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lic report of such married relation, up till he finally left her, after leaving the Isle of Man, all go to prove a marriage.

After hearing counsel, it was

Ordered and adjudged that the interlocutor complained of be *reversed*, and that the bill of advocation be absolutely refused.

For Appellant, *Ro. Dundas, Al. Forrester.*

For Respondent, *C. Yorke, Al. Wedderburn.*

Note.—Lord (Chancellor) Hardwicke, has written this note on his papers as to the grounds of the decision.—“The grounds on which the Lords went were: 1st. That it was admitted that there was no marriage solemnized. 2d, No proof of any contract *de presenti* or *de futuro*. 3d, That almost the only evidence of cohabitation and acknowledgment was in the Isle of Man, where the respondent went clandestinely with the appellant to lie in, and conceal her shame. 4th, That the cohabitation required by law to establish a marriage ought to be *inter familiares natos et vicinos*; where one of the parties has a domicile; and it would be of dangerous example and consequence—dangerous to young girls, heirs of families, &c. that such a remote cohabitation in the Isle of Man should be allowed to constitute a marriage in Scotland.”

Right Honourable Lady Dowager FORBES, *Appellant*;
Right Honourable JAMES LORD FORBES, *Respondent.*

House of Lords, 18th Feb. 1760.

HEIR AND LIFERENTER—LIFERENTER'S RIGHT TO ENTER VASSALS—AGREEMENT—INTEREST—ALIMENT.—The liferentrix of an estate having, in the erroneous belief that certain bonds of provision, executed by her deceased husband on deathbed, in virtue of powers reserved by him in his antenuptial contract of marriage, were reducible on the head of deathbed, entered into agreements restricting her own liferent provisions: 1. Held, in an action of reduction to set aside these deeds of restriction, that the deeds did not prevent her from claiming her just rights: And, 2. That as liferentrix of both the lands of the lordship of Forbes, as well as of the superiorities thereof, and the patronages thereto belonging, she was entitled to enter vassals; reversing the judgment of the Court of Session: 3. Also that, as liferentrix, she had no claim against her daughters for alimentering them until their provisions fell due; the being alimentered *aliunde*; and that she was not

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liable to make good a sum to Lord Forbes, to whom she had assigned such claim: 4. Interlocutor *quoad ultra* reversed, without prejudice to the question concerning the interest of the heritable debts, and cases remitted to discuss reasons of reduction otherwise.

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THIS was a question between heir and liferentrix, in the following circumstances:—

By marriage contract, dated 3d September 1720, between the late William Lord Forbes, on the one part, and Dorothea Dale, now Dowager Lady Forbes, the appellant, on the other, the said deceased William Lord Forbes, in consideration of £10,000 advanced as tocher with his wife, thereby bound and obliged himself to infeft and seize “him, the said Lord Forbes and the said Dorothea Dale, and the longest liver of them in liferent, for her liferent use annually, in case she should survive him, and to the heirs male lawfully to be procreated betwixt them in fee; which failing, to the said William Lord Forbes, his other heirs male whatsoever, whom failing, to the heirs female to be procreated betwixt them with several remainders over, under the conditions and provisions herein mentioned, in all his lands and lordship of Forbes, *together with the patronages and superiorities and feu-duties belonging thereto.*”

The deed contained this provision:—“That it should be lawful, in case there be an heir male of the marriage, and one or more younger children, to the said Lord Forbes at any time in his life, and on deathbed, to make such provisions to the said younger children as he should think fit, and therewith to affect and burden the said lands and estate, providing the same do not exceed in whole the sum of £3000 sterling”—“and the heirs male succeeding to the estate are taken bound to pay the said £3000.”

The contract contained a procuratory of resignation in the above terms, and a precept of sasine for infefting Lady Forbes in the *whole lands and estate*, together with the *patronages and superiorities and feu-duties*, with *warrandices of said infeftments*.

Lord Forbes died, of this date, survived by Lady Forbes, June 26, 1730. his widow, and one son *and three daughters*, having previously, on the 17th of the same month, executed a bond of June 17, — provision in favour of his three daughters, giving £10,000 Scots to the oldest, £8000 Scots to the second, and £6000 Scots to the third (in all £2000), making the said bonds

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payable to them and their heirs or assignees at the first term of Whitsunday or Martinmas next, after their ages of 21 years, or marriages.

