1770. *August* 3 and *December* 11. ELIZABETH TOD *against* DAVID WEMYSS.

IMPLIED DISCHARGE AND RENUNCIATION.

The *jus relictæ*, whether excluded by certain conventional provisions in the marriage-contract?

[*Faculty Collection*, *V.* 174; *Dictionary*, 6451.]

PITFOUR. There is a decision, not in the Dictionary, *12th December* 1712, *M'Aulay of Ardcaple*, observed by Forbes, which determines this case for the relict. Upon this decision I have given opinions and have pronounced interlocutors which have been acquiesced in. Here a clause of conquest makes a subject heritable *destinatione*, which will exclude the question—how far this will hold? If sums of money, they would be exemed from the relict's part; as also stocking and furniture. Bills also would be exemed.

KAIMES. The nature of the contract ought to be taken into consideration; and from it we may conclude, that it was meant absolutely to exclude the *jus relictæ*. The last part of the interlocutor lays down rules for judges when words are clear; but here the meaning is so far from being clear, that, if we adhere, we shall make a deed different from what the parties meant. Independent of the statute 1681, a wife was not entitled to legal provisions if she had conventional. The statute does not say that an express discharge is necessary when intention is plain.

AUCHINLECK. The widow cannot have a share of the conquest, because she is otherwise provided. This case is favourable to the widow; but, suppose that her nearest in kin were claiming, that would sound odd. The *jus relictæ* is not expressly excluded; but a provision is made, just as if it had been the intention of parties to exclude it.

ALEMORE. It is the principle of the law of Scotland that conventional provisions do not, *ipso facto*, exclude legal. So stood the law as to the terce before the Act 1681, notwithstanding the opinion of Balfour and Craig to the contrary. As to the clause respecting conquest, I think that it comprehends bills.

MONBODDO. It is fixed that the *jus relictæ* is not excluded by conventional provisions. Had I seen words implying a discharge, I should not have required direct words.

On the 3d August 1770, "The Lords found the relict totally barred;" altering Lord Monboddo's interlocutor.

Act. A. Bruce. *Alt.* Ilay Campbell.

Diss. Alemore, Pitfour, Kennet, Hailes, Monboddo.

Dec. 11.—MONBODDO. I cannot agree to the alternative of a choice asked by the widow. I am for altering the interlocutor as to the other point. It is impossible to suppose that the legislature laid out of its view the legal provision of the *jus relictæ;* and, therefore, as it said nothing concerning that, it is the same thing as if it had declared the law to remain on its former footing. The whole question then is upon the construction of this particular marriage-contract. A discharge may be by implication as well as by express words; but then the implication must be necessary. I do not see that any of the particular provisions import a discharge of the *jus relictæ* any more than any thing else secured to her.

GARDENSTON. Of the same opinion. The only question is, Whether there is any clause in this marriage-contract importing a renunciation of the *jus relictæ.* The only one that has such appearance is the provision of conquest to the children; but this does not imply a renunciation of her claims, for the conquest is only what remains,—debts, and all other legal burdens being first deduced.

PITFOUR. A marriage-contract, establishing provisions to a wife, does not exclude the *jus relictæ,* unless so provided. But this does not determine the present case. I think that, as to conquest, the wife's *jus relictæ* is excluded; for the subject of the *jus relictæ* is only moveables.

AUCHINLECK. My wishes are for the widow: It is a favourable case. But we must judge as the law stands. Here is a general settlement made by the husband, presumed to have been made with the wife's consent. Every thing is settled. If nothing had been said of conquest, her claim would have been good; but here it is expressly given away with her consent to her children.

COALSTON. The general question in law is not before us. It is plain that the only clause sufficient to bar the wife's claim, is that concerning the conquest. How can we get over it? Any claim falling under the *jus relictæ,* which does not fall under the conquest, may be reserved to the wife.

PRESIDENT. All are agreed that the Act, 1681, is out of the question. A marriage-contract may be so framed as to imply a virtual renunciation. A provision of conquest is what commonly occurs in the settlements of people of middling rank: this is for the interest of the children. It does not touch upon the interest of the wife.

On the 11th December 1770, "The Lords found the wife excluded from conquest by other provisions in her marriage-contract: [adhering to the former interlocutor.] But found she was not excluded from claiming any other subjects which may have belonged to her husband."

Act. A. Lockhart. *Alt.* R. M'Queen.

Diss. Strichen, Gardenston, Kennet, Hailes, Monboddo, President. [Alemore absent, who was against the former interlocutor.