No 121. allowance to his wife during their separation, and which, for peace sake, she might be willing to accept; but, as that ended as soon as the marriage dissolved, the relict, of course, falls to be alimented by the heir, to the next term that her liferent commenced, according to her station; for ascertaining whereof, there can be no better rule than to make it correspond to the liferent provisions to which she is entitled in the event of her surviving her husband. Nor is it any objection, That there are considerable debts owing by the defunct; seeing the aliment due to the relict, till the first term after the husband's death, is as just and onerous a debt as any other; and the estate cannot but afford it, seeing, by the husband's death, the expense of him and his separate family ceases. And, with respect to the heirship, that point was settled in the case betwixt Lady Kinfawns and Mrs Lyon, 12th July 1734, *voce* PRESUMPTION. Nor is it of any importance, that the contract does not bear heirship included; for, it may as justly be argued, that, as it does not bear heirship excluded, it was designed she should have the third of the household plenishing, as it stood at the time of the husband's decease. And it is a mistake to say, that the provision is given as a part of the third of moveables, to which she would have had right *jure relictæ*; for she gets not a share thereof but, in place of it, and other provisions that would have fallen to her by law, a particular jointure, and a share of a particular species only of moveables; namely, the houshold plenishing, as it should be at the time of her husband's death, which she must have as it stands; because, in consideration thereof, and her jointure, she renounces all legal provisions, and all share of any other kind of moveables, whether there were children or not.

THE LORDS found, That the proportion of the conventional aliment must be the rule, unless it can be shown, That, from the circumstances of the estate, there is place for a larger; and that the pursuer had a right to the third share of the houshold plenishing, including the heirship.

C. Home, No. 76. p. 127.

1744. *Dec.* 11.

EXECUTORS-CREDITORS of Mr HUGH MURRAY *against* GRAHAM of BALGOWAN.

No 122.
Upon the death of the husband, the relict's father, is not entitled to retain the tocher for the aliment which he has given her, till the next term, but may retain it till she

SIR ALEXANDER MURRAY-KYNNYNMOUND married Jean Graham, daughter to Balgowan, and by the contract between them, on consideration of the marriage, and of L. 1000 Sterling of portion received by him, he provided her in a jointure, in lieu of all her legal claims, except her half or third of houshold furniture, in the event of the marriage dissolving by his death, with or without children; which proportions he, in the respective events, disponed to her: And by another clause, he obliged himself to pay to Balgowan 6000 merks Scots, at the first term after the dissolution of the marriage, if the same should

No 122.
be satisfied of her provision of the half of the household furniture.

happen without children; and of the same date with this contract, Balgowan granted bond for L. 1000 Sterling to Sir Alexander.

On Sir Alexander's death, and being succeeded by Mr Hugh Dalrymple (afterwards Murray), advocate, there was an account, in order to clearance between the parties, made up by David Graham of Orchil, doer for Balgowan, and Andrew Chalmers, Mr Murray's ordinary clerk, in which was claimed for Balgowan 6000 merks Scots, in terms of the contract; L. 31 : 7 : 2½d. Sterling as aliment for Lady Murray, from March 7. when Sir Alexander died, to the term of Whitsunday; L. 43 : 15 : 7½d. as her half of the household furniture, and L. 25 : 17 : 2d. as her half of the silver plate; which being all deducted from Balgowan's bond and interest thereon, there remained due at Lammas 1737, L. 627 : 11 : 8d. Sterling; which sum was paid to Mr Murray on his bill.

Mr Murray and Lady Murray being both dead, Balgowan was pursued on his bond by Mr Murray's executors-creditors; in which action he defended himself on the account and bill, as a complete clearance and payment; and the executors being willing to allow the 6000 merks and the bill, excepted against the articles claimed as due to Lady Murray; whereupon this question arose, How far the matter was ended by the account and bill tallying therewith, accepted by Mr Murray?

To give light thereto, the communers above-named were examined, and the fact came out as represented; and that the reason why the matter was not formally ended at that time was, that several papers were to be extended, particularly with regard to giving Lady Murray security for her liferent; about which some difficulty arising, the money was paid to Mr Murray on his bill; and Andrew Chalmers depones, "his master signified to him that he acquiesced, not because he was satisfied with the account, but for other reasons."

Pleaded for the executors, There was no final agreement betwixt the parties; nothing but scrolls either of the account or relative deeds were made out; and there is no evidence Mr Murray saw or approved of them; and the taking a bill instead of a discharge, is an evidence the transaction was not finished; and as Balgowan had no right to the claims due to his daughter, which at this day he cannot discharge, but they belong to her executors, there could be no finished agreement without a conveyance from her: And besides, the executors deny that a proof by witnesses is at all competent to establish a transaction, which *ex concessis* was to be completed in writing.

