

1773. November 30.

JOHN COWAN and COMPANY, Merchants in Borrowstounness, *against* HENRY STORAR of Gowrieknow, and KATHARINE STORAR, his Sister.

No II.

A bond of provision was granted to a daughter, payable at the first term after her majority or marriage, which her brother became liable to pay, as representing his father. The daughter having married a bankrupt, his creditors arrested the bond, still unpaid, in the hands of the debtor. It was contended for the arrestee, and for the wife herself, that the circumstances of her husband disabling him from fulfilling his obligation to provide her in a suitable aliment, the other part of the obligation, the payment of the tocher, was void; and it was pleaded *separatim* for the brother, that he should be allowed retention for the aliment and education of his sister for the seven years preceding the marriage, *quia debitor non praesumitur donare*. The Lords repell-

IN September 1765, Richard Storar of Gowrieknow, deceased, executed a bond of provision in favour of Katharine Storar, his daughter, for the sum of 1000 merks, 'payable at the first term of Whitsunday or Martinmas after she shall attain the age of 21 years complete, or marriage, which should first happen, with 200 merks Scots of liquidated penalty, or expenses, in case of failure; together also with the due and legal annualrent of the said principal sum, yearly, termly, quarterly, monthly, and daily, so long as the same should remain unpaid after the said term of payment above written;' in payment of which bond, Henry Storar, now of Gowrieknows, became liable, as representing his father.

Thomas Lister having married Katharine Storar in the month of August 1771, and being indebted to Cowan and Company, in a sum, by his accepted bill, they caused use arrestment in the hands of Henry Storar, as debtor to Lister; and, in a furthcoming at their instance, which was opposed both by Katharine Storar herself, whose husband, Lister, was said to have been in bankrupt circumstances at the time of their marriage, and likewise by Henry Storar, the arrestee, the Lord Ordinary pronounced a judgment, in substance, finding, that the contents of the bond in question are affectable for payment of Lister's debt; and likewise finding, that Henry Storar is entitled to retain, out of the same, the amount of certain furnishings made to his sister, but that he was not entitled to take credit for any expense which he may have incurred by alimenter, clothing, or giving her education.

Cowan and Company acquiesced in this interlocutor; but a reclaiming petition was offered for Henry Storar, and his sister, craving an alteration of the interlocutor, so far as it finds the bond in question at all affectable for Lister's debts, and likewise repels the claim of retention upon account of the aliment and education of Helen Storar, for seven years prior to the marriage, stated at the rate of L. 5 *per annum*.

With respect to the *first point argued*; *imo*, That, as a husband comes under a legal obligation to provide his wife in a suitable aliment, the right which he gets to the wife's tocher is understood to be conditional; and, if his circumstances disable him from implementing that obligation, neither he, nor any in his right, have a title to insist against the wife for obliging her to implement the counter part; 12th January 1761, Christian Monro *contra* William Monro, *infra*, *b. t.*

2do, That the bond in question was heritable, even before the term of payment, and was not carried by Thomas Lister's *jus mariti*; that the rule of law, that bonds, though containing a clause of interest, are moveable before the

terms of payment, is founded singly upon a presumption of the creditor's intending to uplift the money as soon as the term of payment comes. But, as one presumption is overthrown by another, stronger and more probable, and as all presumptions must yield to contrary evidence, so, from every circumstance in the present case, it is infinitely more probable, and, in every respect, more rational, to presume, that she did not intend to demand payment, or, in other words, that she never proposed to allow this sum to be squandered by her husband, or carried off by his creditors; whence the conclusion must follow, that the sum was not made over to him by her marriage, there being here no room for the presumption, from which alone it is said to be moveable.

In the *next* place, Henry Storar contended, that he should at least be entitled to retention for the aliment and education of his sister for seven years preceding her marriage, upon the maxim, 'debitor non præsumitur donare.'

Answered upon the *first* point; It is an admitted fact, that Katharine Storar, when she married, had not attained the years of majority; of consequence, the bond was not payable, and did not bear interest till the first term of Whitsunday or Martinmas after her marriage. At the time of the marriage, therefore, it was yielding no profit, but simply a moveable sum, falling under the husband's *jus mariti*, and, as such, might be legally attached for payment of his debts.

