1697. *November* 26.

CREDITORS of WILLIAM GORDON, late of Pencaitland *against* AGNES BLACKBURN, His Spouse.

No 72.
A sum left to a married woman for her better support and maintenance, was found affectable by her husband's creditors.

MERSINGTON reported the Creditors of William Gordon late of Pencaitland, against Agnes Blackburn his spouse. Sir John Nisbet of Dirleton, her uncle, left her 20,000 merks, 'for her better support and maintenance,' and the fee to her eldest son, with this irritant clause, that he should not contract debt, spend, or any other way dilapidate the same. William Gordon her husband becoming bankrupt, his creditors arrest the annualrents of this sum. The lady raises a declarator, and *contends*, The sum originally coming by her, and being provided for her better subsistence, it is upon the matter alimentary, though it be not so declared in express terms. *Answered*, Her husband not being debarred, it certainly falls under his *jus mariti*, which at first was no more but a right of management and administration of the wife's estate, but now is turned to a right of property and disposal, and consequently is affectable by his creditors; and if my Lord Dirleton had thought upon this case, it is like he would have adjected a clause secluding the husband or his creditors from all interest in the same; but that being *casus improvisus* and omitted, and no ways provided against, and the irritant clauses secure the fee and stock of the 20,000 merks, that it cannot be taken away, nor absorbed by debts; but the fruits, product and rent, lie open to all debts and diligences. Neither is any tailzie so conceived as to secure the yearly rent of the entailed estate from the reach of creditors, (though that renders the present possessor miserable,) for the main design is to secure the succession to the heirs of tailzie therein mentioned *quoad* the tailzied lands allenarly. THE LORDS found the creditors preferable to the lady. Yet see 22d December 1676. Dick of Grange, No 67. p. 10387, where a pension given to a wife did not accresce to the husband's creditors.

1698. *January* 12.—IN the cause marked 26th November 1697, between the Lady Pencaitland and her husband's creditors, this new ground of preference was insisted on for the Lady, That the *jus mariti* was originally no more than a mere act of administration of the communion and society, which cannot be so conveniently managed by all, and therefore the law gives it to the husband, as the *dignior persona* and the head, but so as none of them should want; and by the law both divine and natural, the husband is bound to aliment his wife, though she brought nothing into the society, it being *individua vitæ consuetudo*; but much more when it is a *peculium profectitium* by herself and her friends; and acknowledged, If her patrimony consist in moveable debts, goods, or sums, that the husband's *jus mariti* wholly absorbs the same; but if it be an annual product of an heritable right, adventitious from the wife's friends, then his *jus mariti* must be burdened with an aliment to the wife, not

only against himself, but his creditors; and if law has secured her raiment and other *bona paraphernalia*, though never so costly and sumptuous, from the diligence of creditors, *a paritate rationis*, why should her food (which is more necessary) be obnoxious? And thus an allocate sum (though not bearing to be alimentary, nor secluding creditors) was found effectual to prefer a wife to her husband's creditors, 27th March 1627, L. of Westnisbet *contra* Moristoun, No 50. p. 10368; as also, in the case of Mr Andrew Hamilton's creditors against Lady Carberry, (see GENERAL LIST) the Lords found the husband's creditors behoved to allow her an aliment out of her jointure, there being a *nexus realis* following the subject; and in case of violence or atrocity upon the husband's part, it is usual to modify an aliment to the wife so long as she lives separate, out of his estate, even though overburdened with debts; and it were cruelty to make a fact or deed of her husband's to deprive her of that natural right. *Answered* for the creditors, All this is founded in humanity and commiseration, *et potius ex eo quod vellent constitutum esse quam quod hactenus constitutum est*, but is without all foundation in our law, by which there is no principle more fixed than this, That the husband has an unaccountable administration of all that comes by his wife, and is *dominus* of the fruits and emoluments of the same; and if he be absolute proprietor, how can his creditors either be debarred or burdened with alimenting his wife, which is indeed a duty upon the husband, but is *onus personale*, and does not affect his creditors; and he, by the same rule, is tied to aliment his children and servants *in familia*, yet none will plead *that* obligation passes to his creditors and other singular successors; and to evince that it does not arise from what the wife collates *in communione*, he is bound to aliment her though she had not brought a sixpence with her; yea he is bound to pay her moveable debts, though she gave in no tocher or portion; and if this rule held, a husband *obæratus* might plead to be maintained out of his wife's heritable estate in prejudice of her creditors, which was never pretended. And if this doctrine were good, then no widow or maid bringing a portion or tocher but may claim the husband's right to be burdened with her aliment, and that his creditors must allow the same; which would make a great novation and alteration in our law, and lay a foundation for hundreds of processes, if the Lady once carried this; and she ought to remember she takes her husband for better and for worse, and must follow his fate and condition whatever it be. The Lady's procurators founded much on the customs of foreign nations and judicatories; for in the Low Countries they allow the wife a share of her husband's estate when he falls bankrupt, even though it diminishes his creditors' fund of payment: And by the laws of sundry provinces in France, the husband's power over the wife's estate is necessarily accompanied and burdened with a competent aliment and provision to her, during the marriage; and this is particularly observed by Argentræus, in his commentary ad consuetudines Ducatus Britannicæ Armoricæ, tit. 19, des marriages, droits appertenans aux gens mariez, et dowaire, art. 408. See also Les coutumes de la Provostie et Viconte de Pa-

