

The Lords found, That the provision in the heritable bond by Alexander Reid to his younger children, is innovated as to Isobel Reid's share, by her contract of marriage: but allowed parties to be heard upon the import of *causa data non secuta* in this case.

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1712. *July 23.* The LORD and LADY ORMISTOUN *against* JOHN HAMILTON of Bangour, and his Tutrix.

THE Lady Ormistoun, and her husband, insisted against Bangour, as heir to the Lord Whitelaw, the lady's former husband, for payment of the expenses of the defunct's funerals, assigned by the furnishers to her upon payment.

ALLEGED for the defender,—No process can be sustained against him, for articles of expenses acquired by the pursuer; after the same were prescribed *quoad modum probandi*, in the persons of her authors, not being sued for within three years after they fell due.

REPLIED for the pursuer,—The expenses acclaimed, being directly and principally payable out of the executry, and this prescription not being an extinction of the debt, but only of the manner of probation by witnesses; the Lady Ormistoun, who, as come in place of the Lady Housil, the executrix, by assignation to the subject of the inventory confirmed, stood obliged to pay the defunct's moveable debts, might warrantably pay the accounts now pursued, after expiring of the *triennium*; since thereby she did but renounce a privilege, competent to her to claim or not, as she thought fit: nay, an executor must necessarily pay, even after elapsing of three years, any debt she is conscious to be truly resting; because the verity thereof may be proved by her oath.

DUPLIED for the defender,—1. The Lady Ormistoun's transaction with the executrix can only have effect betwixt themselves, and cannot entitle her to the privilege of the executrix; though her obligation to relieve the executrix, at the hands of the defunct's creditors, be a passive title against her. 2. *Esto* the pursuer were vested with the privilege of executrix, she could not apply any part of the executry to the payment of debts prescribed as to the manner of probation; seeing an executor's oath, though it may prejudice herself as to her proper interest, can never wrong the heir or creditors of the defunct: *March 6, 1627, Scot contra Cockburn; March 13, 1627, Ker contra Caringtoun.*

The Lords found the accounts of the funeral charges, contracted by my Lady Ormistoun, and paid without the three years, do not prescribe; but found the accounts of such charges where she was not contractor, paid without the three years, prescribed.

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AFFIRMED on Appeal,—*Vide* Robertson's Appeal Cases, page 61.