The respondents admit it to be a rule, established not only in obligations betwixt husband and wife, but likewise in the case of all mutual contracts without exception, that, where either party is sued for payment or performance, he is entitled to plead retention, till the other party either implement, or give security to implement likewise. But these principles, however just and equitable, have nothing to do with the present question. The respondents, here, are not insisting for implement of any contract containing mutual prestations; what they maintain, is, that, at the very instant of the marriage, the right of this bond was, by the operation of law, completely transferred to Lister the husband; and, being now attached by the diligence of his lawful creditors, cannot be drawn back upon any pretence whatever.

That a husband is under an obligation to aliment his wife during his life, and that the same obligation is transferred to his representatives, after his death, may be very true; but the performance of this obligation must depend entirely upon the husband's circumstances at the time, and can never be brought in competition with the diligence of his lawful creditors. Unless where the contrary is provided by contract of marriage, a wife, from the nature of things, submits herself to share the fortunes of her husband, and must be contented with such aliment as he is able to give her, after payment of all his just and lawful debts. So the Court has frequently decided, particularly in sundry cases which are collected in the Dictionary, *voce* HUSBAND and WIFE; and the decision, 12th January 1761, *Monro against Monro*, is nowise applicable to the question under consideration.

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ed both these defences, but allowed the debtor retention of certain advances of money made to his sister.

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In the *next* place, the respondents do deny that the presumption above-mentioned is the only, or, indeed, the chief reason why bonds bearing interest are accounted moveable before the term of payment. When personal bonds, with a clause of interest, came into practice, this distinction was thought of by lawyers, who were a good deal puzzled what to make of this new species of security. It is now a settled point, that a bond bearing interest is moveable before the term of payment, as much as a debt due by bill, or a sum of lying money; and, if so, the nature of a subject, as fixed by the determinations of law, cannot be altered from moveable to heritable, or, *vice versa*, by circumstances, or presumptions of a party's intention, which would lead to endless confusion and uncertainty. And much more ought that rule to hold in the present case, where interest only began to run from the term of payment, before which the bond was clearly a moveable debt, being neither a *feodum pecuniæ*, nor even a yearly profit to the creditor.

Upon the *second* point, The respondents are under no necessity of inquiring here, Whether this aliment must have been presumed to have been advanced *animo donandi*, or with a view of being afterwards repaid; for they maintain, that there was here no donation in the case, and that the defender, by alimending his sister, did no more than he was under a legal obligation to do, and what he could have been compelled to do by judgment of law, if he had refused. This is merely a fictitious claim, reared up, *ex post facto*, in order to disappoint the legal diligence of the pursuers.

THE COURT "adhered to the Lord Ordinary's interlocutor, and refused the desire of the petition."

Act. R. Blair.

Alt. Al. Bruce.

Clerk, Tait.

Fol. Dic. v. 4. p. 12. Fac. Col. No 92. p. 230.

1781. January 20.

PARTNERS of the WOOLLEN MANUFACTORY at HADDINGTON,
against ELIZABETH GRAY.

No 12.

A husband had been taken bound in his contract of marriage, to secure his wife's tocher assigned to him for her liferent use. He became insolvent, while the sum was *in medio*; and his credi-

By a contract of marriage entered into betwixt William Rose and Elizabeth Gray, in the year 1766, she assigned to him a bond for L. 500 Sterling, due to her by the Earl of Sutherland. On the other hand, he was obliged to have in readiness, by Whitsunday then next, the sum of L. 500 Sterling, to be laid out at the sight of certain persons, her friends, upon land, or personal security, and to take the rights in favour of himself and her, and longest liver of them two, for her liferent-use; likewise, as soon as the bond assigned in name of tocher was paid, to settle the farther sum of L. 500 Sterling, in the same manner. She was further entitled to the sum of L. 100, in lieu of her *jus relictæ*, if there existed children of the marriage, and to L. 200, if otherwise.