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ment and furnish his wife cloaths, albeit he had got no portion with her, and both before and since her decease he has letters in which he had promised payment of the accompt; as also Sir James his father did treat with the pursuer anent the payment of the accompt, and desired him to delay it for some time, *Replied*, That the letters cannot oblige Philip, because the same were written by him when he was minor, to his lesion, seeing he was not obliged to furnish the cloaths nor to pay the accompt, the marriage being dissolved; as also, he wrote the same only *pro interesse* as husband, and that the marriage being dissolved, he is not farther liable; just as if a factor should promise to pay his constituent's debt, yet if he be immediately discharged of his employment, he will not be liable for the debt *nisi intus habet*, it being always presumed that he made the promise *rebus sic stantibus*; and as to Sir James the father, albeit he treated anent the payment of the accompt, yet he never promised him payment.—THE LORDS found it relevant to assoilzie Sir James the father, that he had sufficiently furnished his son and his daughter-in-law suitable to their rank and quality by his own merchants, in so far as he had paid 5000 merks of merchant accompts for them, which they had taken on the time of the marriage.

Sir P. Home, MS. v. 1. No 260. p. 364.

. This case is also reported by Fountainhall:

JAMES ALSTON merchant in Edinburgh, against Sir James Stanfield and Philip his son, for L. 1,100 Scots of cloaths taken off by himself and his wife in two years time. The ground he insisted on against Sir James the father was, because though the son was major, and married the time of the furnishing, yet he and his lady were *in familia* with Sir James, and the son had no estate *aliunde* to be affected; and so the father was bound to clothe and aliment them. THE LORDS, on Forret's report, decerned against Philip; but assoilzied the father, because he made it appear that he had paid 5,000 merks of debts contracted by him during that very space, and that his son was a prodigal waster. Though we have not amongst us the *S. C. Macedonianum*, prohibiting the lending of money to sons *in familia*.

Fountainhall, v. 1. p. 196.

1745. June 19.

HELEN BEE against The EXECUTORS of ELISABETH WALLACE.

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A relict continuing her husband's management after his death, with-

JOHN WALLACE possesseth the Lands of Sheriff-hall, by a tack from the Dutchess of Buccleugh, which was to become void on her death, unless he should be confirmed in his possession by the Earl of Dalkeith, or other heirs in the estate.

The tenant died shortly after the Dutchess; and his family, consisting of Christian Ramsay his widow, and two daughters, who were majors, continued in the possession and carried on the business, consisting, besides the farm, of a brewery, to which the barony and colliery thereon were thirled, and in a trade of carrying coals to Edinburgh.

One of the daughters died before her mother, and Elisabeth the other survived her from 13th December 1743, to 26th January 1744, when she deceased, having named John Biggar of Woolmot and James Jackson merchant in Dalkeith her executors; and they proceeding to confirm the effects, which were very considerable, were opposed by Helen Bee, one of the nearest of kin of Christian Wallace, who *alleged*, That the effects were *in bonis* of her; for that she on her husband's death, whose tack was thereby voided, had been received as tenant by the Duke's commissioners, and had carried on the business in her own name; so that her daughter who had been her servant, had no claim, unless it were to make her account for her husband's executry.

Helen Bee gave in a condescendence of circumstances; and the Commissaries, 20th April 1744, 'before answer, allowed her to prove, that Christian Ramsay after her husband's death was entered into the Duke of Buccleugh's rent-roll by his Grace's commissioners, as tackswoman of the lands and brewery in question, and paid the rent thereof accordingly; that she managed the farm and brewery, by giving all the directions thereanent; that she bought and sold all things relating to the farm and brewery; that she feed and paid the servants, discharged subtenants' rents, and all other particulars relating to the possession of the farm and brewery; and that by a new agreement in 1741, the relict agreed to pay to his Grace's commissioners L. 200 of rent; and that in the communing with his Grace's commissioners, she proposed that a new tack should be made to her and her daughter Elisabeth Wallace jointly, and that the said commissioners refused to admit the daughter to any share of the new tack proposed; and that Mr Biggar set a lease of the privilege of furnishing ale within his barony to the said Christian Ramsay during her life; and by a new agreement with another person, set the same privilege, to commence at Christian Ramsay's death; and allowed the executors of Elizabeth Wallace a conjunct probation.'

An advocacion was offered, which was reported by the Lord Ordinary, before whom the bill came; and, at advising, the Lords first agreed that the tack belonged to the daughters, and that the possession was continued upon it.

With regard to the property of the moveables, it was urged for the nearest of kin of Christian Ramsay, That supposing her to have no right to the tack, yet as she had acted and traded in her own name, and the effects were the produce of her husband's executry, they ought at least to be proportioned according to the interest of the parties in that executry.

