

ninus, the mother *jure naturæ* ought to entertain him: And therefore some alleged, albeit during the standing of the marriage undissolved, she cannot be distressed for payment personally, by caption, &c. yet her jointures may be affected with arrestments or other diligence. *Vid. Ann. Robert. rer. jud. lib. 2. c. 6. Stair, B. tit. 4. § 16.* This cause being debated in presence, on the 22d July 1680, "the LORDS found a wife's bond null *quoad omnes effectus*, either of personal or real execution; and this, albeit the Lady had an obligement from her son that he should pay her such a price for these necessaries yearly as such persons should modify; because this put the Lady to be once the first disburser, and so had nothing but an uncertain action of repetition of the price." But the LORDS recommended to her to furnish her son *ex pietate materna* (for *venter non habet aures, nec patitur moram*) what she could spare. This was a caution of moral equity, but of no legal compulsion. A wife granting bond for borrowed money, and swearing never to quarrel it, yet both the bond and oath were found null and not obligatory, 18th Feb. 1663, Birch, No 165. p. 5962.

*Fol. Dic. v. I. p. 401. Fountainball, v. I. p. 102.*

\* \* \* See Stair's report of this case, No 178. p. 5981.

1709. January 27.

DICK and DUNBAR against LADY PINKHILL.

BESSIE DICK, Lady Pinkill, being provided in a jointure out of Boyd of Pinkill her husband's lands, she, to obtain his creditors' consent, enters into a transaction with them in 1698, and restricts herself to 800 merks, but takes the security by way of an yearly alimentary annuity, excluding Lieutenant Crichton, then her husband, his *jus mariti*; and that it should not be affectable by his creditors, and that her discharge should be sufficient without her husband. Crichton being dead, she marries one James Dunbar; and Pinkill shunning to pay, she pursues a poinding of the ground on her infestment, and craving decret, Dunbar compares, and alleges the decret must go out in his name, as having right *jure mariti*; and though the former husband was excluded, yet he had never consented nor renounced, and the administration belongs to him as head of the family. *Answered*, She acknowledges she had made an unfortunate choice, who in sixteen months time has dissipated a great part of her means and livelihood, to her utter ruin and starving, what by his creditors' poinding and arresting all, and what by his own drunkenness and prodigality; and if he get the disposal of this small reserved aliment of 800 merks, he will reduce her to a cake of bread; and this being a constituted aliment long before he had any interest by his marriage, it must stand good against him, as well as it did against the former husband. *Replied*, Both by the laws of God and the land, the husband was *princeps et caput familie*, and to divest him of that power, and invest it in the wife was against the laws of nature, and *contra bonos mores*. Yea, the Lords, 9th February 1677, between Lord and Lady Collington, No 50.

No 204.

No 205.

An alimentary provision settled on a woman, does not fall under the *jus mariti* after her marriage, and is not affectable by her husband's creditors; but it being controverted, whether it fell under the husband or wife's administration, the Court, in respect of the husband's prodigality, found that the party who offered the best caution to apply it to the maintenance of the family ought to be preferred in the administration.

No 205.

p. 5828., found the husband could not renounce his *jus mariti*; and therefore the Lady Pinkill having by chusing him for her husband, subjected herself to his government, both as to her estate and person, she cannot deprive him of his legal right; and Dirleton, *voce ALIMENT*, thinks it so personal that it is neither subject to the husband's *jus mariti* nor his creditors' arrestments, though some great lawyers *magno conatu et boatu* assert the contrary; but the LORDS, since his time, have found the *jus mariti* renounceable, as in the case of Dr Cunningham's Lady, and Mrs Anderson and Patrick Telfer, her husband, No 53. p. 5836. and in this case, they declared the Lady Pinkill's aliment not affectable by her husband's creditors, but only applicable to the use for which it was destined, to wit, the maintenance and entertainment of the family, of which Dunbar the husband was a part, and could not be secluded; but, in regard of his bad management, they appointed Lord Prestonhall, the Reporter, to see which of them offered the best caution to apply it to its true use, that these might be preferred in the power of administration and uplifting thereof, to prevent misapplying and squandering.

*Fol. Dic. v. 1. p. 401. Fountainball, v. 2. p. 485.*

\* \* \* Forbes reports the same case:

1709. Dec. 1.

THE Lady Pinkill having an yearly annuity of 800 merks provided to her out of the lands of Pinkill, with consent of Captain Crichton, her former husband, in these terms, viz. that the same should be only applicable for her aliment, and that her receipt and discharge without his consent should be sufficient to the debtor in the annuity; after Captain Crichton's decease, the Lady, with the concurrence of James Dunbar, her present husband, pursued an action of poiding the ground against the tenants of Pinkill; and, when it came the length of a decreet, diverted from him, because of mal-treatment; there arose a question betwixt her, him, and his creditors, in whose name the decreet should go out.

THE LORDS found, That the annuity being alimentary, did exclude Mr Dunbar's disposal thereof by his *jus mariti*, and could not be withdrawn by him or his creditors, but must be employed for alimenting her and him, and their family; and that the term's annuity due preceding their marriage must be applied for payment and satisfaction of the Lady's alimentary debts preceding the marriage; and the term's annuity since the marriage, for satisfaction of alimentary debts of the family since the marriage; and found, that in time coming, the annuity must be applied for maintenance of the family, the husband always having the administration and application thereof, upon finding caution to apply the same accordingly, and particularly to pay the Lady out of the first end of the said annuity yearly the sum of 200 merks for her clothing; providing the debts contracted for obtaining decreets, and making the liferent annuity effectual, be paid in the first place off the whole head of the bygone annuities due preceding and since the marriage.

*Forbes, p. 360.*