

not prejudice him. THE LORDS notwithstanding did prefer the said Alexander Binning, seeing the decret against the wife could never be reduced, being a decret *in foro*; and that the procuratory being conceived as said is, the said William could not have the benefit of a possessory judgment, albeit it were found that he was only a consenter, seeing there was no reservation of his right, it being in his power to consent or not as he thought fit.

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Gosford MS. No 748. p. 461.

1675. December 8. THOMSONS *against* CREDITORS OF ALICE THIN.

THE husband has power to dispose of the moveables in communion, to take effect in his life or after his death, provided it be exercised *sine dolo*. But a bond being granted to a neice, payable after the death of the granter and his wife, 'in case he left no heirs of his own body,' the LORDS found the circumstances of fraud here alleged, viz. That at the date of the bond the granter had not an estate sufficient to satisfy the bond, leaving any thing considerable to his wife, not otherwise provided, and that the bond bore a condition of not having heirs of his own body, relevant to this effect, that the bond should not affect the wife's half.

No 141.

Fol. Dic. v. 1. p. 396. Stair.

. Gosford reports the same case :

In a multiplepounding raised at the instance of Mr James Eleis, who was heretor of the dwelling house, wherein both James Masterton and his wife (Alice Thin) had died, and was preferred to both creditors, for the house-mail, as having *jus tacita hypothecæ*, and had order for satisfying thereof, to dispose of the moveables remaining in the house at the best rate; there being a competition betwixt the creditors of the husband, and the creditors of the wife, who should be preferred to the superplus, it was *alleged* for Margaret Thomson, that she ought to be preferred to Baillie Hall and other creditors of Alice Thin, because the deceased James Masterton, had granted bond to her and her sister, for payment of the sum of five thousand pounds at the first term after his own and his wife's decease, and the longest liver of them two, failing heirs of his own body: Likeas, thereafter he did make a disposition of his whole goods in favours of his wife Alice Thin, with the burden of his whole debts, who not only had accepted the same, but by confirmation of herself as executrix, and uplifting the sum of two thousand merks due to her husband by Sir William Thomson, she had homologated the said disposition, affected with her husband's debts; and therefore the saids Thomsons ought to be preferred to her creditors, who could pretend no right to any of the moveables, which were possessed in common betwixt him and

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his wife until he died. It was *alleged* for the creditors of Alice Thin, that notwithstanding, they ought to be preferred to the just half of the moveables which were possessed by the husband and the wife, the time of the dissolution of the marriage by the husband's death; *imo*, Because this bond was granted for no onerous cause, not being obligatory against the heirs of James Masterton's body, and only payable after his decease and his wife's, and granted to his own neices, and therefore unless they could instruct an onerous cause, and that they were true creditors, it would only be interpreted in law, *donatio mortis causa quæ equiparatur legato*, and so was only payable out of the defunct's half of the moveables, and could not burden the wife's half, to which she hath right by the law and practise of this kingdom, especially there being no contract, nor no lands nor heritage, whereof she could crave a terce. It was *replied* by the saids Thomsons, that they ought to be preferred; notwithstanding, because the bond did constitute the husband debtor; and his heirs not being of his own body, and the delay of the term of payment until after both their deaths, did not alter the nature of the bond; and during his lifetime he having the sole dominion of his moveables, so that he might sell or dispoñe thereupon, and contract debt whereby they might be affected, he having granted this bond, the wife could have no right but *deducto ære alieno*, seeing by our law the husband during the marriage hath not only *nudam administrationem* but is perfect *dominus omnium mobilium*. THE LORDS did prefer the saids Thomsons upon the reasons alleged for them; which seems hard, seeing the moveables were not affected, nor dispoñed by the said bond, and that it being granted for no onerous cause, by her husband to his neices, and being latent until the dissolution of the marriage, in law it could only be interpreted *donatio mortis causa*; but to extend it to the nature of a debt, to take away the wife's part of moveables to which the law doth provide her, having no other provision, and the whole moveables being possessed in common, it was strange and of a dangerous consequence, seeing thereby by such private bonds for no onerous cause, impetrated by such near relations, wives may be prejudged of their whole livelihood and what they had right to by law. Thereafter the saids Thomsons craved to be preferred upon that ground, that the said Alice Thin had accepted of a disposition of her husband's whole estate, personal or real, with the burden of his whole debts, which she had so far homologated, that she did uplift from Sir William Thomson two thousand marks, which was resting by a bond granted to her deceased husband, and thereby she became liable to his whole creditors, for his whole debts, and they might affect the whole moveables which were possessed in common, or the money which was the price and came in place thereof. It was *alleged* for Baillie Hall and the wife's creditors, that they ought to be preferred, notwithstanding, because any acceptation of the said disposition, and making use thereof, could not be interpreted, that she did intend to prejudge herself of the half of the moveables which belonged to herself *jure relictæ*: Likeas, not-

