as being a separate *persona*. In England, however, where that view does not hold, it is settled, as is shown by the passage cited from Lord Lindley's book on Partnership, that such a *concursus* would not be regarded as sufficient to found a plea of compensation. Now, the reasons given for that rule by Lord Lindley are, in my opinion, equally applicable in Scotland.

Accordingly in my view—on the merits of this case, and apart from the technical objections I have referred to—there is a failure here of the necessary *concursus debiti et crediti*, and the sixth plea-in-law for the respondents is well founded. We shall therefore refuse the note.

LORD DUNDAS, LORD SALVESEN, and LORD GUTHRIE concurred.

The Court refused the reclaiming note and adhered.

Counsel for Complainer — Solicitor-General (Morison, K.C.) — D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Respondents—A. O. M. Mackenzie, K.C.—C. H. Brown. Agents—Webster, Will, & Company, W.S.

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*Friday, June 2.*

## FIRST DIVISION.

[Sheriff Court at Perth.

## BARLASS v. BARLASS'S TRUSTEES.

*Trust — Husband and Wife — Aliment — Interim Aliment — Right of Wife to Award of Immediate Aliment after Husband's Death.*

A widow, who had no separate estate, brought an action against her husband's trustees, within six months of her husband's death, concluding for a sum for interim aliment for the next term after the husband's death. There was considerable debt on the trust property, but there was no reason to believe the trust was insolvent, and no creditor was pressing. *Held* (*diss.* Lord Skerrington) that the widow was entitled to decree and was not bound to wait until the expiry of six months.

In January 1916 Mrs Helen Mackie or Kirk or Barlass, widow of James Barlass, ironmonger, Perth, who died on 5th November 1915, *pursuer*, brought an action in the Sheriff Court at Perth against Alexander Barlass and others, trustees acting under her husband's trust-disposition and settlement, *defenders*, for payment "(first) of the sum of twenty-six pounds sterling for aliment payable as at the term of Martinmas last for the half-year immediately following, and (second) the sum of twenty pounds for mournings."

The *facts* of the case appear from the note of the Sheriff-Substitute (SYM), who on 14th February 1916 found "that the deceased Mr Barlass died survived by his wife, and leaving a small moveable estate and also heritable estate which is burdened with bonds; that he left a settlement under which he made no provision for his wife, and that she is claiming terce and *jus relictæ*, but that it is still impossible to have these correctly adjusted: Finds in law that his said wife is entitled to a reasonable sum for mournings and to aliment out of the estate until her legal rights can be adjusted: Repels the defences, grants decree against the defenders for the sum of £14 in respect of mournings, and decree at the rate of £1 per week beginning from the death of Mr Barlass, and continuing until the adjustment of the said legal rights or until further orders of Court."

*Note.*—"On record there is not much difference as to material facts, and the parties wisely endeavoured to put the Court in possession of facts sufficient to make proof unnecessary. Mr Barlass married a second time late in life. He was unhappy in this marriage, and separated from his wife, and allowed her £1 per week. It was found when he died that he had left her nothing, and that he had parted, or professed to have parted, with a good business which he carried on in Perth. But he left a small moveable estate and considerable heritage. Though there is debt on the latter the appearance of the estate *prima facie* is that there will be a considerable surplus, and it is clear that the income of this estate must have supported the spouses when living apart even if the business was gone. In such a state of matters the widow is entitled to support until the trustees of Mr Barlass have had reasonable time to go into his affairs and settle as to her legal rights. The plea that interim aliment and mournings cannot be claimed for many months after the death is almost ludicrous. The adviser of the trustees is much alarmed by the case of *The Heritable Securities Investment Association, Limited* v. *Miller's Trustees*, 1893, 20 R. 675, 30 S.L.R. 354, the doctrine of which the Sheriff-Substitute had to follow in a recent dispute in this Court. There is no doubt that in that instance the doctrine pressed hardly on a respectable man who, being a trustee, had paid away to beneficiaries money which really belonged to creditors. But then mournings are part of the funeral expenses, and the widow has a right to be kept in life till the estate is fully investigated. That adviser ought also to understand that the decree of a competent court will protect the trustees from being thought to have rashly paid away money which—taking a very timid view of the prospects of the estate—they say might have to be kept for creditors."

