Mrs. ANNE MAJENDIE and her Husband the Bishop of BANGOR } *Appellants:*

W. T. CARRUTHERS and his Guardians - - - - - } *Respondents.*

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UNDER a marriage-contract executed in 1735, lands subject to the limitations of an entail, made in 1708, are resigned by the husband, being heir in possession, and destined upon new infeftment to the husband, "and the heirs-"male of the marriage, which failing, to the heirs-male "of the body of the husband in any future marriage; "which failing, to the *heirs-female* of the said spouses, "and the heirs-male to be procreated of their bodies, "the eldest daughter or heir-female, and the heirs-"male descending of her, always excluding the rest, "and proceeding without division." To fulfil the obligations of this contract, the husband made up titles, and was infeft in 1736. A daughter was the only issue of the marriage. This daughter being married, by a contract, in which her husband joined, and which was carried into effect under a decree-arbitral in 1759, accepted from her father a sum of money "in full satis-"faction of all right of succession which they have, or "in any event may have, to the lands subject to the "marriage contract, and of the provisions to children "of the marriage in any portion, &c. whatever, which "the daughter or her husband might claim on the de-"cease of the father, and they accordingly quit claim, "and discharge the father from all demands, and re-"nounce and overgive to him, his heirs and assignees, all "right, claim of succession, or other right which the "daughter and her husband have, or in any event may "have, under the provisions of the marriage-contract." In the same year, 1759, a disposition was executed by the father in favour of himself and the heirs-male of his body, whom failing, to his brother, &c. The daughter died in 1768, leaving a son, *J. R.* The father died in 1774. In 1806 *J. R.* was served heir to his mother, and brought an action to reduce the disposition of 1759, and all subsequent conveyances of the

lands subject to the marriage-contract of 1759. *J. R.* dying in 1811, the Appellant, Mrs. Majendie, became pursuer in the action, as the sister of *J. R.* and heir of provision, under the destinations of the marriage contract; held, 1st, that she was heir-female within the meaning of the terms of the destination; 2d, that the entail of 1708 was barred, both by positive and negative prescription; 3d, that the daughter had power to contract with the father, and renounce and discharge the right under the marriage contract as a *jus crediti* vested in her; the effect of which discharge is to bar the right of all other heirs of the marriage.

THE question in this case arose upon a marriage contract executed in 1735, by which lands (subject to an entail made in 1708,) were settled "upon "*F. C.* the husband, and the heirs-male of his mar- "riage with *M. M.*, whom failing, the heirs-male "of *F. C.* in any subsequent marriage, which fail- "ing, the *heirs-female* to be procreated betwixt the "said spouses, and the heirs-male to be procreated "of their bodies, the eldest daughter or heir-female, "and the heirs-male descending of her, always ex- "cluding the rest, and succeeding without division." *R.* a daughter and only child of the marriage being under coverture, with the concurrence of her husband, and by agreement with her father *F. C.* in consideration of 650*l.* to be paid by him, renounced her estate, right and claim under the marriage settlement.

This agreement was carried into effect by decree-arbitral, discharge and renunciation, in 1759, and the lands were settled by new dispositions made by the father on a new series of heirs. *R.* died before her father, leaving a son and two daughters. In 1806 the

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son served himself heir of provision under the marriage settlement, and brought an action in the Court of Session to set aside the dispositions by which his claim was affected, and the principal question in the cause was upon the validity of the discharge and renunciation. The Court of Session, after various interlocutors, by a final judgment delivered in 1812, affirmed the validity of the transaction, holding the renunciation good against the son of *R.* Under these circumstances the cause came before the House in 1816, and after much argument and doubt on the principal question, expressed by the Lord Chancellor, was remitted to the division of the Court of Session, from which it came, with directions that they should call for the opinions of the judges of the other division on the points of law arising in the case*.

July 10, 1816.

A petition having been presented by the Appellants to the Court of Session, (First Division,) to apply this judgment, an interlocutor was pronounced on the 10th July 1816, appointing the case to be stated in mutual memorials.

Objection to the title.

In the memorial which was thereupon presented for the Respondent, an objection occurred to the title of the Appellant, Mrs. Majendie, which was to the following effect:

By the marriage contract 1735, the estate is provided, "to Francis Carruthers and the heirs-"male of the marriage with Margaret Maxwell, "whom failing, the heirs-male of Francis in

* The opinion of the Lord Chancellor at that time seemed to be adverse to the judgment of the court below on the principal question. MSS. May and June 1816, and see Dow's Rep. vol 4, p. 392.

