

No 105. Further, although the entail gives the heir a faculty to provide 400 merks to his widow, declares that sum to be in full, and contains an irritancy against her legal provisions, upon the heir's failure to exert the faculty, it contains no prohibition against his granting a larger sum, or irritancy of the excess; and, as the limitations of the entail are not to be extended by implication, the deceased might have settled on the pursuer the sum which she now claims, and it is in the power of the Court to supply the omission. Even though the limitations of the entail were held to apply to this case, the same equitable powers which have enabled the Court to give an alimentary provision, where the marriage was dissolved within year and day, or a terce out of lands in which the husband was not infeft, would authorise the present claim; 6th March 1778, Thomson against M^cCulloch, No 70. p. 434.; 15th December 1786, Lowther against M^cLaine, No 71. p. 435; 27th January 1790, Young against Campbell, No 29. p. 400.

Upon advising the petition and condescendence, with answers, it was

Observed on the Bench, Where a husband, who possesses an estate in fee-simple, neglects to provide his widow, the Court may, by giving an aliment out of his estate, supply the omission; but in the present case, the Court cannot, more than the deceased himself, exceed the sum allowed by the entail.

THE LORDS unanimously 'adhered to the interlocutor of 9th June 1795.'

Act. *Solicitor-General Blair, R. H. Cay.* Alt. *M. Ross, Neil Ferguson.* Clerk, *Home.*
D. D. *Fac. Col. No 208. p. 493.*

S E C T. II.

Husband liable for his Wife's aliment, unless insolvent.

No 106.

The creditors of a husband attached his whole funds, and particularly, a considerable *jus mariti* he had in his wife's effects. Found that the creditors were not bound to aliment his wife, *stante matrimonio,*

1687. *November 10.*

CREDITORS of OGILVY of Newgrange *against* DAVID SCOT of Hedderwick.

ALEXANDER FORRESTER of Milnhill, James Alstoun, and other creditors of Ogilvy of Newgrange, their action against David Scot of Hedderwick being debated upon the 8th, was this day advised. The case was, in Hedderwick's contract of marriage with Grahame of Craigie's daughter, his lands were tailzied to the heir-male; and, in case of a daughter, 8000 merks are provided to her. There happened to be only one daughter of the marriage, and she ran away with Francis Ogilvy of Newgrange, when she was about 15 or 16 years of age, for which there was a Council process raised. Newgrange being

in great debts, his foresaid creditors arrest the 8000 merks in her father Hedderwick's hands, and pursue him for making forthcoming.—It was *alleged* for him; *imo*, It was but a destination of succession to this 8000 merks, in case he did not otherwise dispose on it; but, *ita est*, she had proved ungrateful, and married without his consent; and being thus disobliged, he was not bound to pay it. *2do*, This being a provision for his daughter, and come in place of her tocher, in law *dos* was *correlatum* to a jointure, *et pari passu ambulans*. See Durie, 27th July 1633, Gordon, No 23. p. 4460. And seeing the husband was not able to secure her in her jointure, there was no reason that he or his creditors should have the tocher, the one being the mutual cause of the other; and naturally implied therein; and that such tacit conditions were as strong as express ones; as, *imo*, In the case where all things return, the marriage dissolving *intra annum*; *2do*, Where a bond is given for the price of lands, which, though it be simple, yet, *ex natura rei*, it must purge incumbrances. And there are three decisions in Durie, viz. 21st November 1623, Logan, No. 46. p. 4386. 28th June 1637, Galbraith, No. 47. p. 4387. and 29th January 1639, Graham, No. 23. p. 4226. where the assignee to a tocher, the arrester, and the appriser thereof, are all found liable to secure it by caution for the wife's liferent use: And *Faber. in tit. C. De jure dot. defin. 10, 12, 21, and 30*, shews the Parliament of Savoy found, that a husband's creditors could not so affect the wife's tocher where the husband was poor, but with burden of the wife's liferent. And though daughters after 25 might marry without their father's consent, yet if they did it within that age, it was *justa exhereditationis causa, et non tenebatur eas dotare. Perez, ad tit. C. De dot. promiss. num 11.*

Answered for the Creditors, This 8000 merks was a specific obligation and sum, and so not a mere destination. *2do*, They, as creditors, were not concerned to secure her in her jointure; but her father might pursue the husband, either to grant one, or they might rely on the legal provision of a terce; and if she had made an ill bargain, that would not impede them who are her husband's creditors legally to affect, by their diligence of arrestment, what was certainly his *jure mariti*, seeing it bore not annualrent; and that this was so found, 8th February 1670, Cathcart, *voce MUTUAL CONTRACT. 3tio*, The Lawyers and decisions cited, did not meet, being where there was a jointure provided in a contract of marriage, whereas there was none here.

The Lords made a great difference if the husband had right to the tocher by voluntary conveyance and assignation; for then they thought it was probable there would, or should be provisions also adjected for the wife's security; and where he had it only *jure mariti*, by the legal assignation. The President considered it as a dangerous preparative, if men's children were debauched from them, and that their husbands' or their creditors should claim the benefit of their mother's contract matrimonial; which, as it would render

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but that they must find caution to aliment her after her husband's death.

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their daughters miserable on the one hand, so it might tempt them to be undutiful, and to dispose of themselves, thinking they cannot be deprived of it: And it were rational to make an act of Parliament, that they give bond to pay L. 1000 Sterling, if their parents dissent from their marriage; and that children marrying within 25, or such like age, without their parents' consent, should lose any benefit they could expect by them. At last, having balanced all inconveniences, the Lords found the provision of 8000 merks, due to the Lady Newgrange by her father the suspender's contract of marriage, as the only child and daughter thereof, does belong to Newgrange, the husband, and is affectable by the diligence of Alexander Forrester, his creditor, the arrester; and that, during the marriage, the wife has no interest therein for her aliment; but that, after the dissolution thereof, she ought to have the annualrents of the said principal sum for her liferent provision. And therefore find, that the sums ought to be made forthcoming to the charger, in so far as concerns his debt, he finding caution to the Lady to pay her the annualrents in the event foresaid, conform to the sums he recovers. And, as to the determination of the preference betwixt the charger, and the other creditors of Newgrange, called in the summons of multiple-poining, produced and repeated by the suspender, ordain them to produce their interests in this process, to be determined by the Ordinary. Or otherwise, if they do not, find the letters orderly proceeded at the instance of Alexander Forrester, and prefer him as to these sums, to the other creditors called in the multiple-poining.

Fol. Dic. v. 1. p. 393. Fountainhall, v. 1. p. 476.

* * See Harcarse's report of this case, No 116. p. 5907.

1700. July 18. PANHOLES *against* Her Husband's CREDITORS.

No 107.

Here no aliment allowed. In the case above, aliment allowed after the husband's death.

HALCRAIG reported Anna Gray, spouse to William Paton of Panholes, writer to the signet, against her husband's Creditors, for an aliment. *Alleged, imo,* The pursuit is unwarrantable, because her husband is yet in life, and he is neither pursuer nor defender. *2do,* She has consented to most of their rights. *Answered,* She brought a considerable portion with her, whereby her husband purged the lands which they have adjudged of sundry incumbrances then affecting them, and that there will be a superplus after their payment; and the Lords have even allowed aliments to married women, as to the young Lady Lanton, and to the Lady Spencerfield.—THE LORDS considered there were specialities in these cases, founded on their contracts matrimonial, &c. which were not in this case, and therefore refused to modify an aliment. The Privy Council, on application to them, take more latitude in aliments to wives.

Fol. Dic. v. 1. p. 393. Fountainhall, v. 2. p. 104.