

No 14.

so that she comes not in as a creditor by the clause, but as proprietor: Though in such general dispositions the Commissaries use to confirm the subject, which is all that the decisions noticed by the other creditors import.

THE LORDS found the Relict's alimending the family till the next term, is not a privileged debt to give her preference in the confirmation of her husband's moveables, in prejudice of the defunct's other creditors.

THE LORDS delayed to advise the other point, concerning the household plening, till June. (*Infra.*)

Forbes, MS. p. 29.

1714. June 25.

MR WILLIAM FORBES, Advocate, for himself, and Administrator in Law for JANET FORBES, his Daughter, *against* JANET KNOX, Relict of Alexander Lindsay, Merchant in Edinburgh, and his Creditors.

No 15.

IN the advocation from the Commissaries of Edinburgh, in relation to the Creditors of Alexander Lindsay, where in a point concerning Janet Knox his relict's claim, to be decerned and confirmed as executor-dative with the other creditors, with preference to her for the half of the value of the household plenishing, by virtue of her contract of marriage, debated *supra*, 23d February 1714, being this day advised; the LORDS found, that, notwithstanding the relict is provided to the half of the insight plenishing, belonging to the husband the time of his decease, without the burden of debt; yet the same remained *in dominio* of the husband, and therefore she can have no preference in the confirmation of the defunct's testament for that subject; reserving to her action against the heir, in so far as she shall want payment of the value of the plenishing provided to her by the creditors their diligence affecting the same.

Forbes, MS. p. 68.

* * * The following is another branch of the same competition, relative to a gratuitous bond, which was found to affect the moveable estate *pari passu* with onerous debts.

1714. June 25.

MR WILLIAM FORBES, as administrator in law to Janet Forbes, his daughter, having moved an edict before the Commissaries of Edinburgh, for decerning and confirming him executor *qua* creditor to the deceased Alexander Lindsay, merchant in Edinburgh, upon a bond for the principal sum of 1000 merks, granted by the defunct to the said Janet Forbes; it was *objected* for the other Creditors; That Mr Forbes cannot compete upon the said bond with them, because it was a gratuitous deed payable after the granter's decease, and

is *donatio mortis causa*, and of the nature of a legacy, which is only to be paid out of the free gear and deed's part, *deductis debitis*. 2do, Whatever may be the effect of a gratuitous bond granted by a person solvent in *liege poustie*, yet such a bond granted on deathbed, cannot affect the moveables to the prejudice of onerous creditors, who are not bound to debate the extent of the defunct's heritage, which cannot be in view at present.

Answered for Mr Forbes; 1mo, His daughter's bond cannot be reckoned *donatio mortis causa*, or a legacy, because it was not revocable as these are: 2do, Law makes no distinction betwixt onerous and gratuitous creditors, except where the common debtor is insolvent; and here the defunct hath left a competent estate in heritage and moveables, more than sufficient to pay all his debts, the question being here only, who shall be paid out of the moveables, which the creditors would affect *in amutationem* of Mr Forbes? Now, were it not absurd, that a person who has a vast estate in heritage, could not dispose gratuitously of any part of his moveables, if he had more debt than would exhaust these: 3tio, The law of deathbed can be pleaded by the heir, or by the relict or children, in so far as the deathbed encroacheth upon the latter's legitime, or the former's legal share of the moveables, because these, if they were not allowed to quarrel, deathbed deeds would be entirely cut off; but this reason doth not hold in the present case, where the defunct having a sufficient heritage, his creditors can sustain no prejudice, but are sure in all events of being paid. And David Lindsay, heir served to the defunct, is so far from quarrelling the bond, that he hath ratified it by his bond of corroboration; dated 23d December 1703 years.

The Commissaries repelled the objections against Janet Forbes' bond, and admitted her father as administrator in law for his interest, to be confirmed executor dative, for payment to the said Janet Forbes of 1000 merks, *pari passu* with the defunct's other creditors. These other creditors raised advocacy upon iniquity committed by the said interlocutor.

THE LORDS repelled the objection against Janet Forbes' bond as granted on deathbed, in regard of the heir's ratification by granting a bond of corroboration for the same; and adhered to the Commissaries' interlocutor, admitting her and her administrator in law *pari passu* with the other creditors in the confirmation, reserving to the creditors action upon the act of Parliament, as accords.

Forbes, MS. p. 68.

* * Dalrymple's report of this case is No 26. p. 3204, voce DEATHBED.