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1760. *November* 24. FORBES *against* BADENOCH.

A PERSON bound himself, in his contract of marriage, to secure 6000 merks upon land, bond, or other sufficient security, and to take the rights in favour of himself and his wife, and the longest liver, in liferent, and to their heirs in fee. He purchased a small estate at the price of 6300 merks. The wife afterwards pursuing for deficiency of jointure, because the rent of the land did not equal the annualrent of 6000 merks,——THE LORDS found, that the obligation in the contract had been sufficiently implemented, and that the pursuer was not entitled to claim the difference.

Fol. Dic. v. 3. p. 127.

1763. *February* 24.

LACHLANE M'KINNON of Gambole *against* JOHN and ALLAN M'DONALDS.

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A contract of marriage, where the provisions proceeded upon supposition of the husband's predecease, found to exclude the wife's nearest of kin from any claim, on her predecease. *See* No 30. p. 2274.

IN April 1757, a contract of marriage was entered into betwixt Penelope M'Donald, sister to the defenders, and Lachlane M'Kinnon of Gambole. By this contract, the wife was provided, in the *first* place, in an annuity of L. 100 Scots during her life, in the event of surviving her husband; she was also provided to a third of the moveables; further, she was provided in the sum of 2000 merks money, in case the marriage should dissolve within year and day by the death of the husband; then followed provisions to the children of the marriage; after which, the wife was provided to half the conquest, all the sheep and goats, and the best horse, in case of surviving her husband.

The wife's tocher was 1000 merks, for which she assigned to her husband, her brother Allan M'Donald's bill.

The marriage subsisted about three years, when the wife died without children. And Mr M'Kinnon brought a process against John and Allan M'Donalds, his wife's two brothers, for payment of her tocher, and for certain other claims which he had against them.

The defenders *pleaded*, That all the clauses in the contract proceeded upon the supposition of the husband's predecease; but that no provision whatever had been made upon the supposition of the wife's predecease, which being the event that had happened, her share of the moveables devolved upon them as her nearest of kin; and that this share, which was in the pursuer's own hands, did more than compensate the claims he had against them.

This cause came before Lord Kames, who ordered memorials, in order to report it to the Lords.

Pleaded for the defenders, That the wife's share of the moveable estate cannot be taken away, but by an express renunciation. In the eye of law, the wife has an equal share in the communion of goods with the husband; and, as to that

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share, she is absolute mistress, and may dispose of it as she pleases. As she is therefore proprietor, nothing less than an express renunciation of that property can divest her of it, or, in the event of her predecease, her nearest of kin. Hence inserting provisions, as in the present case, will by no means have the effect to deprive either her, or her nearest of kin, of that right. In the just construction of such a deed, it will be understood, that both these provisions, and the legal ones, must subsist, so far as they are not incompatible. The *jus relictæ* is by no means a subsidiary claim. It is a direct property, or interest, which the wife has in the communion of goods, established to her by law and custom, independent of the consideration, whether she is provided or no; and therefore, except she has expressly renounced, she cannot herself, nor can her nearest of kin, in case of her predecease, be deprived of that right, which the law gives her in the moveables in common with her husband.

The act of Parliament 1681 strengthens this argument. Before that law, a particular provision in a contract of marriage out of a land estate did not bar the terce; and it required the authority of an express statute to alter that part of our law. The same rule must now hold with regard to the *jus relictæ*. By the common law of the land, the wife has an equal share of the moveables with the husband at the dissolution of the marriage. If she has not renounced that share, it must remain with her, or, in case of her predecease, with her nearest of kin, and cannot be taken from them by implication. Lord Bankton, b. 1. tit. 5. p. 137. Young *contra* Buchannans, 1664, Stair, v. 1. p. 243. *voce* IMPLIED DISCHARGE, *&c.*; Holmes *contra* Marshall, February 2. 1677, Stair, v. 2. p. 502. IBIDEM.