" in any subsequent marriage, which failing, the " *heirs-female* to be procreated betwixt the said " spouses and the *heirs-male* to be procreated of " their bodies." Under this destination Mr. John Routledge was properly served heir of provision, as being the *heir-male* of the body of Mrs. Elizabeth Routledge, the only daughter or heir-female of the marriage of Francis Carruthers and Margaret Maxwell. But the present Appellant, Mrs. Majendie, who is in a different situation, has served herself heir of provision to her brother John, taking it for granted that she is called as the next heir of this contract.

The destination is to the " heirs-female to be pro- " create betwixt the said spouses and the heirs-male " to be procreated of their bodies, the eldest daugh- " ter or heir-female, and the *heirs-male descending* " of her, always excluding the rest, and succeeding " without division; *which all failing, the said* " *Francis Carruthers, his heirs and assignees* " *whatsoever.*" The heir-female procreated of the spouses was Elizabeth Routledge; and John Routledge, her son, served himself heir of provision as the heir-male of her body. But the present Appellant is *not* an heir-*male* of the body of Mrs. Routledge; and there is here no provision to the heirs-*female* of *her body*. It was submitted, that, according to the sound construction of the terms of the destination of the contract, the destination after the immediate heir-female of the marriage, and the heirs-*male* of her body, is " to " the heirs and assignees whatsoever of Francis " Carruthers." Under this last clause, the Appel-

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lant could have no title to challenge the settlement 1759.

Jan. 15, 1817. Mem. June 6.

On the 15th of January 1817, the Court of Session, (First Division,) pronounced the following interlocutor:

"The Lords having heard and considered the "mutual memorials for the parties, and whole cause, "appoint supplementary memorials to be lodged on "the point of Mrs. Majendie's title to pursue the "present action, whether in the character of heir of "provision under the marriage-contract of Francis "Carruthers of Dormont, or as heir of provision "served to her brother John Routledge; appoint "the memorials to be seen and interchanged."

These additional memorials having been advised, the Lords of the First Division ordered a hearing in presence upon the objection to the title. After the discussion of this question the following interlocutor was pronounced: "The Lords having advised the supplementary memorials, and having "heard parties procurators in their own presence "upon the point of Mrs. Majendie's title, they sustain Mrs. Majendie's title to pursue the present "action, as heir of provision under the marriage "contract of Francis Carruthers of Dormont, and "decern; but find no expenses due to either party."

Feb. 3, 1818. Interlocutor of the Court of Session, First Division. First interlocutor appealed from by the cross appeal.

This incidental point having been thus disposed of, the First Division of the Court of Session pronounced the following interlocutor, in order to obtain the opinions of the Second Division and Permanent Ordinaries, in terms of the judgment of the House of Peers, on the questions stated in that interlocutor.

Feb. 23, 1818.

"The Lords having resumed consideration of, "and advised the mutual memorials for the parties "and whole cause, before answer, and in obedience "to the remit from the House of Lords, order these "memorials, &c. to be transmitted to the Judges of "the Second Division and Permanent Ordinaries, "with a request that they will peruse and consider "the same, and thereafter give their opinions in "writing, either collectively or individually, on the "following questions in law arising therefrom:

"1*mo*. Was the pursuer's mother, Mrs. Rout-"ledge, vested in the *jus crediti* under the marriage-"contract 1735, so as to give her power to discharge "the obligation thereby incumbent on her father, "either on receiving full and specific implement, "or on such terms of compromise as her father and "she settled, or as arbiters might decern?

"2*do*. Whether the decree-arbitral was meant to "regulate the succession of the estate, or was con-"fined to the money provision?

"3*tio*. Did Mrs. Routledge, by her discharge "and renunciation in 1759, following on the rela-"tive agreement, submission, and decree-arbitral, "effectually discharge her *jus crediti* under the "marriage-contract 1735, so as to bar the claim of "her son John, who, by her predeceasing her father, "became the heir of the marriage-contract at his "death, and, but for that discharge and renuncia-"tion by his mother, would have taken the estate "under the marriage-contract?

"4*to*. Was the entail, in the former marriage-"contract in 1708, effectual to secure the estate to "the heirs-male of that marriage; and was it a

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Signed 26th Feb.

" valid and subsisting entail, binding on Francis " Carruthers in 1735?

" 5to. Supposing it to have been binding, is it " cut off by prescription?

The case having been considered by the Judges of the Second Division and the permanent Ordinaries, the following opinions were returned:

Jan. 16, 1819.

" In reference to the interlocutor of the First " Division of the Court of 25th February last, ap- " plying a remit from the House of Lords, we have " considered the printed pleadings on both sides, " and report our opinion on the questions of law to " which our attention is directed.

