

1697. February 9.

MOWAT against KATHARINE LAUDER.

ARBRUCHEL reported the Creditors of Mowat of Buchquholly against Katharine Lauder, Lady Buchquholly. Commissary Elphingston having reduced her different provision on an inhibition prior to her contract of marriage, she claimed her terce, as if she had not been provided at all. *Answered*, By her contract she had accepted of her jointure in satisfaction of all terce and third, and so having renounced it, and founded on her contract, she may not now recur thereto. *Replied*, Her conventional provision being annulled, it was optional to her to claim her legal terce, as if there had been no contract at all; even as if I buy lands owing me a servitude, it extinguishes, *quia res sua nemini servit*; yet if my property in these lands be annulled, my servitude reconvalesces. But the LORDS considered the decision between Lady Balagan and Lord Drumlanrick, No 2. p. 605. where a wife having accepted a provision matrimonial, and being excluded by the ward, was not suffered to seek a terce in supplement thereof; and following the same in this case, repelled the Lady Buchquholly's allegiance. But, in the practick cited, the impediment was only temporary, whereas here the debarment was total; only the *ratio decidendi* seems to be the same. See TERCE.

*Fol. Dic. v. 1. p. 428. Fountainball, v. 1. p. 765.*

1697. June 4.

MARGARET DEANS against ANDREW TOD and Others.

In a concluded cause, Margaret Deans, sister and executrix to John Deans in Dundee, against Andrew Tod, Helen Constable, and others, for exhibition and delivery of sundry goods pertaining to the defunct, this case occurred to the LORDS, upon advising their depositions; that the said John Deans, being in a treaty of marriage with the said Helen, but taking the sickness whereof he died, before consummation, he gifted her on his death-bed his signet-ring, and gave her two bonds extending to 1000 merks; and declared, in case he died before his assignation to her of the same was framed and subscribed, she should detain them till she were paid 1000 merks: And it being *alleged*, These donations were *intuitu matrimonii*, which never followed, they became null, and returned; the LORDS found she had no right to the bonds; but *quoad* the ring, if there was *interventio osculi*, the same, as *delibatio quædam pudicitia*, gave her absolute right thereto. Though the *l. 16. G. De donat. ante nupt.* allows allenarly repetition of the one half of what is gifted; yet the LORDS took not that course here, the gift being mean, and of its own nature indivisible.

*Fol. Dic. v. 1. p. 429. Fountainball, v. 1. p. 773.*

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No 44.

A Lady's jointure was reduced by a creditor who had inhibited before her contract of marriage. Having once founded on the contract by which her terce was renounced, she could not recur to the terce.

No 45.

In case of a marriage, dissolved before consummation, *interventio osculi* would save the wife from repetition of a small gift.