

S E C T. V.

Whether Competent to the Creditors of the Defunct.

1669. November 25.

The CREDITORS of COUPER and BALMERINO *against* LADY COUPER.

THE deceast Lord Couper having made a disposition of his whole estate in fee to his Lady, and thereby having excluded the Lord Balmerino, his apparent heir therein, Balmerino being unwilling to enter heir to Couper, before he knew whether the disposition would stand or not, moves some of Couper's creditors, and some of his own creditors having charged him to enter heir to Couper, to insist in the reduction of the disposition made to the Lady, as being done by Couper, *in lecto agritudinis*. It was *alleged* for the Lady, no process at the Creditors of Couper's instance, *first*, Because they insist only upon personal bonds, granted by the Lord Couper, and have no real right to the land, and so cannot reduce a real right, but upon a real right; so till they have appraised the lands they have no interest. *2do*, Albeit Couper's Creditors might reduce the disposition, as betwixt conjunct persons, without an onerous cause, yet not upon the reason, *ex lecto*, because that is a privilege particularly competent to heirs, but not to creditors, as they are creditors; unless by real diligences, they state themselves in place of the heir, and so make use of his right and privilege. It was *answered* for the pursuers, That in that they were creditors, they had sufficient interest to crave it to be declared, that the estate of Couper should be affected with apprisings upon Couper's debts due to them, notwithstanding this disposition, which is all the effect of this reduction; and as they may, without any real right, reduce, or declare as aforesaid, upon the act of Parliament 1621, against fraudulent dispositions, so they may declare that any disposition done on death-bed, as it could not prejudice the heir, so it cannot prejudice the creditors of the defunct, or his apparent heir, but that they may affect the said estate, with their legal diligences. It was *answered* for the defender, that she repeats the former defence, and further *alleges*, that she is content to take off the interest of Couper's own Creditors, and to declare that the disposition shall be burdened with their debts; but adhered to her defence against Balmerino's Creditors, who, though they produce an apprising yet it is posterior to the summons, and their personal debts can be no sufficient title, nor is there any produced. It was *answered* for Couper's Creditors, that the declarator in their favours was no way sufficient, nor would give them a real right, nor prevent the diligence of other creditors. *2dly*, If they had a good interest to reduce, and thereupon to apprise, no offer could take away that interest but payment.

No 25.

Reduction on the head of death bed is competent to the defunct's personal creditors, for he can no more prejudice them by any deed done on death-bed, than he can prejudice his apparent heir.

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.

No 26.

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 advocation 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 poiding 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-