red somewhat on this. I have heard some debate, where a mother relict aprises the fee of her son's lands, for the bygones of her liferent, if that apprising ought to have a legal, and, when it expires, carry away the whole right of the fee, or only give her a temporary fee; that is to say, possession of the whole lands during her lifetime; seeing no more is designed her but an honourable aliment, and an *usufructus*, (which must be *salva rei substantia*), and she ought not to let her bygones run on. See Hope's Minor Pract. cap. 10.; and some think the books of Regiam. Maj. lib. 2. c. 16. which did not suffer nor empower a husband to give more dower to his wife than the third of his heritage in liferent, more rational; though our custom since, favouring fond husbands, (who often repent what they did *in æstu amoris*), hath abrogated this. No 47.

1681. *July* 7. The debate anent the Lady Craigleith's terce (mentioned 17th Feb. 1681), being advised, the LORDS remitted it to the consideration of the ensuing Parliament, who accordingly made the 10th act of that Parliament thereanent.

Fountainhall, v. 1. *p.* 130. & 146.

1763. *February* 24. M'KINNON *against* M'DONALD.

No 48.

IN a contract of marriage, the wife was provided to a suitable annuity in the event of her surviving her husband, and likewise to a third of the moveables and a half of the conquest, all on the same event; and on her part she assigned in name of tocher to her husband, a bill of her brother's for 1000 merks. Having pre-deceased her husband within the year, he pursued the brothers for the tocher; who urged, in defence, that the conventional provisions in the contract were no discharge of the legal ones, and that these were more than sufficient to compensate the claim for tocher. THE LORDS found, That the provisions in the contract were in full of all the legal provisions.

Fol. Dic. v. 3. *p.* 302. *Fac. Col.*

*** See this case, No 33. p. 2278.

1770. *December* 12.

ELISABETH TOD, Widow of James Wemyss, Pursuer, *against* DAVID WEMYSS, the Eldest Son, and the YOUNGER CHILDREN of the deceased James Wemyss, Defenders.

No 49.
The widow's claim to the *jus relictæ*,

JAMES WEMYSS was married in 1730 to Elizabeth Tod, with whom he received 1000 merks of tocher; and by the contract entered into on that occa-

No 49.
whether excluded by certain conventional provisions in the marriage contract.

sion, the following provisions were made in favour of the wife and issue of the marriage:

1*mo*, James Wemyss obliges himself to have in readiness 2000 merks, and to employ the same, together with the 1000 merks of tocher, for an annualrent on good security, and to take the rights thereof to himself and the said Elizabeth Tod, and the longest liver of them, in conjunct fee and liferent, and the heirs and bairns of the marriage in fee; which failing, 'to fall and appertain 'as after expressed.'

2*do*, Whatever 'lands, heritage, goods, and gear,' shall happen 'to be con-'quessed and acquired,' during the marriage, the said James Wemyss binds and obliges him to provide and secure the same to himself in liferent, and the bairns lawfully to be procreated of the said marriage in fee; which failing, the said James Wemyss, his own nearest heirs, executors, and assignees.

3*tio*, It is hereby expressly stipulated and agreed to by both parties, that if it happens the said marriage to be dissolved by the decease of the said Elizabeth Tod, and that there be no children procreated and existing at the time of the dissolution thereof, then, and in that case, the sum of 500 merks of the foresaid 3000 merks 'to fall, appertain, and accresce to the nearest heirs, execu-'tors, and assignees of the said Elizabeth Tod,' and the remainder of the said 3000 merks to the said James Wemyss, his heirs, executors, and assignees.

4*to*, In case it shall happen the marriage to dissolve by the death of the said James Wemyss, he binds and obliges himself, his heirs, &c. to content and pay to the said Elizabeth Tod, her heirs, &c. the sum of 1000 merks, at the term of Whitsunday or Martinmas after the dissolution of the said marriage.

5*to*, James Wemyss obliges him and his foresaids to pay yearly to the said Elizabeth Tod, in case she survive him, such an annualrent as by law shall correspond to the principal sum of 500 merks, by giving the first year's payment thereof at the first legal term, &c.; all which provisions in her favour are to subsist whether there be bairns of the marriage or not.

6*to*, James Wemyss thereby dispones to the said Elizabeth Tod, in the event of her survivance, one just and equal half of what household plenishing shall be in common between them, in case there be no children procreated and then existing; but restricted to an equal half if there shall be children.

In this contract the usual clause, 'declaring the same to be in full of all the 'wife's legal claims,' is omitted; and though it was signed by James Wemyss and James Tod, the bride's subscription did not appear. The marriage took place; several children were procreated; James Wemyss proved successful in life, acquired a small estate in land, and, at his death in 1766, left upwards of L. 2000 in money, having made no other settlement of his affairs.

Elizabeth Tod the widow, conceiving that her provision was very inadequate to the state in which her husband had left his affairs, brought an action against her husband's representatives, concluding, 'That as she had not signed the 'marriage contract, she was not bound by it, but was at liberty to betake her-

No 49.

