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2do, Eupham's assignation was several months after the marriage. It may be wrong to induce a woman in an ante-nuptial contract to convey her fortune to a man, to whom, as yet, she has no tie: But there is no fault in inducing her to convey her fortune to one who is already her husband; on the contrary, that conveyance is what she owes in justice to him and to his creditors.

In the cases of Cameron and Ker of Abbotrule, the wives were alive, and pleading retention; and the contracts of marriage, in which the wives' tochers had been conveyed, were ante-nuptial. (See HUSBAND and WIFE.)

'THE LORDS repelled the reasons of reduction.'

The conception of Eupham Nisbet's bond, produced to the heir a separate defence against payment of 2000 merks of the 3000 merks.

One thousand merks of the bond was made payable to her, her heirs, executors, or assignees, six months after her father's death, and the remaining 2000 merks was payable to her, and the heirs to be procreate of her body, or her assignees, in any contract of marriage alienarly; and that, upon expiry of year and day after her marriage, together with the annualrent of the said whole sum of 3000 merks, from the first term of Whitsunday or Martinmas after the decease of Archibald the granter.

Pleaded for the heir: That the 2000 merks being only payable upon the expiry of year and day after Eupham's marriage, and she having died within that time, the sum was not due.

Answered for the assignees: Old Carphin's view in delaying the term of payment of the 2000 merks was to prevent the heir from being distressed upon any unexpected marriage of Eupham; for which reason, a year was given to him after her marriage to get the money ready; but it was far from his view to make the obligation of payment depend upon the contingency of her life; on the contrary, the sum bears annualrent as well as the other 1000 merks from the first term after his decease; it is payable to the heirs of her body and certain assignees; and one of these last, her assignee in her contract of marriage, has long survived the term stipulated for payment.

'THE LORDS found the whole sums in the bond of provision due.'

For Assignees, *A. Pringle, J. Dalrymple.*

For Executors and Heir, *Ferguson, Lockhart, A. Hamilton.*

Fol. Dic. v. 3. p. 51. Fac. Col. No 158. p. 239.

J. Dalrymple.

1766. November 21.

Mrs. ANNE NIELSON, &c. against AUSTINS.

MR WILLIAM SLOAN, probationer, having made a clandestine marriage with Anne Neilson in 1752; and, being desirous of concealing it, lest it should mar his prospect of church-preferment, gave her brother an obligation to pay what

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A per, who concealed his marriage, became,

furns he should lay out for her; as to clothes, or tabling, or otherwise; and acknowledged the marriage by a separate missive.

In 1754, having been fettered minister at Duncore, he again acknowledged the marriage, in another letter; but begged that it might be kept private for some time longer, in the idea that, after five years, the censures of the church would be prescribed. In this letter, he renewed his promises of maintaining his wife, as he had hitherto done, and proposed that she should continue to live with her mother.

About the same time, Mr Sloan granted a bond for an annuity of L. 5 to his wife, till the 1st March 1757; and of L. 30, from that period, till he should publicly acknowledge her; and for a smaller annuity in the event of his death.

Mr Sloan lived eleven years after the date of the bond; but still the parties did not cohabit, and the marriage continued secret as before.

Mr Sloan having died in 1765, and the marriage having been proved before the Commissaries, an action was brought by Anne Nielson, and her relations, who had alimeted her, concluding, *imo*, For L. 215, said to have been expended on her alimtent from 1752 to 1757; For L. 30 yearly, from that period, till Mr Sloan's death; and for the stipulated annuity in time coming. *scilicet*, For L. 20 for mournings.

The free effects not being equal to these claims; a competition ensued with the creditors.

The pursuers contended, That the provisions must be considered in the same light, as if they had been contained in a contract of marriage, in which case, they would have been effectual against creditors: That the alimtent being a civil, as well as a natural debt upon the husband, the claim of those who furnished it must be effectual, in terms of Mr Sloan's missive: That the charge for mournings was moderate.

