

No 25.

THE LORDS found the Creditors had sufficient interest upon their personal bonds to insist upon the reduction, *ex capite lecti*; but they found that a real security given to Couper's Creditors, equivalent to an apprising and infestment, was sufficient to exclude their interest:

Fol. Dic. v. 1. p. 212. Stair, v. 1. p. 653.

1714: June 24. THE CREDITORS OF ALEXANDER LINDSAY competing.

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The contrary found, on the ground that death-bed is a privilege competent to the heir only, or those in his rights.

In the competition of the Creditors of Alexander Lindsay for the office of executry before the commissaries of Edinburgh, compearance was made for the relict, who craved and obtained preference for the half of the household plenishing provided to her by her contract of marriage, with an obligation to free the same of all debts.

Compearance was also made for Janet Forbes, the defunct's grand-daughter, who craved to be conjoined with the other creditors, upon a bond for 1000 marks granted by the defunct her grandfather upon death-bed, for love and favour, and other onerous causes; and the Commissaries, upon inquiry, accordingly admitted her *pari passu* with the other onerous creditor.

There were several bills of advocacy from the commissaries upon iniquity. And it was *alleged* by the Creditors, That the relict had no preference for the household-plenishing, because the property of the plenishing remained with the husband, who had the absolute power and disposal of the plenishing during his life; like as a creditor of the defunct's might have affected these moveables by arrestment or poinding at any time during his life, which would have carried the property without any reparation to a wife so provided; and the property not being conveyed, it remained with the husband at his death, and the wife is but a creditor, and must come in *pari passu* with the remanent creditors. The reason why the commissaries gave this preference, appears to be because, by the course and practice of several commissariots, relicts have been preferred to all creditors for the whole provisions in their contracts of marriage; and that was a debateable question before the Lords, till the case betwixt Keith and Leith, determined on the 17th of February 1688, in order to establish a rule in time coming, and then it was found, that the wife had no preference; which has accordingly been followed as a rule ever since, and was particularly so found 19th of February 1713, the Creditors of James Cleghorn against his Relict. And upon the same ground, the LORDS, on the 23d of February 1714, found, that this very relict of Alexander Lindsay had no preference for the aliment of the family, till the next term after her husband's death; so that now a relict is only to be considered as a common creditor. (*See Those cases voce PRIVILEGED DEBT.*)

It was *answered*; That the case of relicts have ever been favourable; and although of late the relict's preference for all the provisions in her contract has not taken place, yet a disposition to a share of moveables in a contract of mar-

riage *per verba de presenti*, with an obligation to free the same from debts, put the relict in a special case from other creditors for liquid sums; for thereby the relict is a creditor upon the particular subject, and as a special legatar has preference to other legatars, so the wife has the same ground of preference to common creditors.

It was *replied*: The wife by law has interest in the half of the husband's moveables where there are no children, as in this case; but with the burthen of the half of the moveable debts, which often times reduces her share in effect to nothing; and the provision in the contract imports no more but an obligation to relieve these moveables of the husband's debts, which can only state her in the case of a common creditor; if there be sufficiency either of heritage or moveables, she will want nothing, if not, she ought to bear a share.

The Lords found the relict had no preference. See HUSBAND and WIFE.

It was *alleged* for the onerous Creditors; That the commissaries had committed iniquity in conjoining the defunct's grand-daughter *pari passu* with them, because her bond was gratuitous and on death-bed.

It was *answered*; That the defunct had a sufficient unincumbered estate to satisfy all his debts heritable or moveable, and thereby was in capacity to give a gratuitous bond, which is no defraud of creditors, there being a fund sufficient for paying all. *2do*, Neither was the reason of death-bed competent to the creditors to quarrel the bond, because that was only the privilege of the heir; and therefore any deed on death-bed, with consent of the apparent heir, or ratified by the heir, is good from the date; or from the ratification; and suppose that the creditors who can by their diligence be in place of the heir, could in other cases quarrel deeds on death-bed, yet in this case the bond is ratified and corroborate by the heir.

The Lords found the Commissaries had committed iniquity, there being a sufficient unincumbered estate in heritage and moveables for payment of the whole debts, and the bond quarrelled being corroborate by the heirs; but if the creditors called the sufficiency of the defunct's estate in question, reserved reduction upon the act of Parl. 1621, as records.

Fol. Dic. v. l. p. 213. Dalrymple, No 110. p. 153.

SECT. VI.

Death-bed Deeds are Effectual, and afford *jus exigendi*, unless Challenged by the Heir.

1581. January 16. THOMAS DICKSON against JOHN C.—.

THERE was one Thomas Dickson, son to Allan Dickson, burghess of Edinburgh, who being made assignee to ane decret obtained be his father against

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An heritable
bond, without