withstanding of the disposition, she did confirm herself executrix to her husband, and gave up an inventory only of the half of the moveables belonging to the husband; and whereas the disposition was burdened with the payment of the debts, it could import no more but that she should be liable to all his creditors, in so far as she had right by the disposition, and be countable to the creditors of her husband for all that belonged to him, in so far as it would extend to, but could never be extended to what truly belonged to her, she being no ways personally obliged, and consequently her creditors could only have right to what truly belonged to herself *proprio nomine*, whether by virtue of her communion of the goods possessed, the time of the dissolution of the marriage, or whatever she did acquire thereafter, especially they having a disposition from her to the said moveables, and by virtue of an instrument having taken possession, and intimated the same to Mr James Elies, in whose hands they were consigned, before the Thomsons had done any diligence to affect the same. THE LORDS did prefer the Thomsons notwithstanding, as being creditors to the said Alice Thin, by virtue of the disposition and acceptance thereof; and granting a discharge to Sir William Thomson, and found that a naked instrument taken, did not give a real right to goods or price thereof; which seems also hard, seeing dispositions made to any person with the burden of debts, they never becoming personally obliged by their bonds to creditors, cannot be extended, but to make them liable so far as they have benefit by the disposition; and it were of a dangerous consequence, to a person that is ignorant of the disponent's private debts, should he be farther liable upon that ground; it being against common reason to think, that by making use of a right or disposition, they intended to involve all their own estate, whereas they could not look upon any such disposition, but as a favour and benefit; and the question being as to the right of moveables, which were extant, the creditors of Alice Thin not only having a disposition made to a conjunct person in their favours to their behoof, but having intimated the same by taking instruments, and first doing diligence by intending action, it was hard to prefer the creditors of the husband whose diligence was posterior.

Gosford, MS. p. 511. No. 812. 813.

. This case is also reported by Dirleton :

1675. November 24.—In a suspension of multiplepoinding, at the instance of Mr James Elies of Stainhopmilns against John Hall and the other creditors of Mrs Masterton, and against the creditors of James Masterton, it was found, that Mrs Masterton the relict, not being confirmed executrix creditrix to her husband, her husband's creditors are preferable as to any goods and debts extant and undisposed of, which belonged to her husband; in respect albeit the right of the same was established in the person of the executrix,

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yet they did pertain to her as executrix, and as having a trust and office, and to the effect the testament may be executed; and what is confirmed should be made furthcoming to all parties having interest, and consequently to the defunct's creditors, and not her own; and the executrix has not an absolute property in the goods confirmed, but only qualified and for administration, and to the effect foresaid.

2do, It was found, that a servant, for his fees, is not privileged and preferable to other creditors.