Pleaded for the pursuer; That a special discharge, or renunciation, is not necessary to evacuate the legal claims arising from marriage. No good reason can be assigned, why an implied or virtual discharge should not be allowed to take place here, as well as in other transactions where the law admits of it, and where the Court has often found, that a discharge or renunciation, though not expressed in words, may be inferred from the nature of the business or transaction, *See* IMPLIED DISCHARGE and RENUNCIATION; Durie, p. 621. 17th February 1632, Kincaid *contra* Yeaman, *voce* HERITABLE and MOVEABLE; Fountainhall, v. 2. p. 462. 16th November 1708, Ormiston *contra* Hamilton, *voce* HUSBAND and WIFE; 22d December 1752, Wachop *contra* Gibson of Durie, Fac. Col. No 51. p. 75. *voce* FIAR ABSOLUTE, LIMITED. The Court determined all these cases on a presumption, arising from the plain meaning and evident intention of parties, which does not seem to be better founded, either in law, or in the nature of the thing, than that which occurs in the present case. Where a man and wife go together without a previous contract, their several interests must no doubt be regulated by the provisions of law; but, where a solemn and formal contract of marriage has been entered into, in which the wife is secured in provisions suitable to her station, and to the fortune of her husband, it is surely a most natural, a most just, a most legal presumption, and the only fair and proper construction that

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such a transaction can admit of, that these provisions are stipulated to the wife, and accepted of by her, in lieu of the claims which she would otherwise have had by law on her husband's estate, and of the interest which she would have had in his moveables. And it seems plain, that the casual omission of a clause of renunciation cannot, in justice or in reason, alter the nature of the transaction.

With regard to the act 1681, cap. 10. it appears by the *Regiam majestatem*, lib. 2. cap. 16.; Balfour, tit. Wife's dowry and terce; and Sir Thomas Craig, lib. 2. dieg. 22. § 25. That originally the provision of terce took place only, where no special provision was otherwise settled upon the wife; and that it was not even in the husband's power, in those days, to settle any higher provision upon his wife than this legal terce. Afterwards, some decisions had run greatly into the other extreme; for which reason the act 1681 was made, fixing it for the future, that the legal terce was presumed to be excluded, unless where expressly reserved in the contract. This act, therefore, did nothing more than bring back the law to where it formerly stood.

'The Lords found, That the provisions in the contract of marriage were in full of all the legal provisions; and that therefore the defenders had no claim upon any part of the pursuer's moveables.'

Reporter, *Lord Kames.* Act. *Iloy Campbell.* Alt. *Monro, Burnet.*

Fol. Dic. v. 3. *p.* 128. *Fac. Col. No* 105. *p.* 246.

No 34.

An heiress, in her contract of marriage, disponed her lands to herself and husband in conjunct fee and liferent, and to the heirs of the marriage in fee, declaring that should there be children existing at the husband's decease, her liferent should be restricted to an annuity; the residue to belong to the children. The husband died bankrupt. Found

1782. *August* 5. Blairs *against* Bell and Others.

Jean Scott, proprietrix of the lands of Belrenmont, in her contract of marriage with Bryce Blair, in consideration of the provisions stipulated to her, and her children, disponed these lands, 'to and in favour of herself, and the said 'Bryce Blair, in conjunct fee and liferent, and to the heirs to be lawfully pro-'created of the said marriage between them in fee; which failing, to the heirs 'lawfully to be procreated of the said Jean Scott's body in any other marriage; 'which also failing, to the said Bryce Blair, his heirs and assignees whatsoever; 'But declaring, that in case there be children, one or more, male or female, 'procreate of the said marriage, and existing at the death of the said Bryce 'Blair, and that the said Jean Scott survive him, then, and in that case, she 'hereby, during the existence of the said child or children, restricts and limits 'her liferent to an annuity of L. 30 Sterling yearly, upliftable forth of the said 'lands; the remainder of the rents, and profits thereof, being to go to the child 'or children to be procreate of the said marriage.'

Bryce Blair died in bankrupt circumstances, leaving a widow and six children of the marriage; upon which event, several questions arose respecting the construction of the clauses above recited.