" Answer to question 1st.—We are of opinion " that, in consequence of previous decisions, the " pursuer's mother, Mrs. Routledge, must be held " as vested in the *jus crediti* under the marriage- " contract 1735, so as to give her power to discharge " the obligation thereby incumbent on her father, " either on receiving full and specific implement, " or on such terms of compromise as her father and " she might settle, or as arbiters might decern.

" Answer to question 2d.—We are of opinion, " that the decree-arbitral was meant to regulate, " and that its terms must be held to apply to the " succession to the landed estate of Dormont, as " well as the pecuniary provision to which Mrs. Rout- " ledge might eventually have been entitled.

" Answer to query 3d.—We think that Mrs. " Routledge, by her discharge and renunciation in " 1759, did effectually discharge her *jus crediti* " under the marriage-contract in 1735, so as to bar " the claim of her son.

" Answer to query 4th.—We are of opinion, that " the entail in the marriage-contract of 1708 was " from the beginning ineffectual, in so far as it re- " lates to the lands of Winterhophead ; but that as " to the lands of Dormont and others proceeding " from the husband, it was in 1735, and in conse- " quence of the titles afterwards completed by " Francis Carruthers, effectual in terms of the act " 1695, chap. 24.

" Answer to question 5th.—But it appears to us, " that all obligation under the marriage-contract " 1708 is now cut off by prescription.

(signed) " D. Boyle,
" Wm. Robertson.
" David Douglas.
" Ad. Gillies.
" D. Monypenny."

Jan. 18, 1819.

" To query 1st.—Whatever might have been the " effect of a conveyance by the pursuer's grand- " father of the whole estate, settled by the contract " of marriage entered into by him in 1735 in favour " of the pursuer's mother, Mrs. Routledge, and " especially if she had survived her father ; we are " of opinion that, as no conveyance was granted to " her, and she did not survive her father, she had " no power to discharge the obligation in the said " contract any farther than concerned herself and " the heirs who represented her.

" Query 2d.—We think that the decreet-arbitral " was meant to apply to the estate as well as to the " sum of 1,000*l.* stipulated in the marriage-contract, " so far as regarded the interests of those who

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" were parties to the submission. But that it can-
" not in just or sound construction be held to ex-
" tend to heirs of the marriage, who were not them-
" selves, and do not represent those who were par
" ties to the submission.

" Query 3d.—We are of opinion, that Mrs. Rout-
" ledge, by the discharge alluded to in this query,
" did not effectually discharge the *jus crediti* under
" the marriage-contract 1735, so as to bar the
" claim of her son John.

" Queries 4th and 5th.—We agree with our
" brethren that the destination of succession in the
" marriage-contract 1735, was not rendered ineffec-
" tual by the entail in the contract of marriage
" 1708; and further, that this latter is now cut off
" both by the negative and positive prescriptions.

(signed) " William Miller.
" Wm. Macleod Bannatyne.
" Ro. Craigie.
" D. Cathcart.
" J. Wolfe Murray.

Feb. 25, 1818.

May 25, 1819. signed 26th. Interlocutor of the Court of Session, First Division.—Appealed from in part by the original, and in part by the cross appeal.

The case then came to be advised by the First Division of the Court; and a majority of the division having declared their opinion to be in favour of the Respondent, it was proposed that the former interlocutor should be adhered to in general terms. But the counsel for the Respondent having observed that an interlocutor in such terms would in point of form decide the question of prescription in his favour, which was contrary to the opinion expressed by the Judges, and that he wished for an opportunity of bringing that question

more particularly under the consideration of the Court, as he was afraid that his argument upon it might have been misunderstood by their Lordships, especially as it had been very much misunderstood and misrepresented by the Appellant; and, besides, it had been held of such inferior importance that no specific judgment had hitherto been given upon it. For these reasons he prayed the Court, if the opinion of their Lordships remained against him on the point of prescription, to insert a finding to that effect in the interlocutor to be pronounced, in order that he might have an opportunity to reclaim against that finding, and, in his reclaiming petition, to state the merits of the question of prescription as unmixed with the other points in the cause. It appeared to the Court that this was a reasonable proposition; and their Lordships not having changed their opinion on the question of prescription, the following interlocutor was pronounced:—"The Lords having "advised the memorials, and additional memorials, "for the parties, and having also advised with the "Lords of the Second Division of the Court, and "with the Permanent Lords Ordinary of both divi-"sions of the Court, and having reconsidered the "whole cause in terms of the remit from the House "of Lords,—They adhere to their former interlo-"cutor of date 12th May 1812, and decern in terms "of the said interlocutor in the two several processes "therein mentioned: And further, in the process "of declarator of irritancy and of reduction, brought "at the instance of William Thomas Carruthers, "and founded on the contract of marriage and set-"tlement of tailzie of 10th August 1708, the Lords

"find, that all claim at the instance of the pursuer "of the said process upon said contract of marriage and settlement of tailzie, is cut off by prescription both positive and negative; and therefore sustain the defences in the said process, "assoilzie from the conclusions of the same, and "decern."