Pleaded for the executors of Elizabeth Wallace, That the tack was her's,

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the profits whereof behoved to be her's, and that her mother's management of her tack ought to be understood to be for her behoof, reserving to her said mother her claim for her share of her husband's moveables.

The effects were of several kinds, to wit, stocking of the farm and brewery, book-debts of customers, and securities taken in the name of Christian Ramsay.

It was *pleaded*; That at any rate the proper moveables fell under the testament of Elizabeth Wallace, because though they had belonged to her mother, yet, in consequence of the late decisions, they were sufficiently vested in her by survivancy and attaining the possession.

THE LORDS, 7th June, 'remitted to the Commissaries, with an instruction to prefer the executors of Elizabeth Wallace, as to the whole stocking which was on the farm of Sheriff-hall at the time of her death, consisting of corns, malt, cattle, horses, sheep, brewing vessels and labouring instruments, household furniture, book-debts and bills arising from the trade of brewing or driving of coals, due at the said Elizabeth Wallace's death, and, in general, all other moveables on the said farm.'

A petition was given in, reclaiming against this interlocutor, and insisting from the circumstances above noticed, and offered to be proved, that Christian Ramsay had no right to the tack; but supposing it to belong to her daughter, yet as she had acted for her own behoof, upon a stocking in part belonging to herself, the profits were her's; and therefore granting that the *corpora mobilia* were by her daughter's apprehending the possession of them sufficiently transmitted, the book-debts and bills were still *in bonis* of her, and her nearest of kin ought to be preferred to them, at least they ought to be preferred to one third thereof, as being the produce of the third of her husband's moveables belonging to her.

'THE LORDS refused the bill, except in so far as it prayed to be preferred to the third of the debts and bills; but ordered this part to be answered.'

1745. July 10.—IN the above noticed cause between these parties, the Lords, besides the points finally determined 19th June, had further, by their interlocutor 7th June, instructed the Commissaries 'To prefer the executors of Elizabeth Wallace to the bonds taken in the name of Christian Ramsay, and bills other than those that should appear to have resulted from the trade above mentioned, as being to be presumed to have arisen from the management of the said farm, brewery, or coal-driving; unless the nearest of kin of Christian Ramsay should bring sufficient evidence to shew, that the money of such bonds or bills might have arisen from some separate subject, or business carried on by the said Christian Ramsay.'

A reclaiming petition against this whole interlocutor being presented, was refused, except as to a claim made therein for the third of the profits, as being

the produce of the third of her husband's executry arising by her own industry, and the securities taken in her own name, which did not appear by their conception to be the produce of the farm or trade; for that these could not possibly be confirmed, except in the name of her nearest of kin.

Upon answers to this petition,

THE LORDS found, That the mother Christian Ramsay was not entitled to a third, or any proportion of the accompts and bills relative to, or which were the produce of the management of the farm, brewery and coal-driving; and therefore, as to that point, adhered to their former interlocutor; but as to the bills and bonds taken in the name of the said Christian Ramsay, other than those that should appear *ex facie* to have resulted from the said trade of brewing or driving of coals, remitted to the commissaries to hear parties, whether the same were not presumed to be *in bonis* of Elizabeth Wallace the daughter, unless the nearest of kin of the mother should bring sufficient evidence to shew, that the money of such bonds or bills might have arisen from some separate subject or business carried on by her.

Pet. *Ferguson.*

Alt. *Dalrymple.*

Clerk, *Kilpatrick.*

Some of the Lords observed, that Christian Ramsay might have a claim for her share of her husband's moveables, or even a demand for a gratification, on account of their being used, and for her own industry; but this was a claim of debt on her daughter, and not a share in the effects.

It being proposed by her lawyers, that this should be reserved to her, it was observed, the interlocutor did not affect it; but however, any such reservation would be of little use, for her daughter the debtor becoming her executor, the debt was extinct by confusion.

D. Falconer, v. I. p. 104. & 116.

. Kilkerran reports the same case :

JOHN WALLACE, husband to Christian Ramsay, was tacksman from the Countess of Dalkeith of the lands and barony of Sheriff-hall, with the liberty and privilege of the whole brewery within the said barony, and furnishing ale to the colliers, &c. Of which barony he kept a part in his own hand, wherein he carried on a considerable trade of brewing, and of driving coals to Edinburgh by his servants and horses. Upon the death of John Wallace, who left two daughters, Christian the widow, and Elizabeth and Anne his two daughters, without distinguishing their several interests (which, in the wife, was her third of the husband's free moveables at his death; and, in the daughters, was the other two thirds, and the tack itself descendible to his heirs) continued the former management; the mother, as well as the daughters, acted as if she had had an interest in the tack, by paying the rent, and taking receipts to herself, paying the duties of excise, &c. as on the other hand Elizabeth, the

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eldest daughter, Anne having not long survived the father, sometimes granted receipts to the subtenants, and to customers, for the prices of coals, as furnished by her to them.

