

No 76. being acknowledged *in græmio* of the pursuer's, reserved and accepted out of it, he cannot quarrel or reduce the same ;—in respect it was *answered* for the pursuer, That the exception in the warrandice of his right, doth not make a right to the defenders, but only secure from recourse against the granter ; and so doth not hinder the pursuer to quarrel and reduce the excepted rights upon nullities, or to declare the same to be satisfied and extinct, by the receiver's intromissions with the rents of the subject disposed.

Fol. Dic. v. 1. p. 381. Forbes, p. 423.

S E C T. VII.

Taking benefit of a reducible deed, while it stands, no homologation.

1664. November 22. MARGARET M'GILL *against* RUTHVEN of Gairn.

No 77.
In a reduction of a contract of marriage, it was not sustained as homologation, that the pursuer uplifted the rents of her jointure lands, because she did not complain of what she got, but what she gave.

MARGARET M'GILL pursues a reduction of her first contract of marriage with umquhile Patrick Ruthven, younger of Gairn, upon two reasons, *1st*, because it was *post nuptias*, and so *donatio inter virum et uxorem stante matrimonio revocabilis* ; *2dly*, Because she was minor, and enormly lesed, in so far as she disposed to her husband, and the heirs of the marriage, which failing, to his heirs, L. 8000 of money and above, and the half of some tenements in Edinburgh worth L. 1100 yearly ; in lieu whereof, her liferent was only of eight or ten chalders of victual, and of her own tenements ; but she did not retain to herself the liferent of the money, or any part of the stock ; whereby she is lesed, in that, if the heirs of the marriage fail, the money and the lands go to the heirs of the husband, and return not to hers ; and that her provision being worth L. 20,000, she ought at least to have had the double of the annualrent thereof in jointure. The defender *answered* to the *1st* reason, That it was no ways relevant, seeing this was expressly a contract of marriage, although after the marriage, there being no contract before, it is alike as if it had been before the marriage ; and, to the *2d* reason, it is not relevant, unless it were enorm lesion ; for there being no portion or rule in tochers and jointures, but that some get a jointure equivalent to the annualrent of their tocher, some half as much more, some double, and it being ordinary that tochers are provided to the heirs of the marriage, which failing, to the man's heirs, here was no enorm lesion, or any thing extraordinary, although there were an equality ; the pursuer being a bur-gess' daughter, and her husband a gentleman of an ancient family, quality

should be compensated with means. *3dly*, The pursuer, since she was major, had homologated the contract, by setting her jointure lands, and lifting the rent thereof.

THE LORDS having, before answer, heard probation of the provision, and of the jointure, and having at length considered the whole cause, they first repelled the defence of homologation, because the pursuer was not quarrelling what she got, but what she gave, and therefore requiring rectification to have more: They also sustained not the first reason of reduction, and found the contract not to be a donation betwixt man and wife; and they found the second reason of reduction relevant, in so far as extended to an enorm lesion beyond the latitude of contracts of marriage amongst such persons, and therefore found it not relevant to reduce the fee of the wife's provision, but found it relevant to add to her a further conjunct-fee, and therefore rectified the contract in so far as she had assigned her sums of money, without reserving her own liferent thereof; and found, that seeing the fee returned not to her, she should have the liferent of her own portion, and her provision out of her husband's estate, which is eight or ten chalders of victual further. *See HUSBAND and WIFE.—MINOR.*

Fol. Dic. v. I. p. 382. Stair. v. I. p. 227.

* * * Newbyth reports the same case: .

By contract of marriage betwixt Patrick Ruthven, younger of Gairn, and Margaret M'Gill, which contract being subscribed by the wife, after the marriage, in Gairn-house, she being removed from all her friends; and by which contract she, as heir to her father David M'Gill, disposes all right she had to all lands, tenements, and heritable sums, which did extend to the sum of L. 23,000; and for which she is only provided to the liferent of eight chalders of victual, and that only after the decease of her father-in-law, whose liferent right was reserved;—the said Patrick Ruthven, her husband, being dead, she pursues reduction of the foresaid contract, and of the foresaid disposition and assignation by her therein contained, as being made and granted by her in her minority, and after her marriage, being *donatio inter virum et uxorem*.—THE LORDS would not sustain the reason of reduction of the contract of marriage, nor of the disposition therein contained; but found, in respect of the disproportion betwixt the lands, and the heritable sums disposed and assigned by her to her umquhile husband, and the meanness of the jointure provided to her, that the contract ought and should be rectified, and accordingly rectified the same; and decerned the relict to have the annualrent of the whole sums of money, and rent of the tenement disposed by her, during all the days of her lifetime, with ten chalders of victual off Gairn.

Newbyth, MS. p. 4. 1.