that process, because that *lis erat finita* by extracting her decreet; which she ALLEGED was but partial. But the Lords had found otherwise.

Vol. II. Page 655.

December 8.—The Lady Ormiston and her husband gave in a second appeal to the British Parliament against John Hamilton of Bangour and his Tutors, reclaiming against a late interlocutor of the Lords, whereby they modified £3000 Scots to be retained by Bangour, as heir, out of the first and readiest of the heritage; with this quality, that if, *in eventu*, my Lord Whitlaw's heritable estate should not be solvendo for all his debts and obligements, then the Lords would consider how far they would diminish this temporary modification. For Ormiston had consented to allow the expenses he had wared out in serving himself heir *cum beneficio*, and in making up the inventary; but objected against the farther account given in of 3 or £4000 expended in defending thir processes against her. Which the Lady Ormiston contended was so far from tending to the preservation of the heritage, that it is a plain destruction and dissipation thereof.

Bangour, on the contrary, ALLEGED,—That he had cast out sundry of her claims, and restricted others; which shows he was neither calumnious nor litigious. *Vol. II. Page* 685.

1712. *February* 5.—The Lady Ormiston and her husband brought down a warrant from the House of Peers against J. Hamilton of Bangour, for introducing their appeal into the house, (*de quo supra*, 8th December 1711;) but it had this more in it than the former, that it was executed against the clerks of session, who scrupled to give him a full extract of the process, as being discharged by the Lords. But rather than underlie the censure of the Peers, they gave out the extract as demanded; and left Bangour to remeid himself only by a protest in the contrary. *Vol. II. Page* 718.

July 30.—The Lady Ormiston gave in a protest for remeid of law against Hamilton of Bangour, because the Lords had found the value of the liferent of the house behoved to deduce off her £7000 sterling bond, *quia debitor non præsumitur donare;* and had found the Peers' judgment and decree did not concern the prescription; and that all the accounts of the funeral charges were prescribed, where she was not contractor and employer; and that the executrix's assignation to her gave her no right to the expenses of confirmation so as to affect the executry. *Vol. II. Page* 763.

[See the numerous other parts of the Report of this Case, pointed out in the Index to the Decisions.]

1712. *February* 7. ELEISES, Daughters to deceased Mr James Eleis of Stanhop-Milns, *against* MR JAMES WATSON of SAUGHTON.

MR James having sold his lands of Saughton to Watson's father for 34,000 merks, for which he gave bond, and 13,000 merks being paid to some pressing creditors; after counting, there was a new bond given for £14,000 Scots, as the

remains of the price, made payable to some particular creditors therein enumerated, and the superplus to the said Mr James his heirs and assignees, secluding his executors. This bond he assigns, some few days before his death, to his daughters, on a narrative of love and favour, so far as it was due. Upon which right they pursue this Saughton, as heir to his father, for payment; deducing the special sums for which it was destinated, and crave only decreet for the superplus.

ALLEGED,—I must have farther allowance of sundry partial payments made to your father, instructed by tickets and receipts under his hand. Which were in two classes; some prior to the bond pursued on, and others posterior thereto. As to the first sort, it was objected that law and reason presumes all these were discounted at the time of granting the bond, and were there allowed.

Which presumption the Lords sustained; and refused to allow these tickets in the sum now pursued for.

All the difficulty arose from the receipts posterior to the bond; against which it was OBJECTED, That, *esto* they were holograph, they could never prove their date against them, who were heirs, at least apparent heirs, to their father; law presuming them to be on deathbed; at which time he could do nothing to prejudge them, the bond being heritably conceived, secluding executors.

ANSWERED, 1*mo*,—Apparency is no sufficient title, except you were entered and served. 2*do*, You are so far from founding on that title, that you have betaken yourself to your singular title as assignees; and your pursuit goes on that ground. 3*tio*, They can never be reputed as done *in lecto;* being all fairly written, and subscribed with his own hand; whereas your assignation is signed by two notaries for him, expressly bearing, *ratione ægritudinis*, that he could not write. 4*to*, Though a man cannot grant a bond upon deathbed, to burden his heir, yet what law hinders him to uplift a sum, whether heritable or moveable, and give his debtor a valid discharge? And which the Lords sustained in July last, against this same Laird of Saughton, in favour of Mr David Ogill of Popilhall.

