1738. *June* 9.

Creditors of Mr David Watson *against* Elizabeth Cameron, Spouse to Mr Watson, and Dr Cameron, Son to the deceased John Cameron.

No 48.
If a husband is unable to perform his part of a marriage contract, his creditors have no right to sue for implement of the prestations incumbent on the wife's part.

By contract of marriage betwixt the said Mr Watson and his wife, he obliged himself to secure so much to him and her in conjunct fee and liferent, &c. and, on the other hand, John Cameron, her father, became bound to pay a certain sum in name of tocher, at the terms therein mentioned, &c.

Mr Watson's circumstances having gone into disorder, he conveyed his effects to his creditors; whereupon they brought an action against the father's representatives, who likewise repeated a reduction of the contract, upon this medium, that Watson had not implemented his part, by securing the sums provided to his wife.

In this process, compearance was made for Mrs Watson; who *insisted*, That she was entitled to a modification of an aliment out of her own tocher; founding her plea chiefly on this, that, without any express contract for that purpose, a husband was bound, by every law human and divine, to maintain his wife; which holds so strongly, that any person who furnishes her aliment, is entitled to an action against the husband, for the value of what was furnished, being in so far considered as a creditor to him; and, if Mr Watson himself were insisting for payment, the defenders would have been entitled to detention of what was bestowed for her aliment; and there is the same reason for retaining the portion here for this purpose, as she is now disappointed of her aliment, by her husband's not performing his part; more especially as there can be no doubt, that the tocher was promitted with the view of that obligation the husband is under to aliment his wife; which he not being in a condition to do, the portion ought to be so applied.

Answered for the Creditors, That there could be no doubt, there was a natural obligation upon a husband to aliment his wife; and, in case he refused so to do, a Judge might modify an aliment out of his effects, which would become a proper debt, and the foundation of diligence, so as to compete with creditors; but that did not apply to the present question, where the husband has nothing to maintain himself; in which case, his obligation to aliment was at an end, as no man could be obliged to impossibilities; 2*do*, When the law has divested the husband of his effects, in favour of creditors, it has not laid them under any obligation to aliment their debtor's wife out of these subjects; 3*tio*, Supposing an aliment were to be modified to Mrs Watson against her husband, yet it would be but a personal debt, which could not compete with creditors, who, several years ago, divested Mr Watson. And here it is necessary to observe, that there is a legal difference betwixt aliments that are due *jure naturæ*, for instance, by a husband to his wife, or by parents to their children, and ali-

ments due by a ward superior to his vassal, or by a liferenter to a fiar, or the apparent heir of the fee. In the first case, the obligation arises from the personal connection betwixt the party to be alimented, and the person liable to that burden, without any relation to his estate; and, therefore, the claim of aliment does not really affect any part of his estate, heritable or moveable; consequently, such obligation can have no effect against his singular successors, whether legal or voluntary. But, in the second case, the ward vassal, or the fiar, has a proper legal interest in the lands, without any regard to the possessor of the casualty of ward, or of the liferent; and, therefore, their right of aliment is not altered by a conveyance. No 48.

Replied for Mrs Watson, and Doctor Cameron, the Representative of John Cameron, It is a principle of law, universally acknowledged, that, if one become bound, under any condition expressed or implied, to pay or perform, that condition, whether suspensive or resolutive, is an inherent quality in the obligation; so that it is either not obligatory, or the obligation not exigible until the condition is purified; for, in all mutual contracts, performance on the one part is understood to be the mutual cause, and a condition of the performance on the other; it is, therefore, plainly repugnant to these principles, that, where the obligation is reciprocal, action should be competent to either of the parties against the other, without previously performing what he himself is bound to.

Duplied for the Creditors, Whatever be the case of common mutual contracts, wherein mutual prestations are the adequate cause of each other, contracts of marriage are of a very different nature; there the marriage is properly the cause of all the stipulations on either side, and the marriage articles are no more but conventional settlements of the legal rights that arise from the marriage; the tocher comes in place of the *jus mariti*; the wife's jointure in place of her terce and third of moveables, *&c.* And, as these legal rights will take place where they are not excluded by a contract, without any regard to the estate brought by the husband or wife, so it is impossible that the marriage contract can be considered upon the footing of other mutual contracts, where the one party's obligement is the adequate cause of the other's. A man may provide his wife in a jointure, though she bring no tocher; and the wife's want thereof will not prejudge her legal rights; which is a demonstration that a marriage contract is not like a bargain of sale, that cannot subsist without a price.

