

No 27.  
infestment,  
was alienated  
on death-bed.  
As our ancient  
laws mention  
only *terre et  
tenementa*, it  
was found not  
to fall under  
the law of  
death-bed.

umquhile John C., the whilk decreit was obtained against the said umquhile John, decerning him to infest the said Allan in certain annualrents heritable, persewit John C., as nearest and lawful heir to the said umquhile John his father, to hear and see the said decreit transferred *active et passive*. It was *alleged* be the defender, that the persewar could have no action as assignee to the decreit to pursue for the translation of the same, because the assignation was null in itself, being made be the said umquhile Allan Dickson, eodem die quo fecit testamentum, et sic in lecto ægritudinis. Et secundum jus regni prout in rubrica c. l. 2. in fine legum burgorum, ubi fit mentio de consuetudine partium in Scotia; nullus burgensis potest terras, quas hereditarie possidet, in lecto ægritudinis alienare, vel quas in sanitate sua acquisivit ab herede, nisi ære alieno esset oneratus, et heres non potest eum in necessitate sua relevare. But so it was that the said assignation of the decreit to infest heritable in annualrents was equivalent to heritage, et sapiebat naturam movabilium, et alienationis terrarum. To this was *answered*, that the law of the Majesty could not be extended to assignations and debts, but only to heritage, where infestments or sasines were obtained of the same. THE LORDS, after long reasoning among themselves, voted for the most part and would not give process upon the said assignation, and admitted the allegiance that it was made *in lecto ægritudinis*.

*Fol. Dic. v. 1. p. 213. Colvil, MS. p. 316.*

1626. July 12.

L. CRAIGIE-WALLACE *against* WALLACE.

No 28.  
An assigna-  
tion being  
challenged as  
done on  
death-bed,  
the exception  
was not re-  
ceived, being  
proponed by  
the debtor,  
although the  
bond assigned  
was heritable,  
and he alleg-  
ed, he was  
not *in tuto* to  
pay to any  
except the  
heir; but  
the Lords or-  
dained the as-  
signee to find  
caution to  
warrant the  
debtor at the  
heir's hands.

LAIRD Craigie-Wallace borrows from David Fullerton 8,000 merks; David, on his death-bed, makes Wallace of Menford assignee, which assignee having obtained the bond registrate at his instance, charges for payment; which charges are suspended, and the said assignation also by action desired to be reduced, both upon one reason, viz. 'That the assignation was made by the defunct, upon his death-bed;' this bond being heritable, and so in prejudice of the heir, who could not be prejudged by the defunct on his death-bed; and the suspender could not be *in tuto* to pay to this assignee, seeing he would be compelled to pay the same again to the heir, who hath the only right thereto. This reason was not sustained at the debtor's instance, seeing the assignee was ordained by the Lords, to find good caution to warrant the suspender at the heir's hands; likeas the cedent, by his missive letters written to the same assignee before his sickness, confest the money to pertain properly to the assignee, and that his name was only borrowed thereto; and in the same letters promised to make the charger assignee; whereby the LORDS found, that this reason was not competent to this debtor, he being also put *in tuto* by caution to warrant him at the heir's hands, as said is. And where the assignation was quarrelled in this same process by the debtor, as not sufficient, because it was subscribed by two notaries, whereas the maker thereof could write himself; this was repelled,

because it was made by the cedent on his death-bed ; neither was it found necessary to prove, that it was subscribed in his death-bed, seeing the assignation itself bore, ' That the notaries subscribed for him, because he was then unable, ' being in his sickness upon his death-bed, to subscribe himself ;' and which the said notaries, in their subscriptions of the said assignation testified, and which the LORDS found sufficient to qualify that it was done upon death-bed, without any other probation.

No 28.

666

Act. Lawrie.

Alt. ———.

Clerk, Scot.

*Fol. Dic. v. I. p. 213. Durie, p. 214.*

1628. February 16.

ROBERTSON *against* DEBTORS.

IN an action betwixt Robertson and her Debtors, the pursuer being relict of her husband, and being made assignee by him to certain bonds and sums, contained in the assignation therein specified, addebted by the Debtors to the husband, and done long before the decease of her husband, pursues the Debtors contained in the assignation, for payment of the moneys owing by them. The pursuit upon this assignation was sustained at the relict's instance, both for the bond of heritable sums, and also of moveable sums, whereto she was made assignee by her husband, notwithstanding that the Debtors *alleged*, That the same assignation made by the husband to the wife, could not be sustained to produce this action, being made to prejudice the heir and executors of the defunct ; and that this assignation could not be respected in their prejudice, but for the relict's own part, or as a testament ; which allegiance was repelled, seeing it was not alleged, that the assignation was made on the maker's death-bed ; neither was it ever alleged to be revocate by the husband before his decease, after the making thereof ; neither was the assignation quarrelled, either by the heir or executors of the defunct, and it was not competent to the Debtors, to quarrel the same upon this ground.

No 29.

Found not competent for debtors to object to an assignation granted upon death-bed, by a defunct to his wife, of certain sums, both heritable and moveable, as being in prejudice of the heir and executor, when they themselves did not challenge it.

Clerk, Scot.

*Fol. Dic. v. I. p. 213. Durie, p. 346.*