

1664, December 20. AGNES YOUNG and Her HUSBAND against BUCHANANS.

No 44.

AGNES YOUNG pursues Buchanans, her children, for her third of her husband's moveables, and for her liferent use of the other two thirds, conform to her contract of marriage, whereby she is provided to his liferent of all goods and gear conquest during the marriage, moveable and immoveable.—The defenders *answered*, That the pursuer cannot both have the third and the liferent of the whole, because it must be presumed, that the liferent of the whole was given in satisfaction of the third and all.—The pursuer *answered*, That this could not be presumed, unless it had been so expressed; no more than a terce is excluded by a provision of liferent, unless it bear in satisfaction of a terce.

THE LORDS found the defence relevant, that the pursuer could not both have her third and the liferent of the rest, but gave her her option, either of the third, *provisione legis*, or of her liferent of the whole, *provisione hominis*.

Fol. Dic. v. 1. p. 434. Stair, v. 1. p. 243.

* * * Newbyth reports the same case :

UMQUHILE JAMES BUCHANAN, by contract of marriage past betwixt him and Agnes Young, is obliged to provide her to a liferent of a house in Stirling, and to the annualrent of the principal sum of 1200 merks; as also there is an obligation that the said Anna shall have her liferent use of whatsoever lands, heritages, moveables, &c. the said parties have presently, or shall happen to acquire. Upon this contract there is a summons raised at the instance of the mother, against the bairns for a terce.—THE LORDS found, That the wife could only have a liferent right of all sums and heritages provided to her by her contract of marriage; but that she could have no terce of the moveables; and that this is the meaning of all such contracts, and the constant custom in such cases. Yet some were of opinion, that the relict should have it in her option to crave either the terce or the liferent of the whole, in regard they thought she might renounce her liferent of the whole, and take herself to the property of the terce, from which she was not secluded, the provision not being conceived in satisfaction of all she could either ask or crave.

Newbyth, MS. p. 13.

* * * This case is also reported by Gilmour :

By contract of marriage betwixt the deceased James Buchanan and Agnes Young his spouse, he is obliged to provide her to a liferent of lands and of a sum of money, with the liferent of all the conquest, heritable and moveable; whereupon she and her second husband, Walter Richardson, pursue the executors of her first husband, not only for her liferent of the hail moveables, but

- No 44. for a third thereof, to a terce of some lands which she liferents.—It was *alleged*, That seeing she is provided to a liferent of the hail, she cannot both enjoy the liferent, and also have a third of what she liferents.—It was *answered*, That the contract doth not exclude her from a third of the moveables, which the law doth provide her to ; and the contract providing her to a liferent, doth not say, that it is in contentation of all third. And though a wife be by contract appointed a liferenter of lands, it will not exclude her from a terce of such lands whereof she is not liferenter.—*Replied*, That she being provided to a liferent, it imports as much as that she should acquiesce with her liferent, without claiming interest to the property of that which she liferents ; or else, if she will have a third, she must renounce her liferent, as has been ordinarily found in moveable bonds containing sums of money provided to the man and wife in liferent.

Which the LORDS found also in this case, conform to the preceding practices.

Gilmour, No 117, p. 86.

- No 45. 1666. July 26. MENZIES *against* BURNETS.

IN the case Menzies *contra* Burnets, it was found, that a relict being provided to a liferent of all the goods belonging to her husband, ought to sell and make money of the horse, oxen, and such goods as may perish, to the effect she may liferent the money and make the sum forthcoming after her decease ; but *cum temperamento*, that a competent time should be allowed to that effect ; and if the goods should perish in the meantime, she should not be liable for the same. In that same case it was found, that a relict should not have both a liferent and third, but should have her choice or option of either. Some of us were of the opinion, that seeing it appeared by the contract, that the goods were not to be in communion, but that she was to have a liferent of the same, she had not a choice to have a third or liferent.

Reporter, Lord Lie.

Clerk, Hay.

Fol. Dic. v. 1. p. 434. Dirleton, No 33. p. 14.

- No 46. 1677. February 2. HOLMES *against* MARSHALL.

THE LORDS found, That a woman, being provided by her contract of marriage to a liferent of the conquest of lands, or other goods that should be acquired during the marriage, and the question being of moveables, and she having accepted a third of the same, she could not return to crave a liferent of the other two parts, though it was *alleged* by her, she had not accepted the same.