Under this settlement the appellant, Lady Forbes, was infeft, but no infeftment was taken at same time on the superiorities or patronages of the same. She afterwards executed a bond, in terms of the deed of entail, containing an additional provision to her daughters, amounting to £1000.

July 2, 1730.

It being represented to her immediately after the death of her husband, that, after all the debts were paid on the heritable estate, the same would be nearly exhausted, she executed a deed of agreement with her son six days after her husband's death, whereby she agreed to restrict the life-rent provisions competent to her by the marriage contract, to the life-rent, or free rents and profits of his heritable estate, "after deducting the hail annual rents due and payable furth thereof, to the several creditors, who have heritable bonds, or real rights, and infeftments thereupon." And she thereby discharged her son of all arrears of rents due her, on condition that he should not *question* or *impugn* the bonds of provision granted to her daughters.

Dec. 27, 1735.

The latter condition was imposed by her under the belief that the bonds were reducible on the head of deathbed, which belief chiefly induced her to enter into the transaction. On her son's death, without issue, the Respondent, his uncle, succeeded; and, under the same impression with which she had entered into the agreement with her son, she entered into a similar agreement with the respondent, restricting her claims. She was then ignorant of the contents of her marriage contract, and of her proper rights. This agreement allowed the respondent to get himself infeft in special in the lands and estate of Forbes, he on his part granting a valid life-rent infeftment to her, with absolute warrandice, over the hail lands and estate of Forbes, and becoming bound to grant heritable bond to pay the provisions to the daughters, with interest, payable to them on their respective marriages, or on the death of their mother, or their attaining the age of 21 years complete. She on her part alimending the daughters until their provisions became due and payable; and also paying the interest of the heritable debts, and assigning to him her claim against her daughters for arrears of aliment in maintaining them.

On being advised sometime afterwards that her daughters'

bonds of provision were not reducible on the head of death-bed; and also informed that her liferent infestment was not taken on the superiorities of the lands and patronages thereof, as well as the lands themselves, she repented having executed these deeds, and was advised to get herself feudally infest of new, so as to include the superiority of the whole lands, whereupon the Respondent brought the present action of reduction to have that infestment set aside; and the appellant, on her part, brought a counter reduction to set aside the deeds of restriction above set forth, and also for payment of the arrears of her liferent; and for declaring her right to the liferent of the superiorities and patronages of the said lands.

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These two reductions being conjoined, Lord Kames, Ordinary, of this date, held “that the obligation of the ap- July 3, 1753.

pellant to assign any claim of aliment she had against her daughters was binding on her, on the respondent implementing his part of the transaction.” But the appellant having

no claim for aliment against these daughters, they having been alimented from their father’s death, by a pension granted by Government for that purpose, the respondent insisted that she, having assigned a claim to which she had no right, was bound to make good to him a sum equal to the amount.

Whereupon the Court, on the report of Lord Bankton, found, of this date, “that the appellant was not bound to Aug. 2, 1758.

“make good the said sum of aliment to the respondent;” and “found that Lord Forbes was liable for the interest of the bonds of provision from the term of Martinmas 1730, being the first term after their father’s death.” And, on the other

points of the case, their Lordships, of the same date, but by a separate interlocutor, found “the Lady Forbes liable in

“payment of the interest of the heritable debts affecting the estate of Forbes, in terms of the contracts 1730 and

“1735, without relief against the fee of the estate; and find that she has not the right of entering vassals, nor of

“presenting ministers, but that she has a right to the feuduties payable by the vassals of the estate, and that she

“has a right to all the emoluments arising from the right of patronage.” On a reclaiming petition against the first of

these two interlocutors, the Lords, of this date, found “the Jan. 2, 1759.

“Lady Dowager of Forbes is obliged to pay to Lord Forbes a sum equal to the aliment of her daughters, till their

“majorities or marriages.”

And thereafter the Court, of this date, found “that Lady Mar. 9, 1759.

