

No 1. all dead except the supplicant's own father, against whom it was sought, and that the supplicant could not seek it upon that clause.—See PROVISION TO HEIRS AND CHILDREN.

Fol. Dic. v. 2. p. 18. Durie, p. 10.

1663. February 27. Lady MILNTOUN against Laird of MILNTOUN!

No 2.

A wife cannot be her husband's interdictor.

THE Lady Milntoun pursues the probation of a tenor of a bond granted by Maxwell of Calderwood, her husband, bearing, that in respect of his facility, he might be induced to dispose of his wife's liferent, and thereby redact them both to want and misery; therefore he obliges himself not to dispose thereof without his wife's consent, seeing he had no means but what he got by her: Hereupon she used inhibition, which she now produces as an adminicle, and craves the tenor of the bond to be made up by witnesses. The defender having *alleged*, That there behoved here to be libelled and proven a special *causus omissionis*, because albeit it were proven that such a bond once was, yet unless it were also proven how it was lost, it must be presumed to have been given back to the husband, granter thereof, whereby he is liberated, and this is the course observed in the tenors of all bonds of borrowed money. The pursuer *answered*, That this was not like a bond of borrowed money, the intent whereof is, not to stand as a constant right, but to be a mean to get payment; but this bond, by its tenor, was to stand as a constant right, to preserve the dilapidation of the liferent, and so cannot be presumed to have been quit, by redelivery thereof, albeit it had been in the husband's hands.

THE LORDS, before answer to this dispute, ordained the pursuer to condescend what the effect of this writ would be, if it were made up; for if it have no effect, there were no necessity to make it up.

The pursuer condescended upon the effect thereof thus, that it would be effectual as an interdiction published by the inhibition, to annul and reduce the disposition of the pursuer's liferent, made by her husband, without her consent, in favour of Milntoun, her step-son; *2do*, This bond being accessory to the contract of marriage betwixt the same, and the marriage is *pactum dotale*, and must have the same effect, as if it were included in the contract of marriage, and so is a provision for securing of the pursuer's liferent to herself, and that no deed by her husband, without her own consent, should be effectual. The defender *alleged*, That none of these condescendences could be effectual, not the first because if the aforesaid bond were an interdiction, it would have no effect, unless it were instructed that the granter thereof were *prodigus*, and if it were instructed that he was *rei suæ providus*, it could take away the effect thereof, because an interdiction is nothing else but *constitutio cartitorum prodigo*, where albeit it is done of course *periculo facientis sine causæ cognitione* with us, yet if it be on a false ground and narrative, it is ineffectual; *2dly*, Though it could be

instructed that the husband was *levis*, yet the interdiction is null, being to his own wife, who cannot be his curator, being *sub potestate viri*, nor curator to any other, much less can her husband be made her pupil, contrary to the law, divine and human; neither could the bond be effectual, as a provision adjected to the contract of marriage, because it being from a husband to his wife, so soon as he was married it returned to himself *jure mariti*, because nothing can consist in the person of the wife which belongs not to the husband *jure mariti*, being moveable, except an aliment formerly constituted to her in a competent measure. The pursuer *answered*, That she opposed the bond, and further offered to restore to the defender all that he gave for the disposition of her life-rent.

THE LORDS, after they had reasoned the several points *in jure*, and found, that, without the offer, the bond could not be consistent as an interdiction, in so far as concerned the husband to annul the disposition, but were inclined to sustain the same for the wife, in so far as might extend to a competent aliment of her family to herself, daughter, and servants, not excluding her husband; yet they found the offer so reasonable to repay the sum paid for the life-rent, being 5000 merks, and the life-rent itself, being eight chalders of victual and eight hundred merks, that they found the effect of the tenor would be to restore either party *hinc inde*, but desired the pursuer to let the defender keep the possession of the house and lands, wherein there were many woods newly cut, he finding caution to pay her eight chalders of victual and eight hundred merks, which his father was obliged to make them worth by the contract of marriage.

Fol. Dic. v. 2. p. 19. Stair, v. 1. p. 189.

S E C T. II.

Pactum contra Libertatem.

1612. March 6.

WEDDERBURN against MONORGUN.

A CONTRACT whereby a man for assythment of slaughter, for the which he was prisoner, binds himself to perpetual banishment, and never to return to the Kingdom, nor to seek licence nor warrant for his returning, under a great pecuniary pain, not found lawful to infer contravention and payment of the sum, because the King's privilege cannot do that without the King's consent, especially he, as being convicted of a capital crime. It was remembered, That the

No 2.

No 3.

Paction of perpetual banishment, in lieu of assythment for slaughter, was found unlawful without the King's consent.