

No 51.

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

reserved. It was *answered*, That his father had renounced his *jus mariti* thereto. The defender *replied*, That the law having established a community of moveables betwixt husband and wife, and the sole and unaccountable management thereof in the husband during the marriage, no contract or paction can be effectual to state any moveables in the wife's person, which doth not *ipso jure* return to the husband to be at his management and disposal, except the abuilziments and ornaments of her body, or a competent aliment, specially appointed for her entertainment or abuilziment, which being so personal, *inhæret ossibus* and doth not recur to the husband; or if a third party give a donation to the wife excluding the husband, whereby the husband claiming right, it would be void and return; but this reservation is in none of these cases, and as such reservations are not consistent with law, so they are most inconvenient, and have been found ineffectual in many cases, as in the case of the Creditors of Mr Andrew Hamilton against the Lady Carberry, (*see APPENDIX*), who reserved her liferent with a renunciation of the *jus mariti*, and, though she had a plentiful fortune, and he had nothing, yet his creditors did affect her whole liferent, except a competent aliment; and in the case of Lord Collington, No 50. p. 5828., who, though in his contract he had renounced his *jus mariti* to the half of his Lady's jointure, and which being assigned to Ratho, and by his back-bond he was obliged to apply the same to the use of Collington and his Lady's family, yet the full administration and disposal thereof was found to belong to Collington himself. It was *duplicated*, That these cases do not quadrate with this, for whatever might be allowed in favours of the creditors of the husband against such reservations as fraudulent, yet it would be a personal objection against the husband himself or his heirs, that they could not come against his own contract, especially if they permitted the wife to uplift or enjoy the reservation. It was *triplicated*, That the very reservation itself returned to the husband *jure mariti* by the disposition of law, which all men plead, and in many cases cannot renounce or avoid, as if an eldest son renounce to his father his succession, or if all the heirs-female do the like, yet the succession will return to themselves with the right of renunciation; albeit an heir-portioner may renounce which will accresce to the rest.

THE LORDS found, that the reservation, with a renunciation of the *jus mariti* in the contract of marriage do recur and return to the husband, not being alimentary, and sustained the compensation thereon to his heir; but found, that the wife's intromission with her reserved liferent, could only be proved by oath or writ, that she had given out the same upon security or retained it in money after the marriage, it being presumed that a wife's intromission, though by her discharges it were proved, it was employed for the use of the family, unless the contrary were proved.

*Stair, v. 2. p. 631.*