

*Act.* A. Crosbie. *Alt.* Ilay Campbell. *Reporter,* Alva.

*Diss.* Hailes, Monboddo.

[More should have dissented, from the tendency of their arguments, but they were moved by specialties.]

Reversed on appeal.

1776. *January 24.* JOHN MALLOCH *against* TRUSTEES of BARBARA BLAIR.

#### HUSBAND AND WIFE.

Wife preferable for the interests of a sum in a bond belonging to herself, until she is taken home and alimeted by her husband, and even then for repayment to her of a sum not falling under the *jus mariti* which the husband had uplifted.

[*Faculty Collection, VII. 167; Dictionary, 5846.*]

GARDENSTON. The trust-deed itself mentions the purpose of marrying. It was fraudulent in the woman to make such a deed.

PRESIDENT. I see no fraud here. The husband had not any right *jure mariti* to the principal sum. The interest was secured to the wife, for very good causes,—that she might not starve. This might have been done in a marriage-contract.

KENNET. The husband was allowed to uplift part of the money belonging to his wife, in consequence of this deed, and he cannot now be heard against it.

KAIMES. A man makes his addresses to a woman upon the supposition that she has a fortune to a certain extent. After the parties are agreed, it would not be just that the wife should have it in her power to disappoint the *jus mariti*. But, here, nothing was done that was not agreeable to the former communing.

JUSTICE-CLERK. It is a hard case if the law stands against this poor woman. I cannot lay so much stress on the nullity of the bans, as thrice proclaimed on one Sunday; for such is the practice, though I observe that the trustees rest much of their argument here. The only effect of this would be to set aside the trust-right. This was by no means an onerous debt. A provision, made by a wife for satisfying former creditors, might be an onerous deed, but it is impossible to term a deed onerous which is merely in her own favour. I incline to hold the trust-deed to be void and null. But then here is L.100 bearing annualrent by bond. The principal sum was heritable as to the husband, although he was entitled to the interest: but there was great reason that the woman in this case should be preferred to the interest of her own money. The law has not said that the husband shall have the whole benefit of the *jus mariti*, and yet not be liable to perform his part. See case of *Ogilvie against The Creditors of Hedderwick*. L.80 has been uplifted: this was a donation which the wife may still revoke. The husband is bound to aliment the wife; she

may therefore retain the interest of L.100 till the husband replaces the L.80, and finds security to aliment her.

MONBODDO. I think that the general point is of great consequence, and that no woman can make a settlement to disappoint the *jus mariti* of her future husband. But in this case the husband ought to find surety for alimentering, and also for replacing the L.80.

COVINGTON. Marriage is a legal assignation to the husband. Strange would be the consequence were this rule departed from. A husband has often no fund but his own industry. Is there any example, in our practice, of obliging a husband to find caution to aliment his wife? When there are settlements, it has been found, and justly, that the husband must fulfil his obligations; for, there, there is a mutual contract; but when there is no contract, and the parties rely on the law, the case is different. If, however, the husband uplifted the L.80, the wife may recal it.

KAIMES. I would be very unwilling to depart from general rules; but here there is an exception. The wife executed the deed after proclamation of bans: it will not stand good if properly objected to. But who is it that complains? The husband; who had formerly agreed to make a settlement. There lies a personal exception against him. [The fact was denied, though, I suspect, without reason.] As to the L.80,—if it was unwarrantably levied by the husband, the wife may say, I will hold the L.5 until you repay me the L.80, or replace it.

GARDENSTON. Although I do not think that the *jus mariti* can be disappointed under pretence of retaining for aliment, yet I think that there is more in the other point. The wife may say, You shall not touch the L.5 till you return the L.80.

ELLIOCK. My notion of the case was this,—The friends were averse to the marriage. Being unsuccessful in their opposition, they next endeavoured to secure part of the fund by having the L.100 settled, while they suffered the husband to levy the L.80; so that I consider this as equivalent to a marriage-contract.

On the 7th December 1776, “The Lords found Malloch and his wife preferable for the annualrents of the sum in question, varying Lord Elliock’s interlocutor, who had preferred the trustees for principal and annualrents; but, on the 24th January 1776, they appointed a *curator ad litem* to the wife, and found that she was entitled to retain the L.5 yearly, by way of aliment, until she was taken home by the husband; and even in that event found that the husband was not entitled to uplift the L.5 until he replaced the L.80; and remitted to the Ordinary to proceed accordingly.”

Act. W. Nairne. Alt. J. Boswell.

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