THE LORDS decerned a proportion not to be allowed in the subsequent term's annualrent.

No 117.

February 1.—IN a count and reckoning pursued at the instance of Jean Couper, executrix to Jean Skeen, Lady Tofts, her mother's sister, against the Laird of Tofts, it was *alleged*, That the Laird of Tofts could have no modification for her aliment after her husband's death to the next term; because her defunct husband had a family in the Merse, (with whom she did not remain) till Whitsunday after his death, who died in January before, she having remained all that time in Edinburgh.—It was *answered*, That her husband having died in Edinburgh, and there being no children betwixt them, she might very well remain at Edinburgh; and for entertainment, she craved no more but what the Lords should modify.

THE LORDS modified a proportion of what she was provided to by her contract of marriage, which being 2000 merks yearly, they made it 600 merks.

And it being *alleged*, That this 600 merks should be allowed to her in part of payment to her of the 1000 merks which was payable to her at the Whitsunday after her husband's death; the LORDS found it should not be allowed; for at what time soever a liferenter of an annualrent dies, the term's annualrent due after their death, will not fall to the liferenter's executors, but to the heir; and therefore they allowed the maintenance till the first term's payment of the said annualrent, who, if she had died before the said term, her executors would not have gotten the annualrent.

Gilmour, *No* 30. *p*. 23. & *No* 25. *p*. 20.

*** See Belshes against Belshes, No 62. p. 3873. which appears to be the same case as reported by Stair.

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A Lady, who in lieu of her jointure, had a bond for a great sum from her husband, payable the term after his decease, craved aliment for maintaining the family five months, from her husband's death till the term after that event. The Lords found aliment due, notwithstanding the bond.

1708. *January* 21.
LORD JUSTICE-CLERK and his LADY, *against* JOHN HAMILTON of Bangour.

LORD GRANGE reported the mutual processes betwixt John Hamilton of Bangour, and the Lady Whitelaw, and my Lord Ormiston, Justice-Clerk, now her husband. Sir William Hamilton, Lord Whitelaw, granted a bond for L. 7000 Sterling to his Lady, failing heirs of his own body. She pursues a constitution of this debt against Bangour, who repeats a reduction of it on these reasons, 1mo, It is null, because though it bear witnesses inserted and subscribing, yet it is offered to be proved by these witnesses oaths, that the paper was presented to them, folded up to the very doquet and signing, and they saw nothing above the said Lord Whitlaw's subscription; so that it might have been a half sheet of blank paper for them; and there was a marginal note to which they are made to be witnesses, and yet saw it not; and if this practice were once allowed,

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then the design of that excellent law, act 25th, 1696, declaring all blank writs, either in whole, or in any substantial parts, null after that act, would be frustrated; and therefore, my Lady Ormiston ought to prove that her name was standing filled up at the time of the witnesses subscribing; and they ought to be examined, if they saw any writing on the paper above my Lord Whitelaw's subscription; a subscription necessarily requiring something *supra scriptum*; and if this strange method of concealing the whole writ be once allowed, then the law of death-bed is overturned, as also all reductions of bankrupts deeds on the act of Parliament 1621, or *ex capite inhibitionis*; for the creditor's or receiver's name may be left blank at subscribing, and filled up either on death-bed, or after he is broke or inhibited, though it bear a date anterior to all these three cases; neither does its being holograph solve the matter, for that proves not its date against the heir; and though the Romans used caution enough in cancelling their substitutions wrote *in ultima cera*, yet the law expressly required the filling up of the heir's name in the testament, in presence of the witnesses adhibited.—*Answered*, They opponed the bond, all written *unico contextu*, wherein, by ocular inspection, there is not the least vestige or appearance that ever there has been a blank; and for the marginal note, being of no moment, they pass from it, and so *utile per inutile non vitiatur*; and it were a new paradoxical doctrine to require that witnesses should see or know the contents of the paper they are called to. It is true, a witness is so far concerned to think he is not called to attest a treasonable writ, and for that he relies on the probity and fidelity of his employer. *2do*, In all instruments of notaries, such as sasines, intimations, &c. the contents and heads of the writ must be read or explained to the witnesses; and, *3tio*, By the law of England, a writ is not probative till the witnesses, if in life, make affidavit on the verity of the deed; but with us, a writ formally subscribed before witnesses, becomes *ipso momento* from delivery, or its dispensing therewith, a valid obligatory writ, and all is presumed *solemniter actum* in favour of the deed, unless improved or reprobated by some known nullity in law; and therefore, unless Bangour will offer positively to prove, by the witnesses inserted, that it was blank, either in whole or in part, when they subscribed it, the writ subsists as a good and complete deed; and it were a dangerous and unheard of presumption, to suppose it null and blank because of the folding up, unless the creditor, receiver of it, prove it was then actually filled up; for, to transfer the *onus probandi* on the receiver were to shake and unhinge all the securities and settlements of Scotland, which stand upon this firm basis, They are good probative writs, except you convel and redargue them by some known nullity in law; and the *onus probandi* lies on the proponer, *allegunti, incumbit probatio*; and writs must not depend upon such uncertainties, as it may be, it was blank in whole or in part, unless there were an act of Parliament made, that witnesses shall not subscribe a deed until they first read or know the contents thereof.—*Replied*, That heirs may be easily defrauded, if a folded paper, concealing all the writ above, shall be sustained in favour of a