This interlocutor was submitted to review in a reclaiming petition by the Respondent, in so far as it found that all claim at the instance of the Respondent upon the tailzie 1708 was cut off by prescription.

Dec. 16, 1819. Interlocutor of the Court of Session, First Division. Third interlocutor appealed from by cross appeal.

Answers having been ordered and given in to this petition, and one counsel on each side having been heard at length upon this point of prescription, the Lords of the First Division pronounced the following interlocutor: "The Lords having resumed "consideration of this petition, and advised the "same, with the answers thereto, and having also "heard the counsel for the parties thereon, they "refuse the prayer of the said petition, and adhere "to their former interlocutor therein reclaimed "against."

Mrs. Majendie entered an appeal from the interlocutor of 25th May 1819, sustaining the defences for the Respondent, founded on the discharge and renunciation in 1759.

Cross appeal of Respondent.

The Respondent entered a cross-appeal against the interlocutors of the 3d of Feb. 1818, from part of the interlocutor of 25th May 1819, and from that of 16th December 1819; in which the objection to the title and the point of prescription were decided against the Respondent.

The case was argued in the House of Lords at very great length, by

The *Attorney General* and *Mr. Brougham*, for the Appellant.

Mr. Clerk and *Mr. Hope*, for the Respondent.

By the petitions of appeal three questions were raised, 1st, Whether Mrs. Majendie, being a daughter of a daughter of the marriage, was an heir-female within the meaning of the provisions of the marriage contract; it being contended by the cross appeal, that daughters only of the marriage were intended as heirs-female, which appeared from the provision for the heirs-male of such heirs-female? Upon this question the following authorities were cited:—

On the cross-appeal,

Pro:—Creditors of Redhouse v. *Glass*, 15th June 1743; Home's Decis. *Ewing* v. *Miller*, 1st July 1747. *Dalziel* v. *Dalziel*, 30th May 1809.

Con.—Erskine's Inst. B. 3, t. 8, §. 48. *Ker* v. *Ker*, Fac. Coll. 13 Nov. 1810.

The second and principal question was, Whether Mrs. Routledge, being heir of provision expectant, and predeceasing her father without having received implement of the contract, could for all future contingent heirs, as well as for herself, renounce the right of provision under the settlement, and by agreement with her father discharge his obligation? Whether she had a *jus crediti*, or merely a *spes successionis*? Whether in fact she did, by the terms of the agreement, &c. renounce for herself personally, or also for the other heirs of provision? On

the former branch of this question (the right to renounce) were cited,

Pro :—*Case of Aikmans*, 20th Dec. 1550, Balfour, p. 222, 223. Craig, L. 2, d. 14, §. 10, 11. 22; Stewart on the obligation of Marriage Contracts; Stair, B. 2. tit. 5, §. 41; Ersk. B. 3, tit. 8, §. 38, 39. 41. *Cunninghame* v. *Cunninghame*, Jan. 17th, 1804. *Cunningham* v. *Stewart Hathorn*, Dec. 20th, 1810. *Case of Bairns of Young*, 7th July 1632, Durie, p. 2. *Hay* v. *Earl of Tweeddale*, Stair, July 21, 1676. *Panton* v. *Irvine*, March 1684. *Cairns* v. *Cairns*, Jan. 31st, 1705. *Ballinghall* v. *Henderson*, 1759; Ersk. B. 3, tit. 8, §. 87. 92. in fine. *Moodie* v. *Stewart of Burgh*, Jan. 17th, 1728 *; affirmed by the House of Lords, Feb. 6th, 1729: cited in *Edgar* v. *Maxwell*, July 6th, 1736; Kilk. p. 148, and affirmed in D. P. on appeal, May 31st, 1742. *Rankine* v. *Rankine*, Feb. 17th, 1736; Home's Dec. No. 17; Elchies' Dec. vol. 2. tit. Mutual Contract. *Trail* v. *Trail*, Jan. 7th, 1737. *Creditors of William Scott* v. *Blair*, Elchies' Dec. tit. Seisin and Confirmation, No. 5. July 30th, 1736. *Moncrieff* v. *Moncrieff*, 8th Dec. 1759. *Sinclair* v. *Sinclair*, Nov. 27th, 1768; affirmed in D. P.; Kaimes's Sel. Dec. *Fotheringham* v. *Fotheringham*, June 20th, 1797. *Allardice* v. *Smart*, Feb. 16th, July 14th, 1720; affirmed in D. P. 21st Feb. 1721. *Stewart Thriepland* v. *Sinclair*, affirmed in D. P. Feb.