Pleaded for Balgowan, *Plus valet quod agitur quam quod simulate concipitur*: And here it is plain what was the real intention of the parties; the account which is written by Mr Chalmers, obviously concerns the bringing the sums stated on the L. 1000 to a balance, which coincides to a fraction with the sum of the bill; and this, if not full evidence, is a strong presumption that it was accepted for the same: And nothing is more ordinary in such cases, than the examining the persons concerned in the treaty, who have all deponed agree-

No 122. ably to this account; so that here is no taking away a writ by witnesses, but explaining a transaction founded on a probative writ, viz. an accepted bill. The bill being thus made out to relate to the account, it is an owning thereof, and the three articles objected to, are not now existing as a separate debt, but have already been imputed to, and are extinguished by the remains of the L. 1000 bond.

The like case was decided, *anno* 1734; Charles Mitchell, purchaser of Pitteddie, had paid to Merchiston, a creditor thereon, several sums on bills, which he was allowed to apply in payment of the price, and not left to seek his recourse off Merchiston. See APPENDIX.

'THE LORDS found that the transaction betwixt Mr Hugh Murray and Balgowan was not finished, so as to *conclude* his creditors.'

Pleaded further for Balgowan, The bond whereon he is pursued, being for his daughter's portion, he ought to be allowed to retain in his hands for security of the counter-stipulations in her favour.

The executors urged, That the contract was implemented, the portion was discharged, and there remained only a simple bond: But supposing this, as coming in place of the portion, were to be governed by the same rules, the payment could not have been suspended till Sir Alexander's death, if it had been demanded before that event, to wait the issue of an uncertain conditional claim, such as that to the household furniture and plate was; and which was no more than a reservation of her legal right, which could never stop the payment of the portion, especially considering she had suffered Mr Murray to intromit therewith; and neither she, nor any in her right, had to this day ever made any demand therefor.

Balgowan insisted, That though the payment could not have been stopt, in expectation of the condition on which the prestations were due, yet the same having happened, gave him a right to retain; and this had been found in cases where the mutual obligations were not expressed in any written contract, but implied by law. Andrew Anderson, Merchiston's doer, being engaged with him in several bonds, for which he had bonds of relief; and having Merchiston's effects in his hands, the creditors arrested them there, and pursued a forthcoming. The defence proponed for him was, That, having engaged with Merchiston on the faith of having bonds, bills, and other vouchers of debts due to him in his hands, which he had recovered, he was entitled to retention until he was relieved of his engagements: This was found; and the present case is much stronger.

Pleaded further at advising, That my Lady's claim to the household furniture and plate was not merely a reservation of her legal right, but the same were disponed to her, free of debts.

THE LORDS found, That Balgowan could have no retention of any part of the sum in the bond remaining in his hands, on account of my Lady Murray's aliment to the term; but found that he could retain the same, till her claim

for her share of the houshold furniture and plate, in terms of the contract of marriage, was satisfied.—*See* MUTUAL CONTRACT. No 122.

Reporter. *Lord Elchies*, Act. *Lockhart*. Alt. *Graham, sen.* *Kilpatrick*, Clerk.
Fol. Dic. v. 3. *p.* 282. *D. Falconer, v.* 1. *p.* 24.

SECT. VI.

Mournings.—Funeral Expenses.—Expense of a Posthumous Child.

1664. *November* 12.
NICOLAS MURRAY, Lady CRAIGCAFFIE, *against* CORNELIUS NEILSON.

No 123.
The husband's representatives are liable for the relict's mournings.

NICOLAS MURRAY pursues a reduction of a decreet of the Bailies of Edinburgh, obtained against her, at the instance of Cornelius Neilson, upon this reason, that she being pursued for the mournings for herself and family, to her husband's funerals, which mournings were delivered to her by the said Cornelius, and were bought by her from him, or by her order sent to her; which was referred to her oath, and she deponed, that Cornelius had promised to his father, to give necessaries for his funerals out of his shop, and according to that promise, had sent unto her.

The Bailies found, that this quality adjected in the oath, that the furniture was upon Cornelius's promise to his father, resulted in an exception, which they found probable by writ, or oath of Cornelius; who having deponed, denied any such promise, and therefore they decerned the Lady to pay; against which her reason of reduction is, that she ought to have been assoilzied by the Bailies, because her oath did not prove the libel, viz. that she bought the ware from Cornelius, or made herself debtor therefor, but only that she received the same from him without any contract, or engagement, which would never make her debtor; for a wife, or a bairn in family are not liable for their cloaths, unless they promise payment, but only the father; and in the same manner, the mournings for the funerals of the husband are not the wife's debt, but the husband's executors. The defender *answered*, That the reason was noways relevant, seeing the pursuer's oath proved the receipt of the goods which was sufficient *ad victoriam causæ*; the quality being justly taken away; for albeit the husband or his executors were liable for the relict's mournings, yet a merchant that gives off the same to the relict, is not obliged to dispute that, but may take himself to the relict, who received the same without either protestation, or agreement not to be liable. The pursuer *answered*, That whatever favour might be pleaded for a merchant stranger, yet this furniture being given