

1751.

MONTGOMERY-
MOIR
v.
MONTGOMERY-
MOIR.

opinion. I thought—that the lady having on her husband's information, been represented to the world as a monster of nature for lasciviousness, and a reproach to her sex, and which scandal has, by the husband and his counsel, in all their writings and pleadings, been maintained to be true, though they said it was impossible to prove them—I thought it impossible that thereafter they could live together as husband and wife, that he could wish to take her again to his bosom, or that she could live with the man who, in effect, declares that she is unworthy of living, and who had for ever debarred her from the society of every modest woman who would believe him. That though his justification from the imputation of impotency, wherewith she is said to have reproached him to one or two of her confidants, had made excusable in him to inform his nearest friend of her insatiable appetite, yet he must, at the same time, have resolved to separate from her, because they could not, consistently with the honour of either of them, thereafter live together; and whenever matters came to that pass, the Court could not refuse a separation, and he was to aliment her so long as she was his wife; at the same time, I saw no necessity for such vindication, nor evidence of the truth of what he reproached her with, and far less saw I necessity of propagating that scandal to so many, or maintaining it in courts of justice. Kilkerran also changed his opinion; and, upon the question, it carried to alter the last interlocutor, and to refuse the bill of advocation *simpliciter*. *Pro*—Lords Minto, Drummore, Kilkerran, Justice-Clerk, Murkle, Shewalton, *et me*. *Contra*—Lords Dun, Haining, and President; but Leven was *non liquet*, and Milton in the Outer House.”—*Vide* Lord Elchies' Notes, vol. ii., p. 193.

1753.

HIS MAJESTY'S
ADVOCATE
v.
DRUMMOND.

[Kames, Sel. Dec., p. 18.]

HIS MAJESTY'S ADVOCATE, *Appellant*;
MARY DRUMMOND, only Daughter of the
marriage between James, Lord Drum- }
mond and Lady Jane Gordon, } *Respondent*.

House of Lords, 3d April 1753.

PROVISION TO HEIRS AND CHILDREN—ANTE-NUPTIAL CONTRACT
—IMPLIED CONDITION.—By an ante-nuptial contract, provision was made for daughters, if one, of 40,000 merks, if two, 50,000 &c., payable at their respective ages of eighteen, or on marriage, providing that these should be in full of all they could claim as natural portion, or bairns' part of gear, which they, or either of

them, as heir, or heirs of line, or at law, might claim. The respondent was the only daughter, and she claimed the 40,000 merks when eighteen years of age; but it was objected that this clause supposed that the daughters were only to be paid the provision upon failure of issue male of the marriage, and, therefore, that it was conditional. Held her entitled to her provision. Reversed in the House of Lords.

1753.

HIS MAJESTY'S
ADVOCATE
v.
DRUMMOND.

By contract of marriage between Lord Drummond and Lady Jane Gordon, in consideration of the marriage portion of 40,000 merks, Lord Drummond bound himself to settle and grant procuratory for resigning the lands and lordship of Drummond, to, and in favour of himself and the heirs male of the marriage; whom failing, to the heirs male of his own body of any other marriage; whom failing, the heirs male and of tailzie and provision, created in the infestment of the estate.

This contract made provision for daughters, one or more, procreated of the said marriage, in case there should be no issue male of the marriage surviving the dissolution thereof, in the following terms: "If there be but one daughter, the sum of 40,000 merks, Scots money; and, if there be two daughters, the sum of 50,000 merks, Scots money, foresaid; and, if there be three or more daughters, the sum of 60,000 merks, to be divided amongst them." These provisions he bound himself and his heirs to pay "to the said daughters, at their respective ages of eighteen years complete, or marriage, which of them shall first happen after the dissolution of our said marriage." And these provisions were declared to be "in full satisfaction to the said daughter or daughters, of all portion natural, bairns' part of gear, and other benefit whatsoever, which they, or either of them, as heir, or heirs of line, or any other manner of way may ask or claim," &c.

Of this marriage there were two sons, and one daughter, the respondent.

Having charged his estate with large debts, he, after the birth of his son, executed a deed by which he intended to divest himself of the fee of his estate, which he did by a deed in favour of the said son, reserving to himself an estate for life, subject to the payment of the annual interest of the debts.

1713.

This deed had this clause, "Also reserving full power and liberty to us, the said James, Lord Drummond, to provide the daughters and younger sons procreated, or to

1753.
 HIS MAJESTY'S
 ADVOCATE
 v.
 DRUMMOND.

“ be procreated of our body, with such suitable provisions,
 “ not exceeding the sum of 120,000 merks; and further,
 “ reserving to us power and faculty to provide a second wife
 “ to a reasonable jointure, not exceeding 5000 merks.”

In 1715, Lord Drummond was attainted for high treason, and his estates confiscated to the Crown.

No claim was made at the time for the respondent's provision.

Thereafter Lord Drummond's son, under an exception of the Act of Parliament, made a claim for restoration of the estate, on the ground that the fee of the estate was vested in him by the above disposition of 1713. This exception was allowed.

James, the elder brother of the respondent, granted a bond to the respondent for £1000, payable at the first term of Whitsunday or Martinmas, that should happen after her marriage.