In this manner the business of the brewery and coal-trade was carried on, till the death of Christian Ramsay the mother, whom Elizabeth her daughter survived only about a month : But, in that period, as she attained the possession of any moveables that could be the property of the mother, so she made her will in favour of John Biggar of Woolmet, and James Jackson, whom she appointed her executors and universal legataries : And they having applied to the Commissaries of Edinburgh, to have inventories made up of the moveables and stocking on the farm, and of the debts in the accompt-books for ale and coals, &c. appearance was made for Helen Bee, who, as nearest of kin to Christian Ramsay the mother, claimed such of the moveables as were the property of Christian Ramsay upon the farm at her death, as *in bonis* of her ; as also the profits made of the trade of brewing ale and driving coals, as carried on upon her industry and credit, at least one third thereof, as arising from her third of the moveables.

Which question, on occasion of an interlocutor pronounced by the Commissaries, being brought before the Lords by advocacy, the claim to the moveables on the farm, pertaining to Christian Ramsay at her death, was dropped, in respect of the possession attained by Elizabeth Wallace her daughter ; whereby, if there were any such moveables pertaining to the mother, they were transmitted to her daughter without confirmation : And the question turned upon the said Helen's claim to a share of the profits made of the trade.

As to which, some of the Lords were of opinion, that as the profits were industrial, and that a third of the stocking belonged to the relict, and the management was totally her's, the profits should be so partitioned ; and that it ought to be so found in all cases where the relict continued to carry on the husband's trade or farm ; for that, should it not be so found, no mother hereafter would meddle, which, in many cases, would be destructive to the children, whose stock for the most part is not sufficient when the mother's third is taken off.

Others, who were not for giving so much as a third, in respect the tack, which was the principal interest, was the daughter's, were yet for finding the mother, and consequently her executors, entitled to some part on account of her management and interest in the stock.

But a different opinion from either prevailed : The relict was considered as only entitled at her husband's death to the third of the free effects reduced into money, and was therefore only creditor to the executry and the heir in the tack, which could give her no title to any of the profits, whether natural or industrial, arising from the management of the farm ; that if she had any claim, it was not for any part of the profits as such, but for a recompence for

pains, which, although it were due to a *negotiorum gestor*, as in law it is not, would not stop the confirmation of the executors nominate.

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And accordingly the LORDS, upon the 18th of June 1745, found, ' That the mother, Christian Ramsay, was not entitled to a third, or any other proportion of the accompts and bills relative to, or which were the produce of the management of the farm, brewery, and coal-driving; and preferred the executors of Elizabeth Wallace to the whole thereof; and even as to bills and bonds taken in the name of the said Christian Ramsay, other than those which did appear *ex facie* to be the result of the trade of brewing, &c. remitted to the Commissaries to hear parties, Whether the same should not be presumed to be *in bonis* of Elizabeth Wallace the daughter, unless the nearest of kin of the mother should bring sufficient evidence to shew that the money of such bonds or bills might have arisen from some separate subject or business carried on by her.'

Kilkerran, (HUSBAND AND WIFE.) No 9. p. 261.

See Tait against Biggar, *voce* EXECUTOR, No 21. p. 3841.

S E C T. II.

How far *Præpositura* presumed to extend.

1582. *June*. LADY BOYD against LD AIRTH, &c.

THE Lairds of Airth, Kilsyth, &c. were pursued by the Lady Boyd, and James Fleming her husband for his interest, as cautioners for the Laird of Boyd her son, to pay to her certain yearly duties, in victuals, capons, and silver, because the Laird her son was obliged, by virtue of an obligation registered in the books of Council. The foresaid cautioners being charged obtained suspension, *alleging*, That they had made payment of the said duties to the Lady, and produced her acquittances and discharges thereupon. It was *objected* against the discharges and acquittances, That they were not sufficient, because the said Lady being clad with a husband, it was necessary to have his consent to the said discharges. To the which it was *answered*, That albeit the said Lady was clad with a husband, yet she intromitted with, and took up the duties of her own conjunct fee by herself, *et fuit præposita omnibus hissce negotiis*, and gave acquittances and discharges by herself, without her husband. To this was *answered*, That albeit *mulier et uxor possunt profici aliquibus negotiis, et exercere ea quæ spectant ad rem domesticam gubernandam; tamen in rebus magni*

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A wife is presumed to be *præposita negotiis domesticis viri*; but this presumption was not extended to a lady tenceer granting discharges of her tenceer duties, which it was found she could not do, without consent of her present husband.