3tio, James Masterton having granted a bond for payment of a considerable sum, after his own and his wife's decease, in case he should not have children of his own body; it was *alleged*, that the said bond, being without an onerous cause, and not being effectual until after his decease, as said is, and failzieing of heirs of his body, was of the nature of *donatio mortis causa*, and could not affect the relict's part; whereunto it was *answered*, that the said bond being granted when he was *in liege poustie*, and had power as *dominus* to dispose of the goods, or to grant bonds which might affect the same, the relict could have no legitim, but of the free gear, the said bond and other debts being satisfied.

Some of the Lords were of opinion, that the bond should affect the hail goods; but others thought that it ought to affect only the defunct's part, seing there is a communion betwixt husband and wife; and albeit the husband is said to be *dominus*, and has full administration of the same, so that he may dispose thereof, and grant bonds for onerous causes, yet he cannot, in prejudice of the communion and the wife's interest foresaid, dissipate and give away the same by fraudulent donations, of purpose to prejudge either the relict, or the children of their legitim: but this point was thought fit to be heard and debated *in prasentia*.

1675: December 9.—By our custom, and the custom of diverse other nations, though there be a communion betwixt a husband and a wife as to moveables, yet the husband during the marriage has not only administration, but is *dominus actu*, and may dispose of the same, not only for onerous causes, but by way of donation; and the wife has only a right and interest *habitu*, which *exit in actum* after the marriage is dissolved, as to all the moveables belonging to them the time of the dissolution.

And yet if the husband dispose of his moveables *in fraudem*, and of purpose to prejudge the wife, and to evacuate her legitim and part of the moveables, as was alleged in the case in question, the circumstances being such as did evince the husband's fraud and purpose to settle his estate upon his near relations after his death, in prejudice of the wife's interest, such donations will not be sustained.

The said James Mastertoun having made a disposition in favours of his wife, with the burden of his debts, so that his creditors should not be prejudged,

but that the said right should be affected with the said debts, it was debated among the Lords, what the import should be of the said clause, and if the creditors of the husband had thereby a real interest in the goods, or only a personal action against the receiver of the disposition: and it was thought that the goods being extant and undisposed of, the receiver of the disposition with the said quality was in the case of a trustee or executor; and the creditors of the husband competing upon their diligence, to affect the same with those of the wife, would be preferable; but if they were disposed of by the wife, tho' the price be not employed for the use of the creditors, though they be extant, the husband's creditors have no interest in the same, seeing the wife was *domina*, and might sell the same; and buyers finding her in possession, are not concerned to enquire what way she should employ the price. *Vide* 17th December 1675, Thomson *contra* Eleis, *voce* MOVEABLES.

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Dirleton, No 302. p. 148. and No 315. p. 154.

* * * See Stair's report of of this case, No 6. p. 3593.

1679. January 10. GRANT *against* GRANT.

No 142.

A MAN having disposed to his brother the whole sums and goods he should have at his death, 'if he survived him, and the disponent have no children of his own,' the LORDS found that this could not disappoint the wife of her legal interest in the goods in communion.

Fol. Dic. v. 1. p. 396. Stair.

* * * Fountainhall reports the same case:

A RELICT being pursued upon a general assignation to goods, for delivery, alleges it is only *donatio mortis causa*, collated *in tempus mortis* of the disponent, and so was revocable, and revoked by a posterior right made to her.—*Answered*, It had not the requisites of a *donatio mortis causa*, and could never be revoked, *nisi per supervenientiam liberorum*, and *in dubio* a donation, (especially if in part it have onerous causes,) *presumitur inter vivos, et conditio est valida, l. 35. § 2. D. De donat. mortis causa. Et lege 13. § 1. in fine D. eodem. Donatio mortis causa* may be left so, *ut nullo casu sit ejus repetitio*. See No 1. p. 3591. where a disposition to moveables, to take effect after the granter's death, excludes the executors.—THE LORDS preferred the first disposition to the second, except in so far as it was in implement of her contract; but annulled it *quoad excessum*; but found the first did not prejudice her of her half of the moveables as relict.

Fountainhall, MS.

* * * See Stair's report of this case, No 7. p. 3596.