

No 53.

Found in conformity with the above.

1682. *January 10.*CAMPBELL *against* SANDILANDS, or TROTTER *against* CAMPBELL.

PATRICK TELFER having, before his marriage with Agnes Campbell, relict of Andrew Anderson printer, renounced his *jus mariti* in all her means, (except L 10,000 she was to contract in portion) with power to her to dispose of the superplus renounced in favours of her children of the first marriage, or any other person, or to himself if she thought fit; and she being obliged to pay L. 10,000 of tocher, and he obliged to provide her to the life-rent of L. 1200 yearly, his creditors arrested all her means, and pursued a forthcoming.

THE LORDS found, That there being a *synalagma* in the contract, between the portion and the jointure, the L. 10,000 ought to be burdened with her life-rent after the husband's decease, and the creditors to find sufficient caution for the same in that event; and found, That the renunciation of the *jus mariti* not being made in favours of the wife's former children, nor any obligation upon the husband for that effect, but only conceived indefinitely in favours of the wife, by way of a faculty to dispose, recurred to the husband by the marriage, which is a legal assignation, in regard she was not denuded in favours of any person before the marriage.

Fol. Dic. v. 1. p. 339. Harcarse, (LIFERENTS.) No 668. p. 190.

1682. *March.*

PATRICK TELFER having verbally settled, as to terms of marriage, with Agnes Campbell, relict of Andrew Anderson printer, whereby she was to give L. 10,000 in tocher, reserving the printing irons, and other estate to herself, before the contract, she disposed all her estate to her brother, upon his back-bond to pay over and above the L. 10,000 of her tocher, her debt, and the superplus to the children of the first marriage, in such proportions as she should appoint; and thereafter Patrick renounced in the contract his *jus mariti*, and consented to her disposing of all at her pleasure to her children, or any she should appoint. Patrick's creditors arrested the sums reserved, and *contended*, That the settlement above-mentioned was but a fraudulent contrivance to cut off the husband's creditors; and that the *jus mariti*, notwithstanding the renunciation thereof, did recur to the husband, seeing the conveyance to the brother appeared to be in trust to the wife, and she always continued in possession of the things disposed; and it cannot be instructed she was debtor to the bairns.

THE LORDS did not find any fraudulent conveyance by the back-bond, and that the wife being denuded by the contract of marriage, the renunciation of the *jus mariti* was effectual; and assoilzied the children, &c. from the declarator at the instance of the husband's creditors.

Fol. Dic. v. 1. p. 389. Harcarse, (CONTRACTS of MARRIAGE.) No 345. p. 84.

* * P. Falconer reports the same case :

IN an action for making arrested goods forthcoming, pursued by Trotter creditor to Patrick Telfer against Agnes Campbell, spouse to the said Patrick, wherein the arrester craved, That Patrick Telfer's wife might make furthcoming the sum of 10,000 pounds, which she was obliged in her contract of marriage with Patrick to pay to him; as also, that her moveables and printing presses might be made forthcoming for payment of the said Patrick his debt, wherein they were creditors to him; it was *alleged* for the defender the wife, That she could not be decerned to make forthcoming the 10,000 pounds foresaid, because her husband was obliged to eik 20,000 pounds of his own means, for her life-rent use, and the bairns of the marriage; and it being a *synalagma*, the creditors could be in no better case than the husband; but so it was, that the husband behoved to employ both sums for her life-rent. THE LORDS sustained the action for making forthcoming, the creditors finding caution for her life-rent of both sums. It was further *alleged* for the wife, That her moveables and printing presses could not be affected by the husband's debt, because by contract of marriage foresaid, and in contemplation of the tocher above written, and that there was an overplus of means belonging to her, and that her children of the first marriage were unprovided, he renounced his *jus mariti*, and did consent, that she should dispose thereof in favours of her children, or any other way she should think fit. THE LORDS found, That albeit the husband had renounced his *jus mariti*, yet she not having actually disposed on the same before the marriage, nor exercised the faculty after the marriage, it did recur and fall back under the *jus mariti*, especially seeing that by the contract, the wife had not only a powr to distribute among her children, but to her husband, or any other she thought fit; but if the reservation had been simply in favours of the children, and that the faculty had not been further extended, the LORDS inclined to have sustained the defence. See MUTUAL CONTRACT.

