

The Commissaries preferred the relict for the provisions of her contract of marriage. No 13.

The Creditors advocate to the Lords upon iniquity, in as far as the relict was preferred upon her contract, which gave her no right of preference by law, as was found by a solemn decision *in presentia*, Keith *contra* Keith, in February 1688, No 11. p. 11833.

It was answered; The practice cited is not found amongst the printed decisions, and if it were, it is yet but a single decision not agreeable to former decisions, and the uniform practice of all the commissariots in Scotland; and particularly in Edinburgh both before and since that decision, it was found, 20th January 1631, the Creditors of Brown competing, No 4. p. 2428. that the relict for her conjunct-fee was preferable; the like 8th February 1662, Crawford *contra* The Earl of Murray, No 63. p. 2613. and 8th November 1677, Sinclair *contra* Richardson, No 29. p. 5647.; and it was very reasonable it should be so, because the wife being *sub cura mariti*, in no condition to act for herself, it was just the law should provide for her security.

It was replied; That in the case Keith *contra* Keith, the Lords had ordained that point to be debated *in presentia* by the most eminent lawyers, of purpose to make a rule, and ever since that decision the same rule hath been uniformly followed; neither was there any settled rule in the contrary formerly; for in none of these decisions is the case accurately reasoned, as may be observed by considering the same, and the law doth otherwise provide for relicts by a terce of free moveables and the third of their husband's lands; and generally contracts of marriage contain a clause, that execution shall pass at the instance of friends for securing the wife's provisions, and there is neither law nor reason, nor the example of other nations to support that privilege, and the practice of the Commissaries must be regulated by the decisions of the Lords.

"THE LORDS found, that the relict had no preference, and remitted the cause to the Commissaries, with an instruction to conjoin the relict and the executors in the office equally."

Dalrymple, No 100. p. 141.

1714. February 23.

THE CREDITORS OF ALEXANDER LINDSAY *against* HIS RELICT.

THE Creditors and Relict of Alexander Lindsay having moved edicts for obtaining themselves confirmed executors creditors to the defunct, the Commissaries conjoined the Relict and other Creditors in the office, but with preference to the Relict for a certain sum for the aliment of herself and family, till the first term after the defunct's death.

The Creditors have raised an advoeation, *alleged* that there was no ground for preferring the aliment of the family to other debts, because there is neither

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The aliment of the family till the first term after defunct's death, found to have no preference to other creditors.

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law nor decision to authorise it, and the Viscount of Stair, enumerating privileged debt, makes no mention of the aliment of the family.

It was *answered*; It has been the uniform practice of all Commissaries, and especially of the Commissaries of Edinburgh who pronounced this interlocutor, to reckon the aliment of the family amongst preferable debts, and there is great regard to their practice in their own peculiar business; and it is also most reasonable, because servants' fees being a preferable debt, their entertainment in the family till the next term is as necessary and more than their fees; for being otherwise unprovided, they cannot be dismissed betwixt terms, and the Relict her necessary servants are a part of the family.

It was *replied*; There being no law for this preference, the decision of the Lords is not to be regulated by the practice of the Commissaries, who universally gave preference to relicts for all the provisions in their contracts as well as the aliment of the family; nevertheless, the Lords, by uniform decisions for many years past, have found that the relicts have preference, and now at last the Commissioners conform themselves to that rule, as they ought also in that of the aliment of the family, whereof the preference had its rise from the privilege they were in use to give to all the provisions in the contract; for by the same reason that the wife's liferent was preferable, her entertainment to the first term's payment of her jointure was also preferable; and, *e contra*, as her liferent is not preferable, so neither is the aliment of the family, whereof the wife is the head and has the principal direction.

“ THE LORDS found the aliment of the family had no preference.”

Fol. Dic. v. 2. p. 176. Darlymple, No 102. p. 143.

* * * Forbes reports this case :

THE deceased Alexander Lindsay, in his contract of marriage with Janet Knox his second wife, provided to her the equal half of his household plenishing which should happen to pertain to him the time of his decease, without the burden of debt, and the other half of the said plenishing to his children of the first marriage, if he should not otherwise dispose thereof in his lifetime. Mr William Forbes moved an edict before the Commissaries of Edinburgh, for decerning and confirming him executor *qua* creditor to the said Alexander Lindsay, and several other creditors craved to be decerned in like manner, and conjoined in the office. The Commissaries admitted Janet Knox, the Relict, to be decerned and confirmed as executrix dative with the other creditors, with preference to her for the half of the household plenishing by virtue of her contract of marriage, and also for payment of L. 200 for her aliment from her husband's death, (which happened on the 1st of December 1712), till Whitsunday thereafter. Mr Forbes and the other creditors raised advocacy of the cause, upon grounds of iniquity committed by the Commissaries; *imo*, in finding

