No 202.

derstood that the said infeftment was made in respect of the said obligation, and so the said obligation *dedit causam infeodationi*, wherefore she could not come in the contrary thereof, she receiving profit of it; and also, a woman could have no more privilege than a pupil, and if a pupil give a reversion of lands, without that reversion, he would be compelled to keep the reversion, *et per consequentiam*, the woman was in the same case. And also the practique of Scotland was, that all such obligations are made without the presence of the husband to the effect that they should not afterwards allege the same to be done through fear of the husband; in respect of the which reply and reasons, the said exception was repelled.

Fol. Dic. v. 1. p. 401. Maitland, MS. p. 205.

1679. *February* 21. COCKBURN *against* BURN.

No 203.

FOUND (which was never decided before) that in the wife's deeds of administration of her own proper goods not falling under communion, the husband's consent is not necessary.

Fol. Dic. v. 1. p. 401. Fountainhall, MS. Stair.

*** See this case, No 29. p. 5793. and No 32. p. 5794.

1680. *June* 18. BAILLIE of Torwoodhead *against* LADY LETHEM.

No 204.
Found that a wife, though living separately from her husband, has no power to oblige herself or contract debt, but can only do those necessary deeds which tend to the administration of her separate patrimony.

IN the charge given by Baillie of Torwoodhead to the Lady Lethem his mother upon her bond, the LORDS declared they would hear this point in their own presence, If a bond granted by a woman cloathed with a husband was so null as that it neither bound her person nor her means, where she lived separate from her husband, (as the Lady Lethem did from Posso,) though not divorced; and where she, by an act of Privy Council, had the free disposal of her former jointure, or of a part of it, or had an aliment which neither her husband's *jus mariti*, nor his creditors, could reach or affect. Some thought the law, (so far as her allowance exceeded a precise aliment) should allow her to contract debt on these jointures, and she might sell her victual, and enter into contract for delivery thereof, upon which undoubtedly the buyer would get execution against her; else it would impede commerce, and none would meddle with her, whereby she might starve. And though the *S. C. Velleianum* annulled womens obligations, yet there was a threefold disparity: 1*mo*, The *Senatusconsult.* only secured wives against their intercessions as cautioners for others. 2*do*, It only related to borrowed money; whereas the bond charged on, is for furnishing necessaries to the house. 3*tio*, It did only strike against strangers; whereas this bond is by the mother to her own son, who having a *bulimia et appetitus ca-*

ninus, the mother *jure naturæ* ought to entertain him: And therefore some alleged, albeit during the standing of the marriage undissolved, she cannot be distressed for payment personally, by caption, &c. yet her jointures may be affected with arrestments or other diligence. *Vid. Ann. Robert. rer. jud. lib. 2. c. 6.*; Stair, B. 1. tit. 4. § 16. This cause being debated in presence, on the 22d July 1680, "the LORDS found a wife's bond null *quoad omnes effectus*, either of personal or real execution; and this, albeit the Lady had an obligement from her son that he should pay her such a price for these necessaries yearly as such persons should modify; because this put the Lady to be once the first disburser, and so had nothing but an uncertain action of repetition of the price." But the LORDS recommended to her to furnish her son *ex pietate materna* (for *venter non habet aures, nec patitur moram*) what she could spare. This was a caution of moral equity, but of no legal compulsion. A wife granting bond for borrowed money, and swearing never to quarrel it, yet both the bond and oath were found null and not obligatory, 18th Feb. 1663, Birch, No 165. p. 5962. No 204.

Fol. Dic. v. 1. *p.* 401. *Fountainhall, v.* 1. *p.* 102.

*** See Stair's report of this case, No 178. p. 5981.

1709. *January* 27. DICK and DUNBAR *against* LADY PINKHILL.

No 205.
An alimentary provision settled on a woman, does not fall under the *jus mariti* after her marriage, and is not affectable by her husband's creditors; but it being controverted, whether it fell under the husband or wife's administration, the Court, in respect of the husband's prodigality, found that the party who offered the best caution to apply it to the maintenance of the family ought to be preferred in the administration.

BESSIE DICK, Lady Pinkill, being provided in a jointure out of Boyd of Pinkill her husband's lands, she, to obtain his creditors' consent, enters into a transaction with them in 1698, and restricts herself to 800 merks, but takes the security by way of an yearly alimentary annuity, excluding Lieutenant Crighton, then her husband, his *jus mariti*; and that it should not be affectable by his creditors, and that her discharge should be sufficient without her husband. Crighton being dead, she marries one James Dunbar; and Pinkill shunning to pay, she pursues a poinding of the ground on her infeftment, and craving decreet, Dunbar compears, and alleges the decreet must go out in his name, as having right *jure mariti*; and though the former husband was excluded, yet he had never consented nor renounced, and the administration belongs to him as head of the family. *Answered*, She acknowledges she had made an unfortunate choice, who in sixteen months time has dissipated a great part of her means and livelihood, to her utter ruin and starving, what by his creditors' poinding and arresting all, and what by his own drunkenness and prodigality; and if he get the disposal of this small reserved aliment of 800 merks, he will reduce her to a cake of bread; and this being a constituted aliment long before he had any interest by his marriage, it must stand good against him, as well as it did against the former husband. *Replied*, Both by the laws of God and the land, the husband was *princeps et caput familiæ*, and to divest him of that power, and invest it in the wife was against the laws of nature, and *contra bonos mores*. Yea, the Lords, 9th February 1677, between Lord and Lady Collington, No 50.