preferable debt on our executry. THE LORDS found the wife's funerary charges a privileged debt as well as the husband's, she having deceased before him. Then a new question arose, seeing the wife's executors in Holland, (where she was born,) had carried a part of her moveables, whether they or the husband's executors ought to be discussed *prima instantia*, or if they ought to be liable, *pro rata*?

No 12.

On a new hearing, the LORDS altered, and found it but of the nature of a common debt, privileged on her own estate, but not against her husband's creditors.

Fol. Dic. v. 2. *p.* 176. *Fountainhall, v.* 1. *p.* 769.

1713. *February* 19.

ISOBEL ALLAN, Relict of James Cleghorn, Merchant in Dalkeith, *against* His CREDITORS.

No 13.
A relict has no preference to her husband's other creditors for the provision of her contract of marriage, but according to the priority of her diligence.

ISOBEL ALLAN having moved an edict before the Commissaries of Edinburgh, for confirming herself executrix-creditrix to James Cleghorn her husband, for the provision in her contract of marriage; several of the defunct's creditors craved to be conjoined in the office; but the Commissaries, conform to their usual custom, preferred the relict to them. The competing creditors brought the cause by advocation before the Lords, where it was alleged for the relict; 1*mo*, Contracts of marriage being *uberrimæ fidei*, and wives provisions alimentary, and often remuneratory for the tocher, which goes to the husband, they ought to be privileged. If it were otherwise, the relict would be postponed to all other creditors; because, her being *sub potestate viri*, disables her, during the marriage, to do any diligence against her husband's person or estate, both which lie exposed to the diligence of other creditors, so that she must be either first or last. Upon this account it is, that the husband's possession is reckoned the wife's possession, in order to make a base infeftment in her favours effectual; 2*do*, By the civil law, the wife was preferable to all her husband's creditors, and had a tacit hypothec in all his means for her tocher to be restored, L. 12. C. Qui potiores in Pign. And our dowries, which come in place of the tochers, should be alike privileged; 3*tio*, The ancient decisions of the Session, and the constant custom of the Commissaries, give the relict a preference upon hercontract of marriage.

Answered for the Creditors; 1*mo*, As a wife comes in for a liferent-infeftment only conform to the date and registration; so she cannot claim any privilege for any other liferent-provision in her favours; for otherwise, the widows of merchants and tradesmen, whose substance consists in moveables, should find more favour in law, than country Ladies who generally bring great portions with them, which is absurd. It was no privilege, but a piece of common justice, that the husband's possession was reckoned the possession of the wife, who

No 13. could possess no otherways till her husband's death. Law hath secured her in a share of her husband's free moveables, and a terce of his lands after his death; but if she take herself to conventional provisions, she deserves no privilege in competition with creditors, which is regulated by the maxim, *Prior tempore potior in jure.* It is groundless to pretend that she was not *valens agere* by her contract *stante matrimonio;* for it is an ordinary clause, in contracts of marriage, that diligence may pass at certain friends' instance for implement in favours of the wife, and where that is omitted, the Lords, *causa cognita*, if the husband is *vergens ad inopiam*, or the like, will authorise diligence in the wife's name for her security; 2*do*, The wife, who, by having a communion of goods, and being in society with her husband, is *particeps utriusque fortunæ*, ought to suffer by the diminishing of his estate, as she reaps benefit by the increase of it, according to the rule, *Ejus est incommodum, cujus est commodum;* 3*tio*, To allow such a privilege to wives, would tempt them to spend and waste as fast as their husbands gain, knowing, that (come what will) they will get all their swinging provisions, if there be so much left; and, were it not unreasonable to prefer a woman that helps to dissipate her husband's means, to his just and lawful creditors, who are ignorant of his circumstances; 4*to*, Who would deal or trade with a merchant, if a latent contract between him and his wife could sweep away all at his death, to the prejudice of third parties, who could not have occasion to know thereof? Therefore, though the civil law prevail much in the Netherlands and in Germany, the wife has no preference for her dowry; Gudelm. De Jure Noviss. 4. 9. 18. Vinn. Comment. ad § 29. Inst. De Action. And this holds generally wherever the communion of goods between man and wife obtains, as it doth in Scotland; 5*to*, The Commissaries' practice in this matter, and some few concurring decisions of the Lords, that proceeded without debate, could not hinder them to correct a custom which had neither law nor reason to support it; and so it is, that after a full and learned debate, February 17. 1688, Keith *contra* Keith, No 11. p. 11833. the Lords found no preference due to a relict.

The Lords found, That Isobel Allan, the relict, had no preference to the other creditors, but according to the priority of her diligence; and therefore remitted to the Commissaries, with this instruction, "To determine accordingly."

Fol. Dic. v. 2. p. 176. Forbes, p. 672.

*** Dalrymple reports this case:

Isobel Allan having moved an edict before the Commissaries of Edinburgh for confirming herself executrix *qua* creditrix to her husband, for implement of the provisions of her contract of marriage, and the other creditors of the defunct craving to be conjoined, and all to come in *pari passu*, conform to the act of sederunt 1662, being within half a year of the defunct's death;

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 præsentia*, Keith *contra* Keith, in February 1688, No 11. p. 11833.

It was *answered*; The practique 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 præsentia* 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.

No 14.
The aliment of the family till the first term after defunct's death, found to have no preference to other creditors.

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 advocation, *alleged* that there was no ground for preferring the aliment of the family to other debts, because there is neither