P. Falconer, No 16. p. 8,

* * This case is also reported by Sir P. Home :

1681. *December.*—SANDILANDS children to the deceased Bailie Sandilands, having obtained a decret against Patrick Telfer merchant in Edinburgh, for the sum of L. 10,000 due to them after count and reckoning, he having intromitted with their estate as tutor; and they having arrested the sum of L. 10,000 in the hands of Agnes Campbell, spouse to the said Patrick Telfer, which she had provided to her husband by her contract of marriage, as also several other debts that were due to the wife, and having pursued to make arrested goods forthcoming, it was *alleged* for the wife, That she could not be obliged to make the L. 10,000 forthcoming, because the said Patrick Telfer her hus-

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band was obliged by the contract of marriage to employ 20,000 merks of his own means, together with the said tocher, being in all 35,000 merks, to her and her husband in liferent, and the children of the marriage in fee; and the husband not having performed his part, the wife was not obliged to pay the tocher of L. 10,000. And as to the sum due by other debtors, the same ought not to be made forthcoming for payment of her husband's debt, as belonging to her husband *jure mariti*, because the husband, by a disposition and renunciation, of the date of the contract of marriage, had renounced his *jus mariti* of all goods belonging to the wife, except the foresaid L. 10,000 in favours of the children of the first marriage; as also before she entered in a treaty of marriage with said Patrick Telfer, she disposed her moveables to Robert Currie, her brother-in-law, for the use and behoof of her creditors and children of the first marriage, with the reservation only of the said L. 10,000, as her tocher, and portion for her second marriage. *Answered*, That albeit the husband be obliged in the contract to employ a certain sum in the terms foresaid, yet that can only furnish a personal action against the husband for implement of the contract of marriage, whose faith she has followed by the contract; and albeit he has not fulfilled his part of the same, yet that cannot be obtruded against the pursuers, who are lawful creditors, as is clear by many decisions, which, if it were sustained, were a compendious way to evacuate the diligence of just and lawful creditors, who by that means should never affect sums contracted in name of tocher, for payment of their debts, for the husband might never fulfill his part of the contract of purpose that the wife's tocher might not be affected, but remain secure to the children; and if the wife and her friends have not provided otherways for the security of the obligations in the contract in her favours, either by real security or sufficient cautioner, *sibi imputet*, but that cannot pre-judge the husband's lawful creditors. And the disposition and renunciation of the husband's *jus mariti* cannot pre-judge lawful creditors, because albeit it proceeds upon a narrative of reserving the rest of the wife's estate, in favours of the children of the first marriage, yet the dispositive words of the right are only in favours of the wife, giving her power to dispose of the same in favours of the children, or any other person she shall think fit, and to manage the same as a separate stock from her husband; and she being fiar of the moveable interest, the renunciation by the subsequent marriage doth accresce and belong to the husband, *jure mariti*, as was expressly found in the case of the Lord Collington, No 50. p. 6828, and several others, where the LORDS found that the husband's right and interest in the wife's moveable estate, neither was, nor could be renounced by any such right, even albeit the wife was denuded of that estate prior to the marriage, in favours of a third party, it being made appear that the same was only to the wife's behoof; and such a renunciation is repugnant to the common principles of law and reason, and to that power and interest that a husband has to the wife's moveable estate; and, as by no paction and agreement it can be provid-

ed, that a husband should not be liable for the wife's debt contracted before the marriage, so neither can it be provided by any paction or agreement, that the husband should not have right to the wife's moveables *jure mariti*, but if he should renounce the same, that obligation by the renunciation does still recur and belong to the husband *jure mariti*, which is founded upon the public law of the kingdom *cui privatorum pactis derogatur*. THE LORDS decerned the L. 10,000 provided in tocher to be made furthcoming to the husband's creditors, they finding caution for her liferent of the sum, in case she should survive her husband; but found, that faculty of disposal of the superplus means did return to the husband, notwithstanding of the renunciation, in respect the wife had not exercised that faculty before marriage, nor since, before the pursuers arrestment; but if the reservation had been simply in favours of the children, and that the faculty had not been farther extended, the LORDS inclined, in that case, to have sustained the defence.

Sir Pat. Home, MS. v. 1. No 66. p. 98.