On appeal the Sheriff (JOHNSTON) on 27th March 1916 adhered.

*Note.*—"There can be no doubt of the soundness of the general principles contended for by defenders that beneficiaries cannot claim payment until creditors are satisfied and that testamentary representatives are not to be harassed by actions within six months. But these principles are not applicable in the case of such claims as are here made. They are claims that

must be satisfied at once. The law does not compel the widow to buy on credit, and does not assume that she can get credit. She is entitled to mournings *now*, when her husband has just died, not six months hence when weeds ought to be beginning to relax. Aliment, too, for wife or young children is an immediately emerging need, and by universal practice is provided from the date of death from all estates not manifestly insolvent. An interim pittance to a widow appears to me a most unsuitable matter for appeal to the Supreme Court."

The defenders appealed to the Court of Session, and argued—Onerous creditors of the deceased could not get a decree against his representatives till six months had elapsed since his death, and then they could be paid only if the estate was solvent. If his representatives made payments prior to that they could be called to account by the creditors — *Heritable Securities Investment Association* v. *Miller's Trustees*, 1893, 20 R. 675, *per* the Lord President (Robertson) at p. 691 and 694, 30 S.L.R. 354. To give the widow decree for immediate payment would give her a preference over onerous creditors of the deceased. While a widow's claim for mournings was undoubtedly a privileged debt — *Griffith's Trustees* v. *Griffiths*, 1912 S.C. 626, 49 S.L.R. 486, following *Buchanan* v. *Ferrier*, 1822, 1 S. 323—interim aliment had no privilege but was on the same footing as permanent aliment, which had no preference—Brodie's Stair, i, 4, 10; *Buchanan* v. *Ferrier* (*cit.*), p. 324; Bell's Prin., sec. 1403; Ersk. Inst. i, 6, 41; Fraser, H. & W., ii, 965. It was not mentioned by the institutional writers in their lists of privileged debt, although the question must constantly have arisen—Stair, Inst., iii, 8, 64 and 72; Bankton, Inst., iii, 8, 22; Ersk. Inst. i, (*cit.*); More's Notes to Stair, vol. ii, p. ccclxi. The presumption was against any extension of the class of privileged debts—*Lawson* v. *Maxwell*, 1784, M. 4473, and 11,854; *Ridley* v. *Hall*, 1789, M. 11,854. The principle upon which servants' wages were privileged was based on the benefit of their services to the deceased's estate, and this did not apply to aliment — *M'Lean* v. *Shireffs*, 1832, 10 S. 217. Mournings were privileged as being a necessary part of the deceased's funeral expenses and were limited accordingly — *Hall* v. *M'Aulay and Another*, 1753, M. 4854; *Sheddan and Others* v. *Gibson*, 1802, M. 11,855. *Kirkland* v. *Burklae*, 1682, Har. Dec. 122, reported also as *Setoun* v. *Butter*, 1 Fountainhall, 197, was not in point, for the widow had a jointure from which the payment could subsequently be recovered if necessary, and there was no proper competition of creditors. In *Macmorran* v. *Campbell*, 1706, 2 Fountainhall, 347, the widow had estate of her own from which, if necessary, the payment might subsequently be recovered. In *Lindsay's Creditors* v. *His Relict*, 1714, M. 11,847, there was a proper competition with creditors and no preference was given to interim aliment. To give the widow decree within the six months might result in a sale of the husband's estate to the prejudice of his creditors — *Baroness de Blonay* v. *Oswald's Representatives*, 1863, 1 Macph. 1147, *per* the Lord Justice-Clerk at p. 1154.

