

1772. July 21. ELIZABETH WINTER *against* CREDITORS of JOHN ROY, Baker in Perth.

BANKRUPT.

THE pursuer was married to John Roy in the year 1759. Some time afterwards they executed a postnuptial contract, by which, failing children, they settled the common estate of both upon the survivor; reserving power to themselves, with mutual consent, to make and secure such provisions as they should think proper for the children of the marriage. In 1760, the pursuer was compelled, by maltreatment, to leave her husband's house. Upon this, the husband, alleging that the postnuptial deed had been unfairly obtained, brought an action of reduction against the pursuer and her father, for the purpose of setting it aside. On the other hand, the pursuer brought a process of aliment against her husband; and, on the dependance, used arrestments in the hands of Sandieman and Company of Perth.

On the 31st of July 1762, a proof was allowed to both parties; and, in the meantime, the Court found the pursuer entitled to an interim aliment, and modified the same to L.40 Scots, to the 1st of February following.

The husband failed in his proof, and the reduction at his instance was dismissed. In the process of aliment, the Court appointed condescendences of the effects and debts of the said John Roy to be given in. In the husband's condescendence it was stated, "that the only fund belonging to him, was L.196 : 7 : 8, which was lodged in the hands of Bailie David Sandieman, merchant in Perth, at 4 per cent., by order of the Sheriff of Perth, out of which there was a preferable annuity, payable to Catherine Graham, the said John Roy's mother, of L.100 Scots, which more than exhausted the interest." He further stated, that he owed debts to the extent of L.156 : 8 : 6, besides interest, in security of which, most of the creditors had arrested in the hands of Bailie Sandieman.

The pursuer denied the accuracy of this statement of her husband's funds; but no evidence was brought to disprove it. The process having fallen asleep, it was wakened in 1770, after the death of Catherine Graham; and Bailie Sandieman, at the same time, called the different arresters into the field in a multiplepoinding.

The husband's creditors admitted that, for the interim aliment of L.40 Scots modified to the pursuer in 1762, she was entitled to be preferred according to the date of her arrestment; but they maintained, that, as the husband was insolvent, the pursuer's claim of aliment could not now compete with the claims of onerous creditors upon the fund *in medio*.

The Lord Ordinary, "Considering that the husband was admitted to be insolvent, desired to hear parties on the following point:—Whether a claim of aliment, supposing *parata executio*, is entitled to compete with onerous creditors?" And his Lordship afterwards found, "That the wife of John Roy, the common debtor, can only compete with the onerous creditors of her husband, to the extent of L.40 Scots, modified to her by the Court."

The case was afterwards stated to the Court in memorials.

PLEADED BY THE PURSUER :—

A wife maltreated by her husband, and compelled to leave his house, has an undoubted claim against him for aliment. For this she is a proper creditor of her husband, and may compete either with prior or posterior creditors. Stair, i, 4, 9; Bankton, i, 5, 91. The pursuer's arrestment, being first in date, is preferable to the others.

ANSWERED FOR THE CREDITORS :—

The fund *in medio*, which is the husband's only fund, is exhausted by the claims of his onerous creditors; and, from the very nature of the thing, a wife's claim of aliment, however well founded in itself, and in a question with the husband, cannot compete with them. The husband, it is true, is bound to aliment his wife; but this can only be fulfilled when he has funds of his own, which he has not when his debts exceed his means of paying them: *New-grange* against *Scott*, 10th November 1687; *Turnbull*, 25th November 1769.

The following opinions were delivered :—

1772. July 21. MONBODDO. The decision *Robertson*, in 1738, is a good decision, and applies to this case. When the husband treats the wife in such a way as to entitle her to an aliment, it is the same thing as if he had become bound to grant her a provision.

PITFOUR. The husband, by maltreating the wife, *delinquendo contraxit*. The decision 1738, *Robertson*, was pronounced by Lord Arniston, was approved of, and has always been held as good law.

COALSTON. A husband is under an obligation, both natural and civil, to aliment his wife; but this obligation cannot compete with creditors. While they live together, the wife must follow the fortunes of the husband. Even the rents of her own estate must go to the husband: if there is a separation, the wife is entitled to an aliment; but the extent of it must depend upon the state of the husband's affairs at the time of the maltreatment being proved. She cannot compete with creditors. Even the husband has *beneficium competentiæ*: no one is so bound to aliment another as to starve himself. For future aliments a wife may compete with creditors, but not *retro*. The consequence of the pursuer's plea is, That the commencement of a process for aliment shall have a stronger effect than inhibition, or any other diligence of the law.

KAIMES. An aliment given by a husband *vergens ad inopiam* will not compete with creditors. But when a wife is maltreated, and the aliment is fixed, she will compete with creditors. *Here*, upon a depending process of maltreatment, the wife arrested. At that time the husband was not bankrupt: the cause has been accidentally delayed, and, now he is bankrupt, the arrestment will entitle her to a right of competition.

