

1709. November 25. TURNBULL *against* Her HUSBAND's Creditors.

MARGARET TURNBULL being provided to a jointure by her first husband, and then married Henry Elder, writer in Dunfermline; and he being *obaratus*, and in much debt unknown to her, his creditors arrest the rents of her liferent lands flowing from her first husband, and evict the same; whereby, she being reduced to poverty, raises a summons of aliment and declarator against her husband's Creditors, that a competent part of her liferent and jointure-lands may be allocated to her for an yearly aliment during the standing of the marriage, that shall neither be subject to her husband's *jus mariti*, nor to her husband's Creditors their diligence, on this ground, that though the marriage was a legal assignation of the wife's whole moveable estate in favours of her husband, yet that liferent-jointures to wives, are but aliments on the matter, and pass to the husband *cum suo onere* of maintaining and entertaining his wife, especially out of her own; and tochers being given *ad sustinenda onera matrimonii*, one of the principal *onera* following marriage was the natural obligation to aliment the wife; and the husband's creditors could be in no better case than he was himself, whose *jus mariti* being clogged with her aliment, they behoved to take it with the same *onus*, and as they had the *commodum* of the superplus above a precise aliment to her, so they were liable to the *incommodum* of entertaining her out of the fore-end of her own jointure she brought with her, for *cujus est commodum ejus et incommodum*, seeing she offered to renounce any jointure or benefit provided to her by her present husband in favours of his creditors. *Answered*, This was new doctrine, and impinged on the principles of law, there being nothing more incontestibly clear than the husband's right to all his wife's moveable estate; yea, it was lately found, Vallance of Possill and Macdouall, No 54. p. 5840, that though a husband renounced a *jus mariti*, yet it recurred and fell back to him again, and it did so personally *barere ossibus*, that he could not avoid it; and if such a process were once sustained, there would be a hundred such actions presently raised to the defraud and ruin of lawful creditors, who lent their money, and furnished goods on the faith of that fund of their debtor's wife's jointure; and if she has made an ill bargain, she takes him for better and for worse, and has none to blame but herself; and all that can be said in this case is *caveat emptor*; if he have an opulent fortune, she has the benefit of it; if he fall in straits, she must run the risk and hazard with him, and bear patiently these accidents of Providence. It is true, where a wife's liferent is expressly and originally constituted *per modum alimenti*, and is moderate without excess, there it has been sustained as unaffected by her subsequent husband's creditors, as the LORDS found 27th Jan. 1709, Dunbar *contra* Lady Pinkill, his present spouse, Div. 5. Sec. 9. *b. t.* But there it was constituted as a formal aliment, and the question was only between the wife

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Found in conformity with the above.

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and her husband ; and, no doubt, she will get an aliment modified against her husband, whereof we have many instances, as in the case of the Dutchess of Gordon, No 112. p. 5902, the Lady Innergelly, and many others ; but Mrs Elder has neither her liferent to constitute, nor is she contending for an aliment from her husband, but to be taken off his creditors, to whom there is a *jus quæsitum* by the marriage. *Replied*, That marriage introducing a communion of goods *nemo tenetur invitus manere in communione* ; and therefore if my husband *vergit ad inopiam*, or be severe, I may by the common law seek a *separatio bonorum*, whereby the wife's estate is freed from his administration and debts, as appears by Pope Innocent III. his rescript, *lib. 4. decretal. tit. 20. cap. 7.* and Perezus *ad Cod. tit. De Donat. inter vir. et ux.* And Bachovius has the same observe, that if the husband be *lapsus bonis*, the wife *exit de manu mariti, fit inter conjuges separatio bonorum, et seorsim uxori conceditur rerum suarum administratio.* And Stair, *lib. 1. tit. 4. § 9.* affirms that alimentary provisions do neither recur to the husband nor his creditors. And it were the hardest thing in nature, that a woman should not be maintained out of her own means that she brought with her ; and an aliment should be as much exempt from the *communio bonorum*, the *jus mariti*, and the creditors' access by diligence, as her wearing clothes and *paraphernalia* are, the one being more necessary than the other. And though christian patience requires her to bear a share in her husband's misfortunes, yet it goes not that length to oblige her to starve with him when she has of her own, and craves nothing of his. And whereas it is objected this may tempt wives to be prodigal, on the prospect that they will at the long-run always get what they brought with them for an aliment, it is *answered*, A good woman will never waste her husband's means on this expectation, and a bad one can be curbed by the legal remedy of an inhibition and otherwise ; and nothing but a scrimp aliment is pleaded for. She is willing all the rest go to her husband's creditors. THE LORDS found neither law nor custom for a wife's taking a *separatio bonorum* with us, whatever equity the common law stood on : and therefore found the husband's *jus mariti* absorbed her whole jointure, and was affectable by his creditors without any burden of an aliment to her ; and therefore, refused to sustain any process of aliment at her instance against her husband's creditors, and assoilzied from it, whatever might have been, if the debate had only been between her husband and her. THE LORDS remembered they had done the like some years ago between William Gordon, late of Pencaitland, his Creditors, and his Lady, claiming an aliment out of the annualrent of L. 1000 Sterling, that came by my Lord Dirleton, her uncle.

Fol. Dic. v. 1. p. 393. Fountainball, v. 2. p. 530.

