Thereafter Thomas White elder, in his daughter Marion's contract of marriage with Patrick Thomson, covenanted to pay with her 4000 merks of tocher. Of this contract James Gray, as assignee of Margaret Mathison, relict of Thomas White younger, raised reduction upon this ground, That Thomas White elder, having become bankrupt, could not enter into such an obligation in prejudice of Margaret Mathison's liferent provision, for which he was priorly bound, as burden-taker for his son, by which he, as *correus*, had subjected himself to the fulfilling of any obligation his son had come under in his contract of marriage with her.

No 25. sum on good security. This obligation was found to affect the son only, not the father personally.

It was *answered*, That the father became only obliged to pay 3000 merks to his son, but was not bound to employ the same with the wife's tocher; that the son alone was taken bound to perform that part of the contract; and though the father, as administrator in law, authorised his son, because then a minor, which gave occasion to the usual clause in the beginning of the contract, 'With the special advice and consent of his said father, and the said Thomas White elder, for himself, and taking burden upon him for his said son, and they both of one consent and assent,' &c. yet that could never imply that the father was cautioner for the son in those obligations in which the son was alone bound.

THE LORDS found, That Thomas White elder was not bound in his son's contract of marriage for the liferent of the 5000 merks thereby provided to his wife Margaret Mathison, and now assigned to James Gray; and therefore found he could not reduce Thomson's contract of marriage on the ground of that credit.

Reporter, *Lord Cullen.* Act. *Ch. Binning.* Alt. *H. Dalrymple, sen.* Clerk, *Mackenzie.*

Fol. Dic. v. 3. *p.* 127. *Edgar, p.* 125.

1730. *January* 1. KENNEDIES *against* RONALD.

A WOMAN, in her contract of marriage, obliging herself to pay to her husband 2000 merks of tocher, at least to subscribe and deliver assignations to as many sufficient bonds as would extend to that sum; this clause was found to import, that the sum must be paid by bond or assignation as aforesaid, and that the moveable goods and gear which fell otherwise to the husband, *jure mariti*, could not be imputed in payment thereof.

No 26.

Fol. Dic. v. 1. *p.* 146.

See This case *voce* HUSBAND and WIFE.

1743. *February* 19.

MARGARET GARDEN, Relict of GILBERT STEWART, Merchant in Edinburgh, *against* JOHN STEWART, &c. Representatives of the said Gilbert.

No 27. It was provided, in a contract of marriage, that the

THE said Gilbert Stewart having married Margaret Garden, he, by a postnuptial contract, provided her in L. 30 of annuity, in case she survived him,

No 27.
special provisions which the wife accepted of in full, should remain effectual, altho' the marriage should not subsist year and day. It did not subsist so long. She was found entitled to aliment and mournings, besides her special provisions.

and, in the same event, he obliged himself to pay her 1000 merks for her share of the household plenishing; which provisions she accepts 'in full of all she 'and her nearest of kin can claim, or demand for terce of lands, third or half 'of moveables, executry, and others whatsomever, from the said Gilbert Stew-'art,' &c. After which she assigns him to a jointure she had by a former marriage. And then follows this clause, 'And both parties agree and declare, that 'these provisions on both sides shall stand in full force, notwithstanding the mar-'riage shall dissolve by the death of either of the parties, within year and day, 'without a living child.' Gilbert died about seven weeks after the marriage; whereupon she brought a process before the Commissaries of Edinburgh, for alimenting the family until the next term, and for mournings. The Commissaries 'found her entitled to mournings, and to the maintenance of the family, and 'allowed a proof of the same, reserving modification.'

The Representatives offered a bill of advocation, and *pleaded*, That it was a fixed principle in our law, that when the marriage dissolves within year and day, &c. every thing returns *hinc inde*. It is true, that of later years, practice has prevailed, of dispensing with the law in this particular, by a special *proviso*; but where no such provision is made, the law stands as it did. Upon the same principle, it must be admitted, that it is optional for the parties to dispense with the same, in whole or in part. If the dispensation be total, the provisions, whether legal or conventional, must take place in their full extent, as if the marriage had subsisted beyond the year: if but partial, the dispensation will have its full effect, so far as the paction goes, and no further. To apply these observations to the case in hand; it does not appear from the above contract of marriage, that there is any such *proviso* in it, as that, in case of the dissolution of the marriage within year and day, the party surviving should be intitled to every provision legal or conventional, competent by law, as if the marriage had not been so dissolved; on the contrary, the *proviso* is most special and limited, that the particular provisions as covenanted *hinc inde* in the marriage contract, shall stand in full force, notwithstanding the marriage dissolve within year and day; so that the dispensation is plainly so circumscribed, as to reach no farther than the special provisions contained in the contract; and therefore, as to every other particular, the law stands as it did. It is submitted, therefore, if the relict is not debarred from any such claim by the express words of the contract, whereby she accepts of the provisions therein specified, 'in full of all that she 'or her nearest of kin can claim or demand for terce of lands, third or half of 'moveables, and others whatsomever,' &c. Are not the particulars, now insisted for, a claim which she makes against her husband's estate? and if such, are they not especially excluded by the express words of the above clause?

THE LORDS refused the bill of advocation.

Fol. Dic. v. 1. p. 127. C. Home, No 231. p. 377.