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ever, and being deserted and left by the husband in possession of this fund, weighed with the Court to give effect to the natural right; which, had it been brought forward in proper shape, could not have failed to have been sustained. The Court accordingly adhered to the Lord Ordinary's interlocutor; and upon advising another reclaiming petition with answers, the same judgment was given.

Lord Ordinary, *Kames*.
Clerk, *Ross*.

For Jameson, *Alex. Belsches*.
For Houston, *W. Baillie*.

R. H.

Fac. Col. No. 44. p. 128.

1794. March 8.

AGNES ROBB *against* The TRUSTEE for her Husband's Creditors.

No 110.

The wife of a bankrupt is not entitled to an aliment out of her own estate falling under her husband's *jus mariti*.

In 1787, Agnes Robb was married to William Robb. There being no contract of marriage, her moveables to the value of above L. 1000 Sterling, and the yearly revenue arising from her heritable property, and her bonds, bearing interest, which together exceeded L. 100, fell under the *jus mariti*.

In 1792, her husband became insolvent, and fled the country, and his estate was soon after sequestrated.

In 1793, Mrs Robb made a summary application to the Court, praying to have a suitable aliment modified to her out of the annual produce of her heritable property; and, in support of this claim, she
Pleaded, 1st, If the wife, before her marriage, has no property of her own, she must depend entirely on her husband's fortune or industry for support; but, when effects formerly belonging to her are transferred to him by the act of the law, in consequence of the marriage, as that transference is founded entirely on the presumed will of the parties, it must be an implied condition in it that he shall suitably aliment her; or rather, that she shall reserve as much to herself as is necessary to secure her in all events against absolute indigence. Accordingly, in the case Fac. Col. 2d November 1785, Lisk *against* her Husband and his Creditors, No 103. p. 5887. the Court, proceeding on these principles, modified out of her own estate a liberal aliment to a wife whose husband had become bankrupt. See also Fac. 21st February 1745, Bontein *against* Bontein, No 100. p. 2895. Stair, b. 1. tit. 4. § 9.

2^{dly}, When a wife is obliged to leave her husband on account of maltreatment, and still more, when, as in the present case, she is deserted by him, she becomes a just creditor for an aliment, in the same manner as she would for her legal provisions, upon the dissolution of the marriage by his death. On this ground, she may not only claim on his bankrupt estate, but may also retain her own property for her security. December 1721, Selkrig

against Selkrig, *voce* MUTUAL CONTRACT. Neither can it be maintained, that there is now no room for retention, the legal assignation at the marriage having already transferred it completely to the husband; for a legal assignation can have no stronger effect than a voluntary one; and it is a clear point, that in the case of a direct assignation by the wife to the husband in a marriage contract, while the subject remains *in medio*, it may be retained in the event of the husband's bankruptcy, till the counter obligations in her favour are made good, 22d June 1743, Crawford against Mitchell, *voce* MUTUAL CONTRACT.

3dly, The wife may be considered as fiar of her own heritable estate, and her husband, or the trustee for his creditors in his right, as the liferenter; and, according to the obligation universally understood to lie on the liferenter, where the fiar has no separate means of livelihood, the petitioner is entitled to an aliment, 1491, c. 25.; Stair, b. 2. tit. 4. § 36.; 22d February 1722, Master of Lovat against Fraser, No. 23. p. 396. Ersk. b. 2. tit. 9. § 62.

Answered, Whether a husband get a fortune by his wife or not, he is obliged to maintain her. But, if there are no goods in communion, this obligation must necessarily cease. Now, the funds from which the petitioner here asks an aliment belong not to him, but to his creditors, against whom she has no legal claim. Fountainhall, 25th November 1709, Turnbull against her husband's creditors, No 188. p. 5895. Even where a wife is secured in a liferent annuity by express paction, it was never pretended that she had right to it *pendente matrimonio*, on the insolvency of her husband.

The petitioner's argument, if good for any thing, would establish, that creditors are in every case bound to aliment, not only the wife, but the children of their insolvent debtor, as he is under a natural obligation equally strong to maintain them. This doctrine, however, is adverse to those established principles in our law, that a man's whole funds are liable in payment of his onerous debts, and that in every case the wife must follow the fortune of her husband, unless she has a separate estate constituted by law or paction.

Besides, it is wrong in the petitioner, who in fact has such separate estate, to plead that she is destitute. Upon her giving her creditors a part of the fee of her heritable property equivalent to the value of her husband's *jus mariti*, they will instantly renounce their right over the remainder.

Observed on the Bench, The fund from which Mrs Robb claims an aliment, belongs, without any reservation, either express or implied, to the husband, *jure mariti*, and consequently to his creditors. Were the Court, therefore, to give her an aliment out of it, this would just be disposing of so much of their property, which the Court has no right to do. Even therefore if the petitioner's whole fortune had been moveable, she would have had no legal claim against them; and, as the larger part of it is heritable, her claim on their

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compassion is considerably weakened. By accepting of their offer of purchasing her husband's liferent on her disposing of part of the fee, she can obtain an immediate livelihood. The case of Lisk against her husband's creditors, was thought to have been erroneously decided; and an appeal was entered against it, but a compromise afterwards took place in consequence of what passed in the House of Peers, after the cause had been begun to be pleaded.

The Court, with only one dissenting voice, refused the desire of the petition.

A reclaiming petition was refused, (27th May 1794,) without answers.

For the Petitioner, *M. Ross, Fletcher.* Alt. *Tait.* Clerk, *Home.*

R. D.

Fol. Dic. p. 3. 289. Fac. Col. No 114. p. 253.

S E C T. III.

The Wife if maltreated may withdraw, and be entitled to a Separate Maintenance.

No 111.

1594. June 18.

HOWIESON *against* RAE.

HOWIESON having obtained a decret of adherence against Rae, his wife; and having charged her, under the pain of horning, to adhere, she suspended, *alleging*, that she durst not adhere *propter sævitiam mariti*. In respect whereof, he was ordained to find her caution to treat her lovingly, as became a husband to treat his wife, she making faith that she dreaded bodily harm.

Fol. Dic. v. 1. p. 394. Haddington, MS. No 413.

1697. June 8.

DUTCHESS of GORDON *against* The DUKE.

No 112.

What amounts to such maltreatment, as to entitle the wife to withdraw.

WHITELAW reported the bill of advocation, given in by the Dutchess of Gordon against the Duke, her husband, of a process of adherence, pursued by him against her, for deserting and withdrawing, with this design, that if she did not return to cohabit, he might from thenceforth be free of any aliment she could claim during the separation occasioned by herself. The *first* reason was, The Commissaries had committed iniquity, in sustaining process at the Duke's instance for adherence, and repelling her defence, founded on the 55th act 1573,