

No 50. the duties for the said use and end ; and the Lady, as she could neither pursue nor defend without the husband's concurrence, and his being called, far less can she comply with her husband ; and albeit he had out of his goodness hitherto suffered the Lady to meddle, the same cannot debar him for the future ; and the missive letter contains nothing but *verba officiosa*, and compliments of a passionate lover to his mistress. Likeas by the same letter he gives her the same power over his estate as over her own ; and it is not to be imagined, that he intended to subject all his interests to her disposing ; and the settlement and back-bond was clear two years after ; and if such a preparative should be sustained, it would be pressing examples, and of dangerous consequences ; and albeit the renunciation had expressly related to the husband, yet it may be contended in law, that his right revived by the subsequent marriage, and he with far better reason might pretend to the estate in the north, albeit hitherto he has never moved any question for the same.—THE LORDS found, That the husband was not prejudged by the renunciation of his administration of the wife's estate ; but that he had the sole power and interest to dispose thereupon, and employ the same for the maintenance of the family.

Newbyth, MS. p. 92.

1670. June 30. GREIGS against JAMES WEMYSS.

No 51.
A contract of marriage, providing that the means and estate of either party should return to themselves, failing children of the marriage, and should not be under communion, was sustained, though it was pleaded to be contrary to the *jus mariti*, which, it was alleged, the husband could not renounce.

By contract of marriage betwixt James Wemyss and umquhile Judith Nairn, it was agreed that the means and estate of either party, contained in an inventory of the date of the contract, should return to either party, failing bairns of the marriage, and should not be under communion. Thereafter, the wife provides a daughter of a former marriage, to a part of her means in the inventory, with her husband's consent ; by which contract it is provided, that in case the marriage dissolve within year and day, or in case at any time thereafter, there being no children, the tocher should return to the said Judith Nairn. And the said Judith leaves in legacy 1200 dollars due by the Estates of Bremen, which was a part of her inventory, to her husband and her three children of the first marriage, there being no children of the second marriage ; whereupon John, Charles, and Judith Greigs, pursue the husband for the legacy, as having uplifted this sum from the Estates of Bremen.—The defender *alleged, first*, That the clause in the contract of marriage, taking away the communion of goods, and making even the moveable estate of either party to return, is against the law of Scotland, inconsistent and ineffectual ; for any reservation or provision in favour of the wife, doth, *ipso facto*, return to the husband *jure mariti*, which *jus mariti* neither is nor can be discharged. *2dly*, Albeit the first contract of marriage were consistent, yet the sum in question being provided to one of the daughters of the first marriage by her contract, upon condition to return to the wife if the marriage dissolved, the marriage dissolving, it comes back to the

wife *tanquam novum jus ex pacto acquisitum*, and so it falls under the husband's *jus mariti*, as well as any sum acquired would. 3dly, The husband uplifted this sum by commission from his wife, and so it must be presumed to have been spent *in oneribus matrimonii*, at least the husband must have retention of his expenses in recovery thereof.—The pursuers answered, That albeit provisions in contracts of marriage, stating rights in the wife's person, to be enjoyed by her during the marriage, have not been sustained in some cases; yet this being a provision of a return after the dissolution of the marriage, it is most consistent, especially in this case, where the estate contracted was abroad, and the contract itself made abroad, where, by the civil law current there, the means of either party do return *hinc inde*, and the profit thereof is only common *stante matrimonio*; neither is the case altered by the daughters contract; for both by the law and that paction, the tocher returning to the mother who gave it, in the same case it was, it is her's by her first right, the second right by the marriage becoming void, both by law and provision; neither doth it import that the husband lifted the sum; for by the contract, he is obliged to re-pay it, and could only employ the profit of it, *in oneribus matrimonii*.

THE LORDS repelled all these defences, but allowed expenses to the husband laid out by him in recovery of the sum.

Fol. Dic. v. 1. p. 389. Stair, v. 1. p. 687.