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ris, and Molineus ad consuetud. Parisienses. After all, the LORDS thought it dangerous to unhinge our ancient practice by introducing a novelty, which though very plausible, yet belonged more to parliamentary power; therefore they preferred the creditors arresters to the Lady.

Fol. Dic. v. 2. p. 77. Fountainhall, v. 1. p. 797. and 811.

1705. *February* 3. DICKSON *against* BRAIDFOOT.

No 73.
A clause in a contract of marriage appropriating a jointure the wife had by a former marriage, to the maintenance of the family, found to exclude the husband's creditor, as the sum did not exceed a suitable aliment.

HELEN BRAIDFOOT being first married to Menzies of Harperfield, and by him liferenting some lands, she marries Pitcairn of Pitlour to her second husband; and he being debtor to James Dickson, merchant in Edinburgh, in a certain sum, he arrests the rents of her jointure-lands, and pursues a forthcoming. *Alleged*, That she, foreseeing her husband to be in some debt, had provided against the same, by a clause in her contract of marriage with him, expressly allocating, destinating, and providing her jointure for the maintenance and subsistence of her family, and that it shall not be lawful for any of them to apply it to any other use, and so debarring her husband and his creditors from any intromission therewith to any other end, but constitutes it as a formal aliment. *Answered*, 1*mo*, In the case of the Lady Collington and Foulis of Ratho, Feb. 9. 1667, No 50. p. 5828, the *jus mariti* was found not renounceable, but like water cast on a higher ground, it still recurred and came back to the husband; see also 13th July 1678, Nicolson, No 52. p. 5834; and 10th January 1682, Telfer, No 53. p. 5836. 2*do*, Though it were renounceable, yet here it is not done, for this clause will not amount to a formal renunciation of the husband's *jus mariti*, which ought to be *specifiee* and *in terminis* done, and not inferred from remote consequences. 3*tio*, If this were allowed, every jointure and tocher shall be conceived by way of personal appropriation, which teaches bankrupts a way to defraud their creditors. *Replied*, Though of old the Lords thought the *jus mariti* so inherent *ossibus mariti*, that it could not be renounced, yet now they find it may be restricted, renounced, and regulated, *per paeta dotalia;* and the decisions cited point mainly at this, that a husband may not renounce his right of administration, headship, and management; for that were to unhusband himself, and renounce the privilege given him by the laws of both God and nature; and though law gives him right to all his wife's moveables, yet *provisio hominis* may take this away; yea Dirleton goes a greater length, for in his Dubia et Quæstiones, *voce* ALIMENT, he condemns the lawyers qui magno conatu et boatu would persuade judges, that wives' jointures are subject to the husbands creditors' diligence, though the *jus mariti* be renounced. THE LORDS, by plurality, found this clause of appropriation excluded the husband's creditors, and made it so personal, that it was not affectable by arrestment, no more than a formally constitute aliment can be arrested, as