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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 Lic.*

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.

in satisfaction of what she could claim. *2do*, It was found, That a woman being provided, as said is, to a liferent of all the moveables her husband had the time he married her, and which he should acquire during the marriage, it was in her option either to take her to her liferent of the whole, or to claim the third part in property, but making election could not vary. Though this was found by plurality, yet some of the LORDS were of opinion, that by the provision foresaid she has only a liferent, and that she had not the said election; seeing *eo ipso* that she is provided to a liferent of all, it is intended and agreed there should be no *communio bonorum*, it being inconsistent that she should be both proprietor and liferenter *usufructu formali*.

Reporter, *Newbyth*.

Clerk, *Gibson*.

Fol. Dic. v. I. p. 434. Dirleton, No 448. p. 218.

* * * Stair reports the same case.

CHRISTIAN HOLMES, by her contract of marriage, being provided to the liferent of all sums and goods acquired by her husband before or during the marriage, pursues John Marshall, as executor nominated to her husband, or as intromitter with his goods, to fulfil her contract. The defender *alleged* absolvitor, because the pursuer received a third of her husband's whole means, which being the provision competent to her by law, she cannot both have the third of the stock of her husband's means, and crave a liferent of the whole; for, by accepting of a liferent of the whole, she hath passed from the property of any part; it being incompatible that she should be both proprietor and liferenter of the same things. It was *answered*, *imo*, That except her provision of liferent bear, 'To be in satisfaction of all that she can claim,' no provision by paction can exclude the provision of law, as hath been ordinarily found in terces, but that a conjunct-fee, how great soever, doth not exclude a terce of the rest of the husband's estate, unless it bear 'in satisfaction thereof.' It was *replied*, That the defence founded on, is the inconsistency of a right of liferent and property of the same subject, and not the presumptive acceptance in satisfaction; and therefore if a wife be provided to a part of her husband's moveable sums or goods, she cannot both have the liferent and a third of the property thereof; yet she may have a third of any other moveable sums or goods, not provided to her in liferent; and therefore the pursuer having drawn a third, she cannot have a liferent of the other two thirds, or else she should both have a liferent of the whole, and the property of a third. It was *duplicated* for the relict, That a part of the husband's estate bears annualrent, which is heritable *quoad fiscum et relictam*; and therefore her acceptance of a third of the moveables cannot exclude her from the liferent of the sums bearing annualrent.

THE LORDS found, That the liferent of the whole means provided by the contract did exclude the relict from the property of any part; but seeing of con-

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sent she had drawn a third of the moveable sums and goods, they found she could not claim the liferent of the other two-thirds thereof; but as to the sums bearing annualrent, whereof the law gave her no share, the LORDS found she had right to the liferent thereof, with the property of a third of what was simply moveable.

Stair, v. 2. p. 502.

1681. *January 25.*

The LADY CRAIGLEITH *against* The LAIRD of PRESTONGRANGE.

No 47.

A liferent provision to a wife, being an annualrent, was found not to exclude her from a terce out of the same lands; but the Lords allowed it only out of the surplus of the rents.

IN an action of count and reckoning of a tutor-account between the Lady Craigleith and her daughter, and Prestongrange her husband, the Lady Craigleith craved allowance of a terce of the lands of Craigleith. It was *answered*, That by her contract she was provided to an annualrent of 10 chalders of victual out of the barony of Craigleith, which is more than a terce, and therefore she could crave no terce of that barony; for albeit a terce is not excluded by a liferent, unless it be accepted in satisfaction of the terce, yet that hath never been sustained, to give a liferenter both a terce and liferent of the same barony or tenement; but if her liferent be less than the terce, she may crave supplement to make up her terce; but this annuity is more than the third of the barony, and though she might claim a terce of any distinct tenement, yet she can have no terce of this tenement. It was *replied*, That law and custom have made no distinction, but that a terce is due wherever it is not renounced; so that a liferent may be of a part of the barony, and a terce of the superplus. *2do*, In this case, there is no liferent of a part of the barony, but only an annualrent out of the barony; and therefore the liferenter ought to have her annuity and a terce out of the whole barony.

THE LORDS found, that this liferent being an annualrent, did not exclude a terce of the same barony, but would allow it only out of the superplus of the rent of the barony more than the annualrent.

Fol. Dic. v. 1. p. 434. Stair, v. 2. p. 840.

. Fountainhall reports the same case:

1681. *February 17.* LADY CRAIGLEITH, pursuing for a terce of her husband's lands against her daughter; *alleged*, It is true she hath not renounced a terce by her contract matrimonial, but having got more than a competent jointure, and being provided to the liferent of the half of her husband's fortune, in law and reason she ought not to crave more. *Answered*, Unless she had accepted the said provision in full satisfaction of all she could ask or crave by terce, third, or otherwise, she hath a clear right to a terce, as was found in Mr John Elies' Lady's case, against Maxwel of Kirkhouse, her son.* THE LORDS demur-

* Examine General List of Names.