the Relict preferable to other creditors as to her aliment ; because *de jure communi*, all debts are alike, or brought in conform to their diligence, except where, by statute or established custom, that is *auctoritate rerum perpetuo similiter judicatarum* in a sovereign court, a special privilege is indulged, and privileges debording from the common rule of law, being always strictly interpreted, are never extended *de casu in casum*. Now, all debts privileged by law or custom, are only four, viz. medicaments afforded to the defunct on his deathbed, his funeral charges, a term's house mail, and servants' fees for a year or term, as they were fied ; Stair, lib. 3. tit. 8. § 64. 72. lib. 4. tit. 35. § 3. But there is no vestige of any preference ever given to the aliment of the defunct's relict and family. Besides, there are special reasons for indulging a privilege to the other debts aforesaid, none of which can be pleaded in favours of the aliment. Medicaments on deathbed, and funeral expenses, are necessarily privileged from the common obligation of humanity ; the one, that the dead may not be unburied, and the other, that a sick man, who is not in case to do for himself, may not want the proper remedies for his recovery. House-mails are preferred upon account of the landlord's hypothec. Servants' fees for the current year or term, have a privilege, partly, because, generally speaking, these are but a small matter, and indigent servants if deprived thereof, would be rendered unserviceable, and want present subsistence ; partly for that, if it were otherwise, servants would desert their masters on their deathbed, and in their extremity when they stood most in need. Whereas, a privileged aliment to a relict till the first term after her husband's death, can be supported by no reason ; especially considering, that wives are commonly provided with liberal jointures ; as it is in this case, where Janet Knox is provided to a liferent of 15,000 merks. *2do*, The Commissaries committed iniquity, in giving preference to the relict for the half of the household plenishing ; because the provision of the household plenishing being only a destination and a general disposition of what the husband should have undisposed of at the time of his decease, without so much as an instrument of possession and symbolical delivery, that did not divest him of the property ; so that, notwithstanding thereof, the goods might have been alienated by him, or arrested and poynded by his creditors during his life, and remained at his decease *in bonis ejus*. See the cases of Procurators Fiscal of Edinburgh and St Andrews, in 1665, *voce* SUCCESSION ; 15th June 1624, Strachan *contra* Scot, *voce* PROCESS ; and 19th June 1711, Liddel *contra* Davidson, No 253. p. 11588, *voce* PRESUMPTION. The act of sederunt also brings in all creditors equal in diligence *pari passu*.

Answered for Janet Knox ; *imo*, The Commisaries of Edinburgh are in constant use to give a preference to a relict for her aliment, and the *stylus fori consistorialis* in matters under their inspection, comes to be a rule when backed with long custom. And in the case of a settled custom, we need not much enquire into the reason. *2do*, Provisions in contracts of marriage being onerous, and in effect alienations, there was no necessity of a formal delivery where the husband's possession was the wife's possession ; she, at her husband's death had the absolute and preferable right to the half of the plenishing free of debt ;

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so that she comes not in as a creditor by the clause, but as proprietor: Though in such general dispositions the Commissaries use to confirm the subject, which is all that the decisions noticed by the other creditors import.

THE LORDS found the Relict's alimending the family till the next term, is not a privileged debt to give her preference in the confirmation of her husband's moveables, in prejudice of the defunct's other creditors.

THE LORDS delayed to advise the other point, concerning the household plenishing, till June. (*Infra.*)

Forbes, MS. p. 29.

1714. June 25.

MR WILLIAM FORBES, Advocate, for himself, and Administrator in Law for JANET FORBES, his Daughter, *against* JANET KNOX, Relict of Alexander Lindsay, Merchant in Edinburgh, and his Creditors.

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IN the advocation from the Commissaries of Edinburgh, in relation to the Creditors of Alexander Lindsay, where in a point concerning Janet Knox his relict's claim, to be decerned and confirmed as executor-dative with the other creditors, with preference to her for the half of the value of the household plenishing, by virtue of her contract of marriage, debated *supra*, 23d February 1714, being this day advised; the LORDS found, that, notwithstanding the relict is provided to the half of the insight plenishing, belonging to the husband the time of his decease, without the burden of debt; yet the same remained *in dominio* of the husband, and therefore she can have no preference in the confirmation of the defunct's testament for that subject; reserving to her action against the heir, in so far as she shall want payment of the value of the plenishing provided to her by the creditors their diligence affecting the same.

Forbes, MS. p. 68.

* * * The following is another branch of the same competition, relative to a gratuitous bond, which was found to affect the moveable estate *pari passu* with onerous debts.

1714. June 25.

MR WILLIAM FORBES, as administrator in law to Janet Forbes, his daughter, having moved an edict before the Commissaries of Edinburgh, for decerning and confirming him executor *qua* creditor to the deceased Alexander Lindsay, merchant in Edinburgh, upon a bond for the principal sum of 1000 merks, granted by the defunct to the said Janet Forbes; it was *objected* for the other Creditors; That Mr Forbes cannot compete upon the said bond with them, because it was a gratuitous deed payable after the granter's decease, and