

1712. December 12.

ARCHIBALD M'AULAY of Ardincaple *against* JANET BELL, Lady Barachney.

No 30.  
Found in conformity with  
Dunduff *a-*  
*gainst* Crai-  
gie, No 23.  
P. 3843.

A BOND bearing annualrent having been granted by John Herbertson of Barachny, for 1000 merks, payable to Alexander Maxwell of Duntrochar, his heirs, executors, or assignees; and in case of his decease before uplifting the principal sum, that Margaret Bell his spouse should liferent the annualrent thereof, without prejudice to himself to uplift the money during his lifetime; and Alexander Maxwell having died without children before the term of payment, there arose a competition betwixt Ardincaple, to whom George Maxwell, the defunct's brother and executor *qua* nearest of kin, having confirmed the bond, assigned it, and Janet Bell, sister and executrix-dative to the said Margaret Bell, the defunct's relict, who claimed, under her sister, right to the equal half of the said sum as moveable *quoad relictam* by the husband's dying before the term of payment.

*Alleged* for Ardincaple; Alexander Maxwell, the original creditor, being absolute fiar by the conception of the bond, the same devolved upon his executor, who, by virtue of his confirmation, having free and full power to dispose thereof, exercised that power by the assignation to Ardincaple, which lodged the right to the money in his person; and Janet Bell hath only action against her husband's executor for repetition, February 14. 1622, Stevin *contra* Govan, No 24. p. 3843.; July 7. 1625, Falconer *contra* Irving, No 27. p. 3845.; December 9. 1628, Mackie *contra* Dunbar, No 18. p. 1788. The wife's interest in the moveable estate of her husband, upon dissolution of the marriage, is to be regulated according to the nature of the subject; that is, she hath a right of property to the legal share of moveables that were in the joint possession of the husband and her *stante matrimonio*; but the husband and his executors are fiars of sums of money, in which she hath no *jus in re*, but only a personal action against the executors to make the half furthcoming to her. For, as the husband could, by alienating the bond, have excluded her from any share of the money, so by his taking the bond payable to himself, his heirs, executors, or assignees, and giving her only the liferent, he manifestly declared his intention, that she should have no further interest. *2do*, The relict was liberally otherways provided in her contract of marriage, and *proviso hominis tollit provisionem legis*.

*Answered* for Janet Bell; *imo*, The interest of wives in the moveables in communion is truly a right of property, the exercise whereof, and administration (though restrained during the subsistence of the marriage, while the wife is *sub potestate viri*) is competent to her after dissolution of the marriage, which the husband could not deprive her of; and an executor, who is but an administrator in office, could not voluntarily assign to a stranger; yea, could not pay even to a creditor of the defunct without a sentence. Nor hath he right of administration of more than was *in bonis defuncti*; and the relict's share of the

husband's moveables was not *in bonis ejus*. As to the cited decisions, it cannot be thought strange that debtors, or intromitters with the defunct's goods, should be liable to his executor *primo loco*, when the quantity and extent of the relict's interest is not known, but from a computation of the debts and free gear; but here, where the debt is still extant in the debtor's hand, and the executor in the field, *cui bono* should the relict be put off to seek the executor? Let him say now what he can against her, *actiones non sunt multiplicandæ*. 2do, No provision made by the husband without the wife's consent, or acceptance in satisfaction, can exclude her from the provision of law. The making of a law to exclude a wife who hath a liferent provision from a terce of lands, without mentioning any thing of moveables, doth imply that these were industriously omitted, and left as before to the disposition of law. Besides, here is no liferent secured to the wife, which can be presumed in satisfaction of a legal right; because the husband being absolute fiar, could have disappointed her thereof by uplifting the money; and he was not so much as obliged to re-employ it for her liferent use.

THE LORDS found, that Margaret Bell's contract of marriage doth not exclude her from an interest in the husband's moveables; and that she is not excluded by the act of Parliament 1681, that act relating only to terces: And found the husband's executor had right to confirm the whole subject, and the *jus exigendi*; but remitted to the Ordinary to hear the relict's procurators upon her interest as to this sum as free moveables.

*Fol. Dic. v. 1. p. 273. Forbes, p. 643.*

1740. December 19.

LORD NAPIER and Others *against* MENZIES and his Cautioners.

ONE who is creditor to a defunct, either originally or by assignation, or by having made payment upon a discharge which entitled him to relief, thereafter confirming executor *qua* nearest of kin, has the same preference as if he had confirmed upon his debts as executor-creditor, his confirmation being in the one case as in the other considered as a proper diligence for his payment or relief. Nor does it vary the case, in so far as concerns the cautioners in the confirmation, though the said executor be also heir; for though, as heir, he be universally liable, yet his cautioners in the testament are only bound for him *qua* executor, for what remained unexhausted of the testament over his own debt.

Upon which grounds it was, in the process at the instance of the Lord Napier and Others, creditors of the deceast Sir William Menzies, against his Executor *qua* nearest of kin, and his cautioners, found, 'That the cautioners for Mr Thomas Menzies, in the eiks of Sir William Menzies his father's testament, ought to have credit for such debts as were paid by Mr Thomas the executor,

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A person who had confirmed executor to his father, before his confirmation, intromitted with moveable subjects belonging to his father, to whom he was likewise debtor in moveable debts. In an action against his cautioners, the Lords found, that neither the