repelled, and the said sums found to be moveable, and not to pertain to the heir; and consequently, that the relict had right to her third, wherein the LORDS found that she was not prejudged by the assignation made by her husband, and by the comprising deduced thereupon by the assignee, and infeftment following on the comprising; seeing the said assignation was made by the husband on his death-bed; at which time, the LORDS found, he could do no deed, neither to his bairns or any other, to prejudge her in her third of the moveables; likeas they found the said relief to be of the nature of moveable sums, notwithstanding that the principal bond was heritable, *quoad creditorem*, in so far that the same would pertain to his heir, and not to his executors, and this notwithstanding of all the arguments above-written. In this process it was also questioned, if a bond bearing this clause was heritable or not, viz. whereby the debtor was obliged to pay to his creditor a sum at a certain term, as destinated to be laid upon land for annualrent; and in case of failzie, to pay at that term L. 100 of penalty; but he was noways obliged to pay the annualrent, by any clause of the bond. This point was not decided, albeit most of the LORDS esteemed the bond of this tenor to be moveable, because the destination to employ a sum for annualrent, was not thought sufficient, except according thereunto, the sum had either been employed, or else that the debtor had been expressly obliged in the bond to pay annualrent, while the re-payment thereof.

Act. Stuart & Nairn.

Alt. Hope & Peirson.

Clerk, Scot.

Fol. Dic. v. 1. p. 212. Durie, p. 386.

1634. March 15.

BROWN against THOMSON.

No 20.

A man, on death-bed, cannot gift away his lying money, further than his own half or third.

MARGARET BROWN being married upon one Thomson her husband, who died within the year after their marriage, she pursues the heir of her said husband for repetition of her tocher, viz. 2500 merks, which, by his discharge, he had granted was paid to him; and the defender *alleging*, That the discharge could not burden the heir, because it was subscribed by the defunct on his death-bed, and so could not prejudice the heir; and the pursuer *replying*, in fortification of the discharge, That the sum was really numerate and received by the defunct; the defender *duplied*, That the enumeration was elusory; for instantly after, a form of enumeration was made to the defunct, he being then on his death-bed,

immediately rendered back again the sum to the payer of the same ; and the pursuer *replying*, That albeit he had given it back again, yet the discharge must bind his heir ; seeing the sum being once given to him, and so being beside him as a moveable sum, if he had given the same to any other, it was lawful for him so to do, and the doing thereof could not have prejudged the pursuer to have repeated the tocher discharged ; even so, the giving of the sums to the pursuer liberates not the heir of the burden of the discharge, which makes him liable for the defunct's receipt of the tocher, in respect of the law, which provides repetition where the parties live not year and day, there being no bairns procreate betwixt them.—THE LORDS found, in respect of the discharge and real payment, albeit the discharge was made on death-bed and also, albeit the money was instantly re-delivered ; that the heir of the defunct was liable to pay again the half of the sum discharged and no more ; for they found that the defunct, by way of testament or legacy, might leave his own part, which is testable, to the pursuer ; and so, by the like consequence, that the giving of the tocher back again was effectual, in respect of the discharge, granting receipt to make the defender liable for the half, as his legacy, which struck upon his own part, and so did affect the half ; and therefore decerned the defender to pay to the pursuer the half of the sum contained in the discharge.

Act. ———.

Alt. *Gibson*.Clerk, *Scot*.*Fol. Dic. v. i. p. 212. Durie, p. 713.*1679. *January 29.*JOHN AIKMAN, Goldsmith in Edinburgh, *against* DAVID BOYD'S RELICT.

THE LORDS found, seeing the assignations did not exhaust the defunct's whole moveables, that the general legacy was only to be extended to the *superplus posteriore testamento rumpitur prius*, and so might consist with the assignations ; but if the assignation had been of all the moveable estate, it would have been decided otherwise ; for the LORDS distinguished thus, viz. that assignations made and delivered on death-bed, were not of a testamentary nature *quoad* legatars, but fully excluded them from all part of the sums assigned ; but acknowledged they were of a testamentary nature as to the interest of the relict, children, creditors, commissars *quot*, and confirmation dues, as has been decided.

*Fol. Dic. v. i. p. 212. Fountainball, MS.*1682. *February.*MANNER *against* DAVIDSON.

A MOTHER having taken a bond bearing annualrent, and an obligation to in-feft, to herself in liferent, and to her second son in fee, and the heirs of his body ; which failing, to such of his brothers and sisters, and their children, as

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No 21.

The wife and children cannot be prejudged by any deed on death-bed, more than the heir.

No 22.

Whether competent to children born *post hereditatem delatam* ?