

No 57.

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 fore-said, 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. 266.

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

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

No 58.

In a settle-
ment by a fa-
ther of his e-
state on his
daughter, in
trust for her-
self and chil-
dren, her hus-
band's power
of adminis-
tration, in the e-
vent of his
future insol-
vency, 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, implement 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 multiplepounding 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,

that, though a husband could renounce his *jus mariti*, so far as it respected his interest in the wife's moveables, ~~yet could not divest himself~~ of his curatorial power, or right of administration. The contrary, however, is now established; and, with respect to a third party giving an estate to a wife, it never was at any time doubted whether he might exclude the husband's power of administration; and such is the predicament in which Mr Chessels stood.

No 58.

Answered for the Creditors of Scott; The *jus mariti* is, in the eye of law, as much an estate in a husband as any other property whatever. In this case, Mr Scott appeared vested with that right from the moment his wife succeeded to her father, and, on that footing *bona fide*, his creditors transacted with him. With respect to them, therefore, the exclusion contained in the latent deed in question ought to be held *pro non scripto*. But, even though there had been no deception in the matter, the *jus mariti* having once taken effect, and a *jus quæsitum* thereby been created to the husband's creditors, they cannot justly be now deprived of it, on account of a circumstance altogether unknown to them. That would be to give to that eventual exclusion a retrospect to their prejudice, which ought not to be allowed. Every man's estate is liable for his debts. Hence entails, when first introduced, were considered as *pacta contra leges*; and it is only upon the ground of the subsequent invention of irritant and resolutive clauses, that they are now supported. But still the interests of third parties are guarded by the forms of publication which the Legislature has ordained. Nor is there any solidity in the observation respecting a distinction between the *jus mariti* and the power of administration. The *jus mariti* includes both the rights of administration and disposal; the latter of which, indeed, is inseparable from the former; Lord Stair, B. 1. tit. 4. § 9.

Replied; The argument from entails, brought into this question, is totally misapplied. There each heir is fiar or proprietor of the estate; whereas, in regard to a wife succeeding to a stranger, the estate belongs not to the husband, whose right, as such, is merely personal, but to the wife alone.

“THE LORDS found that Archibald Chessels's heritable subjects, and also his moveables, and executry funds, were vested in Helen Chessels, his daughter, in trust, for the purposes mentioned in his deed of settlement, and were not affectable by James Scott, or his creditors; and that, when James Scott became bankrupt, his right of administration of the said subjects ceased, and that the rents, and annualrents, that fell due thereafter, belonged to Helen Chessels and her children, in terms of Archibald Chessels's settlement, and were not affectable by James Scott's creditors.”

Act. Lord Advocate, Sol. General, & Hlay Campbell. Alt. Rae, A. Murray. Clerk, Gibson.

Fol. Dic. v. 3. p. 280. Fac. Col. No 110. p. 292.

No 58.

*** This cause was appealed:

The House of Lords, 23d March 1775, "ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors therein complained of, be affirmed."

1776. January 25.

PATRICK BLAIR and Others, Trustees for Barbara Blair, *against* JOHN MALLOCH.

No 59.

A wife preferred in a multiplepinding, for the interest of the sum in a bond belonging to herself, until she should be alimented by her husband; and even then, for repayment to her of a sum, not falling under the *jus mariti*, which the husband had uplifted.

BARBARA BLAIR was creditor to Captain Robertson of Newton in a bond for L 180 Sterling, payable at Whitsudnay 1770, and bearing interest from Whitsunday 1769.

By the conception of the bond, the annualrent is made payable quarterly; and Barbara Blair received payment of her annualrents from the date of the bond down to Lammas 1773.

About that period she conceived an intention of intermarrying with one John Malloch, who kept a public-house in Perth, a man of an indifferent character, and in very suspicious circumstances.

Her friends finding they could not prevent the match, endeavoured to make the best of a bad bargain, and, at all events, to secure something to her and her children. In that view, they entered into treaty with John Malloch, the intended husband, who engaged to furnish L. 50 Sterling on his part, to which L. 80 Sterling of the bride's fortune was to be added, to make a joint stock of L. 130, to be laid out upon land, or other good security, and to be employed *ad sustinenda onera matrimonii*; and it was agreed, that the remaining L. 100 Sterling belonging to Barbara Blair, should not be subject to John Malloch's *jus mariti*, nor affectable by his debts or deeds. These terms being settled, the scroll of a contract of marriage, agreeable thereto, was made out; but Malloch, who, though he had engaged for L. 50, was not master of a penny, resiled from the agreement, and would not sign the contract. The above is the account of the matter that was given by one of the parties to the present question; although it was partly contradicted by the other, viz. John Malloch, particularly as to the alleged terms of a contract of marriage having been settled, and his afterward resiling therefrom, whereas he averred that he rejected the proposal from the first, so that the scroll produced in process was a fabrication with which he had no concern.

Barbara Blair, however, did, before her marriage, execute a trust-deed in favour of Patrick Blair her brother, James Hay her cousin-german, and James Ross her doer; the three persons in whose names it was by the contract of marriage provided that execution should pass.

This deed proceeds upon the narrative, that she was resolved to marry John Malloch, though unacquainted with his stock or circumstances; and that, if