

No 58.

*** This cause was appealed:

The House of Lords, 23d March 1775, "ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors therein complained of, be affirmed."

1776. January 25.

PATRICK BLAIR and Others, Trustees for Barbara Blair, *against* JOHN MALLOCH.

No 59.

A wife preferred in a multiplepinding, for the interest of the sum in a bond belonging to herself, until she should be alimented by her husband; and even then, for repayment to her of a sum, not falling under the *jus mariti*, which the husband had uplifted.

BARBARA BLAIR was creditor to Captain Robertson of Newton in a bond for L 180 Sterling, payable at Whitsudnay 1770, and bearing interest from Whitsunday 1769.

By the conception of the bond, the annualrent is made payable quarterly; and Barbara Blair received payment of her annualrents from the date of the bond down to Lammas 1773.

About that period she conceived an intention of intermarrying with one John Malloch, who kept a public-house in Perth, a man of an indifferent character, and in very suspicious circumstances.

Her friends finding they could not prevent the match, endeavoured to make the best of a bad bargain, and, at all events, to secure something to her and her children. In that view, they entered into treaty with John Malloch, the intended husband, who engaged to furnish L. 50 Sterling on his part, to which L. 80 Sterling of the bride's fortune was to be added, to make a joint stock of L. 130, to be laid out upon land, or other good security, and to be employed *ad sustinenda onera matrimonii*; and it was agreed, that the remaining L. 100 Sterling belonging to Barbara Blair, should not be subject to John Malloch's *jus mariti*, nor affectable by his debts or deeds. These terms being settled, the scroll of a contract of marriage, agreeable thereto, was made out; but Malloch, who, though he had engaged for L. 50, was not master of a penny, resiled from the agreement, and would not sign the contract. The above is the account of the matter that was given by one of the parties to the present question; although it was partly contradicted by the other, viz. John Malloch, particularly as to the alleged terms of a contract of marriage having been settled, and his afterward resiling therefrom, whereas he averred that he rejected the proposal from the first, so that the scroll produced in process was a fabrication with which he had no concern.

Barbara Blair, however, did, before her marriage, execute a trust-deed in favour of Patrick Blair her brother, James Hay her cousin-german, and James Ross her doer; the three persons in whose names it was by the contract of marriage provided that execution should pass.

This deed proceeds upon the narrative, that she was resolved to marry John Malloch, though unacquainted with his stock or circumstances; and that, if

they turned out to be bad, her patrimony might be consumed, and herself and children, if she should have any, might be left in poverty and distress; for these cogent reasons, she assigned to the above named persons, as trustees for the behoof of her and her children, L. 100 Sterling, part of the L. 180 due to her by Captain Robertson; declaring that the said L. 100 should not be subject to the said John Malloch's *jus mariti*, nor affectable by his debts or deeds. The assignation was intimated, and recorded in the Sheriff-court books of Perth.

It soon appeared that all the precaution used was but too necessary; for not only was Malloch a beggar in point of circumstances, but his character and conduct going on from bad to worse, became at length so flagrant, that, by a judgment of the Magistrates, he was banished for ever from the town of Perth. In these circumstances, he soon consumed as much of his wife's money as he could lay his hands on, and she remained (for there were no children of the marriage) without any resource but the L. 100 in question; and he, or rather his creditors in his name, making demands upon Captain Robertson for the remaining L. 100, which had been secured by the trust-assignation, Captain Robertson found it necessary to bring a multiplepoinding; in which the trustees appeared, produced that assignation as their interest, and were thereupon preferred by repeated judgments of the Lord Ordinary; against which the other party reclaimed, insisting that the husband had the preferable right; that a married woman can execute no deed without the consent of her husband; that, in law, the proclamation of bans is in this respect held equivalent to marriage; and that the assignation to the competitors, though executed before the celebration of the marriage, being after the proclamation of bans, is invalid.

Answered; Although no objection lay to the regularity of the proclamation, it could not at any rate support the defender's argument. This was a debt which, although the marriage had been completed, would not by law have fallen under the *jus mariti*. In these circumstances, is it possible to maintain that her husband, or his creditors in his name, will be allowed to uplift, for the professed purpose of wasting it, or paying his debts, a sum of money belonging to her, which does not fall under his *jus mariti*, and to which, of consequence, even independent of her trust-deed, he has by law no right?

The trustees have, therefore, no need to argue upon the validity of the trust conveyance; but, were it otherwise, were the proclamation of bans unexceptionably regular, and were the money in question a sum which would, by law, have fallen under the *jus mariti*, it is contended, that the trust-deed, executed by Barbara Blair before her marriage, would be an effectual bar to the claim now made by her husband and his creditors.

That the publication of bans of marriage, when regularly made, is by our law in many respects held equivalent to the celebration of the marriage, is not disputed. It is not so, however, in all respects; for example, it has been repeatedly found, that a donation made by either of the parties to the other, after proclamation and before marriage, is not revocable; 26th January 1680,

No 59.

Home, Div. 10. Sec. 1. *b. t.*; and February 1688, Gordon, *IBIDEM*, whereas a donation made after marriage by either party, may unquestionably be revoked. And there is another difference established in our law, that although, after marriage, a woman can grant no deed whatever (unless *mortis causa*) without consent of her husband, yet, before marriage, although after proclamation of bans, she is only barred from granting such deeds as are purely gratuitous.

THE COURT, by their first interlocutor, found the husband preferable for the annualrents of the sum in question; and, with that variation, adhered to the Lord Ordinary's interlocutor; but, on a reclaiming bill for the wife and her trustees, and answers for the husband, the case was considered to be a very special one, and to be determined upon its own circumstances, *viz.* The husband had uplifted and spent the L. 80 which he had agreed to accept of as tocher; and that was a sum that fell not under the *jus mariti*, as bearing interest. On the other hand, the wife had an indubitable claim to be alimeted by her husband; but he showed no fund other than that in question: Therefore, even supposing the trust-deed to be invalid, the question came to this, Was she not well founded in a plea of retention, both on account of the alimement, and likewise for indemnification *quoad* the L. 80 *indebite* uplifted by him?

The following judgment was pronounced, after appointing a curator *ad banc litem* to Barbara Blair, on a motion of her counsel:

" Find the said Barbara Blair entitled to uplift and retain the annualrents of the sum in question, until she is taken home, and properly alimeted in family by her husband; and, even in that case, find her entitled to the said annualrents, for repayment to her of such part of the L. 80 Sterling as has been already paid to her husband, or until sufficient caution is found by him to replace the same."

Act. Nairne.

Alt. J. Boswell.

Clerk, Kirkpatrick.

*Fol. Dic. v. 3. p. 279. Fac. Col. No 217. p. 167.*1793. *January 29.*

JANET MACDONALD, and John DUFF, her Husband, against DAVID DOIG.

No 60.

Every thing in the wife's possession, except her paraphernalia, is presumed to belong to the husband, till the contrary be

JOHN DUFF, in 1787, obtained a decree of *cessio bonorum*. In this action David Doig was called, among his other creditors.

Near two years after, Duff married Janet Macdonald. In an antenuptial marriage-contract, proceeding on the narrative of her being possessed of personal effects at least to the extent of L. 200, he renounced his *jus mariti*; and she conveyed to trustees the whole property which she then possessed, or should