

should no ways prejudge the person substitute ; but here the creditor died before the term.

No 11.

Act. *Lermonth.*

Alt. ———.

Clerk, *Scot.**Fol. Dic. v. 1. p. 385. Durie, p. 481.*

* * * Kerse reports the same case :

BOND to a father, and failing of him by decease, to his son, albeit the father died *ante terminum*, found sufficient to exclude the relict from the third of that bond.

*Kerse, MS. fol. 65.*1663. *June 24.*SCRIMGGEOR *against* MURRAY.

No 12.

A BOND bearing annualrent and obligation to infest falls not *sub communionem*, nor will the relict have any part thereof.

Fol. Dic. v. 1. p. 385. Stair.

* * * See this case, No 7. p. 464.

1665. *June 28.*JAMES PITCAIRN *against* ISOBEL EDGAR.

No 13.

UMQUHILE David Edgar, by his contract of marriage, provided 4000 merks to be paid by him and his heir of the first marriage, which failing, any other his heirs, to the bairns of the second marriage ;—the portion of the daughters payable at their age of 18, and the sons at 21, with five merks yearly of annualrent after his death, for the children's subsistence. Isobel, one of the children, having married after her father's death, James Pitcairn, her husband's creditor, pursues for the sum as belonging to the husband *jure mariti*. It was *answered*, That the sum was heritable, bearing annualrent, and the term of payment of the annualrent was come before the marriage, and therefore it did not belong to the husband *jure mariti*. It was *answered*, That it was not properly an annualrent, but an aliment of five per cent. and that the term of payment of the annualrent was after the act of Parliament 1641, declaring such bonds moveable ; and albeit the fisk and relict be there excluded, yet the *jus mariti* is not, but is only added by the act 1661.

Bond bearing annualrent falls not under the *jus mariti*.

THE LORDS found, that seeing this provision bears annualrent, whether more or less, and that the marriage was after the term of payment, that it was heritable, and fell not to the husband *jure mariti*, but only the annualrents thereof.

No 13. till his death, albeit there was no contract of marriage, nor a tocher, and that the husband had, after the marriage, given some provision to the wife.

Fol. Dic. v. 1. p. 385. Stair, v. 1. p. 290.

* * * Newbyth reports the same case :

ISOBEL EDGAR, relict of James Pitcairn of Lordon, having right to the sum of 4000 merks by virtue of her contract of marriage ; and this sum being acclaimed by William Oliphant, who was executor creditor decerned and confirmed to the said James Pitcairn, and to the which sum it was alleged the said James had right *jure mariti*, and consequently was *in ejus bonis* the time of his decease ;—it was *alleged* for the relict Isobel Edgar, That the sum could not belong to her husband *jure mariti*, being heritable, the term of payment being come, and bearing annualrent before the marriage ; and, by the late act of Parliament, in *anno 1661*, it is provided, that albeit bonds bearing annualrent be moveable *quoad* the executors ; yet, where such bonds are made to the wife, no part thereof is to pertain to the husband *jure mariti* ; nor, where bonds were made to the husband, no part to pertain to the wife *jure relictæ*, and is *correctionem juris veteris*, and drawn back to the year 1641. To which it was *replied* for the pursuer, The allegiance ought to be repelled ; because the term of payment was not come, nor did bear annualrent the time of the act of Parliament 1641 ; and, by the said act of Parliament, all bonds, even bearing annualrent, if they bear not an obligation to infest, and seclude the executors, are declared to be moveable, and belong to the executors ; and the only exception in that act is, *nisi quoad fiscum et relictam*, which *format regulam in casibus non exceptis*.—THE LORDS found there was no *jus mariti* in this case, in this sum of 4000 merks, by virtue of her parent's contract of marriage, to which the husband, and consequently his creditors, could have right ; but found they had good right to the annualrents preceding the husband's decease.

Newbyth, MS. p. 30.

* * * In conformity with the above, was decided the case Rollo against Brownlee, No 121. p. 2653.

1673. December 6. ROBERT ROBERTSON *against* LORD HALKERTON.

No 14.

In an action pursued at Robertson's instance, as assignee in and to a bond granted by the Lord Halkerton, father to the pursuer's cedent, viz. the Lord Halkerton's sister against the Lord Halkerton, as representing his father, it was *alleged*, That this assignation not being intimated before the cedent's marriage with the Laird of Laurieston, the bond, being a moveable bond, did fall to him