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“ Forbes’ daughters, Mrs. Jean, Maria, and Mrs. Elizabeth Forbes, are each of them entitled to an aliment of £20 sterling yearly, from 26th June 1730, being the time of their father’s death, till they attained to the age of seven years ; and of £30 sterling yearly, from that time till they were twelve years old ; and after that age, that each of them is entitled to an aliment equal to the full interest of their several portions till their respective majorities or marriages.”

Against these three last interlocutors, Lady Forbes brought the present appeal, in so far ; 1st, As they find her liable to make good to Lord Forbes the claim of aliment assigned by her to him. 2d, In so far as they find her liable in the payment of the interest of the heritable debts, without relief against the fee of the estate ; and, 3d, In so far as they find that she had not the right of entering vassals, and presenting ministers to vacant churches, in virtue of her liferent right of the estate.

Pleaded for the Appellant :—1st, As to the *aliment*.—That the appellant’s claim against her daughters for aliment could arise only from the provision made for them by their father. Happily for mother and daughters, they were discharged of that burden by the King’s bounty, (proved in these cases), which gave them £200 per annum for maintenance and support ; and, consequently, no action and no claim lie at the instance of the appellant against her daughters on account of their aliment ; for they must be presumed to have alimented themselves. Her assignation, therefore, of this claim fell to the ground ; and the judgment, finding them entitled to certain sums from certain ages was therefore ill founded in law. 2d, As to her right of relief against the fee of the estate for interests, both of arrears and of accruing payments of her whole jointure, as well of heritable debts paid by her, she is entitled to stand in the place of a creditor ; and, consequently, to come against the inheritance for reimbursement thereof. 3d, As to the superiorities and patronages, she never gave up them. The infestment taken for her in 1731 was a fraud, from which she had a right to be relieved, and so indeed the decree partly admits, by giving her the feu-duties payable by the vassals. But the same principle which entitles her to these, entitles her also to the right of entering vassals, and presenting to vacant churches, these being what her husband enjoyed at his death. Nor does the appellant understand what are the emoluments arising from the right of patronage allowed her by the de-

cree, unless it be the right of presenting to vacant churches. On these grounds, and also because the whole transaction was gone into, on the supposition that her daughters' bonds of provision were reducible on the head of death-bed, the deeds of restriction executed by her sought to be reduced, ought to be set aside, and her rights be declared to exist as fully as her husband settled them by the contract of marriage.

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Pleaded for the Respondent.—1st, The validity of the two deeds of restriction executed by the appellant being established, the import of the obligation to aliment the daughters, and to assign to the respondent the value of their aliment, must be taken according to the intent of the parties, and the true spirit and meaning of the agreement; and from the terms of this agreement it was manifest, the appellant meant to substitute the aliment and education in place of the interest of the provisions, that the one might compensate and be set off against the other: So that the reason for giving the respondent the benefit of the clause of aliment which might arise against the daughters, was to indemnify him against the demand of interest on their provisions; and as the respondent has been subjected in the whole interest, therefore, according to the true intent of the agreement, the respondent is, in law and equity, entitled to an equivalent for the claim of aliment bargained for; 2d, In regard to the interest of her jointure, and the interest of the heritable debt or incumbrance upon the estate, she, as liferentrix, was bound in law to keep down the interests accruing during her possession; and, separately, she was also bound, by special agreement, to do so, and therefore she can have no relief for these against the inheritance. 3d, With respect to the superiorities and the patronages of churches, she is found entitled, by the interlocutor complained of, to the feu-duties, to the casualties of superiority, and to all the emoluments arising from the right of patronage; but as a liferentrix, she is not entitled to present to the churches, nor to grant charters, the exercise of these rights being inherent in the proprietor of the fee. The power of granting charters to vassals, and of presenting ministers to churches (from which she is excluded) yields no profit or advantage whatever, and was certainly meant, as in justice it ought, to accompany the right of property and title of honour belonging to the representative of the family. As liferentrix, therefore, she is not entitled to the powers properly inherent in the fee and owner-