Argued for the respondent—The widow was entitled to immediate payment of interim aliment. The ordinary rule of practice was to make advances to the widow to carry her on till her legal rights became payable, but in law also the widow was entitled to payment — Stair, Inst., i, 4, 22, and More's Notes, vol. ii, p. ccclxii; Ersk., Inst., i, 6, 41, and 58, Ivory's Note, No. 191; M'Laren on Wills and Succession, vol. ii, p. 1165. *Kirkland* (*cit.*) actually gave her the right to retain her husband's goods as against this claim. In that case and in *Macmorran's* case (*cit.*) the aliment of the family till the next term was allowed. *Lindsay's* case (*cit.*) was not in point, for the widow had available funds of her own. *Buchanan* v. *Ferrier* (*cit.*) was not in point, for the widow had a separate provision. *The Heritable Securities Investment Association* v. *Miller's Trustees* (*cit.*) was distinguished, for the payment was made to the widow and children as to beneficiaries under the trust as such. A payment of aliment to minor children was sustained against creditors though the estate ultimately proved insolvent — *Harkness* v. *Graham*, 1836, 14 S. 1015, *per* Lord Corehouse, at p. 1019. In *Palmer* v. *Sinclair*, F.C., 27th June 1811, the widow's claim was recognised—Fraser, H. & W., vol. ii, p. 965. In any event the widow would ultimately get her terce, which would be available to the trustees for their reimbursement. Terce did not run during a broken term—Ersk. Inst. ii, 9, 50—so that it was all the more necessary that the widow should be provided for till the terce became payable. If she was not entitled to interim aliment *de plano* she was at least entitled to it as an advance chargeable against her terce. In the *Baroness de Blonay's* case (*cit.*) the passage referred to related to the case where the widow had other provision. That case and *Moncrief* v. *Monipenny*, 1713, M. 3945, showed that this claim was a real debt chargeable not only against the dead's part but against the whole executry.

At advising—

LORD PRESIDENT—Although a considerable amount of research and learning has been devoted by counsel to this case, I continue to share the opinion expressed by the learned Sheriff that "An interim pittance to a widow appears to me to be a most unsuitable matter for appeal to the Supreme Court," and had it not been that the Sheriffs here have given a decree which I believe to be incompetent, that view would have prevailed. In the aspect in which I am disposed to regard this case it raises no general question of law. The pursuer, the widow of an ironmonger in Perth, sues the testamentary trustees of her late husband for a sum in name of mournings and for aliment down to the term of Whitsunday 1916, being six months from the date of his death. The Sheriffs have given decree for the sum of £14 in name of mournings. That decree is not now challenged. They

have further given decree for aliment at the rate of £1 a week beginning from the date of the death of the testator and continuing until the adjustment of the widow's legal rights or until the further orders of the Court. We are all agreed that this decree is incompetent in respect that it goes outside the crave of the initial writ.

The defenders plead in answer to the whole claim for aliment (first) the heritable estate left by the deceased being burdened with bonds and dispositions in security, the defenders are in duty bound not to pay away any part of the estate left by the deceased till all the debts are satisfied; and (second) in any event, the pursuer being an alimentary creditor can have no preference over the ordinary and secured creditors of the deceased. Both these pleas appear to me to be entirely beside the mark and do not justify the rejection of the widow's claim.

The precise position of this estate at the date of the testator's death is described by the defenders, who say that "the moveable estate will be under £400 and will not be realisable for some time. . . . The heritable estate left by the deceased is working-class tenement property situated in Reform Place, Longcauseway, and Earls Dykes, Perth, and is burdened with bonds and dispositions in security to the extent of £2650, and the defenders are of opinion that it may take the whole estate of the deceased, both heritable and moveable, to meet these bonds, as there is absolutely no market for working-class tenement property at the present time."

