1739. *February* 3. & 13.

MARGARET and JANET CRAIES *against* The MALTMEN of Glasgow.

No 18.
A substitution in a disposition to the nearest heir was reduced, at the instance of a remoter heir.

A DISPOSITION was granted *in lecto* to certain trustees for the behoof of the disponer's only child, her heirs and assignees, in case she lived or attained to the age of 21; but in case of her decease before marriage, or 21 years of age, for behoof of the poor of the maltmen of Glasgow. And the child having died before majority or marriage; in a reduction at the instance of the next heir, the LORDS 'found the disposition to have been not only in prejudice of the remoter heir, but also in prejudice of the nearest heir at the time, she being an infant, and the estate upon her failure, even in infancy, provided to strangers; and therefore that it was reducible *ex capite lecti*, without prejudice to the defenders continuing in possession till they should be heard upon their claims, on which they pleaded at least a partial onerous cause.'

Fol. Dic. v. 1. *p.* 212. *Kilkerran*, (DEATH-BED.) *No* 2. *p.* 151.

SECT. IV.

Competent to a Wife;—and to Children.

1628. *July* 10. CANT *against* EDGAR.

No 19.
A wife cannot be affected in her right to a third of moveables, by a deed on death-bed.

ONE Cant pursues Edgar, for payment to the relict of umquhile Edward Edgar, of the third of her umquhile husband's moveable goods. The said umquhile Edward being cautioner for umquhile Mr William Maxwell of Carvens, to his creditor, in an heritable bond; in the which bond, the said Mr William was obliged for his relief, and the said umquhile Edward being compelled, and having paid the sum, and dying before he was relieved, it was controverted if that relief contained in the heritable bond should be estimate an heritable sum, and so pertain to the heir of the cautioner; or if it was moveable, so that the relict would have in law her third thereof; which the defender alleged could not be found moveable, seeing he alleged that the relief was of the nature of the bond given to the creditor, which was heritable; likeas the defunct had, in his own lifetime, obtained decreet against the principal, for whom he was cautioner and had paid, for re-payment of the principal sum, with the bygone annualrents, and decerned him to make payment also in time coming of the yearly annualrent, ay and while he were re-paid, whereby the same pertained to the defunct's

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 prejudge the heir; and the pursuer *replying*, in fortification of the discharge, That the sum was really nnmerate 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,