

1746. December 18.

Lady BALMERINO *against* The CREDITORS of her Husband.

## No 26.

Tho' a legacy cannot take effect in prejudice of creditors, yet the creditors debarring a special legatee were obliged to assign so much of their debts as might correspond to the price of the special legacy, to the effect the legatee might operate relief of said price.

THAT the relict's aliment till the next term after the husband's death was a debt upon the executry, though not a preferable debt, was found in the case betwixt Mrs Murray, relict of Murray-Kynnynmound and his Creditors, No 122. p. 5918. ; nevertheless, a sum of money that was in her hands at his death, she was found not obliged to repeat, in respect she had *bona fide* applied it to the maintenance of the family till the next term.

But in this case, the matter was carried further ; for, upon the death of the Lord Balmerino, at inspecting his repositories, the sum of L. 97 : 5s. Sterling therein found, having, upon the widow's application been, by order of the Commissaries, delivered up to her, upon her granting her receipt to the clerk to be accountable ; when the creditors came to make up inventories, in order to a confirmation, the Commissaries, notwithstanding its being alleged by the Lady, that she had applied the sum for the maintenance of the family, " Appointed the same to be added to the inventory, reserving to the Lady to insist for it as accords."

And the Lady having complained by bill of advocation, the LORDS " directed the Ordinary to refuse the bill, so far as the Commissaries had appointed the sum to be added to the inventory ;" but with this instruction, " That they should sustain it relevant to exhaust the said sum, that the complainer did *bona fide* apply the same towards the maintenance of the defunct's family from his death, till the next term." Though some of the Lords were for refusing the bill simply, as the maintenance of the family was no privileged debt, and that there were no habile terms of a *bona fides*, as the money having come into her hand by order of the Court, and upon her receipt to be accountable, was to be held as still *in manu curiæ*.

There was another part of the Commissaries' procedure complained of in the bill of advocation. At the roup of the deceased Lord's household furniture, made by order of the Commissaries, the Lady had purchased several particulars, such as plate, china, pictures, &c. for which she partly paid ready money, and partly gave security. After the roup was over, there was discovered in the Lady's repositories a holograph writing, subscribed by my Lord in 1739, wherein he gives to his Lady " All the china, whether for the table or tea-table, that then was, or thereafter should be in his possession, the silver tea-kettle and lamp, his own and his Lady's pictures, &c."

Upon this discovery, she applied to the Commissaries, praying they might find, that so far as she had given security for the price at which she had bought any of these particulars, the security might be ordered to be given up to her ;

and so far as she had paid ready money, the same might be imputed in the price of such parts of the furniture as fell not within the donation; which the Commissaries "refused," in respect a legacy must give place to debts; and of this she also complained.

As to this the Lords remitted to the Ordinary to "Refuse the bill," but to give this instruction, "That the Creditors should be obliged to assign to the Lady so much of their debts as might correspond to the price of the particulars purchased by her at the roup, to the end she might operate her relief for the said price as accords."

*Fol. Dic. v. 3. p. 374. Kilkerran, (HUSBAND and WIFE.) No 10. p. 262.*

No 26.

1747. February 24.

ELIZABETH SYME *against* M'FARLANES.

ELIZABETH HAMILTON, relict of the late John M'Farlane, writer to the signet, executed a deed in favour of Elizabeth Syme her servant-maid, whereby, on the narrative of the care she had taken of her, she legated and bequeathed to her 400 merks; and, for her further security, assigned her in and to as much of the first and readiest of her effects as should satisfy and pay the said 400 merks, and annualrents thereof after her death. Upon this title, Elizabeth Syme pursued Alexander Bell, town-clerk of Linlithgow, as executor confirmed *qua* nearest of kin, and also John and Robert M'Farlanes, sons-in-law to the defunct, as intromitters with effects not contained in the executor's inventory.

*Alleged* for the executor, That he was exhausted; and for the other defenders, it was *objected* to the pursuer's title, That there was another confirmed *qua* nearest of kin, to whom only they were answerable.

THE LORD ORDINARY, "In respect the pursuer is not confirmed executor-creditor *ad omissa*, found no process against the said John and Robert M'Farlanes, without prejudice to her insisting against the executor confirmed, as accords."

The pursuer reclaimed; and having in her petition set forth the case as of a common bond granted to her in remuneration of her service, the LORDS, on moving thereof, thought that it deserved an answer; for that although, where there is an executor confirmed, action will not lie against another person as vicious intromitter, yet it was thought action might lie to a creditor, against an intromitter with effects omitted out of the inventory, *in valorem*; Durie, June 20. 1629, Douglas *contra* Tours, *voce* PASSIVE TITLE.

But in the answer to the petition, the truth of the case being set forth, that the ground of the pursuer's process was not a common bond, but a legacy; the Lords having advised petition and answers, and considering that the pursuit is at the instance of a legatary, "Adhered to the Lord Ordinary's interlocutor."

*Kilkerran, (LEGACY.) No 3. p. 327.*

No 27.

Where there is an executor confirmed, a legatee cannot pursue a debtor of the defunct, if not confirmed *ad omissa*.