* No where reported, but the circumstances appear stated in the printed cases delivered in to the House of Lords upon the appeal; from which, and from recitals, statements and arguments in other cases, it was contended by the Appellant that the heir of provision predeceased the father in that case.

13th, 1770. *Cowan* v. *Young*, Feb. 9, 1769; Gosfird. *Wauchope* v. *Wauchope*, Feb. 6, 1683. *Cunninghame* v. *Cunninghame*, July 9, 1776. *Sinclair and Moodie* v. *Sinclair*, July 29, 1768. *Lawson* v. *Lawson*, Feb. 6, 1777. *Henderson* v. *Henderson*, July 26, 1782. *Lamond* v. *Lamond*, July 30, 1776. *Boyd* v. *Boyd*, Jan. 6, 1670.

Contra:—*Lyon* v. *Creditors of Easter Ogle*, Jan. 1724; Kaimes's First Collection, p. *Case of Hamilton*, 21st of Feb. 1690. *Case of Preston*, 15th July 1691. *Creditors of M'Kenzie* against *his Children*, 2d Feb. 1792; Voet, lib. 5. tit. 2, §. 3; Bank. vol. 2, p. 338; Ersk. B. 3, tit. 8, §. 38. *Hay* v. *Lord Tweeddale*, Stair's Decisions, July 31, 1676. *Panton* v. *Irvine*, Harcarse, March 1684. *Cairns* v. *Cairns*, Harcarse, 31st Jan. 1705. *Case of Cunyngham*, Jan. 17, 1804. *Anderson* v. *the Heirs of Shields*, Kilkerran, Nov. 16, 1747. *Christie* v. *Dunn and others*, Fac. Coll. Jan. 21, 1806; Bankton, vol. 1, tit. 5, §. 10; Ersk. B. 3. tit. 8, §. 39, p. 603. *Inglis* v. *Hamilton*, Dict. vol. 1, p. 220, Dec. 4, 1734. *Bayne* v. *Sir John Belsches*, Feb. 16, 1793. *Atkyn's Rep.* vol. 2. 160; 1 *Wilson*, 229. *Machonochie* v. *Greenlees*, 12th Jan. 1780. *Cunningham* v. *Hathorn*, 20th Dec. 1810. *Lord Wemyss* v. *his Father's Trustees*, 28th Feb. 1815. *Case of Powrie*, (*Fotheringam* v. *Fotheringam*,) as to the question of fact, whether the son predeceased or survived the father in the case of *Stewart of Burgh*. *Harvie* v. *Craig*, Buchanan, 12th Dec. 1811, containing the opinion and statement of Lord Meadowbank as to case of Elsieshiels.

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The third question was, Whether the settlement of 1708 was cut off by positive or negative prescription, and to what title the possession was to be ascribed? On these points were cited,

For the Appellant in the original appeal:—*Porterfield* v. *Porterfield*, Dec. 6, 1771. *Case of Welsh Maxwell*, June 21, 1808. *Balfour* v. *Lumsden*, 13th June 1811. Fac. Col. Edgar, Jan. 17, 1724, *Case of Muirhead*, Lord Kaimes, 11 Feb. 1724. *Earl of Dundonald* v. *Marquis of Clydesdale*, Kaimes's First Col. Jan. 21, 1726. *M'Dougal* v. *M'Dougal*, Clerk Home, 10th July 1739; June 25, 1785, Menzies; Cod. de Loc. et Conduct. L. 4, tit. 65. L. 25. *Harris* v. *Anderson*, Spott. *voce* Possession. *Cunningham* v. *Cook*, Spott. *voce* Removing; Stair, 177; Bankton vol. 1, p. 514; and Ersk. 176. Dict. *voce* Mutual Contract, p. 598, *et seq.* and 7th Feb. 1777, Carnegie.

For the Respondent:—*Carmichael* v. *Carmichael*, 5th Nov. 1810. *Case of Welsh Maxwell*. *Balfour* v. *Lumsden*. *Smith and Bogle* v. *Gray*, Kilkerran, p. 424. Ersk. Inst. B. 2, tit. 1, §. 50.

After an elaborate argument on the 25th, 26th, and 31st of May, and on the 1st and 5th of June, the judgment of the Court of Session was affirmed on all the points.

Judgment affirmed.