The estates thereafter descended to James' younger brother, John, Lord Drummond, who was also attainted in 1745, and his estate forfeited, and the respondent now, after twenty years' silence, claimed, for the first time, before the Commissioners of his Majesty, 1st, For the 40,000 merks in the marriage contract; and, 2d, On the bond for £1000, granted by James, her brother.

The appellant contended that, in the present case, the inductive cause of the provision being, that the estate was tailzied to heirs male, and the provision itself being to females, made it evident that the provision was only intended to take place failing issue male of the marriage, and therefore that this must be understood as a conditional provision, which was not purified by the existence of the condition.

July 11, 1752. The Lords pronounced this interlocutor: “ On the report
 “ of Lord Minto, the Lords sustain the claim for the 40,000
 “ merks provided by the contract of marriage to the only
 “ daughter of that marriage, and for the annual rents thereof,
 “ from Lammas 1725, being the first term after the claimant's
 “ attaining to the age of eighteen years, and decern.”*

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Crown.—1. That the obligation in the con-

* The same interlocutor sustained the claim on the £1000 bond, granted by her brother, James.

1753.

HIS MAJESTY'S
ADVOCATE
v.
DRUMMOND.

tract of marriage to pay the sums or provisions therein mentioned, is by no means absolute, but is to pay the respective sums to *the said daughters*, that is, to the daughters secluded from the succession by the tailzie, or settlement, of the estate, to the heir male; and a daughter, such as this respondent, who had two brothers of that same marriage, who successively took, or were entitled to take, was not a daughter *so secluded from the succession*, by virtue of the tailzie, or destination, of the estate to heirs male; and, therefore, is not *such a daughter*, or one of the *said daughters*, in favour of whom the stipulations in this clause are conceived. The obligation was therefore conditional, and not pure.

2. The provision by the contract is given to one or more daughters of the marriage, in satisfaction of all that she or they could claim, or take, as heir, or *heirs of line*, or at law, to the Lord Drummond; and such heir, or heirs, she, or they, could not possibly be, so long as one or more sons of the same marriage should exist.

3. The construction for which the appellant contends, is agreeable to the common usage in Scotland in marriage settlements, and the sense in which the respondent, her parents, and family have, for so many years, understood the contract.

Pleaded for the Respondent.—1. By the marriage contract, the estate of Perth is limited to heirs male of Lord Drummond's body, of the then intended marriage, whom failing, to his collateral heirs male and of tailzie; and intending to make a provision for daughters, the father obliges himself and *his heirs foresaid*, to pay the particular sums mentioned in the deed to the daughters, at the terms therein mentioned; and therefore to say that the heir male of the marriage, who is the first taker by the contract, was not bound to pay the provisions to the daughters, is inconsistent with the very deed he takes.

2. Contracts of marriage depend upon the agreement of the parties, and must be construed according to their expressed intention. There is no established form of such contracts in Scotland. James, Lord Drummond, had certainly power to make this provision for a daughter, and it cannot be thought unreasonable that the only daughter of the marriage should have her mother's fortune.

3. The motive for limiting portions to daughters in the marriage contract, was the total exclusion of daughters from the estate, by the ancient settlements of the family, confirmed

1753.

HIS MAJESTY'S
ADVOCATE.
v.
DRUMMOND.

by that contract, and the provision for the daughters ought to be equally extensive with their exclusion, and, consequently, every person who took by virtue of the settlements, was bound to pay these portions.

4. Although the exclusion from the estate was the motive of the provision in the deed, yet it was not the only consideration of it; for it was given in full satisfaction of every provision which they were entitled to.

5. James Drummond, though he did not particularly charge the estate with 40,000 merks provided for the daughter of the marriage, yet he reserved a power to charge the estate with a much larger sum for younger children, and, at the time he made the conveyance, it was uncertain what younger children he might have at his death. At the time of the claim by the trustees of the respondent's brother, she was an infant of very tender years, and nothing was then due to her, and the money, secured to the respondent by her mother, is only payable at her mother's death; so that, if the respondent cannot have the benefit of the provision made for her by her father, she will be excluded from any share whatsoever in her father's estate, both real and personal.

After hearing counsel,

It was ordered and adjudged, that the said interlocutors and decreè complained of in the said appeal be, and the same is, hereby reversed. And it is further ordered that the claim given in before the said Court of Session, on behalf of the respondent, so far as the same relates to the said 40,000 merks Scots, and the annual rent, or interest thereof, be, and the same is, hereby dismissed.

For the Appellant, *D. Ryder, Wm. Grant, W. Murray.*

For the Respondent, *A. Hume Campbell, Alex. Lockhart.*

NOTE.—Lord Elchies has this note:—"The Lords, on a division, seven to six, sustained the claim. *Against*—President, Duke of Argyll, Kilkerran, Justice-Clerk, Leven, *et me.* *For the interlocutor* were Minto, Drummore, Strichen, Kames, Murkle, Shewalton, Woodhall. I should have noticed, that the claimant quoted the cases of Anderson's daughters, 13th February 1722, affirmed in Parliament, and of the daughter of Hamilton of Redhouse."

Ante, Watson
v. Glass.