No 123. of the said provision, and that the disposition to the defender in this case was just the same as a succession. It was admitted, that where an heir is, before his succession, the proper creditor of his predecessor in a moveable debt, his service as heir will not extinguish his claim against the executry, and that *vice versa* the case was the same, where an executor is creditor to his predecessor in an heritable debt. For although *quoad* creditors of the defunct, both are considered as but *eadem persona cum defuncto*; yet, in questions between themselves, the heritable and moveable succession makes the defunct to be considered as two different persons, and as having two different heirs; but it was also thought, that the case was very different where the debt due to the heir, as in this case, was only a provision of succession, wherein he is partly heir as well as creditor.

N. B. This judgment was, upon an appeal, reversed.

Kilkerran, No 5. p. 457.

1747. *January* 6.

Margaret Crawfurd, and John Cochran her Husband, *against* William Hogg.

No 124.
A clause in a contract of marriage, whereby the wife accepted the provisions in full of all she could claim through her husband's decease, was found, in consideration of the circumstances of the case, to exclude the claim of her next of kin on her decease.

By contract of marriage entered into between William Hogg, merchant in Edinburgh, and Anna, daughter to Patrick Crawfurd merchant there, it was agreed that William Hogg should provide 24,000 merks Scots of his own money, together with 7000 merks received by him in tocher, upon land, or other securities, to be taken to himself and spouse, in conjunct fee, and to the children of the marriage, declaring, that if there should be no children, she should have a liferent of 1200 merks Scots, and the half of the conquest, with one half of his household furniture, restricted, in case of children to 900 merks, and half of the household plenishing, which she 'accepted of in full satisfaction of all further 'liferent, terce, moveables, or any other manner of way, through her said pro-'mised husband's decease.'

The marriage dissolved by the death of Anna Crawfurd; and Margaret her sister, with concourse of John Cochran of Ravelridge her husband, brought a process against William Hogg, junior, merchant in Edinburgh, as representing William Hogg then also deceased, to account for the wife's share of moveables in communion, in which the Commissaries of Edinburgh, 21st November 1746, 'Having considered the contract of marriage betwixt William Hogg and Anna 'Crawfurd, and the ample provisions therein contained, in favours of the said 'Anna Crawfurd, and the whole circumstances of the case, found that by the 'said contract she had accepted of the conventional provisions therein specified, in place of the legal provisions.'

This question, whether her accepting of a conventional provision related only to the event of her surviving her husband, or also to that of her predeceasing him, was reported on a bill of advocation and answers. No 124.

Pleaded for the defender, That the claim set up by the nearest of kin to wives, to carry off the effects from the husband, was unfavourable, but especially so, when the wife had renounced her right in the communion, and accepted of an equivalent in the event of her surviving her husband; and it was believed that there was no instance of this renunciation being made in the one event and not in the other, except when it was omitted by the inaccuracy of the writer; that in this case the provisions settled on the wife, were a large annuity of 1200 merks, with the liferent of half of the conquest, and the half of the household furniture; and the terms of the renunciation made by her comprehended her whole interest in the moveables, without being restricted by the latter part of the clause; for she had not right to them through her husband's decease, but in virtue of the communion subsisting during the marriage: And these words must relate to the other claims competent her, as, besides her terce, that for aliment and mournings.

A clause discharging a husband in these terms, 'Of any thing that could 'belong to the wife as relict, in case she survived him, by law, or any other 'manner of way whatsomever.' was found to exclude her nearest of kin, 12th July 1701, Boyse against Sandilands, 31. p. 5049. as was a clause, where the acceptance was, 'In full of all third or half of moveables the wife, her 'executor, or nearest of kin could claim by or through the husband's decease, 'any manner of way, excepting his good will only;' 19th February 1743, Thomson against Lawrie, No 351. p. 6142.; and a like case, 25th July 1738, Freebairn against Gowan. See APPENDIX.

Pleaded for the pursuer, That the plain intendment of the contract was to discharge the claims competent to the wife, in the event of the husband's death, for which she received an equivalent; but as there was none stipulated to her nearest of kin for the claim competent upon her decease, therefore she did not renounce it. Such a bargain is equal, and to be presumed, though sometimes, in fact, the agreement is made otherwise, in which case it must stand: But there was no reason of straining words to presume any such bargain here, as the provisions on the wife were moderate, and rather small than otherwise.

The relict's share of moveables may very properly be said to fall to her through her husband's decease; for, though lawyers talk as of a communion, yet she is entirely excluded from the administration; her proportion is not determined, but depends on the existence or not of children; and the husband may, by changing the nature of his effects, entirely diappoint her.

The decisions do not come up to the present case: In that of Boyse the renunciation was of any thing that belonged to her as relict, or any other manner of way whatsoever: In Freebairn's, the wife had discharged her claim, ei-

No 124. ther at her own or her husband's decease; and in Lawrie's, she renounced the claim of her nearest of kin.

The Lords refused the bill.

Fol. Dic. v. 4. *p.* 122. *D. Falconer, No* 151. *p.* 193.

*** Kilkerran's report of this case is No 30. p. 2274, *voce* Clause.

1750. *July* 6.

Lady Dunnipace, and Taylor, her Trustee, *against* Watson and Vert.

No 125.
A wife having buried her husband, when no funds appeared, was found preferable on a fund afterward emerging, it not being presumed she did it *animo donandi.*

The Lady Dunnipace was at the charge of burying William Innes, her husband, when it was by every body believed he had not a sixpence of his own in the world; but, some years thereafter, a sum cast up, till then unknown, viz. a legacy that had been left to him by Doctor Fraser, which came to knowledge by a multiplepoinding raised by the Doctor's Executors; and that sum having been confirmed by the defunct's Executors, the Lady brought an action against them before the Commissaries, for the funeral expense, and other privileged debts, paid by her.

Their defence was, That these expenses had been laid out by her *animo pietatis*, and as her *animus* must be judged of as at the time they were laid out, she could not retract upon this posterior discovery; which the Commissaries "Repelled; and found the defenders liable for the sum, as by them modified;" and the Lords "Refused a bill of advocation."

It was not thought to follow, that, because the Lady had not allowed her husband to lie unburied, therefore, she had renounced all claim for the expense upon his effects which she might happen to discover.—*See* Privileged Debt.

Fol. Dic. v. 4. *p.* 122. *Kilkerran,* (Presumption.) *No* 7. *p.* 430.

*** D. Falconer reports this case:

1750. *July* 7.—William Taylor, Writer to the Signet, dying without any apparent funds, the Lady Dowager of Dunnipace, his relict, defrayed his funeral expenses; and there afterwards appearing a fund of a legacy which had been left him, and was confirmed by his creditors, she, by her assignee, William Taylor, writer in Edinburgh, obtained a decreet of cognition, and pursued the Executors for this privileged debt; in which the Commissaries found them liable; and the Lord Ordinary on the Bills refused an advocation.

Pleaded in a reclaiming bill; She having buried her husband, when no funds appeared, is presumed to have done it *ex pietate*, and cannot retract her resolution, and make a demand upon the executor.