

death of the father; it was therefore found to be a *jus crediti*, not a destination to heirs: but the contrary would have been found, had the obligation been to pay at a certain term after the death of the father.

'THE LORDS preferred the creditors.'

For the Creditors, *Sir John Stewart.* *Alt. J. Grant.* Reporter, *Murkle.* Clerk, *Justice.*  
*Fac. Col. No 109. p. 160.*

*Dalrymple.*

1755. July 14.

JOHNSTON and WILSON, Assignees of William Telfer, against NISBETS.

ARCHIBALD NISBET of Carphin granted a bond of provision to his daughter Eupham for the sum of 3000 merks.

Eupham Nisbet, after the death of her father, married William Telfer, but without any contract of marriage.

Three months thereafter, in a post-nuptial contract of marriage, William Telfer bound himself to provide 9000 merks to his wife and the children of the marriage; and Eupham Nisbet, on her part, assigned to him, his heirs, &c. her portion of 3000 merks. In this contract, there was a clause dispensing with the legal return, in case the marriage should dissolve within year and day.

Within the year Eupham Nisbet died without children.

William Telfer having assigned away the above bond, and the assignees having pursued the heir of Carphin for payment of it, the executors of Eupham brought a reduction of the contract of marriage, and of all that followed upon it, against the assignees.

The ground of reduction was, That Eupham Nisbet had been fraudulently induced by Telfer, at a time when he was insolvent, to marry him, and to convey her portion to him; in consideration of which, he pretended, on his part, to bind himself to provide the sum of 9000 merks to her and her children, when he had no such sum.

The proof came out, That, at the time of the contract, William Telfer was in very bad circumstances.

In support of the ground of this reduction, two late decisions were referred to; Watson against Cameron in the year 1734, and Ker of Abbotrule against the Creditors of Elliot in the year 1741. (See HUSBAND and WIFE.)

*Answered* for the assignees.

*Imo,* The utmost the law has gone, when the husband cannot perform the prestations contracted on his part, is to allow the wife retention of her tocher, for security of the provisions made to her; but here the wife being dead, has no need for the husband's part of the prestations in the contract.

No 105.

No 106.

A woman possessed of a bond for 3000 merks, conveyed it to her husband in a postnuptial contract. She died soon after; and her executors attempted to reduce the contract, the husband having been insolvent, and incapable to perform his part of the engagements. The reduction dismissed.

No 106.

2do, Eupham's assignation was several months after the marriage. It may be wrong to induce a woman in an ante-nuptial contract to convey her fortune to a man, to whom, as yet, she has no tie: But there is no fault in inducing her to convey her fortune to one who is already her husband; on the contrary, that conveyance is what she owes in justice to him and to his creditors.

In the cases of Cameron and Ker of Abbotrule, the wives were alive, and pleading retention; and the contracts of marriage, in which the wives' tochers had been conveyed, were ante-nuptial. (See HUSBAND and WIFE.)

'THE LORDS repelled the reasons of reduction.'

The conception of Eupham Nisbet's bond, produced to the heir a separate defence against payment of 2000 merks of the 3000 merks.

One thousand merks of the bond was made payable to her, her heirs, executors, or assignees, six months after her father's death, and the remaining 2000 merks was payable to her, and the heirs to be procreate of her body, or her assignees, in any contract of marriage alienarly; and that, upon expiry of year and day after her marriage, together with the annualrent of the said whole sum of 3000 merks, from the first term of Whitsunday or Martinmas after the decease of Archibald the granter.

Pleaded for the heir: That the 2000 merks being only payable upon the expiry of year and day after Eupham's marriage, and she having died within that time, the sum was not due.

Answered for the assignees: Old Carphin's view in delaying the term of payment of the 2000 merks was to prevent the heir from being distressed upon any unexpected marriage of Eupham; for which reason, a year was given to him after her marriage to get the money ready; but it was far from his view to make the obligation of payment depend upon the contingency of her life; on the contrary, the sum bears annualrent as well as the other 1000 merks from the first term after his decease; it is payable to the heirs of her body and certain assignees; and one of these last, her assignee in her contract of marriage, has long survived the term stipulated for payment.

'THE LORDS found the whole sums in the bond of provision due.'

For Assignees, *A. Pringle, J. Dalrymple.*

For Executors and Heir, *Ferguson, Lockhart, A. Hamilton.*

*Fol. Dic. v. 3. p. 51. Fac. Col. No 158. p. 239.*

*J. Dalrymple.*

1766. November 21.

Mrs. ANNE NIELSON, &c. against AUSTINS.

MR WILLIAM SLOAN, probationer, having made a clandestine marriage with Anne Neilson in 1752; and, being desirous of concealing it, lest it should mar his prospect of church-preferment, gave her brother an obligation to pay what

No. 07.  
A per, who concealed his marriage, became,