'self to her legal claims of *terce* and *jus relictæ*.' But, upon 16th November 1768, *voce* MUTUAL CONTRACT, the Court found 'the contract of marriage 'betwixt James Wemyss and Elizabeth Tod, in respect of the subsequent 'marriage betwixt them, subsisting and obligatory upon all parties.' And the Lord Ordinary, to whom the cause as to the otherpoints was remitted, 'found 'that James Wemyss, the father, had a power of *division*; and having exer-'cised that power by taking the fee of the lands of Lathallan in favour of the 'defender, his son, the same does belong to him.'

The pursuer acquiesced in the interlocutors, but contended that she was still entitled to her legal provision of a third of moveables, as well as to the conventional provisions in the marriage contract, the same not having been expressly discharged. Upon advising memorials, the Lord Ordinary pronounced an interlocutor, finding, that as the pursuer had not discharged her *jus relictæ*, she was still entitled thereto, over and above the provision in her marriage contract. David Wemyss, along with the other children, gave in a petition; upon advising which, with answers, the Court found, 'That in this case Elizabeth Tod 'is not entitled to claim her *jus relictæ* over and above the provision in her con-'tract of marriage.'

Elizabeth Tod, in a reclaiming petition, *pleaded*;

1*mo*, The legal provisions to which wives were entitled, if not otherwise regulated by parties, were, a terce of the husband's lands, and a third or half of the free moveables in communion; and, in order to entitle her to the enjoyment of these, no stipulation was required.

These legal provisions, however, were so far to be distinguished from one another, that they rested upon different principles. The terce was a temporary burden upon the husband's estate, of which, in case of survivance, she could not be disappointed by any act or deed of his; whereas the *jus relictæ* was not a claim of debt against the husband or his heirs, but a partition of those moveables which were in communion and were extant at the dissolution of the marriage. Hence this right was the creature of the law, and operated *ipso jure* whenever the event on which it depended took place. There was, however, one principle in law common to both, viz. '*Quod provisio hominis non tollit 'provisionem legis*,' if the same was not clearly and explicitly renounced by the previous agreement of parties. Lord Stair, b. 1. tit. 4., § 21. lib. 3. tit. 8. § 45. Lord Bankton, lib. 1. tit. 5. § 82. 107. and 123. Craig, lib. 2, Dieg. 22. § 25.

This point was put out of all doubt by the enactment of the statute 1681. c. 10. 'concerning wives terces;' which, being a correctory law, was to be strictly interpreted. By that statute it was enacted, that where a particular provision by contract of marriage or other right was granted by a husband in favour of his wife, she should be secluded from a terce of lands or annualrents, unless the contrary was expressly provided. Hence, as no mention was made here of the wife's *jus relictæ*, it was the intendment of the statute that the law on that point should be left upon the same footing as it stood formerly; and of

No 49. course, that no special provision, if it was not granted and accepted by her in satisfaction, should exclude the wife of that right.

2*do*, As to the particular circumstances of the case, the tenor of the marriage contract was evidence of the intention of parties; for as it must be presumed the contracting parties knew that a simple provision was a 'discharge' of the terce, so they must equally well have known that such provision could have no such effect as to the *jus relictæ*; and as that accordingly had neither been discharged nor renounced, the contract could admit of no other construction than that it was to be in satisfaction of one of these legal rights, but not of the other.

The *third* clause in the contract, by which 500 merks, part of 3000, in the event of the wife's predecease without issue, was appointed to accresce to her nearest heirs, &c. and the remainder of the 3000 to James Wemyss, his heirs, &c. was merely explicatory of the first clause recited, by which the 3000 merks was provided, failing children of the marriage, 'to fall and appertain as after 'expressed.' No more was thereby intended but a return of so much of the wife's portion to her nearest heirs in the said event; but it never could be inferred that this agreement, so expressly limited to the 3000 merks, should be construed to import a transaction respecting the claim of the widow's nearest of kin to the whole of the *jus relictæ*, with which this sum of 3000 merks had no connection.

The obligation in the *fourth* clause of the contract, by which, in the event of his predecease, James Wemyss and his heirs became bound to pay to the widow 1000 merks, was clogged with no quality whatever; it was to be paid whether there were children or not; it was in fact a debt pendent upon the petitioner's survivance; and, as it was not given in satisfaction of any other claim, legal or conventional, it fell, like any other debt, to be paid out of the executry, and would no doubt so far restrict the *jus relictæ*, but farther than that it could not operate.

The defender answered;

1*mo*, It was a principle founded on reason, that a wife, independent of the enactment of any statute, should not be allowed to claim both a conventional provision and a terce out of her husband's lands. This was the law prior to the statute 1681; and it was to correct the ignorance of writers of marriage settlements, and to prevent an undue advantage from being taken of husbands, contrary to the real meaning and intendment of the parties, that the statute was made; which, instead of being narrowed, should receive a beneficial and extensive construction. There appeared, therefore, to be the same reason why the law should, in this respect, have been extended to the *jus relictæ* as well as the *terce*; there was in reality no distinction betwixt them; and the only reason why the statute 1681 was silent as to the *jus relictæ* was, that at that period, moveable estates were of little value, and not an object of legislative attention. Hence it could not be doubted, that where in a marriage contract a provision

was stipulated for the wife in the event of the husband's predecease, it was the intention of parties it should be in full of all she could claim out of her husband's estate.