It will be observed that there is no statement to the effect that the estate is manifestly insolvent much less in bankruptcy. There are no creditors in the field. None certainly has done diligence, and the widow has no separate estate. Under those circumstances I am of opinion that the defenders ought to have continued the modest payment of £1 a week for six months after her husband's death—a sum which, it appears, the testator had paid for some considerable time before the date of his death, as the parties were living separately. If the trustees had made that payment, they would, in my opinion, have incurred no liability to creditors of the deceased even although the estate had ultimately turned out to be insolvent. I do not hold, nor was it contended to us on behalf of the pursuer, that the widow is a privileged creditor in respect of her claim for aliment. The contrary was decided in this Court in the case of *Lindsay's Creditors* v. *His Relatives*, 1714, M. 11,847, although down to the date of that decision in 1714 it appears to have been the uniform practice of all the Commissaries to give effect to the widow's claim for aliment as preferable—a uniform practice which, as the report bears, was supported by uniform decisions in this Court. That practice—in my opinion a very proper practice—has been continued down to the present time. And accordingly I am disposed to accept the view of Lord M'Laren when he says, in his work on Wills and Successions (section 2164), that "it is a rule of practice having the force of law that the aliment of the truster's family until the time when their provisions become payable is a good charge against the truster's estate, and the writer is unwilling to believe that if trustees, without knowledge of the insolvency of the estate, should make the customary interim payments for maintenance, they would be held disentitled to credit for the payments, only because the estate eventually proved insolvent."

In my opinion there is a very good ground for Lord M'Laren's belief. It appears to be confirmed by the judgment of Lord Corehouse in the case of *Harkness* v. *Graham*, 1836, 14 S. 1015, to which Lord M'Laren refers, and justifies the course followed and the ground of judgment adopted by the learned Sheriff in the present case when he says that "aliment . . .for the wife . . . is an immediately emerging need, and by universal practice is provided from the date of death from all estates not manifestly insolvent."

In the circumstances of this case as disclosed on the record I am of opinion that the conclusion which the learned Sheriff has arrived at is correct, and accordingly that we ought here to affirm the judgment so far as relates to mournings, and that we ought to give decree for the sum sued for—£26 in name of aliment.

Lord Johnston—There is considerable doubt whether this decree is appealable, as the full conclusions of the summons are for £46 only, and though reservation of a further claim is made this judgment would not dispose of it in principle as in the case of a continuing obligation, because new and different *media concludendi* must be adduced. But the Sheriffs have *per incuriam*, and without its being noticed or objected to by the defenders, as is shown by the fact that leave to appeal was asked but properly refused, given decree beyond the conclusions of the summons, and this, the parties being now alive to the mistake, opens the door to review by this Court. It is a very simple matter to correct the terms of the decree. But the defenders have taken the opportunity thus afforded them of presenting an argument on the merits.

I adopt the view of the case presented very clearly by both Sheriffs, and would add that the defenders ought to have been content to accept the advice given them by the Sheriff-Substitute, and to have relied on the protection, if they wanted protection, which the decree of a competent court gave them instead of involving the estate, for the protection of which they represent themselves as being so solicitous, in legal expenses which will undoubtedly amount to a sum which would have more than satisfied the widow's modest claims.

The whole matter is this—The late Mr Barlass left a settlement by which he made no provision for his widow, who was separated from him by agreement and receiving an allowance of £1 per week. She has no means of her own. Her legal rights are not excluded. Mr Barlass has left estate, though

not a large one, and he also left debts. He died in the odour of solvency. It is not suggested that his estate is now bankrupt, and it is not suggested that there are creditors pressing. His widow asks that a small sum be paid her for mournings, and that another small sum be paid her as interim aliment for the first six months until her legal rights can be adjusted. Her husband's trustees, the defenders, take up the position that she may be entitled to a small sum for mournings, but deny her right to anything in the way of interim aliment, and in any view plead that they are not bound to pay her anything on either head until six months from her husband's death have expired. They take up the somewhat monstrous attitude that she can get along on credit or starve. The widow limits her claim for interim aliment to the £1 a-week which her husband was allowing her. As we are told by the Sheriff-Substitute the defenders appear to have been frightened by the case of *Miller's Trustees*, 1893, 20 R. 675, 30 S.L.R. 354—a very hard case indeed for the trustees in question, but they had been administering the estate for ten to fifteen years, and had paid debts of the testator's and divided sums to account among beneficiaries without taking care to see that the truster's heritage was sufficient to meet bonds upon it, for which he was as usual personally bound. That case differs *toto cœlo* from the present.

