

No 108. hibition, &c. and the *jus mariti* being formally the same in a poor man, as in a rich, the Lady Penkil's case comes home to the present question.

THE LORDS found the wife could have no aliment in prejudice of her husband's creditors.

Forbes, p. 355.

*** In conformity with the above, was decided a case, Gibson against her Husband's Creditors, Feb. 1732.—See APPENDIX.

1770. Nov. 14.

MARY JAMESON *against* ISABELLA HOUSTON.

No 109.

The rents of a small subject, the property of a wife separated from her husband, found to be an alimentary provision to the wife, and not attachable by the husband's creditors.

THE defender was married to Captain Houston in 1743; some years after, a separation took place, but without any agreement or provision for maintenance or aliment. In 1752, the defender succeeded as heir-portioner to a small subject called Hartwood Hill, from which she drew about L.13 *per annum*, and upon which no direct claim was ever made by her husband, who died in the year 1769. In the year 1762, however, Captain Houston had granted a bill for L.70 for value to Mary Jameson the pursuer, in whose house he had lodged for several years, and to whom it would appear he was truly indebted. This bill having been protested for payment, arrestments were laid on in the hands of the tenants of Hartwood Hill, for payment of the rents resting owing by them to Captain Houston, in right of his wife. A good deal of procedure followed before the inferior Court; and the cause having been removed by advocacy, the Lord Ordinary, 'considering that it is not alleged, on the part of Mary Jameson, that Captain Houston cohabited with his wife or alimented her; preferred Mrs Houston.'

The pursuer, in a reclaiming petition, *pleaded*;

The husband became by the marriage the absolute proprietor of all moveable rights belonging to the wife, and of the rents of her lands falling due during the marriage; and as he could dispose of this estate, so it was equally attachable by his creditors. The only ground alleged for controlling this general rule, was the claim that had been made for this fund in the present instance, as an alimentary provision for the wife during her separation. But there was really no foundation here for the exception; for it was not pretended that the rents of this subject had been expressly settled on and set apart to the wife for aliment, which could alone entitle her to be preferred to the husband's creditors, 27th March 1627, Westnisbit, *voce* PERSONAL AND TRANSMISSIBLE; 4th July 1637, Tenant, *IBIDEM*; 8th March 1639, Kirkcaldron, *IBIDEM*; 22d Dec. 1676, Dick, *IBIDEM*.

If Mrs Houston had wished to secure the rents of the subject to her own behoof, there should have either been an agreement between the parties, settling

them upon her in name of aliment, in which case, so far as it was reasonable, it might have been sustained; or she should have brought her action before the Court, which was the proper method, concluding for a suitable aliment in consequence of the separation. But she had not done so; so that nothing occurred in the present instance to take the case out of the common rule of law; according to which, the wife's whole subjects were affectable by the husband's creditors. 12th January 1698, Gordon, *voce* PERSONAL AND TRANSMISSIBLE; Creditors of New Grange, No 106. p. 5892. 18th July 1700, Lady Panholes, No 107. p. 5894. 25th Nov. 1709, Turnbull, No 108. p. 5895.

The defender answered:

Though, by the law of this country, marriage imported a legal assignation of the moveables belonging to the wife, yet the husband, on the other hand, became bound to aliment her during the marriage, and to provide her in a suitable provision after his death. As these burdens affected the *jus mariti* in the husband's person, there was the same reason why they should affect it in the persons of his creditors. In a variety of cases, accordingly, where the husband's creditors had attempted to affect the tocher, which happened not to be paid, the wife or her friends were found to have a right of retention till she was secured in her jointure. Dict. *voce* Mutual Contract, *voce* Husband and Wife, Div. 3. Sec. 4. The obligation to aliment the wife during the marriage was at least as strong as the former; the one being immediately necessary, the other only eventual. But with regard to aliment, a distinction had been taken when the husband and wife were living together, and when they were separate. In the former case, it was the rule that the married couple must share one another's good and bad fortune; and to that case did the decisions founded on alone apply; whilst, in the latter, the rule was, that, as there was a separation of persons, there came to be, so far as it was necessary, a separation of effects. Fount. 11th June 1712, Robertson *contra* Robertson, *voce* MUTUAL CONTRACT. Dalrymple, 31st Jan. 1717, Cuming *contra* Duncan, *IBIDEM*.

It could not admit of a doubt, that the defender, when deserted by her husband, and without aliment, would have been entitled to have one allowed her in preference even to her husband's creditors; and, in this view, she would have had a good claim to have the rents of her own property allotted for that purpose. She did not bring any such action; and abstained from doing so, for the obvious reason, that her husband had voluntarily acquiesced in her possession of the subject from the year 1752, till his death in 1769; which amounted to a tacit agreement that she should enjoy this fund as an alimentary provision.

Though, at advising, it was agreed that aliment to a wife was a natural burden on the husband's estate, some hesitation was entertained in this case, as the wife had not been secured to it in a regular way: The separation, how-

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ever, and being deserted and left by the husband in possession of this fund, weighed with the Court to give effect to the natural right; which, had it been brought forward in proper shape, could not have failed to have been sustained. The Court accordingly adhered to the Lord Ordinary's interlocutor; and upon advising another reclaiming petition with answers, the same judgment was given.

Lord Ordinary, *Kames*.
Clerk, *Ross*.

For Jameson, *Alex. Belsches*.
For Houston, *W. Baillie*.

R. H.

Fac. Col. No. 44. p. 128.

1794. March 8.

AGNES ROBB *against* The TRUSTEE for her Husband's Creditors.

No 110.

The wife of a bankrupt is not entitled to an aliment out of her own estate falling under her husband's *jus mariti*.

In 1787, Agnes Robb was married to William Robb. There being no contract of marriage, her moveables to the value of above L. 1000 Sterling, and the yearly revenue arising from her heritable property, and her bonds, bearing interest, which together exceeded L. 100, fell under the *jus mariti*.

In 1792, her husband became insolvent, and fled the country, and his estate was soon after sequestrated.

In 1793, Mrs Robb made a summary application to the Court, praying to have a suitable aliment modified to her out of the annual produce of her heritable property; and, in support of this claim, she

Pleaded, 1st, If the wife, before her marriage, has no property of her own, she must depend entirely on her husband's fortune or industry for support; but, when effects formerly belonging to her are transferred to him by the act of the law, in consequence of the marriage, as that transference is founded entirely on the presumed will of the parties, it must be an implied condition in it that he shall suitably aliment her; or rather, that she shall reserve as much to herself as is necessary to secure her in all events against absolute indigence. Accordingly, in the case Fac. Col. 2d November 1785, Lisk *against* her Husband and his Creditors, No 103. p. 5887. the Court, proceeding on these principles, modified out of her own estate a liberal aliment to a wife whose husband had become bankrupt. See also Fac. 21st February 1745, Bontein *against* Bontein, No 100. p. 2895. Stair, b. 1. tit. 4. § 9.

2dly, When a wife is obliged to leave her husband on account of maltreatment, and still more, when, as in the present case, she is deserted by him, she becomes a just creditor for an aliment, in the same manner as she would for her legal provisions, upon the dissolution of the marriage by his death. On this ground, she may not only claim on his bankrupt estate, but may also retain her own property for her security. December 1721, Selkrig