bankrupt's effects, 22d of October 1759; and the assignment by Margaret Jamieson to her father was not intimated till the 17th of May 1760.

No 146. intimated till after, was preferred before the *jus mariti*.

The representatives of John Hamilton, in order to pay safely, brought a multiplepoinding against the assignees to the bankrupt husband's effects, and against Robert Jamieson assignee from the wife.'

And the Lords found, 'That the assignment in favour of Robert Jamieson, having been granted and delivered before the marriage, though not intimated, is preferable to the legal assignment by the subsequent marriage.'

This Judgment rests upon two different grounds, both of which were under view of the Court. 1*mo*, That the legal assignment by marriage transfers nothing to the husband but what the wife had the free disposal of; and therefore, not any subject made over by her to another, of which she could not dispose, though the legal title remained with her. 2*do*, As Margaret Jamieson's assignment to her father bears warrandice from fact and deed, the husband, had the subject been even conveyed to him expressly, must have conveyed it to the assignee, as being liable for his wife's debts.

Sel. Dec. No 206. *p.* 273.

*** See this case as reported in the Faculty Collection, No 84. p. 2858.

1771. *December* 5.

THOMAS and ANDREW SORLIES *against* ELISABETH ROBERTSON, Relict of PATRICK SORLIE.

No 147. The power of a husband over the goods in communion does not authorise him to execute a deed, with the evident design of disappointing the relict's legal claims.

In the year 1720, Patrick Sorlie, the pursuer's uncle, lent to the Duke of Athol the sum of 2000 merks; the security taken was a contract of wadset, by which the sum was taken payable to himself, in liferent; to Patrick Sorlie, the pursuer's eldest brother, in fee; and, in the event of his dying without issue, to the pursuers.

Patrick Sorlie, being in the fee of the loan, called up the money; and in the year 1753 granted a bond, proceeding upon the recital of the destination in the contract of 1720; whereby he bound 'himself and his heirs, in the event of 'his having no children, to pay to the pursuers, his brothers, equally betwixt 'them, their heirs, &c. the sum of 2000 merks, and that against the day after 'his death.' He provided, that his just debts should be preferred to this bond, 'but that no legacy, or claim, or pretension of Elisabeth Robertson his spouse, 'or any of his relations whatever, should have any preference thereto.'

Patrick Sorlie died in 1768, leaving his effects chiefly vested in bills; when a process took place betwixt the brothers and the widow of the deceased; in which the chief question was, Whether or not the above 2000 merks should come off the whole executry before the widow could claim any interest therein *jure relictæ*?

No 147. The Sheriff found, 'That the relict had right to the just and equal half of the free effects and debts which belonged to the defunct; and that the bond and assignation for 2000 merks, in favour of the executors, did not affect the relict's share.'

The cause having been brought into Court by advocation,

The pursuers *pleaded*; The goods naturally in communion betwixt husband and wife were affectable not only by the onerous, but by the rational deeds of the husband. They might also be affected by deeds merely of a gratuitous nature, where it did not appear that an attempt to defraud the relict had been in view. The deed, in the present instance, was rational, executed with a design to preserve the destination in the former settlement of this fund; and as in this the relict had originally no interest, she neither was defrauded, nor was it in contemplation to defraud her of her just claims.

Nothing in this case had been done that the defender had any right to complain of. If this money had either remained upon the former security, or been lent out upon a new one with the same destination, or even upon a common bond bearing interest, the relict could have claimed no interest in it; and as all these measures, by which her interest would have been excluded, were in the husband's power, it was the same thing, nor could she complain of any injury, when the same effects merely, were the result of the method that had been followed.

The bond was not a deed of a testamentary nature, but a deed *inter vivos*, being granted fifteen years before the granter's death; during which period, had he entertained any idea that, contrary to his declared intention, his relict would have claimed any interest in this sum, he would have put it out of her power, by taking a security for it upon a different footing.

The defender *pleaded*; 1*mo*, As the bond was evidently a *donatio mortis causa*, there could be no doubt that it affected only the dead's part, and in no manner lessened the relict's share. That it was a deed of a testamentary nature was clear from the circumstances. It was gratuitous, not payable till after the death of the granter, was preferred to all other legacies, and postponed to all the granter's onerous deeds. It had been decided by the Court with regard to the legitim, that a father, by a deed to take effect after his death, could not disappoint his children of that right; the legitim and *jus relictæ* were, in this respect, precisely similar; so that the reason and foundation of the judgment was equally applicable to both. Feb. 1728, Henderson, *voce* LEGITIM.

2*do*, Although this bond was considered as a deed *inter vivos*, yet it was of such a nature as to exceed the power the husband had over the goods in communion. All reasonable acts of administration were valid, but the law did not allow him to make an improper use of the confidence reposed in him; so that whenever he abused that confidence, and under colour of his right of admini-

stration executed deeds with intention to defraud his wife of her legal interest, such deeds would be declared null and void. No 147.

Every deed fell under this rule, where it could be proved it was done with a design to deprive the widow of her share. The circumstances, in the present case, were strong, and sufficiently indicated the design in view. Independent of those already mentioned, the deed itself contained a clause, expressly declaring that it should take place of any claim the defender might have; and as the pursuers were the granter's natural heirs, the deed had evidently been made for no other purpose than to defeat the defender's legal right. Dirleton's Doubts, *voce* Jus Relictæ. Thomson *contra* Creditors of Thin, No 141. p. 5939.; 10th January 1679, Grant *contra* Grant, No 142. p. 5943.; Fac. Col. 26th June 1760, Campbells *contra* Campbell, No 145. p. 5944.

The Judges rested their opinion upon its appearing to be the intention of this bond to disappoint the wife; and therefore 'found, that the sum due in the bond cannot affect or impair the relict's share of her husband's moveables.'

Upon advising a reclaiming petition and answers, the Court unanimously adhered; there being a strong appearance, as well from the circumstances as from the terms of the deed, of a design to defraud the wife.

For Sorlies, *D. Graeme.* For Robertson, *D. Smith.*
Lord Ordinary, *Pitfour.* Clerk, *Gibson.*

R. H. *Fac. Col. No 114. p. 338.*

1783. *June* 17. Jean Donaldson *against* James Hay.

No 148.
Found, that the sums due to the child of a minister, under the act establishing a fund for their widows and children, tho' declared by the act not to be arrestable, do yet fall under the *jus mariti*, and may be attachable for debts of the husband of such child.

Mr Donaldson, minister at Glammis, died in September 1779, leaving one daughter, who was married to Mr Hay.

Mr Hay died in March 1781; when a question arose, whether the sums due to his wife, as the child of a minister, in consequence of the statute 17 Geo. II. c. 11. had fallen under his *jus mariti*.

The merits of this question depended on the construction of the following clauses.

'And be it enacted, by the authority aforesaid, That the payments herein after directed shall be made to the children or widows respectively named in the warrants, if the persons so named are majors, and to the tutors of such of them as are minors; and if they have no tutors or curators, to such person or persons as shall be authorised for that purpose by an act of the presbytery or university respectively, of which the person under whom the provision is claimed was last a member.'

'And be it enacted, &c. That the foresaid annuities payable to the widows, and the provisions payable to the children of the aforesaid ministers of the Church of Scotland, and of the heads, principals, and masters of the aforesaid