wife; for where she has got the ascendant over her husband, it is easy for him to leave it blank when he adhibits the witnesses, and fill it up long after. And all laws grow gradually, as the cunning inventions of men increase to elude what was law before; for then new antidotes must be invented for new frauds, and deceits set on foot to disappoint former laws, especially *in re domestica*, where the *blanditiæ* and suggestions of a wife may prevail very far.——THE LORDS repelled the nullity, and sustained my Lord Whitelaw's bond to his Lady, notwithstanding the writ was covered and folded down when the witnesses subscribed it; and found it not relevant *esto* it were true, and refused to examine them thereupon, unless it were positively offered to be proved that it was then blank, either in whole or in part.—The *second* reason of reduction was, That he binds his heirs and successors, and not himself; whereas, by an express title in the common law, all obligations must begin *a defuncto*, otherwise *nec prosunt nec obsunt hæredibus*. *3tio*, This being a moveable bond, and granted *stante matrimonio*, it *jure mariti* recurred to the husband, and could not subsist in her person, as Newton observes was decided in January 1682, Telfer *contra* Campbell, No 53. p. 5836.; and was so found before, 9th February 1677, Lord Collington *contra* Tenants of Invertyle, No 50. p. 5828.; and 13th July 1678, Nicolson *contra* Inglis, No 52. p. 5834.—*Answered*, That subtilty of the Roman law, making an obligation necessarily to commence at the defunct, was repudiated by the later constitutions, as a groundless ceremony; and a renunciation of the *jus mariti* to accresce and devolve again upon the husband, though advanced for a while *tam magno conatu et boatu* by our advocates, *primi ordinis*, as my Lord Dirleton speaks, *voce* ALIMENT, is now laid aside; and it is generally acknowledged, that paction will over-rule it, that it shall not, like water cast up a hill, recur back again; but if Bangour subsume, this bond was revoked by my Lord Whitelaw, the allegeance will be good.——THE LORDS repelled the *second* reason.—The *third* was, That this bond was extinct by confusion, in so far as my Lady was a vitious intromitter with her husband's goods, and so universally liable, at least to extinguish her own debt.—*Answered*, *1mo*, By her contract of marriage she had right to a share of her moveables. *2do*, Any intromission she had was necessary *custodiæ causa*. *3tio*, This was only competent to a creditor. *4to*, The Lady Houshill was confirmed executrix to her brother, from whom she has right; and this purges vitious intromission.—*Replied*, Confirmation can never defend here, because there is a fraudulent superintromission concealed, and not given up in the inventory, as both Hope in his larger and lesser practics, and Spottiswood, *voce* EXECUTORS, observes; and the heir is a creditor *quoad* his relief of moveable debts.——THE LORDS found the confirmation purged the passive title of vitious intromission, being before citation in the pursuer's process; and that the concealing and superintromitting made only place for a dative *ad omissa*.

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1708. *November* 16.—LORD GRANGE reported John Hamilton of Bangour *contra* Lord Whitelaw's Relict, now Lady Ormiston, of which cause see more