* * * Fountainhall reports the same case :

SANDILANDS *contra* Agnes Campbell and Patrick Telfer her spouse, 'THE LORDS, upon Saline's report, found that Agnes the defender is not obliged to pay the tocher of L. 10,000 to her husband, or his creditors, unless they find sufficient caution for performing the obligements in the contract of marriage in favours of the wife for her liferent and jointure: And find, that the husband's renunciation of the *jus mariti*, and his obliging himself to consent to any right made by the wife in the terms of this obligation, does not so denude the husband as that the right does not recur by the subsequent marriage; but that, notwithstanding thereof, the right recurs to the husband and his creditors, and that the wife, during the marriage, cannot dispoise thereon, she not having dispoised thereupon before the marriage by virtue of that faculty reserved to her in the contract.' At pronouncing, the defenders procurators *alleged* *absolvitor quoad* the 2d point, because they offered to prove that she had dispoised prior to the marriage, in terms of the interlocutor. 'THE LORDS ordained the said disposition alleged upon to be produced, reserving to the pursuer's procurators to be heard against the same.'

I heard some lawyers condemn that recurring of the *jus mariti* back to the husband, as a ridiculous incongruous subtilty: See Collington and his Lady's case, No 50. p. 5828. where this was first decided; but it were hard (though such renunciations of the *jus mariti* should and may stand good and effectual against husbands themselves,) to extend them against his creditors to defraud them. As to the 1st part of the interlocutor anent correlative and mutual obligations, where the one correlate is the mutual cause of the other, See Everhard, *loc. legal.* p. 697. *Item*, December 1672, between Arthur Forbes of Balveny and Sir Charles Erskine, No 12. p. 5076. where this is fully debated.

No 53. 1682. *March 17.*—The point betwixt Dr Trotter and Patrick Telfer and Agnes Campbell his spouse, being this day reported by Saline, ‘The LORDS sustained her disposition.’

Fountainhall, v. 1. p. 168. & 179.

1709. *July 14.* VALLANCE against M^oDOWALL.

No 54.
Found in conformity with
Nicolson against Inglis,
No 52. P.
5834.

JAMES VALLANCE of Possil having married Barbara Fullerton, sister to Corsby, and relict of Macdowall of Freugh, to obtain her consent, he grants a full and ample renunciation and discharge of his *jus mariti*, and all right he had to her jointure, in regard she was resolved not to wrong her first children by that re-marriage. Possil having raised a process of mails and duties against the tenants of her liferent-lands, compearance is made for Freugh her son, who *alleged* you can never crave these rents, because you are excluded *objectione personali ex capite doli*, having renounced all interest you had therein, and *per leg. 1. D. De pact. nihil magis fidei humanæ congruit quam ea quæ placere servari*, if they do not shock moral honesty, nor the standing laws of the kingdom; and it was so found, 15th January 1669, Hamilton *contra* Baine, Div. 10. Sect. 2. *b. t.* that a husband could not recall a ratification of a wife's disposing her jointure in favour of her first childreu. *Answered*, The question is not, if a husband may not renounce his *jus mariti*, either before or after his marriage, in favours of a stranger, so that he might have assigned her jointure to a third party, and it would have stood good and subsisted in law, though it had been in favours of her own children; but the case here is of a renunciation given by a husband directly in favours of his future spouse, and her assignees; and she having made no assignation before the marriage, his discharge accresced and returned to himself whenever the marriage was complete; and he being both debtor and creditor in the obligation, it became extinct, and was so found, 9th February 1667, Ratho and Collington *contra* the Lady Collington, No 50. p. 5828.; and his power of administration is so inherent and rooted, that it can no more be renounced than his marital right of government of the wife, as by the laws divine and natural he is constituted to be her head. *Replied*, That *bona fides* is a necessary requisite in all transactions, but especially in contracts of marriage; and this were to turn deliberate pactions entered into in the greatest state of unrestricted freedom into ridicule, under pretence they were made *in æstro amoris et contra bonos mores*; and if the future husband renounce his *jus mariti*, will he not be liable in warrandice if he contravene? and these pactions have been sustained for a long tract of time backward.—THE LORDS, by plurality, found the renunciation, before the marriage, accresced and returned back to the husband on the consummation, unless it had been assigned to a third party before the marriage was entered into.

Fol. Dic. v. 1. p. 389. Fountainhall, v. 2. p. 515.