No 56.
Jus mariti how to be ascertained, with respect to debts falling to the wife by succession, as nearest of kin.

1744. *June* 20. The CREDITORS of TANSH *against* DUNBAR.

THE relict of Mr James Dunbar minister of Duffus, having confirmed herself executrix-dative to her husband, upon the credit of her contract of marriage, intromitted with his whole effects, which were partly sums bearing annualrent, and partly simply moveable, to an extent much exceeding her ground of credit. After the relict's death, upon a submission between her Executors, and Margaret Dunbar, as nearest of kin to the said Mr James Dunbar her brother, and Æneas Tansh her husband, for his interest, the balance due to the nearest of kin being settled by decreet-arbitral, the creditors of Æneas Tansh arrested and obtained decrees of furthcoming; whereof Margaret Dunbar his wife, being properly authorised, pursued reduction, in which the Lords proceeded upon the following principles:

That the period at which the interest of all concerned in the executry is to be judged of, is the term of the defunct's death; and if at his death, there be effects simply moveable, which fall under the *jus mariti*, and others which are heritable *quoad fiscum et relictam*, and that there be also debts due by the defunct, some heritable, others moveable, the moveable debts must affect, in the first place, the effects that are simply moveable, *et vice versa*; and that it will not alter the case in the question between the nearest of kin and her husband, that the executor, whose duty it is to turn all into money, may have uplifted the sum in an heritable bond; for that will not vary the interest, which the wife, who is nearest of kin, has in the question with her husband; and as little will it vary the case, that a creditor of the defuncts has, upon a debt that was heritable, affected a debt due to the defunct, or other effects of his that were moveable, *aut vice versa*. For still in the question between the nearest of kin and her husband, the balance remaining in the hands of the executor-creditor will fall under the *jus mariti* or not, according to the state of the subject at the defunct's death, whatever may have been the nature of the debt due to the executor-creditor, or of the subjects confirmed and intromitted with by him, or whatever have been the method, whether by decreet-arbitral or otherways, that the accounts have been settled between the executors-creditors or his heir, and the nearest of kin and her husband for his interest.

Kilkerran, (HUSBAND AND WIFE.) *No* 7. *p.* 259.

No 57.
The husband can renounce his right of administration.

1745. *February* 5. TRUSTEES of MURRAY *against* DALRYMPLE.

A WIFE, to prevent a jointure from a former husband, from being affected by the creditors of a second husband, vested it in trustees for the behoof of herself and family. The person upon whose estate the jointure was secured, *alleged*,

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That he was not in safety to pay to the trustees, because the wife could neither defeat her husband's *jus mariti*, nor could he renounce it; the renunciation itself being a moveable right, and falling under it; and likewise because she was prohibited by her first contract of marriage to alienate or burden the jointure. —*Answered* for the wife, That that notion of the old law with regard to the *jus mariti* has been long exploded; and that she has made no alienation, as the disposition is for her own behoof.——THE LORDS sustained the wife's defences.

Fol. Dic. v. 3. p. 279.

*** Kilkerran reports the same case:

IT was the opinion of our old lawyers, that the husband's renunciation of his *jus mariti*, even before marriage, could not be effectual, unless the wife had before marriage conveyed the subjects falling under it in favour of a third party. Their notion was, that the right acquired to the wife by the renunciation fell back, and accresced to the husband by the marriage, like water thrown upon high ground, as Stair expresseth it; though now for some time it has been considered as a settled point, that the wife's reservation is effectual, though not exercised by her in favour of any third party. But it is still a different question, how far the husband can renounce his right of administration? that is, what seems to have been thought to be *contra bonos mores*. *Vide* 9th February 1667, Lord Collington *contra* the Lady, No 50. p. 5828. Yet though even that was the expressed intention in this case, as it was executed by a trust-right, it was found effectual.

The case was, Isabella Sommervill, relict of Mr Hugh Murray-Kynnynmound, having agreed to marry Charles Murray, brother to Sir Alexander Murray of Stanhope, after he had been declared bankrupt, and obtained a *cessio bonorum*; in order to secure her estate from his creditors, and to enable her to apply the same for the subsistence of her, and her future husband's family, she, by her contract of marriage, conveyed her estate to George Lockhart of Carnwath, and others as trustees, for the ends and purposes therein mentioned, viz. 'For her sole use 'and benefit, exclusive of the *jus mariti* of her said future husband, and of all 'right of administration or other right whatsoever that might be competent to 'him by and through the intended marriage, and exclusive of his debts con'tracted or to be contracted, wherewith the subjects thereby disponed are de'clared to be noways affectable, but the same to be applied for her sole use, 'and for the aliment and subsistence of her and her family, notwithstanding 'the coverture; with a power to the said trustees to appoint such factors as she 'should name, who should be obliged to account to her, and to pay over to her 'what they should receive, upon receipts to be granted by her alone, without 'the consent of her husband.'

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And Sir James Dalrymple, who was debtor in a certain annuity to the said Mrs Isabella, having for his own safety presented a bill of suspension of a charge at the instance of the factor appointed by the trustees to the end foresaid, chiefly upon these reasons, That a husband could not effectually renounce his *jus mariti*, at least his right of administration; the LORDS, upon answers, 'remitted to the Ordinary to refuse the bill.'

Fol. Dic. v. 3. *p.* 281. *Kilkerran*, (HUSBAND AND WIFE.) *No* 8. *p.* 260.

*** See D. Falconer's report of this case, No 28. p. 2273.

1774. *March* 4. Messrs ANNAND and COLHOUN *against* HELEN CHESSELS.

No 58.
In a settlement by a father of his estate on his daughter, in trust for herself and children, her husband's power of administration, in the event of his future insolvency, may be excluded.

HELEN CHESSELS was the daughter of Archibald Chessels, and the wife of James Scott.

About a year before his death, Mr Chessels executed a settlement of his whole estate, real and personal, in favours of his daughter, in trust, for behoof of herself, in liferent, and of her children in fee, with this proviso, 'That, in 'case of the event of James Scott her husband's insolvency, he secluded and 'debarred the said James Scott's *jus mariti*, and him from the administration 'and management of the said estate, heritable and moveable, and of the rents, 'annualrents, and other produce and profits of the same; and declared the 'same should neither be liable nor subjected to the payment of his debts, im-'plement of his deeds, nor affectable by the diligence of his creditors.'

Scott became bankrupt, and, notwithstanding the proviso in Mr Chessels's deed of settlement, Annand and Colhoun, as creditors of Scott, having proceeded to attach certain subjects, which would otherwise have fallen under his *jus mariti*, a process of multiplepoinding ensued.

Pleaded for Helen Chessels and her Children; An unlimited fiar or proprietor is entitled to the full exercise of his property, and, consequently, may alienate it, either absolutely, or under any lawful condition, such as that of excluding the *jus mariti* of the disponee's husband; Lord Bankton, B. 1. Tit. 5. § 84.; Erskine's Lesser Instit. Book 1. tit. 6. § 7.; Larger Instit. B. 1. Tit. 6. § 14. Hence Mr Chessels might, either by the nature of his settlement, or by a special clause to that effect, exclude the *jus mariti* of Mr Scott; and, in fact, he did both; conveying his whole estate to Mrs Scott in trust, which imported a virtual exclusion, and farther qualifying the conveyance by the above express condition, by which Mr Scott's right of administration, the only thing given to him, was barred, in the event of his insolvency. The distinction between the complete *jus mariti*, and the simple power of administration, was early known in the law of Scotland. A difference, indeed, formerly arose from this,