

HOUSEHOLD PLENISHING.

1709. July 8. and 23. LADY RANKEILLOR *against* The LADY AYTON.

IN the process at the instance of the Lady Rankeillor, assignee constituted by the deceased Lord Rankeillor her husband, confirmed executor creditor to Sir John Ayton of that ilk, against Sir John's Lady, as intromitter with goods and gear belonging to the defunct, the defender *contended*, That, by her contract of marriage, she had right to the just and equal half of the whole plenishing and furniture of his house, as well heirship as other moveables, free of all debts.

Alleged for the pursuer; *imo*, The defender can have no share of uncut webs of cloth lying by the defunct; because, these not being formed to any particular use, but applicable to many uses, or to sale, are not reckoned household furniture or plenishing, which, by the Romans, is called *suppellex*, and defined *domesticum patris-familias instrumentum rerum ad quotidianum usum paratarum*. *2do*, Vessels of silver of a larger size, as the great bason, laver, and caudel pot, fall not under division as household furniture; because these were not for daily use, but for ornament or ostentation, and had been long in the family, l. 3. § *ult. ff. De Suppellectile Legata*. So the Court of Frizeland, Sande lib. 2. tit. 5. def. 5. in the case of a division of household furniture betwixt married persons, *Suppellectili id tantum adscripsit, quod conjugibus fuit in quotidiano usu, non illud quod non in quotidiano usu, sed in argentario repositum habuerunt*. *3tio*, The defender ought to restore without division two gold medals, *viz.* an Elizabeth, valued about two pounds Sterling, and a medal on the siege of Breda valued about ten pounds Sterling, except she can instruct they were gifted to her by her husband at or before her marriage; with the proving whereof she ought

No 1.

In a process against a relict, to whom the half of the household plenishing was disposed, it was found, that uncut webs of cloth were not household plenishing, nor such large silver vessels as were kept rather for ornament than for daily use; nor medals, unless the defender could prove that they had been gifted to her was *paraphernalia*. This according to Fountainhall's report. According to Forbes, the silver vessels were considered to be household plenishing.

No 1. to be burdened, since giving is not to be presumed from her possession, because of the easy access she had thereto after her husband's death.

Answered for the defender; *imo*, The uncut webs must fall under division, and be reckoned household furniture, though not actually formed and shaped to that use; because they were made and provided for the use of the family, as to be hangings to rooms, bed-clothes, table-linens, &c. and not for sale: And it were hard to exclude the Lady from a share of her own virtue, to which she has so clear a right. The word *suppellex* in the civil law was not so extensive as household furniture in ours; there being in the Pandects a title, *De Auro, Mundo, Ornamentis, Veste vel Vestimentis Legatis*, (whereof several species come under the denomination of house furniture), distinct from the title *De Suppellectile Legata*. *2do*, Albeit when the Romans affected to live *ritu et more veterum Sabinorum*, silver work did not with them fall under *suppellex*; yet, when under their Emperors, they became masters of the world, they ridiculed that ancient austerity, and had scarcely any household vessels that were not of silver and gold, l. 3. § 5. l. 8. l. 9. § 1. *De Suppellectile Legata*. And here there can be no doubt but the larger vessels fall under division, considering that the Lady is provided to a half of the heirship, as well as of the other common moveables. The distinction betwixt what is designed for daily use, and that for ornament or extraordinary occasions, is frivolous; for, whatever is kept in the house and family to be made use of, whether daily or upon solemn occasions, must be reckoned household furniture; otherwise it were as reasonable to distinguish betwixt table and bed-linens, or the like, daily used, and those kept for extraordinary occasions. So that, if the pursuer's argument prove any thing, it proves too much. Again, had Ayton designed no share of the great silver vessels to his Lady, he would either have expressly excepted them, or tailzied them with the estate to his son; as some noblemen have tailzied their jewels with their estate; and one tailzied a silver salt of immense weight and bigness, that had been made to prevent giving offence to some by the superstitious omen of overturning the salt. *3tio*, The medals are presumed to be the defender's, since they are in her possession; for it is not possible that she can prove that these *jocalia* were her marriage gifts, as indeed they were, it not being ordinary for the like to be given in the presence of witnesses.

Replied for the pursuer; The parallel betwixt finer linen and the greater silver vessels doth not hold, because the former, though not daily used, is not of the kind of what is of necessary use; whereas these last were never intended for necessary use, but only for ornament, as *res pretiosæ*. And as an argument that the defunct had no thoughts of giving his lady any share thereof, she is provided to the half of the household furniture, or 500 merks in her option; whereas the silver vessels in controversy are of far greater value, abstracting from the other household furniture.

Dnplied for the defender; The alternative of 500 merks can have no influence upon the point of right; seeing that was adjected only in case the half of the plenishing had proved to be of lesss value, which indeed might have happened, seeing no man can tell what household furniture, or other effects, he will leave at his death.

THE LORDS found, that the clause in the defender's contract of marriage carried her to a share of all heirship moveables that were household plenishing, but no other heirship moveables; nor to the medals, unless they were gifted by her husband at or before the marriage: And found, that the uncut cloth was not to be reckoned household plenishing; but that the silver plate, though not destined for daily use, falls under the denomination of such plenishing. Here it was *observed* by one of the Lords, That the decision of the Court of Frizeland, observed by Sande, was only in the case where a wife claimed her legal share of plenishing, under which heirship plenishing doth not fall, and therefore doth not meet the present case. See HUSBAND and WIFE.

Fol. Dic. v. 1. p. 384. Forbes, p. 341.

* * * Fountainhall reports the same case :

THE Lady Rankeillor, as executrix-creditrix confirmed to her brother, the Laird of Ayton, pursues for delivery of the moveables and plenishing of the house. The Lady Ayton, sister to the Lord Colvil, competes on her contract of marriage, disposing to her the half of the whole plenishing and furniture of the house, as well heirship as others, free of all debt; and they being remitted to my Lord Tillicoultry, he found that the several pieces of uncut linen, and other webs of cloth, could not fall under the division, nor the great silver laver, bason and caudel pot, these not being for common use, but more for show, ornament, and ostentation; and also found the golden medals, such as the Elizabeth, the siege of Breda, &c. could not fall under the division, and the wife had no interest, claim, or share therein. The Lord Rankeillor having, by letters to the Lady Ayton, signified, if she would acquiesce in the foresaid interlocutor, she might have the half of all the other plenishing presently delivered to her; and she having founded on these letters, and yet quarrelling the interlocutor, it was contended she could not both *approbare et reprobare*; and as to the *ist*, that many ladies made webs to sell, which was as lawful as their making money by their chalders of victual; and for the greater silver plate, the Romans, during their frugality in their republican state, before the Asiatic luxury corrupted them, under the name of *suppelles*, and household furniture, understood nothing but *res ad usum quotidianum paratas*. And Sande, Dec. Fris. lib 2. tit. 5. def. 5. tells us, their supreme court followed that distinction.

No 1.

THE LORDS found, that uncut webs, not formed into any particular use of sheets, curtains, or the like, were not to be reputed household plenishing; nor yet these greater silver vessels, nor the medals, unless the Lady Ayton offered to prove they were gifted to her with her other paraphernalia. Some of the Lords were influenced to this decision by her founding on my Lord Rankeillor's letters.

Fountainball, v. 2. p. 512.

See APPENDIX.