REPLIED,—The Lords have found apparent heirs, even without a service, might reduce deeds done to their prejudice on deathbed; as in the case of *Balmerino's Creditors* against *the Lady Couper*, *25th November* 1669; and *Colonel Heriot's Apparent Heir* against *his Creditors*, *23d February* 1676; and if persons on deathbed were permitted to uplift heritable sums, it would make that privilege given to heirs very ineffectual. For is not the heir as much prejudged, by uplifting sums heritably secured, (which would fall to him by law,) as by his predecessor's contracting debts then? And though the Act of Parliament 1621 discharges bankrupts only to grant bonds or assignations, yet Sir George Mackenzie, in his Observations, and others, tell us, it must be extended to discharges as well as bonds; and so it was found, 28th *November* 1676, *Carmichael* against *Demster*.

DUPLIED,—It is clear, *evidentia facti*, thir receipts have been given in *liege poustie*, for they are all writ with his own hand; whereas their assignation is signed by notaries, so they are necessarily anterior to it. And it is strange doctrine to assert a man cannot receive his own money, and give receipt for it at any time in his life. Yea, Stair, *tit. Succession, sec.* 29, tells such a discharge was sustained, though the defunct, at delivery, distributed the money to his friends as he thought fit, without ever asking his heir's consent; and cites a decision out of Durie for it. Yea, an assignation, though onerous, will not hinder

the debtor to pay the cedent, any time before intimation, (though he thereby incurs the warrandice, but the debtor is secure;) much less will this gratuitous assignation, never intimated in his lifetime, but only to take effect after his death, hinder Saughton to pay their father any part of the debt when he called for it. But the truth is, all the payments were long before their assignation; and the father acts more ingenuously than they, for he assigns only to what is due.

The Lords repelled the objections against the discharges; and found the payment *bona fide* made; and that thir assignees could not quarrel the same; and that Stanhop-Milns, (though he had been on deathbed, which did not appear,) might have uplifted the sum in whole or in part. What influenced the decision very much was, That the payments had been truly and fairly made; and it was both unreasonable and unjust in thir daughters to seek payment over again, because the receipts and tickets wanted writer's name and witnesses; though they knew them to be their father's hand-writs. And, though they shunned to be heirs, as unsafe, yet they claimed the privilege belonging to heirs, that law presumed such writs to be done *in lecto;* and yet the title they founded on was an assignation visibly made on death-bed, he not being so much as able to sit up then, and sign his name; but forced to cause it be done by two notaries, because of his prevalent sickness and bodily weakness; which behoved to be great when he could not so much as put his name to a writ. And the Lords looked upon this objection as a mere catch, to take advantage of one whose father had paid a part of the debt already. *Vol. II. Page* 718.

1712. *February* 9. JAMES GRIERSON of CAPINOCH *against* ALEXANDER CLARK.

GRIERSON against Clark. Carruthers of Warranby assigns a bond of 1000 merks, due to him by the Lord Stormont, in favours of James Murray, son to Hydewood, bearing love and favour; and, in respect he was a pupil, he appoints the said James's father and mother, and the longest liver of them two, to be his tutors in the management of the sum assigned. James Grierson of Capinoch being creditor to Murray the child's father, and he being deceased, Capinoch confirms himself executor-creditor to him in that sum, as being *in ejus bonis*, and presumed to be acquired by the father's means, the infant having no effects of his own to make any such purchase. Alexander Clark being likewise creditor to the father, he applies to the mother, as the longest liver, and gets an assignation from her, *qua* tutrix, to the sum. Whereupon a competition arises betwixt Capinoch the executor-creditor, and Clark the assignee; who contended that the sum was unquestionably the pupil's; and he having obtained a right thereto from the tutrix, he was clearly preferable to Capinoch, whose confirmation presupposed the sum to be the father's. But if that foundation were overthrown, then his right fell in consequence; for though lands taken in the name of a pupil presumed the acquisition to be by the father's means, yet it was not so in rights flowing from third parties, which may be pure donatives, without any respect to the parents. The *peculium adventitium* in the Roman law was the child's own property *quoad* the fee; and if it were otherwise, it might discour-