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Found and declared that the said interlocutors complained in the appeal be reversed; but that the reversal be without prejudice to the question concerning the interest of the heritable debts affecting the estate of Forbes, when the reasons of reduction shall be heard and discussed pursuant to the directions hereinafter given: *And it is hereby declared* that the appellant has the right of entering vassals, and of presenting ministers, upon the estate in question; and it is ordered, that so much of the first interlocutor of the 2d August 1758, as finds "That the Lady Dowager Forbes is not liable to make good a sum to Lord Forbes in consideration of an aliment to her daughters, in respect that, before the contract 1735, and thereafter, they were alimented *aliunde*" be confirmed: And it is further ordered and declared, That the causes be remitted back to the Court of Session, and that the said Court do hear and discuss the reasons of reduction in both suits, and proceed therein according to law and justice. And it is also ordered that the Court of Session do give all necessary directions for carrying this judgment into execution."

For Appellant, *C. Yorke, Al. Forrester.*

For Respondent, *John Morton, Alex. Wedderburn.*

Note.—One point decided here seems to strike against the doctrine laid down by the authorities, namely, that a liferenter, by constitution, has no power to enter vassals. The compiler has made great efforts to ascertain the precise grounds of the reversal without success. Lord Hardwicke has left no note of the grounds of the reversal, although from the notes of the argument taken by him, he seems to have presided for the Lord Chancellor Northington, in disposing of the case. Nothing appears to throw light upon the point; but it may be conceived to have proceeded on these principles:—That this is the liferent of the superiority of lands, specially conveyed by the granter to himself and wife, and the longest liver of them in liferent, for her liferent use allenary, and to the heirs male of the marriage in fee. That by such conveyance, the wife has as full a liferent as the husband. And as in the conveyance of superiorities, the lands themselves in *feudal form* are always conveyed, such a liferentrix may be considered in a situation to grant a *renovatio feudi*, and to enter vassals after the husband's death. This is not a conjunct fee and liferent; but Erskine, B. II. T. 9,

§ 42, says, " In conjunct fees granted to husband and wife, the wife's right is, in the general case, considered merely as a liferent, which dies with herself; yet, as she is, *by the form of the right*, entitled to the fee equally with the husband, her liferent is as amply extended as a liferent by reservation."

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FORBES OR
MAITLAND
v.
GORDON.

Unreported in Court of Session.

Major ARTHUR FORBES, now taking the name	}	<i>Appellant</i> ;
of MAITLAND - - - - -		
WILLIAM GORDON, Trustee of KATHERINE and	}	<i>Respondent</i> .
ANN MAITLAND - - - - -		

House of Lords, 24th March 1760.

DELIVERY OF DEED—PRESCRIPTION—CONFUSIO—BONA FIDE CONSUMPTION—INTEREST OF DEBT.—Circumstances in which held, 1st, That debts acquired by a husband affecting his wife's estate, do not prescribe during marriage; and that prescription does not run against these bonds during the minority of the person for whose behoof they were purchased. 2nd, That a bond of provision granted by a brother to two sisters, in addition to their family provisions, was to be presumed in law delivered of its date, unless the contrary be proved, although it had not been delivered to them, and there was no clause dispensing with delivery. 3d, That this bond of provision was onerous to the full extent. 4th That the sums in said bonds were not diminished by the sisters having been alimented by their mother, while in family with her. 5th, That the rents of the estate during Katherine's possession were *bona fide percepti et consumpti* by her, and she not accountable therefor; But, 6th, That she was not liable for behaviour as heir, but that the appellant was liable for principal and interest of the sister's bonds, under the deduction of two-thirds of the annual rents, from their mother's death to their brother's death, in consideration of the aliment and necessaries furnished them by their brother.

For the particulars out of which the present action arises see report, p. 570 and 628, ante Craigie and Stewart.

The appellant having prevailed in that suit, was then entitled to possession of the estate, of which he had been deprived, as heir male of the original investiture, but the estate having, in the meantime, been taken possession of by Katherine Maitland, and she, in order to frustrate his obtaining possession, having along with her sister Anne, conveyed their first bonds of provision to the respondent Gordon, as trustee for them, adjudication of the whole estate was rais-