2do, Upon a fair and just construction of the marriage contract, it appeared that the *jus relictæ*, in the present instance, was clearly cut off. All contracts must be construed according to what appears to have been the intention of the contracting parties. The intention of the parties in the present case was obvious; and, in point of law, an implied or virtual discharge had as strong an effect as a discharge conveyed in the most explicit terms. In this contract, accordingly, a sum of money was expressly stipulated to be given to the wife's nearest of kin, in the event of her predecease; which could bear no other construction, than that it was meant to come in place of that claim which, from the communion of goods, accresced to the wife's nearest of kin out of the moveables when there was no special settlement. From this clause it was plain, that both the wife's claim of *terce* and claim *jure relictæ* were under view, and intended to be superseded by the conventional provision, 6th January 1747, Crawford *contra* Hay. * Fac. Col. 24th February 1763, M'Kinnon *contra* Macdonalds, No 49. p. 6451.

This stipulation of 500 merks was, in this view of the question, a reasonable one; but it never could be the intention of parties, that, in the event of the petitioner's predecease without children, her nearest of kin should not only claim the 500 merks, but carry off from the husband in his lifetime the one half of all his moveable estate. This reasoning was likewise applicable to the 4th clause of the contract; and as in the one case the 500 merks must be understood as in full of the claim of the nearest of kin, so the 1000 merks in the other must be understood to be in full of the claim competent to the widow in the event of her surviving her husband. One clause, indeed, in this contract, by which the whole conquest was secured in favour of the bairns of the marriage, was decisive of the cause; as it would be completely inconsistent to allow the wife to claim a share of that which, with her own consent, was provided to her children without any burden or limitation; 17th June 1732, Stirling of Glorat *contra* Lukes, *voce* LEGITIM.

The petitioner also maintained, though insisting but little upon it in point of argument, that the meaning of the interlocutor of the Court reclaimed against, was, that though she could not take both her legal and conventional provisions, yet she might betake herself to the one or the other as she should find most beneficial. But this the respondents denied; for as it had been determined that the marriage contract was binding upon all parties, this necessarily tied her down to be satisfied with the provisions therein stipulated.

In giving judgment, their Lordships were of opinion that the *jus relictæ* was not excluded, except by an express clause, or where particular subjects were specially provided. The clause in the contract as to the conquest, by which it

* Examine General List of Names.

No 49. was settled *sub destinatione* to the heirs of the marriage, could not fail to have that import and construction; and they therefore 'found, That the petitioner 'claiming on her *jus relictæ* was excluded from any share of her husband's con-'quest or other moveable estate standing specially provided by the contract of 'marriage, but not from her share of any other moveable estate belonging to 'her husband which did not fall under said provisions.'

Lord Ordinary, *Monboddo*. For Tod, *Lockhart*.
Clerk, *Tait*. For Wemyss, *Macqueen*.

R. H. *Fac. Col. No 59. p. 174.*

1776. *January* 19. HELEN MILLER *against* HENRIETTA BROWN.

No 50.
Jus relictæ cut off by a renunciation executed by the wife upon a voluntary separation of the husband and wife.

IN the year 1762, some family differences having arisen between the pursuer and her deceased husband, William Scot taylor in Canongate, they agreed to a voluntary separation, and upon this occasion mutual deeds were executed. The pursuer renounced all right to any of the goods, gear, or other effects belonging to her husband, or to any aliment, or other provision of the law, competent to her as his wife, in the same manner as if they had never been married, and renounced any right thereto, so as that he may freely dispose on his effects, whether heritable or moveable, without her consent. He, at the same time, renounced his right to his wife's effects *jure mariti*, and gave her full power over them.

In May 1774, Helen Miller being informed that her husband was at the point of death, and that he had either executed, or was going to execute, a testament in favour of Henrietta Brown, she caused execute a revocation, by which she revoked the discharge granted to her husband, above recited; and having afterward sued Brown for her share of the moveables belonging to her husband, at the time of his death, the latter founded her defence upon the testament executed by the defunct in her favour, and on the foresaid discharge executed by the pursuer at the time of the separation.

Observed on the Bench; Although the word *jus relictæ* is not mentioned, yet the words of the deed are sufficiently broad to comprehend it equally as if it had been expressed; and the husband renounced his *jus mariti*, which was a *quid pro quo*. It was plainly dissolving the communion; and it is from the communion the *jus relictæ* and the legitim arise.

"THE LORDS find, That the pursuer, by the agreement in process, did renounce her *jus relictæ*.

Act. *Geo. Clerk*. Alt. *Arnot*. Clerk, *Gibson*.

Fol. Dic. v. 3. p. 303. Fac. Col. No 215. p. 164.