No 119. lict's living till then, or dying before; or whether she have a fund of credit or not, aliment is due to her by a general rule, and not in particular cases only. So that she is entitled to an *interim* aliment by a general rule, whereby a relict, having a jointure by a former husband, or being proprietor of lands as an heiress, hath right to such an aliment; which proceeds rather upon the motive of natural obligation, than that of mere necessity. As to the objected practick, it makes for the relict, since there aliment was decerned not to be allowed in the next term's rent.

THE LORDS modified a sum to the relict for her aliment from her husband's death, till the commencement of her jointure.

Forbes, p. 601.

1713. *July* 15.

The CREDITORS of ROBERT SCOTT of Harden, and JEAN KERR, his Relict, Competing.

No 120. IN a competition betwixt the Lady Harden and her deceased husband's creditors, THE LORDS found, that the extent of the Lady's jointure is not to be the rule of alimenting the defunct's family till the term after his death, but the quality of the person, and condition of the family left by him.

Fol. Dic. v. 1. *p.* 395. *Forbes, p.* 703.

1737. *November* 18. MARY BOSWELL *against* DAVID BOSWELL.

No 121. How much is to be allowed to the relict for aliment till the term is arbitrary, according to circumstances: The jointure is not the rule; nor was a separate aliment found to be the rule, which she had complied with, rather than live with her husband; but in respect of the circumstances of the estate, the LORDS, in the present case, allowed her only a proportion of the separate aliment, unless she show cause from the circumstances of the heir for a larger allowance.

Fol. Dic. v. 1. *p.* 395.

*** C. Home reports the same case:

BY contract of marriage betwixt Andrew Boswell and the said Mary, he provided her in the equal half of his estate, which was, in whole, about 1200 merks a-year; as also to the mansion-house, yards, &c. which she accepted, 'in full satisfaction of all terce of land, third part of moveables, and others 'whatsoever, that may befal to her, by and through her husband's decease, 'in case she survive and outlive him, except her abuilziements, ornaments,

'and third part of the moveables of their house, for the time, which are here- No 121.
'by disponed to her,' &c.

Some years before the dissolution of the marriage, Andrew separated from his wife, and gave her an aliment of 200 merks yearly; who, upon her husband's decease in February 1736, insisted against his heir for an aliment to the next term, which, she contended, should be proportioned according to the liferent provided to her by the contract. *2dly*, She claimed the third share of the moveables, including the heirship.

Pleaded for the heir, to the *first*: That the rule of modifying the aliment ought not to be what the pursuer is to have of liferent in her viduity, but what she had from her husband during the marriage; for that the time of alimenting, from the husband's death to the first term after, is considered to be the same as alimenting his family; consequently, the aliment ought to be suitable to what was then allowed her: *e.g.* If she had been married to a man of great estate, and had only been provided to a small liferent, the modification of her aliment would have been suitable to what she would have had while in her husband's family; and, by the same rule, it ought to be lessened, when her husband's circumstances were such as made him incapable to give her an aliment suitable to the extent of her liferent; or, suppose the case, which many times falls out, that a husband has but a small free estate, and that his widow, by his death, comes to a liferent much more in value than the yearly free rent he had to live upon, it would not be reasonable she should have an aliment suitable to her husband's circumstances in her viduity; so that the rule ought to take place here, *surrogatum sapit*, &c.; more especially as the defender has nothing to maintain himself out of the estate, the annualrents of the debts thereon being more than exhausts the full half of the rents.

To the *second*, it was *answered*; That, in provisions to wives, it has been always considered as a doubtful point, whether heirship was understood excluded, or included; and therefore it has commonly been in use, for removing this doubt, to express in the deed, That heirship was included in the provision, when it was designed that these should go to the widow; which not being done in this case, creates a presumption they were not intended to be included; and which ought the more especially to hold here, seeing this provision is given as a part of the third of the moveables to which she would have had right *jure relictæ*, if she had not been excluded, and so the third must be understood to be of the same nature and kind of moveables which she discharged.

Replied for the relict: That the aliment allowed her, while she lived separate from her husband, can be no rule for proportioning the aliment now claimed; because, while he lived, he had himself and a separate family to maintain. Besides, there might be many other reasons for giving a scrimp

No 121. allowance to his wife during their separation, and which, for peace sake, she might be willing to accept; but, as that ended as soon as the marriage dissolved, the relict, of course, falls to be alimented by the heir, to the next term that her liferent commenced, according to her station; for ascertaining whereof, there can be no better rule than to make it correspond to the liferent provisions to which she is entitled in the event of her surviving her husband. Nor is it any objection, That there are considerable debts owing by the defunct; seeing the aliment due to the relict, till the first term after the husband's death, is as just and onerous a debt as any other; and the estate cannot but afford it, seeing, by the husband's death, the expense of him and his separate family ceases. And, with respect to the heirship, that point was settled in the case betwixt Lady Kinfawns and Mrs Lyon, 12th July 1734, *voce* PRESUMPTION. Nor is it of any importance, that the contract does not bear heirship included; for, it may as justly be argued, that, as it does not bear heirship excluded, it was designed she should have the third of the household plenishing, as it stood at the time of the husband's decease. And it is a mistake to say, that the provision is given as a part of the third of moveables, to which she would have had right *jure relictæ*; for she gets not a share thereof but, in place of it, and other provisions that would have fallen to her by law, a particular jointure, and a share of a particular species only of moveables; namely, the houshold plenishing, as it should be at the time of her husband's death, which she must have as it stands; because, in consideration thereof, and her jointure, she renounces all legal provisions, and all share of any other kind of moveables, whether there were children or not.

THE LORDS found, That the proportion of the conventional aliment must be the rule, unless it can be shown, That, from the circumstances of the estate, there is place for a larger; and that the pursuer had a right to the third share of the houshold plenishing, including the heirship.

C. Home, No. 76. p. 127.

1744. *Dec.* 11.

EXECUTORS-CREDITORS of Mr HUGH MURRAY *against* GRAHAM of BALGOWAN.

No 122.
Upon the death of the husband, the relict's father, is not entitled to retain the tocher for the aliment which he has given her, till the next term, but may retain it till she

SIR ALEXANDER MURRAY-KYNNYNMOUND married Jean Graham, daughter to Balgowan, and by the contract between them, on consideration of the marriage, and of L. 1000 Sterling of portion received by him, he provided her in a jointure, in lieu of all her legal claims, except her half or third of houshold furniture, in the event of the marriage dissolving by his death, with or without children; which proportions he, in the respective events, disponed to her: And by another clause, he obliged himself to pay to Balgowan 6000 merks Scots, at the first term after the dissolution of the marriage, if the same should