We are not concerned with the question of the continuing right of widow and children to be alimented out of the husband and father's estate—a question in which legal rights, forisfamiliation, and the children's capacity to maintain themselves are involved. What we have to consider is the simple question whether they are entitled to be kept from want and to be supplied with decent mournings during the brief period immediately following on the death of the breadwinner, and whether, if they are so entitled, they are notwithstanding to be condemned to live on credit or charity for six months. I do not think that I am required to go further than Fraser on Husband and Wife, p. 965, where it is correctly, I think, stated that "a widow is entitled to aliment from her husband's representatives from the day of his death till the first term of Martinmas or Whitsunday that may arrive, at which any provision left her by marriage contract or will or her legal rights of *jus relictæ* and terce are payable, and this is a burden on the whole executry. The principle of this rule is that the law holds the husband's domestic establishment not to be broken up till the term following his death, and therefore the wife receives the aliment, not on account of her husband's death, but on the fiction of his continued existence." The decisions, the learned author adds, "hold the aliment to be due as a part of the husband's family expenses incurred by him prior to his death." The children living in family with the deceased are *in pari casu*, or rather are included, with the widow. This is, I think, subject always to the conditions of necessary and reasonable, and does not hold when the widow has means of her own or is otherwise provided for by her husband during the period in question. It is necessarily involved that the payment must meet the need, and cannot be withheld, as payment of ordinary debts is, for the lapse of six months or any other period.

But then, it is asked, will the payment be sustained in a question with creditors if the estate ultimately prove insolvent? Lord Fraser says (p. 966)—"Further, the claim is not privileged so as to possess a preference over creditors." I am unable to accept this as sound or founded on principle. The learned author bases it on *Buchanan* v. *Ferrier*, 1822, 1 S. 323, where the Court repelled the claim made not *de recenti* but in a ranking and sale of the deceased's estate, on the double ground that the widow had a separate estate, and (without any reason assigned) that it was not good against creditors; on *Lindsay's* case, (1714) M. 11,847, where the estate was bankrupt from the beginning, executor-creditors had been confirmed, and the widow was confirmed with them. Her claim was not *de recenti* on the death but in a ranking of the husband's estate. The Lords "found the aliment of the family had no preference," discarding thereby the general practice of the Commissaries; and lastly, on More's Stair Notes, pp. ccclxi *et seq.*, where privileged debts in general are dealt with. The decisions collected by More, except the two above referred to, give no very certain ground, as they mostly involve specialties. I am disposed to ask for some principle to distinguish the cost of maintaining the family during the period immediately following the death from other acknowledged classes of privileged debts. It is admitted the expenses of the deceased's last illness, of his decent burial, of reasonable mournings for his family, the current term's wages of his servants and presumably their board, are all privileged in a question with creditors, and the reason is assigned that considerations of humanity and decency require that they should be so. I accept the reason, but then *a fortiori* must I apply it to the necessary and reasonable interim maintenance of widow and children when they have not other resources and would else be destitute. And I am prepared so to hold if necessary, returning to what I believe to have been the earlier and more consistent rule. I am confirmed in this by the statement of the Sheriff to the effect that despite the decisions in *Lindsay's* (*cit.*) and *Buchanan's* (*cit.*) cases the practice of the Commissaries has been adhered to, and aliment to wife and children, which is an immediately emerging need, "by universal practice is provided from the date of death from all estates not manifestly insolvent." I myself believe this to be a correct statement of practice.

LORD MACKENZIE—I am of the same opinion. I think that the Sheriff-Substitute and the Sheriff have disposed of this case in an eminently reasonable manner, and I should be sorry to think that there was any decision of this Court which compelled us to take a different view. The case must be

disposed of upon its own circumstances, and, as the Sheriff-Substitute points out, there is not on record much difference as to material facts. He states that the parties wisely endeavoured to put the Court in possession of facts sufficient to make a proof unnecessary, and I take the conclusion at which the Sheriff-Substitute arrives as a cardinal fact in the case—"The appearance of the estate *prima facie* is that there will be a considerable surplus." Therefore we are not here concerned with any question which might be raised in a competition between the widow and family and the creditors. The case does not raise the general question which might have to be considered and disposed of in a case where such a competition does arise. The case we are dealing with here is one in which the widow, having no means of support otherwise, asks for support from the trustees of her deceased husband for a reasonable time, until they have had an opportunity of going into his affairs and settling as to her legal rights.