No 118. at the 21st January 1708. The Lady now insisted on another conclusion of her summons against Bangour, for implementing that clause in her contract of marriage, whereby Whitelaw was bound to provide her to the liferent of L. 200 Sterling, as the annualrent of 60,000 merks. *Alleged* absolvitor; because posterior to the said contract of marriage my Lord Whitelaw had granted her a bond for L. 7,000 Sterling, which being *majus* included *sub se minorem summam*, and must be understood to be in lieu and full satisfaction of all prior obligations; for law never presumes a donation, where there is a debt; but on the contrary, *nemo præsumitur donare nec rei suæ jacturam facere*, especially where the deed is in favours of a wife, and to the prejudice of an heir, whom law presumes the defunct *gravare* as little as he can, and this agrees to the constant uniform practice of our decisions, as is to be seen, 4th February 1623, Guild *contra* Guild, *voce* IMPLIED DICHARGE AND RENUNCIATION; 11th Nov. 1624, Wallace, *voce* WRIT; and 24th February 1632, Kinnaird, No 40. p. 5469.; and in President Newton, 27th Nov. 1685, Robertson, *voce* PRESUMPTION; 16th Nov. 1682, The Children of Walter Law, Div. 11. Sec. 1. *h. t.*; and 2d February 1686, Selkirk, *voce* PRESUMPTION; in all which cases and many others, the brocard *debitor non præsumitur donare*, was sustained, and any posterior deeds were abscribed in payment and satisfaction of the first debt. *Answered*, If my Lord Whitelaw, a very eminent lawyer, and nice in the framing of clauses, had designed the L. 7,000 bond to be in implement of his prior obligement for the liferent-jointure, he would have certainly expressed it so; and it must be a donative *per se* without regard to her contract of marriage, because in the last he binds his heirs whatsomever, and in the L. 7,000 bond only his extraneous heirs, not of his own body; and since that bond he purchased houses and stables, and took the rights and securities of them to her in liferent, which implies he designed that she should bruick and enjoy her liferent over and above that donative. THE LORDS thought if that brocard of *debitor non præsumitur donare* took not place here, it could never take place, seeing it was between an heir who was favourable in law, and a relict who beyond her legal provision of a *rationabilis tertia* is not very much to be favoured, law having restrained donations *inter virum et uxorem*; and therefore found, by plurality of votes, that the L. 7,000 Sterling bond was presumed to be in satisfaction of the liferent provisions in the contract of marriage, and fully implemented the same, as being more.

1709. *January* 15.—IN the mutual actions oft mentioned *supra*, betwixt Hamilton of Bangour and the Lady Whitelaw, the Lady insisted for alimenting the family from the time of her husband's decease in December 1704, to the Whitsunday thereafter, being five months and some more, for which she craved L. 200 Sterling to be modified. *Alleged* for Bangour, That the foundation of this practice to aliment the family out of the defunct's means till the next term, was founded on this principle of natural equity, that they had not where-

with to defray the charge till their jointure existed, and became due, which was not till the next term; but where they had a fund and stock flowing from the husband whereon to subsist themselves, that reason ceased, and so they could claim no aliment, which was the present case; for my Lord Whitelaw had given her a bond for L. 7,000 Sterling; and though it was not due till the term after his decease, yet it was a sufficient fund to afford her credit to maintain herself, and her own peculiar servants to the term; however my Lord Whitelaw's executry might be liable to aliment his own servants till the next; but his Lady being full handed, could crave nothing; and seeing the Lords had found this bond was in place of her jointure, and she could not claim both, by the same rule it behoved to stand for her claim of aliment till the next term, as well as for her jointure, seeing *debitor non præsumitur donare*. *Answered*, This defence was new doctrine; for if this held, then a relict, who had been married to a former husband, and had a jointure by him, might be denied an aliment, because you can maintain yourself on your first husband's jointure. *2do*, This can be obtruded against an heiress of lands, when she becomes a widow; you can crave no aliment to the term, for you have lands in property, by which you can competently maintain yourself. *3tio*, Where the contract of marriage provides the half of the tocher to return to the wife in case of no bairns procreated of the marriage, or gives her the half of the conquest, in that event, will any body say that this will debar her from seeking the aliment of the family till the next term, though she have more than sufficient fund from her husband to live upon till that time. *Replied*, A widow having a liferent by a former husband cannot be denied an aliment, because her jointure is uncertain, depending on her life, and if she die before the term, she and it end together; but where she has a stock in money, there is no reason that either her husband's heir or executor be burdened with her aliment. Will any Judge give an apparent heir aliment, if it be instructed that he has *aliunde* to maintain himself; and even so here, in relicts. THE LORDS, by plurality, repelled the defence, and found an aliment due, notwithstanding of her L. 7,000 Sterling bond. The next question was, what it should be? and the Lords made her liferent provision the rule; and finding her jointure was L. 200 Sterling per annum, they modified the alimenting of the family for five months and a half to L. 100 Sterling. The Lady had proved by her chaplain, and other servants in the house, that she had actually expended the aliment on the family till the next term. The common defence used to be proponed against this aliment, was omitted by Bangour, viz. You can have no claim for alimenting, because there was sufficient provisions laid in to serve the house till the next term, at least, to diminish the modification and make it less, such as provisions of meal, malt, coals, &c. which might furnish the family *pro tanto*, till the next term; or, *2do*, You intromitted with as much money lying beside the defunct as might defray the expense, though that money might have been expended on the fu-

No 118. neral charges and mournings, which require present money; and if so, it would not be deducted off the aliment.

Fol. Dic. v. 1. *p.* 395. *Fountainhall, v.* 2. *p.* 421. 462. & 480.