* * * Gosford reports the same case:

JUDITH NAIRN by her first husband, Charles Greig, having had two sons and two daughters, did marry James Wemyss for her second husband; and, by contract of marriage made in Holland, there was to be no communion of goods, but each party was to provide certain goods and sums of money according to an inventory, which, after their decease, were to pertain to their respective heirs. And particularly, there was a debt of 1200 rix-dollars due by the town of Bremen, which had fallen, and did belong to the said Judith, as heir to her brother Colonel Gordon, reserved to her to be disposed upon at her pleasure; and accordingly, by her testament, she having left 300 thereof to the said James her second husband, and 900 to her children of the first marriage, they did thereupon pursue the said James, their father-in-law, as who did uplift the whole sum from the city of Bremen. It was *alleged* for the defender; 1st, That the pursuer's mother did assign the said sum in name of tocher with Margaret Greig, one of her daughters of the first marriage, who dying within year and day, by the dissolution of the marriage, it did return to the mother, and so did belong to the defender *jure mariti*. This defence was repelled; both because the Lords found, that by the dissolution of the marriage the mother did return to be in that same case as she was before; as likewise, it was so expressly provided by the contract of marriage, to which the defender had consented. 2do, It was *alleged*, That the contract of marriage, discharging all communion of

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goods, was *contra jus publicum*, and reprobated by our law. This defence was likewise repelled; for the Lords found, that the contract being celebrated in Holland according to the law there, and the goods being debts due at Bremen, it was valid and obligatory; and also, that by our law, a reservation of a part of the goods belonging to the wife by contract of marriage, was not unlawful, and by the subsequent marriage, did not return to the husband *jure mariti*, the wife contracting for a sufficient portion *ad sustinenda onera matrimonii*. It was *alleged*, That the whole children of the first marriage had given a discharge to the defender and their mother of all that they could ask or crave. This allegiance was likewise repelled in respect of the reply, that that could only be interpreted of all that was due to them *proprio jure*, and did not comprehend this legacy left to them thereafter by their mother; likeas, the general discharge did bear an exception of their mother's good will, and did comprehend this legacy.

Gosford, MS. No 291. p. 125.

1678. July 13.

NICOLSON *against* INGLIS.

No 52.

A person in his contract of marriage with a widow, renounced his *jus mariti* as to her jointure. Found that the renunciation before the marriage returned to the husband upon the consummation, unless it had been previously assigned to a third party.

In a pursuit at the instance of the relict of John Inglis of Elvingston, against his son for implement of her matrimonial provision, an allegiance having been founded on the said John's renunciation of his *jus mariti*, in so far as concerned a part of her jointure, which she derived from a former husband, the LORDS "found the said renunciation could not subsist in the person of the wife, but that *ipso momento* it recurred back again to the husband, and accresced to him." My Lord Dumfermline was much troubled at this interlocutor, for it knocked his cause against the Earl of Callendar on the head, and cutted its throat. Some thought the Lords did it of purpose to advertise Dumfermline to agree. See observes in another MS. why this paction should not subsist validly betwixt man and wife, and that it should only be reprobated in so far as it may prejudice the husband's creditors; where mention is made of the Lady Collington's case with her husband, No 50. p. 5828. See APPENDIX.

Fol. Dic. v. 1. p. 389. Fountainball, v. 1. p. 7.

* * * Stair reports the same case :

By contract of marriage, umquhile John Inglis is obliged to infest Sarah Haliburton in liferent in an annualrent of 1000 merks yearly, and the said Sarah assigns him to a part of a former liferent of her's, and reserves another part thereof to be uplifted and disposed of by herself, whereupon he renounces his *jus mariti*. Mr George Nicolson, as assignee to the said Sarah, pursues John Inglis, as representing his father, for the payment of the yearly annuity, who alleged compensation, because the said Sarah, the cedent, had uplifted the mails and duties of that part of her liferent land which was