I adopt the way in which the matter is summed up in the opinion of the learned Sheriff—"Aliment for wife or young children is an immediately emerging need, and by universal practice is provided from the date of death from all estates not manifestly insolvent." That is, in effect, stating the law in the same way as it is stated by Lord M'Laren in the passage your Lordship in the chair has already read.

Accordingly I am of opinion that the judgment, except in so far as modification is required as to the amount for which decree was given, should be affirmed.

LORD SKERRINGTON—I regret that I cannot concur in the view which your Lordships have expressed in regard to the law applicable to this unfortunate litigation. I think that the Sheriffs erred when they granted a decree within six months of the death of the testator for payment to the pursuer by her husband's testamentary trustees and executors of a sum in name of mournings and another sum in name of interim interdict. A widow's claim for mournings is a privileged debt, and may be paid by the executor within the six months if he so chooses. In the present case this claim would probably have been so paid by the defenders but for the fact that the parties were not agreed as to the amount which ought to be allowed. I know, however, of no authority for the view that a widow can demand as of right that decree for a sum in name of mournings shall be issued in her favour within six months of her husband's death. There is no hardship to the widow involved in the contrary view. Her claim being privileged, she will generally have no difficulty in obtaining either from her husband's executors or from some other person an advance of a reasonable sum for the purchase of mournings unless there exists a real doubt as to the sufficiency of the estate to meet even this preferable claim. Professor Bell states quite generally, Prin., sec. 1900, that an executor "cannot be compelled to pay to anyone till the expiration of six months from the death"; and Lord M'Laren in his work on Wills and Succession, vol. ii., secs. 2159, 2161, lays down the law to the same effect. The same objection applies to the Sheriffs' award of a sum in name of interim aliment, though the decree is open to the additional objection that it in substance places this claim in the position of a privileged debt. In his opinion in the case of *Baroness de Blonay* v. *Oswald's Representatives*, (1863) 1 Macph. 1147, at p. 1154, Lord Justice-Clerk Inglis said—"The widow's alimony never can be paid till after the period for the expenses of which it is required, because no executor is bound, or in safety, to pay any creditor till the expiry of six months from the death of the testator or defunct."

The proper course, in my opinion, is that we should recal the interlocutors appealed against, and that (the six months having now expired and there being now no dispute as to the amounts to be awarded) we should of new decern for £14 in name of mournings, and also for £26 in name of interim aliment for the half year commencing at Martinmas 1915. The first of these sums being a preferable debt will be paid by the defenders out of the first of the funds which come into their hands. On the other hand, according to the authorities, at any rate since the case of *Lindsay*, (1714) M. 11,847, a widow's claim for aliment is not privileged. Though the contrary was argued by the pursuer's counsel, it seems to me to be out of the question to ask the Court to add of its own authority a new item to the list of privileged debts which is given by the institutional writers—Ersk. iii, ix, 43; Bell's Prin., 1402-9; Bell's Com. (7th ed.), ii. 147-151. For my own part I am prepared to go further, and to hold that a claim for interim aliment is in the same position as any other well-founded claim for aliment at the instance of a member of the family of the defunct, and that it cannot rank in competition with the debts of ordinary creditors. It does not, of course, follow that alimentary claims ought not to be paid by an executor in a case where no ordinary creditors have used diligence, and where the estate is not clearly insolvent. At this stage, however, it is impossible for us, in my opinion, to do more than to give to the pursuer a decree of constitution for £26 in name of interim aliment, leaving it to the defenders to consider whether they have any good grounds which would justify them in suspending a charge at the instance of the pursuer for payment of this sum.

The Court recalled the interlocutor of the Sheriff-Substitute and decerned against the defenders for payment to the pursuer of (1) £14 in respect of mournings, and (2) £26 in name of aliment, with interest on the said sums as craved.

Counsel for the Pursuer and Respondent—M'Lennan, K.C.—Lillie. Agents—Dalgleish, Dobbie, & Company, S.S.C.

Counsel for the Defenders and Appellants—Chree, K.C.—Lippe. Agents—Menzies, Bruce-Low, & Thomson, W.S.