*** Forbes reports the same case.

IN the process at the instance of the Lord Justice Clerk and his Lady, against John Hamilton of Bangour, the pursuer insisted for payment of L. 200 Sterling, as the aliment of Sir William Hamilton's family, due to the Lady from his death, to the first term thereafter, when her liferent provision did commence.

Alleged for the defender, Whatever might be pretended for the servants left in Whitelaw's family at his decease, no aliment could be due to the Lady and her necessary servants; because, she had a separate provision from the defunct, viz. the L. 7000 Sterling bond, whereof *dies cessit* at his death, which was a sufficient fund of credit to aliment herself; and aliment supposeth a previous necessity in the person to be alimented in all cases. So an heir cannot pretend to an aliment from the liferenter, if he have a separate estate; nor children from their parents, if they can, by their employments, or otherwise, sustain themselves; yea, a relict provided to a liferent of lands, will have no aliment from the heir, to the term of payment of the rents, No 117. p. 5908, observed by Gilmour. For *provisio hominis tollit provisionem legis*; and the maxim, *nemo alitur de præterito*, goes upon this foundation in law, that none can claim aliment who have of their own. 2*do*, As the Lords have found, 16th November, in this same cause, that the L. 7000 Sterling bond is imputable in satisfaction of the liferent provision, it must likewise be ascribed to extinguish the aliment; because, *debitur non præsumitur donare*, takes place against implicit, as well as express obligements; and the aliment coming only in place of the liferent provision to the term subsequent to the husband's death, is extinguishable in the same manner.

Answered for the pursuers, Aliment doth not, in all cases, presuppose necessity in the person to be alimented; for a husband is bound *ex officio* during the marriage, to aliment his wife, though she hath a reserved *peculium* of her own sufficient for her maintenance; an heiress has right to aliment till the next term, off her husband's heir, though she hath a fund of credit; a wife will have right to an aliment after the death of her second husband, albeit her jointure by the first would supply her necessity in that interval; and the same tie that is upon the husband to maintain his wife, during the standing of the marriage, continues by our custom till the next term, for till then the family is not understood to be dissolved. 2*do*, The Lords presumed the bond to have been granted in place of the provision in the contract; because, Sir William Hamilton, at the date of the bond, knew himself to be under such

a former obligement; but he could not then have in his view an obligement which did not exist, and was so casual as that it might have never existed by his surviving his Lady, or living till the day before the term.

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THE LORDS found an aliment due, and modified L. 100 Sterling to the Lady for maintenance of the Lord Whitelaw's family from the 14th December 1704, to Whitsunday thereafter. See OBLIGATION. PRESCRIPTION. PROCESS.

Forbes, p. 310.

*** In this cause, a point was determined relative to the funeral expenses of the defunct. See No 2. p. 4981.

1712. *June* 20.

ISOBEL MONCRIEFF and her HUSBAND *against* CATHARINE MONYPENNY, Lady Sauchope.

No 119.
A relict provided to an annuity to be uplifted betwixt Yule and Candlemas after her husband's death, was allowed a sum for her aliment from her husband's death till the commencement of the annuity.

GEORGE MONCRIEFF of Sauchope, in his contract of marriage with Catharine Monypenny, obliged himself to infeft her in a liferent yearly annuity of eight chalders of victual, to be uplifted betwixt Yule and Candlemas furth of his lands, beginning the first year's payment, betwixt the first feast of Yule and Candlemas after his decease. George Moncrieff having died November 19th 1707, Catharine Monypenny, his relict, craved an aliment to be modified to her, from the 19th November, till Candlemas thereafter.

Alleged for Isobel Moncrieff, the husband's executrix, No aliment can be allowed, because, aliment to a relict till the next term after her husband's decease, is indulged only when she hath neither immediate access to her jointure, nor a fund of credit, that she may not be left to live upon the air; as when her liferent is provided by way of annualrent, in which case, if she happen to die betwixt terms, or before the first term of payment of her jointure, she gets nothing at all; and seeing that may fall out, no person will credit her in prospect of her jointure; which reason for an *interim* aliment ceaseth in this case, where the relict's security in a liferent annuity out of certain lands, afforded her a fund of credit immediately after her husband's decease; seeing, whether she survive Whitsunday or Martinmas or not, she has still right to less or more of her jointure. This distinction seems to be established by a solemn decision *in terminis*, Couper *contra* L. Tofts, No 117. p. 5908.

Answered for the Relict. There is no solid difference betwixt a liferent provision of annualrent, and a liferent provision out of lands, where the provision doth not commence till the first term after the husband's death. For here lies a necessity of an alimentary provision *medio tempore*. Whether the liferent be due the next term after the husband's decease or not, by the re-