* * * Forbes reports the same case :

MARGARET TURNBULL finding her liferent infestment in some houses in Edinburgh, provided to her by her first husband, to be affected by the Creditors of

Henry Elder, her present husband, as falling under the *jus mariti*, she raised action of aliment against him and them upon these grounds; *1mo*, The pursuer's jointure, by a former husband, being *sua natura* alimentary, *ad sustinenda onera matrimonii*, (as all tochers are given *eo intuitu*) and the *jus mariti* but a limited *dominium*, clogged with the burden of the wife's aliment, his creditors, who are in no better case than he, cannot affect the jointure in prejudice thereof; *2do*, As where *Socius vergit ad inopiam*, *separatio bonorum* is never refused, *quia nemo invitus tenetur manere in communi*, so by the canon law and the custom of other places in Europe, where a husband's affairs go wrong, *separatio bonorum in communi* is allowed, *Perez. in cod. lib. 5. tit. 12. No. 4. Treut. vol. 2 disp. 6. Th. 13.* And albeit this is not agreeable to our law, yet with us, the wife in such a case ought at least to have a suitable aliment allowed to her out of her jointure; *hoc maxime attento*, that her jointure is of that nature, that it cannot be totally affected at once by the creditors, but only from term to term; as, if her tocher were still in her father's hand unpaid, he might exclude the husband's creditors from uplifting thereof, unless they found caution for her aliment. *3tio*, A wife's right to aliment out of the goods in communion, *inheret ossibus*, is so peculiar to and inseparable from her person, that it can no more be affected by the husband's creditors, than her cloaths and *paraphernalia*, *Stair Instit. lib. 1. tit. 4. § 9.* And an aliment was lately found due to a wife, in the Lady Penkil's case, Div. 5. Sec. 9. *b, t.*

Alleged for the Creditors of the husband. *1mo*, When wives marry, they take their husbands for better, for worse, and must share with them in the increase and decrease of their fortunes. *2do*, The *jus mariti* is so fixed in the husband by our law, that he cannot renounce it; and the *separatio bonorum* is a novelty, and would be of dangerous consequence in our practice, for it would both prove a snare to creditors, and encourage wives to spend profusely their husband's fortune, with a view, when it is gone, to crave a separation of what they brought with them. *3tio*, Though liferents constituted formally by way of aliment, and declared not affectable by creditors, are secure from diligence at their instance, yet a liferent provision in common form hath no such privilege. *4to*, The Lady Penkil's case doth not meet, in respect she had a plentiful jointure, and he was bankrupt before the marriage.

Replied for the pursuer, *1mo*, The marriage-formula of *taking for better for worse*, imports no more but a Christian patience in comporting with the ordinary infirmities of husbands, and not any obligation to starve with them; for taken in a strict sense, it would exclude all divorces, and aliments, upon whatsoever account, which no doubt is contrary to law. *2do*, The *jus mariti* is effectual in an absolute sense only as to what is over the *onera matrimonii*; for *answering* whereof in the *first* place, The husband has the administration of the goods in communion. As a good woman will never mispend her husband's substance, so a bad one may be restrained by the legal remedies of in-

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THE LORDS found the wife could have no aliment in prejudice of her husband's creditors.

Forbes, p. 355.

*** In conformity with the above, was decided a case, Gibson against her Husband's Creditors, Feb. 1732.—See APPENDIX.

1770. Nov. 14.

MARY JAMESON *against* ISABELLA HOUSTON.

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The rents of a small subject, the property of a wife separated from her husband, found to be an alimentary provision to the wife, and not attachable by the husband's creditors.

THE defender was married to Captain Houston in 1743; some years after, a separation took place, but without any agreement or provision for maintenance or aliment. In 1752, the defender succeeded as heir-portioner to a small subject called Hartwood Hill, from which she drew about L.13 *per annum*, and upon which no direct claim was ever made by her husband, who died in the year 1769. In the year 1762, however, Captain Houston had granted a bill for L.70 for value to Mary Jameson the pursuer, in whose house he had lodged for several years, and to whom it would appear he was truly indebted. This bill having been protested for payment, arrestments were laid on in the hands of the tenants of Hartwood Hill, for payment of the rents resting owing by them to Captain Houston, in right of his wife. A good deal of procedure followed before the inferior Court; and the cause having been removed by advocacy, the Lord Ordinary, 'considering that it is not alleged, on the part of Mary Jameson, that Captain Houston cohabited with his wife or alimented her; preferred Mrs Houston.'

The pursuer, in a reclaiming petition, *pleaded*;

The husband became by the marriage the absolute proprietor of all moveable rights belonging to the wife, and of the rents of her lands falling due during the marriage; and as he could dispose of this estate, so it was equally attachable by his creditors. The only ground alleged for controlling this general rule, was the claim that had been made for this fund in the present instance, as an alimentary provision for the wife during her separation. But there was really no foundation here for the exception; for it was not pretended that the rents of this subject had been expressly settled on and set apart to the wife for aliment, which could alone entitle her to be preferred to the husband's creditors, 27th March 1627, Westnisbit, *voce* PERSONAL AND TRANSMISSIBLE; 4th July 1637, Tenant, *IBIDEM*; 8th March 1639, Kirkcaldron, *IBIDEM*; 22d Dec. 1676, Dick, *IBIDEM*.

If Mrs Houston had wished to secure the rents of the subject to her own behoof, there should have either been an agreement between the parties, settling