

November 1709, Turnbull, No 108. p. 5895. ; 8th March 1774, Rob, No 110. No 104.
p. 5900.

THE LORDS adhered to the former interlocutor, repelling the defences.

Lord Ordinary, *Abercromby.* Act. Connel. Alt. Solicitor-General Blair, Jo. Clerk.
Clerk, Home.

D. D.

Fac. Col. No 188. p. 455.

1796. March 1. MRS JEAN GIBSON *against* CHRISTIAN KERR REID.

THE nature of the claim brought in this case by Mrs Jean Gibson against Christian Kerr Reid, and the clauses in the entail of the estate of Hoselaw upon which it depended, are narrated, *voce* TERCE.

THE COURT, 9th June 1795, found, ' That in this case, the pursuer's claim of aliment cannot be extended beyond the 400 merks allowed by the entail in question to be settled on wives.'

Upon advising a reclaiming petition with answers, the LORDS, 25th November 1795, ' before answer as to the quantum of her aliment, ordered a condescendence of the free rent of the estate, after deducting the interest of the debts with which it is affected, and of any other circumstances that may have an influence in ascertaining the extent of the aliment.'

Parties differed as to the amount of the free rent of the estate. It appeared to be about L. 180 or L. 190 per annum. But along with his condescendence, the defender gave in a petition, in which he contended, That the question must be determined by the clauses of the entail, without regard to the value of the estate ; and further

Pleaded, If the claim of a widow to an aliment out of the estate of her deceased husband, different from the terce and *jus relictæ*, be at all founded in law, it comes under the description of a legal provision, and therefore the entail of Hoselaw contains an irritant, as well as a prohibitory and resolute clause against it ; and it can make no difference as to this question, that the entail contains no irritancy against the contracting of ordinary debts.

Besides irritant and resolute clauses were both unnecessary. The right of the widow, at best, is only to a maintenance out of the free funds of her husband. It is postponed not only to onerous but gratuitous creditors, and consequently must be postponed to the right of the substitutes in an entail with prohibitory clauses, which constitutes them onerous creditors of the heir in possession.

Answered, The widow is an onerous creditor against her husband's estate, to the extent of a maintenance suited to his rank and circumstances. Her claim may therefore be made effectual out of any subject which is liable to his onerous debts, and it is admitted, that the estate of Hoselaw is so.

No 108.

When an entail fixes the *maximum* of the provision which an heir can give to his widow, and he dies without making any settlement on her, a greater sum cannot be awarded to her in name of aliment.

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