

decreet *in foro*, but upon the consent of parties. Thereafter the executors insisting for the quots of testaments during the ann; the Lords, upon the former reason, did find that the quots did not fall under the ann, but belonged to the Bishop who confirmed.

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1674. December 2. BEATRIX CRAIG against EDGAR of WODDERLY.

EDGAR of Wodderly, being debtor to the said Beatrix in the sum of seven hundred merks by bond, she did assign the same to John Greenleys, her first husband, in her contract of marriage; who did make a retrocession thereof to the said Beatrix before his death; and she thereafter did of new assign the same to Mr John Lowthian, her second husband; to whom the said Beatrix being confirmed executor, and given up an inventory of that same debt, she did pursue Wodderly for payment.

It was ALLEGED, That she could have no right, as executrix to Mr John Lowthian; because the sum being formerly assigned to her first husband, any retrocession made by him not being intimated, it remained *in bonis defuncti*; and his executor can only have right to pursue.

It was REPLIED, 1^{mo}. That the allegiance was *jus tertii* to the defender; and the pursuer was content to find caution to warrant:—2^{do}. The debt being originally due to the pursuer; and albeit it was assigned, she being thereafter retrocessed, she had undoubted right thereto; and it could not be *in bonis defuncti*, after retrocession, but did belong to the pursuer, as executrix to her second husband.

The Lords did find, That an assignation made to a husband by a contract of marriage ought not to be intimated, otherwise he transferring the same, or making a retrocession, it did so denude him, that the debt assigned could not fall under his testament; and it was sufficient that the pursuer did offer to warrant against any distress, which could never happen at the instance of the executors of the first husband, who were obliged to warrant the retrocession; so that there could remain no difficulty but one being confirmed executor-creditor to the first husband; who thereupon might pretend that the defunct, being denuded by assignation, never intimated during lifetime, he confirming, ought to be preferred. But this was not the case, there being no executor-creditor; and, albeit there had been one confirmed, yet it is thought that the pursuer, as executrix to the second husband, who had right by translation, having first confirmed the sum, and done diligence, could have been preferred: but if the executor-creditor to the first husband had done diligence first, the difficulty would have been the greater, seeing it may be alleged, that an executor-creditor being confirmed, it is in effect a legal assignation to that debt of the defunct's; and, doing the first diligence, ought to be preferred to any prior assignee, who had never intimated the same.

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