

the tocher, it is presumed he gave a bond for the repayment, and which *de facto* was repaid. No 371.

Answered for the pursuer; That provisions between husband and wife, or third parties, in contemplation of marriage, do indeed resolve upon the dissolution thereof within the year; but this bond was granted after the marriage.

THE LORDS generally inclined to sustain the first defence; but some being unclear as to that, the LORDS determined upon the second, that the husband being debtor, by intromitting with L 1000 of the tocher, the granting of the second bond was intended in satisfaction of that debt, seeing *debitor non præsumitur donare*; and here the bond bore 'love and favour,' and onerous causes.

Harcarse, (STANTE MATRIMONIO.) No 872. p. 247.

1743. February 19. MARGARET GORDON *against* STEWART and Others.

No 372.

FOUND, that even where marriage dissolves within year and day, the relict is entitled to mournings.

The point was new; the mournings were considered to be due in this case, not so properly as a legal consequence of marriage, as that the wife, being a part of the husband's family, ought to have mournings, as what the respect due to the husband's family required, as it did, that servants get mourning.

Fol. Dic. v. 3. p. 289. Kilkerran, (HUSBAND and WIFE.) No 6. p. 258.

1751. February 22. ELIZABETH SOMERVILLE *against* GEORGE BELL.

No 373.

JOHN FORRESTER of the island of Jamaica, had it long in view to make his addresses to Elizabeth Somerville, so soon as his circumstances should permit him to marry. One of his letters to her dated in March 1739, has the following paragraph: "I'll settle upon you, in case of death, L. 100 per annum, to be paid upon the Exchange of London. As to your own fortune, I want none, nor did I ever court you with that view; if you have a mind to give it to any of your relations, I'll with all my heart consent, for I thank God I do not want it. I'll take care to support you as well as your dear heart can wish. As to your jointure, it shall be preferable to any sister you have, &c." In the year 1743, Mr Forrester came home, and the marriage was celebrated 27th December that year, but without the formality of a marriage-contract. Being upon death-bed, April 1744, and without the least prospect of recovery, he executed a deed, which became a subject of dispute in the Court of Session. It proceeds upon the narrative, 'That there was no contract of marriage, but only some verbal conditions; therefore, in execution of his just intentions, he becomes bound to pay the sum of L. 666 : 13 : 4 Sterling, to his spouse in life.

Where marriage dissolves within year and day, post-nuptial contracts fall.

No. 373.

'rent, and to the children to be procreated of the marriage in fee; whom failing, to his spouse, her heirs, and assignees.' This sum is declared to be in place of her legal provisions. The deed farther contains a legacy to her of the household plenishing; and lastly, bears a dispensation with the delivery. What was expected happened, for Mr Forrester did not survive this deed three days, and he left no child.

It came to be disputed betwixt the relict and the nearest of kin, whether this deed was to be considered as granted *intuitu matrimonii*, and to fall, as the marriage did not subsist year and day; or *intuitu mortis*, and thereby to be effectual as a legacy, or *mortis causa donatio*. The Lord Ordinary having given it the former construction, the relict reclaimed upon the following grounds: *1mo*, That this heteroclitic practice of annulling marriage-contracts, when the marriage does not subsist year and day, can have no other foundation but an implied consent of parties; and supposing such consent to be implied in post-nuptial, as well as in ante-nuptial contracts, the circumstances of this case afford real evidence, that Mr Forrester intended the deed to be effectual, though he should die the next day. The deed bears date the 28th April, the year and day did not elapse till the 27th of December; the granter was given over by his physicians, and died a few days thereafter; can we admit of so absurd a supposition, as that he intended the deed should be null, unless he lived eight months, when he had not a prospect of living eight days?

2do, The deed in question is not a contract of marriage, ante-nuptial, nor post-nuptial. It is a legacy or *donatio mortis causa*, the characteristic of which is to be effectual at the granter's death, and not before. It is not a mutual contract, which is the character of a contract of marriage; it contains no obligation upon the Lady; but is altogether in her favour, and bears expressly 'to be in execution of his just intentions, and of some verbal conditions agreed upon at the time of the marriage.' And what these intentions were, appears from his missive letter above set forth. And that this was meant a *donatio mortis causa* is proved beyond doubt by the clause dispensing with the delivery; this clause is legal evidence that Mr Forrester intended to keep this deed in his own hands, and consequently under his own power. With regard to such a deed, it is really absurd to imply an irritancy in case the marriage did not subsist year and day; an irritancy, from the very nature of the thing, presupposes that the deed is binding, and that it is to be effectual in case the irritancy be not incurred; what use can there be to stipulate an irritancy, or to suppose such a thing intended, in a deed which the granter keeps entirely in his own power?

"THE LORDS adhered by a very narrow plurality. The President was clear for the relict upon this footing, that a deed *mortis causa* retained in the granter's hands, and under his power, to be effectual upon his death, is inconsistent with the supposition of any irritancy."

Fol. Dic. v. 3. p. 290. Rem. Dec. v. 2. No 122. p. 257.

* * * Kilkerran reports the same case:

No 373.

It is a peculiarity, in the law of this country, that where marriage dissolves within year and day, marriage-contracts, and other provisions made *intuitu matrimonii* become void. But a question was stirred in this case, whether or not this took place in post-nuptial contracts of marriage. Ante-nuptial contracts of marriage being entered into *intuitu matrimonii*, imply a condition that they are not to be effectual unless marriage subsist for year and day; but it was argued, that post-nuptial contracts can imply no such condition, and must therefore subsist as other contracts conceived in pure and absolute terms.

But as there was no such distinction known in practice, the LORDS found, "That post-nuptial contracts fell by dissolution of the marriage within year and day."

It was in this case further *argued*, from a variety of circumstances, and *inter alia*, that this post-nuptial deed was granted by the husband, at a time when he was ill of the sickness of which he died; that it is a deed altogether in the wife's favour, without any thing given on her part; that it was never delivered to the wife, but retained in the husband's custody, as it contained a dispensation with the not delivery, and might therefore have been destroyed by him at his pleasure; I say, it was *inter alia* from these circumstances argued, that this deed, called a post-nuptial contract, was rather a *donatio* by the husband *mortis causa*; and if such appeared to be the granter's intention, it could not fall under the above rule with respect to marriage-contracts.

But to this the answer was satisfying, That though it is true, that the intention must determine the question, as it is in the power of parties to recede from that part of our law; yet the circumstances were not sufficient to show such intention, as there were no words in the deed to show that *mors* was the *causa donandi*. On the contrary, the deed proceeds on the narrative of there having been no contract of marriage, but only some verbal conditions agreed upon, and intended to be digested into writing, and therefore in execution of that intention, 'he binds and obliges, &c.'; that further, far from appearing that *mors* was the *causa donandi*, he, in hopes of issue thereby, provides for the children to be procreated; and declares the provisions made, to be in full satisfaction of all further provision, of terce of lands, half or third of moveables, or others competent to her, or her nearest of kin, the usual stile of a marriage-contract, which being supposed executed, though retained in his hand, he could not lawfully destroy.

And accordingly, the LORDS "sustained the defence against the relict's claim upon her contract, that the marriage had dissolved within year and day."

Kilkerran, (HUSBAND AND WIFE.) No 19. p. 270.