Answered for the creditors:—The present case is different from that of a marriage contract. The marriage having been concealed till the last, creditors advanced their money to Mr Sloan, in the belief that he was a single man; so that Mrs Nielson is barred *personali exceptione* from excluding them; in consequence of provisions kept latent by her own fault.

All claims preceding the date of the bond must be presumed to have been discharged. At any rate, the obligation upon a husband to alimtent his wife, is only prestable out of his free funds; and, therefore, cannot compete with creditors. The annuity of L. 30 was exorbitant. The claim of mournings is not good against creditors.

THE LORDS absolved from all the claims preceding 1st March 1757: Found, that the pursuer cannot compete with her husband's onerous creditors upon the alimentary bond for L. 30 yearly, from 1st March 1757 to the time of her husband's death; and, therefore, restricted the same to L. 10 Sterling yearly during

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after marriage, bound for an alimentary provision to his wife. After his death, the alimtent restricted from L. 30 to L. 10 in competition with creditors, but the relief found preferable to the nearest in kin for the balance.

No 107. that period: Found that she is preferable to her husband's nearest of kin for the remaining L. 20 Sterling: Found that the pursuer is not entitled to mournings.'

A&. *Crosbie, Alexander Murray.*

Alt. *Macquern.*

G. Fergusson.

Fac. Col. No 45. p. 272.

1778. February 14.

JAMES CAMPBELL, and Others, *against* JANET SOMERVILL.

No 108.

A postnuptial grant of the liferent of a house, by a husband, *oboratus*, to his wife, found good against creditors, to the effect of securing her antenuptial provisions, in so far as the funds might be otherwise insufficient. If the funds should turn out sufficient for payment of the debts, the liferent was to remain as a separate provision.

ROBERT JAFFRAY, in his contract of marriage with Janet Somervill, became bound to provide her in an annuity of L. 25 Sterling, in case of her surviving. Soon after his marriage, upon a narrative of 'love and regard,' he executed a liferent-conveyance of a house in favour of his wife. Robert Jaffray died, in a few months after executing this deed, in Jamaica, leaving his affairs much involved. His effects in Scotland not being sufficient to pay his creditors, they brought a reduction of the forelaid disposition of the liferent of the house to the widow, upon the act 1621.

Pleaded for the pursuer:—Jaffray died insolvent, and was in the same situation at the time of granting this deed. Where a wife is otherwise unprovided, a postnuptial settlement in her favour will be good to the extent of a rational provision, even when the husband is *oboratus* at the time of granting it. But it will not be supported by the Court, if immoderate, against onerous creditors; Kilkerran, No 4. *voce* BANKRUPT, No 103. p. 988.; *Fac. Col.* p. 225. Noble against Dewar, 12th July 1758, *voce* TAILZIE; Erskine, b. 4. tit. 1. § 33.—In the present case the wife was provided in the contract of marriage. This ascertained what the parties considered to be reasonable in their circumstances. Every addition thereto, by a postnuptial deed, after the husband is *oboratus*, must be held as immoderate; *Fac. Col.* No 18. p. 32. February 7, 1761, Bruce against Glen, *voce* PROVISIONS TO HEIRS AND CHILDREN.

Answered for the defender:—There is no certain evidence of the husband's insolvency at the time of granting the deed. But, although he had been insolvent, this deed was granted for a just cause, and, therefore, is not reducible. It is only an addition to the defender's jointure, of a small house at L. 4 rent, in which to live with her family. This case, therefore, differs from those founded on by the creditors; in all of which the provisions were immoderate. The only question, with respect to such provisions is, Whether they are exorbitant or not? and it makes no difference, if they are moderate, whether they are additions to a former scanty provision by the marriage-contract, or granted when there has been no former provisions.

The Court found, 'That Janet Somervill's liferent-right to this tenement, is to remain in security to her of the annuity in her contract of marriage; but, referred to her, in case of her husband's debts being paid by the proceeds of his effects at Jamaica, or elsewhere, to claim the liferent-right as a separate provision.'

A&. *Matthew Ross.*

Alt. *Ad. Rolland.*

Fol. Dic. v. 3. p. 51. Fac. Col. No 16. p. 29.