AUCHINLECK. If a woman brings an action for aliment, she may affect her husband's subjects by arrestment, &c. for securing her aliment. Were it not for this, a husband might, from mere malice, dilapidate his effects.

COALSTON. If children bring an action against their father, to lend out and employ, and use arrestment, this will be good against the father, but not

against the creditors of the father. The diligence must always partake of the nature of the obligation on which it is used : so also in the present case.

PRESIDENT. The moment that the husband maltreats the wife, he is bound to aliment her. Some time may be spent before the aliment is found due. The wife arrests. This will draw back to the constitution of the obligation, if I may so speak.

PITFOUR. The diligence will not make the obligation better than it was ; but then it must be remarked that the obligation takes its rise from the time of the delict.

ALEMORE. This is not an action arising from a debt *ex delicto*, nor for damages, but to enforce a natural obligation. The answer of the husband is, I am willing to aliment you, if you will live with me. The reply is, I dare not, because of maltreatment. The conclusion is, that the husband must provide a separate aliment. The condition of the parties at the commencement of the action must be considered ; the aliment will draw back, and consequently the arrestment will secure it.

KENNET. The condition of children is very different from that of a wife seeking aliment. Children are as much heirs as creditors, and cannot compete with onerous creditors ; but the wife claims as creditor.

On the 21st July 1772, the Lords found the wife preferable for her aliment from the date of arrestment.

Act. B. M'Leod, D. Rae. *Alt.* D. Græme.

Reporter, Kaimes.

Diss. Coalston, Ellick, Stonefield, Hailes.

The creditors petitioned against this judgment ; and, on advising the petition and answers, the following opinions were delivered :

1772. November 21. MONBODDO. No doubt that the wife is preferable for aliment due at the date of the arrestment, and also for aliment due at the date of the competition ; but I would not prefer her in time to come. Arrestment cannot affect annualrents in time to come. So it was determined in 1739.

COALSTON. By the law of Scotland, a husband is under an obligation, both natural and legal, to aliment his wife ; but this obligation is of such a nature as not to compete with creditors. The aliment must be suitable to the circumstances of the husband : if his funds are exhausted, no aliment will be given. After decret, on account of maltreatment by the husband, the wife may compete with creditors. Arrestment after decret will secure her both as to by-gones and in time coming. Every diligence must follow the nature of the obligation on which it is used. The obligation of the husband, towards his wife, is of such a nature as not to compete with onerous creditors until it is constituted by decret. In the case of provisions to children of the marriage, they cannot compete with creditors : hence inhibition will only secure, not increase the obligation.

PITFOUR. In considering of an aliment, we must consider the situation of affairs at the time of bringing the action.

GARDENSTON. A party is dilatory in conducting a process. That cannot affect the state of things as it is at the issue of the process. The husband and his creditors may say the debts are now increased. We must determine the aliment according to the state of the funds at the time of the decret.

KAIMES. If the husband cannot maintain himself, how can we force him to maintain his wife? There was a claim of debts *ten* years ago, but no decret. Until decret, there is nothing more than a claim of debt.

PITFOUR. Here there was not merely a demand for aliment, but gross maltreatment proved, and diligence done upon this.

JUSTICE-CLERK. A process for aliment being brought, at what time is the Court to determine the *quantum* of the aliment? The process does not divest the husband of his property, nor puts any man *in mala fide* to contract with him. The arrestment does not vary the rule for ascertaining the aliment: the rule must still be the quantity of the husband's free effects.

PRESIDENT. The natural obligation cannot compete with debts. As soon as the aliment is constituted, this comes to be an obligation: but it is impossible to hold the action for aliment as equal to a debt.

ALVA. I think that the wife had a hold of the subject *in medio* by means of the arrestment, and is thereby preferable to the after contractions with creditors.

On the 21st November 1772, the Lords preferred the creditors, altering their former interlocutor.

Act. D. Rae. *Alt.* D. Græme, A. Lockhart.

Diss. Pitfour, Alva, (and in part, Monboddo.)

1772. December 1. MARGARET SCRUTON *against* JOHN GRAY.

FORUM COMPETENS.

The Commissary Court of Edinburgh not competent to a declarator of marriage against a person who had been some time resident here attending the colleges, not a native of Scotland, nor within it at the time of citation by affixing copies on the market-cross of Edinburgh, pier and shore of Leith, there being no *termini habiles* for a founded jurisdiction *ratione domicilii vel contractus*; and an arrestment in the hands of his late landlord, who acknowledged having in his custody certain moveables of no great value, used *ad fundandum jurisdictionem ratione rei sitæ* being deemed insufficient to produce that effect, in an action not of debt, but purely declaratory.

[*Faculty Collection*, VI. 88; *Dictionary*, 4,822.]

HAILES. By the law of Scotland, marriage may be proved from consent, without the intervention either of church or state. This is not derived from liberal principles of policy, nor from generous maxims, with regard to the constitution and interpretation of contracts, but from a fouler source, from the