

1711. December 21.

JAMES HUTCHISON, Writer to the Signet, *against* THOMAS COUITS, Merchant in Edinburgh.

No 79.

An alimentary provision belonging to a wife, having, after her separation from her husband, been divided equally, of consent, betwixt them by the Lords, the half payable to the husband was found not alimentary in his person during the separation.

AN alimentary annuity of 800 merks belonging to Elizabeth Dick Lady Penkil, having, after her separation from James Dumbar her present husband, upon the account of family differences, been divided by the Lords equally betwixt them of consent, during their living separately; James Hutchison factor for uplifting the whole annuity, craved allowance in his discharge of what he had advanced to the husband upon bond or bill, out of that part of the annuity appointed to be paid to the husband, and assigned by him to Hutchison. Thomas Couits, who was creditor, by alimentering the husband since the separation, pleaded preference to Hutchison, an assignee for a common anterior debt.

Alleged for Hutchison; After the division of the annuity, the half belonging to the husband was no longer alimentary in his person, so as he could not dispose of it for payment of his just debts.

Answered for Couits; The annuity being destined originally for the aliment of the Lady and her family, the husband assumed by her (who was not only a part, but head of the family, L. 195. D. De Verb. Signif.) hath right to a share of the aliment; which doth not alter its nature, from what it was before the division, or become of a different nature from the portion of it allotted to the wife, that is undoubtedly alimentary still; for *separatio a thoro et mensa, non tollit vinculum matrimonii*, and notwithstanding thereof, all the effects of a marriage continues safe, Can. 1. Caus. 32. Q. 1. et quod juris est in toto, idem est in aliqua ejus parte.

THE LORDS found, That the 400 merks payable to James Dumbar the husband, is not alimentary in his person, now after the separation from his wife.

Forbes, p. 560.

1714. December 16.

JOHN SPRUILL of Miltoun *against* The DUKE of DOUGLAS.

No 80.

Found in conformity to Westnisbet *against* Morison, No 50. p. 10368, that a fund appropriated by a third party for the aliment of a wife, is not affectable by her husband's creditors.

THE late Marquis of Douglas in a contract of marriage of one Mrs Jean Douglas, obliged himself to pay L. 50 sterling to her in liferent, and to Mr Alexander Inglis her husband in fee, by way of tocher, with L. 100 Scots yearly, to her during life. The fee of the L. 50 sterling upon Inglis's death was assigned by his executrix, to Mr Thomas Hamilton the second husband, who transferred the same to his wife; but he made likewise another assignation there-after of the said L. 50, in favours of Lilius Douglas, his wife's sister, in liferent, and to Leggats her children, in fee.

The late Marquis having made payment, both of the annualrents of L. 50

sterling, and the yearly annuity of L. 100 Scots, during Mrs Douglas's life; and the present Duke having paid some part of the L. 50 to the Leggats, as the nearest of kin to Mrs Douglas, as having right thereto by the two several rights above-mentioned, as also by a decret of Privy-Council, ordaining the Marquis to pay the same to her in her husband's absence, in name of aliment; John Spruil now insists against the present Duke, as deriving right to the said subjects from the said Mr Thomas Hamilton, who, prior to the above rights, had transferred the subjects in favours of Crawford of Cloberhill, and delivered up to him the decret against the Marquis for payment; and Cloberhill, for further security, did also arrest in the Marquis's hands, and the furthcoming came the length of an act, assigning a term to the Marquis to depone, as to the rest of the L. 100 Scots annuity, and assigning a term to prove the L. 50 sterling *scripto* of the Marquis; but Cloberhill shortly thereafter dying, Spruil, his creditor, confirms the premisses, and pursues the Duke on the passive title. It was *alleged* for the pursuer, That the alleged payments could not be made *bona fide*, because the grounds of the debt were not in the hands of the Leggats, without which they could no more oblige the Marquis or Duke to pay, than an assignee producing his assignation without the bond, in which case the debtor paying, does it on his peril; *2do*, That Cloberhill had arrested, and in the forthcoming the Marquis had deponed, and *Avisandum* therewith made, so that being so notably interpellated, he could not make payment to another party *bona fide*, which takes place even as to the Duke, the act being a judicial contract.

Answered for the defender to the *first*, That the Marquis could have no ground to doubt Mr Hamilton's right, to whom he had been in use to pay before, nor could he have any reason to suspect that Mr Hamilton had conveyed the same subject to any other, having already assigned it to the Leggats, and so was still in *bona fide* to pay to them, till another right were intimated; for otherways at every payment, the creditor's whole progress must be produced to the debtor.

To the *second*, *answered*, That the arrestment was prescribed, being laid on in anno 1695, and the Marquis's oath taken in 1697, but nothing thenceforth done in it; though the act of parliament requires arrestments to be wakened every five years, otherways to prescribe in ten years.

Replied, That no prescription could here take place, because of the *avisandum* taken with the Marquis's oath in the forthcoming, after which there can be no prescription, except that of 40 years.

Duplied, That though in that case there needs no wakening, even after the year, yet that does not hinder prescription to take place, if the cause be not insisted in within the time appointed by law.

It was *separatim* also *answered* for the defender, That it is of little import, whether the arrestment be prescribed or not, since the subject of itself was not

No 80. arrestable, seeing it had been given as an aliment to Mrs Jean Douglas during life, by decret of Privy Council.

Replied for the pursuer, That aliments are rarely given to wives in prejudice of lawful creditors; but the decret of aliment bearing, (that it was given because the husband had left the wife in a starving condition) how soon she returned to, and was maintained by her husband, the aliment ceased; therefore, after the husband's return, at least after the wife's death, the payments made to him by the Marquis, can in no sense be said to have been on account of the wife's aliment; nor are his receipts and discharges relative to any aliment; nor can it be said, that these payments after her death were in satisfaction of the aliment for the years she lived and got no payment; since the decret of Privy Council overturns that argument, seeing aliment was given because her husband had left her destitute, therefore, when she returned to be maintained by him, her aliment ceased.

Duplied for the defender, That the decret of aliment gave the wife a right during life; so that whether the yearly payments were made to herself or to her husband; yet it could only be upon her right as constituted by the act of council; and if there was any of the aliment unuplifted when Mrs Douglas died, it would have belonged to her nearest of kin; and supposing the husband might lay claim to it, because of the presumption of his having alimented her, yet that could be of no use to this pursuer; for the husband's claim to these rests, came only to exist upon his wife's death, for she had the entire right during her life; so that no diligence of any of his creditors preceding the time, could affect the subject, so as either to hinder Mr Hamilton himself to uplift the same, or far less to put the debtor *in mala fide* to pay.

THE LORDS found the L. 100 Scots yearly, and the annualrent of the L. 50 sterling, appropriated by the Privy Council for Mrs Hamilton's aliment, was not affectable by arrestment, at the instance of the husband's creditors;—and, also found, That the arrestment could only affect the bygones of the L. 100 yearly, and the annualrent;—and also sustained the payments by the Duke as made *bona fide*, in respect the arrestment was not renewed, nor any diligence on the arrestment in his father's time against him, till after his father's payments; and upon a reclaiming bill and answers, the LORDS adhered to their former interlocutor as to the payments made by the Marquis, but remitted to the Ordinary to hear parties procurators upon what was mutually represented, in relation to payments made by the Duke.

Act. Sir John Ferguson.

Alt. Mr Thomas Kennedy.

Clerk, Robertson.

Fol. Dic. v. 2. p. 76. Bruce, v. 1. No 21. p. 28.