

or diminish; and while this notion prevailed, such a claim as the present could not be admitted. But those rigid maxims have since been justly exploded. A woman, *vestita viro*, is now enabled to maintain every suit against her husband which is requisite for effectuating the obligations he has come under to her. As, therefore, in a question with the husband, the pursuer would have been entitled to an aliment corresponding to the produce of her own estate, this being necessarily implied in the legal assignation of her property, which results from the marriage; so the intervention of his creditors should not here make any difference.

By one interlocutor, the LORDS found 'the pursuer entitled to an aliment during the subsistence of the marriage; and that the same, as being merely alimentary, is exclusive of her husband's *jus mariti*, and debts of all kinds preceding the commencement of her present aliment; and modified the same to L. 200 Sterling.' On advising a reclaiming petition for the Creditors, with answers for Mrs Lisk, the sums formerly awarded were restricted to L. 150 Sterling.

Lord Ordinary, *Ankerville*.

Act. *H. Erskine, Wight.*

Alt. Lord Advocate, *Abercromby*.

Clerk, *Orme.*

C.

Fol. Dic. v. 3. p. 288. Fac. Col. No 236. p. 365.

. This judgment having been appealed from, the matter was compromised.

1795. December 1.

JAMES LEE *against* The EXECUTORS of ROBERT WATSON.

GEORGE LUMSDAIN married a daughter of Robert Watson. No contract took place on the marriage; but, by the family settlements, she was entitled to L. 125 from the father, on her marriage, which was accordingly paid, and to the like sum on his death.

Lumsdain became bankrupt, and he was apprehended upon suspicion of forgery. He, however, escaped from prison, and fled to Holland, leaving his wife behind him. His estate was immediately sequestrated. His wife, after having been for some time maintained by her father, went abroad, and resided with her husband for several years; but, she having become insane, he sent her back to Scotland, where, her father being dead, she was maintained by his executors.

James Lee having purchased, from Lumsdain's creditors, the provision which he was to receive in right of his wife, on her father's death, brought an action against his executors for payment of it.

No 103.

No 104.

When the husband's estate is sequestrated, and he absconds, leaving his wife behind him, his relations are entitled, in competition with his creditors, to retain a part of her fortune remaining in their hands, either for her aliment during the life-time of her husband, or for a suitable provision to her after his death.

No 104.

Various defences were stated before the Lord Ordinary, which it is unnecessary to mention. They were repelled by his Lordship, and afterwards (20th May 1795) by the Court.

In a petition against this interlocutor, and in an additional petition allowed by the Court, retention was, for the first time, claimed by the executors, in relief of Mrs Lumsdain's part, and in security of her future maintenance, during her husband's life, and for a provision to her after his death. In support of this claim, they

Pleaded, In cases where a marriage-contract has been executed, it has often been found, that the wife, upon the bankruptcy of the husband, is entitled to retain her fortune till the conditions of the contract are fulfilled; and to rank as a creditor for her provisions, if her fortune has been already received by him. And, for the same reason, although there is no contract, it must be implied from the nature of the thing, that a wife shall have the same security for a reasonable provision out of the fortune which she brings along with her; 27th February 1765, Corrie, No 10. p. 5772.; 10th November 1687, Creditors of Ogilvy, No 106. p. 5892.

And it is surely not more the duty of a husband to secure his wife in a suitable provision after his death, than to aliment her during the subsistence of the marriage. Her right to both is equally onerous. It is true, that so long as a wife resides in family with her husband, the law presumes that she is properly supported by him, and his obligation is modified according to his circumstances; but, if he should refuse to give her an aliment, and, for the same reason, if he should desert her, or turn her out of doors, she becomes a creditor for her maintenance. 11th June 1712, Robertson against Robertson, No 44. p. 708.; 31st Jan. 1717, Cuming against Duncan, *voce* MUTUAL CONTRACT; 1770, Jamieson against Houston, No 109. p. 5898.

Answered, Where provisions are stipulated in a marriage-contract in return for the wife's fortune, her right of retention arises from the principle of mutual contracts, and not from any inherent right which she has to be provided for; Erskine, b. 3. t. 3. § 86. But where there is no contract of marriage, she is understood to rely on her husband's personal security, and to take her chance of a legal share of the residue of his funds, after his onerous debts are paid; 20th Jan. 1781, Woollen Manufactory at Haddington, *voce* MUTUAL CONTRACT.

Upon the same principle, where the husband's powers of administration, and the right of his creditors, are not excluded, the husband's obligation to aliment his wife depends on his circumstances, and ceases altogether on his bankruptcy. His wife cannot rank as a creditor for her aliment after his sequestration; and as little can she, or those possessed of her fortune, plead retention on that account; Stair, b. 1. tit. 4. § 10.; Bankton, b. 1. tit. 5. Par. 20. 8th March 1639, Lord Kilkadron, *voce* PERSONAL and TRANSMISSABLE; 26th November 1697, and 12th January 1698, Gordon's Creditors against Gordon, *IBIDEM*; 25th

November 1709, Turnbull, No 108. p. 5895. ; 8th March 1774, Rob, No 110. No 104.
p. 5900.

THE LORDS adhered to the former interlocutor, repelling the defences.

Lord Ordinary, *Abercromby.* Act. Connel. Alt. Solicitor-General Blair, Jo. Clerk.
Clerk, Home.

D. D.

Fac. Col. No 188. p. 455.

1796. March 1. MRS JEAN GIBSON *against* CHRISTIAN KERR REID.

THE nature of the claim brought in this case by Mrs Jean Gibson against Christian Kerr Reid, and the clauses in the entail of the estate of Hoselaw upon which it depended, are narrated, *voce* TERCE.

THE COURT, 9th June 1795, found, ' That in this case, the pursuer's claim of aliment cannot be extended beyond the 400 merks allowed by the entail in question to be settled on wives.'

Upon advising a reclaiming petition with answers, the LORDS, 25th November 1795, ' before answer as to the quantum of her aliment, ordered a condescendence of the free rent of the estate, after deducting the interest of the debts with which it is affected, and of any other circumstances that may have an influence in ascertaining the extent of the aliment.'

Parties differed as to the amount of the free rent of the estate. It appeared to be about L. 180 or L. 190 per annum. But along with his condescendence, the defender gave in a petition, in which he contended, That the question must be determined by the clauses of the entail, without regard to the value of the estate ; and further

Pleaded, If the claim of a widow to an aliment out of the estate of her deceased husband, different from the terce and *jus relictæ*, be at all founded in law, it comes under the description of a legal provision, and therefore the entail of Hoselaw contains an irritant, as well as a prohibitory and resolute clause against it ; and it can make no difference as to this question, that the entail contains no irritancy against the contracting of ordinary debts.

Besides irritant and resolute clauses were both unnecessary. The right of the widow, at best, is only to a maintenance out of the free funds of her husband. It is postponed not only to onerous but gratuitous creditors, and consequently must be postponed to the right of the substitutes in an entail with prohibitory clauses, which constitutes them onerous creditors of the heir in possession.

Answered, The widow is an onerous creditor against her husband's estate, to the extent of a maintenance suited to his rank and circumstances. Her claim may therefore be made effectual out of any subject which is liable to his onerous debts, and it is admitted, that the estate of Hoselaw is so.

No 108.

When an entail fixes the *maximum* of the provision which an heir can give to his widow, and he dies without making any settlement on her, a greater sum cannot be awarded to her in name of aliment.