

1713. December 3. COLONEL JOHN ERSKINE *against* AIKENHEAD.

No 75.  
Mode of estimating a relict's interest for a life rent annuity, in competition with creditors. See epitome of the case in the Synopsis.

COLONEL ERSKINE having obtained a decret against Aikenhead, as representing her husband, and she having suspended and produced her husband's confirmed testament, wherein she is confirmed executrix creditrix upon her husband's contract of marriage, providing her to 600 merks of yearly life rent, she is thereupon reponed against the decret.

The Colonel insisted for a patrimonial share of the inventory of the defunct's testament, effecting to the sum due to the pursuer and the defender, because that diligence was done upon his debts within six months after the defunct's decease, and that by the current of late decisions, relicts are found to have no preference upon their contracts of marriage; which the Lords sustained. The question then occurred, how the inventory of the confirmed testament should be divided betwixt the pursuer and defender, the inventory being very far short of their respective debts, and consisting chiefly of the price of the merchant ware and plenishing bearing no interest.—It was *alleged* for the Colonel, That the relict's credit being her life rent annuity, must be estimate at five, six, or seven years purchase as the Lords shall find just, and she to have a proportional part of that sum compared with his; and *alleged*, That the Commissaries were in use to put such a valuation upon wives' life rent provisions, and to prefer them to other creditors at that estimate; and likewise there was an estimate put upon the life rent in order to regulate the quote payable out of the free gear.

It was *answered*; The Commissaries were indeed in use to put a valuation upon life rents, in order to liquidate the quote due to bishops, as they were warranted to do by a special act of Parliament, 1661, but they were neither in use nor had power to put any estimate upon a wife's life rent to any other effect; because, if a wife should die in a short time within a term, two or three of the creditors would have the benefit, and the defunct's means could not be subjected by any deed of the Commissaries to the burden of the life rent longer than the same did continue; on the other side, neither could the Commissaries restrict the life rent provision though she should survive twenty, thirty, or more years; and in this case the defender had already survived her husband sixteen years, or thereby.

• THE LORDS having considered and reasoned this case, and finding no decision upon debate in the like case, they found the rule of proportion and division of the inventory should be as follows, viz. That the wife should be stated as a creditor in the sum of 10,000 merks, answerable to her annuity of 600 merks yearly, and that the inventory should be divided betwixt the Colonel and her proportionally, effecting to his sum as it was the time of the confirmation, and the said 10,000 merks; and that the relict should have retention of her said proportion of the inventory confirmed during her lifetime, in satisfaction of her annual rent of so much of the 10,000 merks as her share did amount

to, she finding caution to make the said sum retained by her, furthcoming to the Colonel, and others having interest at her decease, and reserving to her representatives to affect the same, for the inlakes of her liferent annuity proportionally with the other creditors; and found her presently liable to the Colonel for his proportional share of the inventory confirmed.'

No 75.

*Fol. Dic. v. 1. p. 182. Dalrymple, No 101. p. 142.*

\* \* Forbes reports the same case :

MARGARET AIKENHEAD being confirmed executrix creditrix to the deceased George Reid of Broadlees, her first husband, for her liferent provision of 600 merks; she was pursued within six months of her husband's death, by Edgerton Snow, for payment of a debt resting to him by the defunct, which was assigned by Snow to Colonel Erskine.

THE LORDS found, That the Colonel's author having done diligence within six months of the defunct's death, the inventory of the testament ought to be divided proportionally betwixt him and Margaret Aikenhead the defender, after allowing to her payment of the funeral charges as a privileged debt in the first place; and that the rate of proportion and division of the remainder ought to be as follows, viz. Margaret Aikenhead to be reckoned as a creditor in the sum of 10,000 merks, as answerable to her liferent annuity of 600 merks yearly, and the Colonel in the debts resting to him, or his authors, at the time of the confirmation: Again, she was found to have right to retain her proportional share of the inventory, to be stated to her at the date of the confirmation, as a principal sum bearing annualrent, and the annualrents thereof to be imputed in satisfaction of the annualrent of so much of the sum of 10,000 merks, and to find caution to make furthcoming the sum allowed to be retained by her at her death to the Colonel, and all other parties having interest; reserving to her to affect or retain the same for the inlakes of her liferent provision at her death, in proportion to what shall be found due to the Colonel as accords; and found her liable to the Colonel for his proportion, without prejudice to him to restrict her interest on the executry, in so far as she has uplifted or possessed any separate estate or effects belonging to the defunct.

*Forbes, MS. p. 9.*