Triplied, It is incumbent upon the creditors to point out the law or reason of the thing that should make a distinction betwixt contracts of marriage and other mutual contracts. The genius of most laws have leaned the other way, to put them on a more favourable footing. By the ancient law of this country, they had a preference amongst their husband's personal creditors. And, as to the observation, that the marriage itself is in part the cause of the mutual obligations *hinc inde*, it was *answered*, That, if the husband marries the wife, the

No 48. wife marries the husband, and, in so far, they are at least equal; and though the provisions *hinc inde* are, no doubt, gone into from a view, and upon supposition of the marriage which is to follow, yet it is ludicrous to say the marriage itself is any part of the onerous cause of the mutual contract. The Romans surely had a quite different notion of the matter, when they required an exact equality betwixt the *dos* and *donatio propter nuptias*, as the *quid pro quo*; and the stile of our marriage settlements strongly confirms the truth of this proposition; the husband obliges himself to secure the wife in a certain liferent, &c. *for the which causes*, she, or whoever contracts for her, becomes bound to the husband; thereby plainly denoting, that the obligation on the one part is the mutual cause on the other; at least, that, as the husband is first in the obligation, the performance, upon his part, is a condition of the wife's being bound at all.

The decisions referred to for the Creditors were, November 25th, 1709, Margaret Turnbull, No 108. p. 5895.; David Reid *contra* Lady Ruthven, *anno* 1726, (see APPENDIX.); Daughter of Alexander Falconer against his Creditors, February 1736, (see APPENDIX.)

For Mrs Watson, &c. the following cases were quoted: Elizabeth Hart *contra* the Creditors of John Strachan, her Husband, February 1735, (see APPENDIX.); December 1721, Selkirk, No 28. p. 9167.; February 1673, Murdoch, No 61. p. 9209.; 13th July 1670, Raith, No 21. p. 9154.

THE LORDS found, that, notwithstanding the prestations by Mr David Watson, in favour of his wife, were not performed, yet she, *stante matrimonio*, was not entitled to an aliment out of her own portion, or annualrents thereof, in competition with her husband's creditors, who had done diligence to affect the said sums; and found, that the creditors were entitled to compel Dr Cameron to stock out such of the bygone annualrents of the tocher as shall be found yet due, to make up, with the principal, the sum which Mr David Watson was obliged, by the contract of marriage, to secure in the terms thereof.

But, thereafter, 5th of December 1738, the LORDS found, that Mr Watson not having performed his part of the contract, and being now utterly incapable to perform, that, therefore, the creditors have no right to pursue for implement and performance, either by paying or stocking out the annualrents.

C. Home, No 93. *p.* 145.

*** Kilkerran reports this case:

1732. *July* 4. 1738. *June* 10. & *December* 5.

A MAN, who, in his contract of marriage, had become bound to secure a sum for his wife's liferent, becoming bankrupt, his creditors affected the tocher stipulated in the contract to be paid to the husband, and insisted in an action against the wife's father for payment. The defence was, That the tocher and jointure being mutual causes of one another, the defender was not bound to

pay the tocher till his daughter was secured in her jointure; and, *separatim*, that seeing the husband was now bankrupt, and utterly enable to perform, the defender should be declared free of his engagement, as if the contract had not been entered into, even although his daughter should die before her husband. No 48.

Upon which last point, it being *answered* for the creditors, That contracts of marriage, where marriage follows, cannot be voided by non-performance of any article, as they do not, as other contracts, admit of the restoring of each party to their original state, the LORDS gave no judgment, but 'found, by interlocutor July 4. 1732, the defence, that the mutual cause of the tocher was not performed, relevant to assoilzie *hoc statu*.'

But thereafter, and after the defender's death, the creditors having wakened and transferred the cause, insisted on this new topic, that although the defender could not *hoc statu* be obliged to pay, yet they were entitled to oblige him to stock out the bygone annualrents of the tocher, in order that thereby, together with the principal sum of the tocher, the capital might be made up which the husband was obliged to secure, and to the annualrents whereof, when made up, the creditors would be entitled, and to the capital itself, how soon the obligation upon the husband came to be purified by the death of the wife.

And so the LORDS at first found, by interlocutor June 10. 1738, but thereafter, by interlocutor December 5. 1738, this was altered, and it was found by a narrow majority, 'That the creditors of the husband had no right to pursue for implement and performance, either by payment or stocking out of the annualrents.'

Kilkerran, (MUTUAL CONTRACTS.) *No* 2. *p.* 356.

1743. *June* 22. CRAWFORD *against* MITCHELL.

No 49.

A PERSON, in his contract of marriage, bound himself to employ the sum of L. 166 Sterling, together with the sum of L. 186 of tocher, after assigned, on sufficient security to himself and wife, in conjunct fee and liferent, for her liferent use, and to the children in fee. The wife, on the other hand, assigned to her husband a bond due her of L. 186 Sterling, and execution was appointed to pass, at the instance of the debtor, on said bond. A creditor of the husband having arrested this bond in the hands of the debtor, and pursued a furthcoming, the LORDS found, that the said sum being assigned by the wife in her marriage-contract, to herself in liferent, the debtor in the bond, who was trustee for executing the contract, could not be obliged to make furthcoming to the pursuer any part of the principal sum, unless the pursuer should find caution for the whole liferent provided to the wife in case of her survivance.

Fol. Dic. v. 4. *p.* 16. *Kilkerran. C. Home.*

*** This case is No 31. p. 8266. *voce* LIFERENTER.