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 disharge, 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. No 20.

Act. ——. Alt. *Gibson.* Clerk, *Scot.*

Fol. Dic. v. 1. *p.* 212. *Durie, p.* 713.

1679. *January* 29.

JOHN AIKMAN, Goldsmith in Edinburgh, *against* DAVID BOYD'S RELICT. No 21.

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

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, cretors, commissars *quot*, and confirmation dues, as has been decided.

Fol. Dic. v. 1. *p.* 212. *Fountainhall, MS.*

1682. *February.* MANNER *against* DAVIDSON. No 22.

Whether competent to children born *post hæreditatem delatam*?

A MOTHER having taken a bond bearing annualrent, and an obligement to infeft, 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

No 22. she should name in his lifetime; he died without children, after he had made a nomination on death-bed. The eldest brother, who was debtor in the bond, raised reduction of the nomination *ex capite lecti*, as done to the prejudice of him as heir of conquest, at least as one of the heirs substitute in the bond.

Alleged for the defender; That the clause to infeft could not make the bond be repute conquest, no infeftment having followed; 2*do*, The act of Parliament anent the disposing in prejudice of heirs, ought to be understood of heirs general, not of heirs substitute, who might be otherwise strangers.

THE LORDS found, That a person on death-bed could not prejudge heirs substitute more than other heirs; and found, that the pursuer was one of the substitutes, and that the nomination on death-bed was invalid; and that therefore the whole brothers and sisters, and their children born, when *hæreditas* was *delata*, came in as substitute, and *per capita*; but that those born *post hæreditatem delatam* by the death of George the creditor, were not to be reputed substitutes. But this last point was but overly reasoned. It was much debated that the brothers, &c. were not called substitutes in the bond, but only the creditor was by his faculty to determine the substitutes; and so the brothers not nominate could not be looked on as heirs, and consequently could not quarrel *ex capite lecti*.

Harcarse, (LECTUS ÆGRITUDINIS.) *No* 649. *p.* 179.

No 23. An assignation to moveables on death-bed was found valid, where the cedent had neither wife nor children to challenge it as done to their prejudice.

1683. *March* 15. SANDILANDS *against* SANDILANDS.

IN the competition betwixt Sandilands and Sandilands, it being *alleged*, That the pursuer's right was an assignation to a moveable bond upon death-bed, and so ought to be confirmed;—it was *answered*, That albeit an assignation was granted upon death-bed, yet it was granted *admodum inter vivos*, and intimated before the granter's death, who was thereby denuded; and that a moveable right, such as the bond assigned, was transmissible by an assignation and intimation upon death-bed.——THE LORDS found, That in this case, where the granter had neither wife nor children, who might pretend they were prejudged, that the assignation and intimation, albeit upon death-bed, did sufficiently denude and convey, without necessity of confirmation.

Fol. Dic. v. 1. *p.* 212. *P. Falconer, No* 59. *p.* 39.

No 24.

1683. *March.* MR JAMES HENDERSON *against* SAUGHTONHALL.

A BOND, heritable by bearing annualrent, is confirmable, and falls under executry, if the creditor die before the term of payment; and sums lent out upon heritable security by a person *in lecto ægritudinis*, do not prejudge his relict and bairns.

Fol. Dic. v. 1. *p.* 212. *Harcarse*, (EXECUTRY.) *No* 454. *p.* 124.