

APPENDIX.

PART I.

PERSONAL AND TRANSMISSIBLE.

1757. August 10. Countess of CAITHNESS against Her CREDITORS.

THE Earl and Countess of Caithness, anno 1741, entered into a contract of separation, in which the Earl became bound to pay to my Lady L. 1000 Scots of separate maintenance, with liberty to either to renounce the agreement. My Lady took the benefit of this privilege, and brought a process before the Court of Session for a suitable maintenance, which was ascertained to the sum of 200 Sterling yearly.

The Earl, in whose hands arrestments were laid by my Lady's creditors, raised a multiplepounding; in which process my Lady appeared, and insisted, That the sum in controversy, decreed to her by the Court of Session, was in its nature alimentary, and not arrestable. This point being reported to the Court, it was the opinion of the President, That the annuity here, being modified by the Court as an aliment to Lady Caithness, is not arrestable by her creditors. It was answered, That a man who makes a donation may adject what quality he pleases. If he allocate a yearly sum for aliment to any person, the sum cannot be diverted to any other purpose, not even by the grantee, far less is it attachable by the grantee's creditors. But it is not in the power of any man to withdraw his own property from his creditors. With respect to the present case, the sum decerned to Lady Caithness is not a donation. It is no more than a modification of the maintenance she was entitled to from the Earl. It is a yearly sum she is entitled to in her own right; and which, therefore, like any other article of her property, must be subjected to the diligence of her creditors. The Lords have not declared this sum to be alimentary so as to be secure against creditors; and, had they done so, it would have been illegal; unless they them-

NO. 1.

How far a yearly annuity settled by a man upon his wife, is understood to be alimentary, so as to exclude her creditors?

NO. 1. selves had been the donors. The present case is precisely similar to the terce, or to a jointure provided in a contract of marriage. These, no doubt, are alimentary : So are the proprietor's rents of land ; but not in the sense of excluding creditors.

The Court took a middle course ; which was, upon the acquiescence of the creditors, to sustain the arrestments to affect the half only of the annuity.

Sel. Dec. No. 132. p. 187.

1776. July 23. ALEXANDER CALDER Pursuer, *against* The RELICT and CHILDREN OF KENNETH MACKENZIE, Defenders.

NO. 2.

Whether an action *ex delicto* be transmissible against the heirs ? Effect of *litiscontestation*. Act before answer. See No. 37. p. 10363.

THE deceased Kenneth Mackenzie having been attacked and wounded in the dark, and a quarrel having subsisted between him and the pursuer, suspicions were entertained of the pursuer having been himself the actor in, or privy to this business. He was accordingly examined, first before the Sheriff of the county, and afterward at Edinburgh, before the Lord Justice-Clerk, but no sufficient proof appearing against him, no further steps were taken.

The pursuer afterward brought an action of oppression and damages against Kenneth Mackenzie, who having died *before any proof had been taken therein*, a transference of the action was raised against his widow and children ; who having insisted that the action being founded on a supposed delict, was not transferable against the heirs of the deceased, the Lord Ordinary, after some procedure, " In respect that *litiscontestation* was made " with the defunct by an extracted act and commission for proving, adhered " to his former interlocutor transferring *in statu quo*."

Pleaded for the defenders : No point is more clear, than that penal actions arising *ex delicto* do not pass against heirs. Nay, even actions *ex delicto*, though *rei persecutoria* only, do not transmit ; 19th January 1711, Lady Ormiston *contra* Hamilton, No. 26. p. 10343. Besides, the present action is not *rei persecutoria* ; for although it bear a conclusion for damages, these are in reality no more than a *solatium* claimed on the footing of an injury, where a pecuniary loss cannot be said to have been incurred, or to be capable of being estimated by any rule whatever. Such damages, therefore, cannot be demanded from heirs, any more than a fine incurred in consequence of a delict, the ground of action dying with the transgressor, and becoming extinct.