

No 72.

ris, and Molineus ad consuetud. Parisienses. After all, the LORDS thought it dangerous to unhinge our ancient practice by introducing a novelty, which though very plausible, yet belonged more to parliamentary power; therefore they preferred the creditors arresters to the Lady.

*Fol. Dic. v. 2. p. 77. Fountainball, v. 1. p. 797. and 811.*

1705. February 3.

DICKSON against BRAIDFOOT.

No 73.

A clause in a contract of marriage appropriating a jointure the wife had by a former marriage, to the maintenance of the family, found to exclude the husband's creditor, as the sum did not exceed a suitable aliment.

HELEN BRAIDFOOT being first married to Menzies of Harperfield, and by him liferenting some lands, she marries Pitcairn of Pitlour to her second husband; and he being debtor to James Dickson, merchant in Edinburgh, in a certain sum, he arrests the rents of her jointure-lands, and pursues a forthcoming. *Alleged*, That she, foreseeing her husband to be in some debt, had provided against the same, by a clause in her contract of marriage with him, expressly allocating, destinating, and providing her jointure for the maintenance and subsistence of her family, and that it shall not be lawful for any of them to apply it to any other use, and so debarring her husband and his creditors from any intromission therewith to any other end, but constitutes it as a formal aliment. *Answered*, 1mo, In the case of the Lady Collington and Foulis of Ratho, Feb. 9. 1667, No 50. p. 5828, the *jus mariti* was found not renounceable, but like water cast on a higher ground, it still recurred and came back to the husband; see also 13th July 1678, Nicolson, No 52. p. 5834; and 10th January 1682, Telfer, No 53. p. 5836. *2do*, Though it were renounceable, yet here it is not done, for this clause will not amount to a formal renunciation of the husband's *jus mariti*, which ought to be *specifice* and *in terminis* done, and not inferred from remote consequences. *3tio*, If this were allowed, every jointure and tocher shall be conceived by way of personal appropriation, which teaches bankrupts a way to defraud their creditors. *Replied*, Though of old the Lords thought the *jus mariti* so inherent *ossibus mariti*, that it could not be renounced, yet now they find it may be restricted, renounced, and regulated, *per paeta dotalia*; and the decisions cited point mainly at this, that a husband may not renounce his right of administration, headship, and management; for that were to unhusband himself, and renounce the privilege given him by the laws of both God and nature; and though law gives him right to all his wife's moveables, yet *provisio hominis* may take this away; yea Dirleton goes a greater length, for in his *Dubia et Quæstiones, voce ALIMENT*, he condemns the lawyers qui magno conatu et boatu would persuade judges, that wives' jointures are subject to the husbands creditors' diligence, though the *jus mariti* be renounced. THE LORDS, by plurality, found this clause of appropriation excluded the husband's creditors, and made it so personal, that it was not affectable by arrestment, no more than a formally constitute aliment can be arrested, as

was found 9th July 1668, *Bogg contra Davidson*, No 62. p. 10380; but if it exceed the bounds of a suitable aliment, conform to the parson's equality, (which is to be modified and determined by the Lords), then the excess may be affected by creditors.

*Fol. Dic. v. 2. p. 77. Fountainball, v. 2. p. 265.*

No 73

1705. June 22.

Mr WILLIAM IRVING, Minister of the Gospel, *against* PATRICK CRAWFORD, Merchant in Edinburgh.

THOMAS GORDON being debtor to the Earl of Cassillis, Mr William Irving, to whom the Earl was debtor, arrested first in the hands of Gordon, and obtained a decret of forthcoming; then he arrested in Patrick Crawford's hands, as debtor to Thomas Gordon, and pursued a forthcoming, wherein the defender deponed, "That he was noways debtor to Thomas Gordon, but only in so far as by a decret-arbitral he is decerned to pay to him and his wife in liferent for their aliment the annualrent of 3000 merks, and the fee to their children, which sums are declared not affectable by Thomas Gordon's creditors."

*Alleged* for Crawford; That he could not be decerned against in the forthcoming, the annualrent of the 3000 merks due to Gordon being alimentary, and not affectable by his debts.

*Replied* for the pursuer; The 3000 merks being the proper effects of Thomas Gordon, neither he nor the arbiters could alter or invert the nature thereof by making it alimentary, or declaring it not to be subject to the diligence of his creditors; for no man needed to trouble himself about the payment of his debts, if he could declare his own estate free from diligence.

THE LORDS found, That after Gordon was debtor to the Earl of Cassillis, the decret-arbitral could not prejudice the Earl; and consequently that the annualrent of the 3000 merks was arrestable.

*Fol. Dic. v. 2. p. 77. Forbes, p. 10.*

No 74.

A debt payable to one by a decret-arbitral, arrestable by a creditor to him, before the decret, altho' it was therein declared alimentary and not affectable by creditors.

1705. July 5.

CLELAND'S CREDITORS Competing.

IN the competition betwixt William Hamilton of Wishaw, and the other creditors of Cleland of that ilk, Wishaw craved preference to them all for L. 721 Sterling, on this ground, That Cleland being collector of the cess and supply for the shire of Lanark in 1701, and Wishaw his cautioner, he fell in arrear to the general receiver, and commissaries of the army, in that sum, so that Wishaw being forced to pay it, he has got an assignation thereto; and the public being a privileged creditor, he, as come in their place, has the same privilege; wherein he endeavoured to clear the Lords on these two points, *imo,*

No 75.

The assignee of the fisk found to have right to the privileges of the fisk.