No 36.

In this process, the wife and her second husband, and having repaired the other little tenement, which was ruinous, and built it much better than ever it was; for which they pursued for the reparations.

The Lords found, that they ought to have the reparation decerned, not only in so far as is necessary, but *in quantum*, the heir will *lucrari*, by getting greater mail to be paid at the wife's death, she leaving the tenement in as good case as now it is.

Fol. Dic. v. 1. p. 213. Stair, v. 1. p. 275.

No 37.

1668. *January* 21. Shaw *against* Calderwood.

The Lords found, That a wife being provided *in lecto* by her husband, her provision should be restricted and sustained as to a terce, she being no otherwise provided before.

Fol. Dic. v. 1. p. 213. Dirleton, No 141. p. 58.

*** The same case is reported by Stair, Sect. 3. *h. t.* No 15. p. 3196.

No 38.
A disposition being challenged as on death-bed, the disponee alleged onerous causes, and condescended, that he was creditor to the defunct by a clause of warrandice. The Lords sustained the disposition as a security of the clause of warrandice; but that the lands disponed upon death-bed might not be perpetually burdened with that relief, they restricted it to distresses occurring within seven years.

1676. *February* 1. Lawrie *contra* Drummond.

William Lawrie having adjudged the lands of Scotstoun upon a debt due by Mr John Drummond the apparent heir, and to his own behoof, pursues a reduction of a disposition of the saids lands granted by Sir Robert Drummond to Sir John Drummond, as being done on death-bed, which disposition bears, 'For 'love and favour, and for divers onerous causes;' whereupon the Lords did formerly find, that the disposition was sustainable, in so far as an onerous cause could be instructed; and thereupon Sir John having produced several debts due by Sir Robert to him, doth now insist, upon this ground, that Sir Robert was debtor to Sir John by the clause of warrandice of the lands of Meidhope, disponed by Sir Robert to Sir John *in liege poustie*, which not being for an equivalent cause onerous, anterior creditors might reduce the same, in which case Sir John could have no recourse upon the warrandice, the estate going to a singular successor; and it cannot be questioned but a disposition on death-bed, making a personal warrandice real, was for an onerous cause, and not reducible.

The Lords sustained the disposition as a security of the clause of warrandice of Meidhope, providing that any distress upon that clause be timeously intimate, and that Sir John make use of all the rights he hath to exclude the distress, either by virtue of Sir Robert's disposition or otherways; and that the lands may not be perpetually burdened with that relief, they restricted the

No 38.

same to distresses occurring within seven years; seeing the Lords did extend the disposition beyond the express tenor of it, to what was just for Sir Robert to have granted, or wherewith Sir John might have affected the lands of Scotstoun, if they had been in another man's person; therefore the Lords found that they might qualify the same in these terms.

Fol. Dic. v. 1. *p.* 214. *Stair, v.* 2. *p.* 408.

*** Gosford reports the same case:

IN the reduction at Blackwood's instance, of the disposition of the lands of Scotstoun, as being made *in lecto*, in so far as it was not for an onerous cause adequate to the worth;—it was *alleged* for Sir John, That he could not be obliged to dispone in favours of the pursuer, as having adjudged from the apparent heir of Sir Robert Drummond, but with the burden of the absolute warrandice of the lands of Meidhope, whereby Sir John was obliged to relieve Sir John of all cautionries, and, in contemplation thereof, the lands of Scotstoun were disponed, which was a most onerous cause. It was *replied*, That the defender being satisfied of all just and onerous causes that he could now instruct, the pursuer not being heir to Sir Robert, but a creditor to the apparent heir, and having adjudged his right, the lands of Scotstoun ought to be adjudged to him free of any such warrandice, unless the same were real, and did affect the same before Sir John's disposition, without which the creditors had only personal actions against his heirs or representatives. It was *duplied*, That this pursuit being to the behoof of the apparent heir, upon his own bond, voluntarily granted, and the pursuer Blackwood having no interest, the disposition ought to be qualified with the warrandice, unless Mr John, the apparent heir, would serve himself heir to Sir Robert, in which case the defender, by inhibition, or legal diligence, might secure himself from emergent cautionry, otherwise Sir John could never get his relief, seeing the lands of Scotstoun may be disponed with consent of the apparent heir, against whom no inhibition could take effect, Blackwood not being personally tied, and Mr John having renounced to be heir.——THE LORDS did find, that the disposition of Scotstoun ought to be affected and burdened with the debts and cautionries wherein Sir John stood obliged for Sir Robert Drummond, which could be presently instructed, or should be emergent within seven years, which they thought was sufficient time for discovering all such engagements, seeing it was not imaginable the creditors would delay so long, to their prejudice, to pursue for payment and satisfaction, where there were so many intricacies; but, as to such cautionries, they found that it was most just that the disposition should be affected, it being granted that the reduction was to the behoof of the apparent heir, who, of purpose, did renounce and take that way, that he might be free of all actions com-

No 38. petent against him if he had entered heir; so that it was just that either he should enter, or the disposition of the lands be affected.

Gosford, MS. No 845. p. 535.

1676. *December* 14. Mitchel *against* Littlejohns.

No 39.
Bonds granted on death-bed, although they do affect only the dead's part, yet are preferable to legacies left in the ordinary way; for the defunct is *in legitima potestate* as to affecting his part, and granting of bonds to that effect.

Umquhile Thomas Littlejohn, by his first contract of marriage, provided his whole conquest, during the marriage, to the bairns of the marriage; shortly before his death, he granted a bond of provision to the bairns in satisfaction of their portions natural, and what they could crave of him; and having married Catherine Mitchel, he provided her, by her contract, to 720 merks yearly; and, by a posterior bond, he obliged himself, his heirs, executors, and assignees, to pay her 600 merks yearly in case the marriage dissolved within year and day. Which the Lords sustained, notwithstanding of the prior clause of conquest, in so far as might extend to the third of the moveables. The said Thomas did also grant a legacy to Andrew Littlejohn, his brother, for several gratitudes, containing an obligement upon his heirs, executors, and assignees, to pay the same, with condition that he accepted the tutory of his bairns. The account being remitted to an auditor, he did report, that the bairns provision exceeded the two parts, and therefore they craved to be preferred to the relict and the legatar; because, albeit their bond was due on death-bed, yet there is no law nor custom restricting the power of persons on death-bed as to dead's part, but they may grant legacies or bonds as *inter vivos*, betwixt which there is this difference, that those who get bonds on death-bed are creditors; and albeit their bonds be not effectual against the heir's bairns, or wife's part, against whom neither the obligements nor declarations of defuncts are valid, yet they are fully valid against the executor *quoad* dead's part, and so they are not legatars but creditors; so that the provision to the wife and bairns being not by way of legacy, but by way of credit and bond *inter vivos*, they are both preferable to the legacy, although it proceed upon rational motives, being no civil debt; and though it bear an obligement upon the heirs and executors to pay the legacy.

The Lords found, that a bond granted by a defunct on death-bed, not by way of legacy, but obliging heirs and executors, was preferable to his legacy.

Fol. Dic. v. 1. p. 213. Stair, v. 2. p. 479.

*** Dirleton reports the same case:

The Lords found, That bonds granted on death-bed, albeit they are legacies, as to that effect, that they affect only the dead's part, yet they are preferable to other legacies left in the ordinary ways of legacies; and that the defunct was *in*