

1745. February 5.

TRUSTEES of MRS MURRAY, against SIR JAMES DALRYMPLE.

MRS ISABELLA SOMERVILLE, relict of Mr Hugh Murray advocate, being about to contract a marriage with Mr Charles Murray of Stenhope, who had obtained a decret of *cessio bonorum* against his creditors; in order to obviate their affecting her estate, assigned it to trustees for the aliment of herself and family; and Mr Murray, by the same deed, accepted a liferent in name of an alimentary provision for him and his family, in case of her death, 'in full satisfaction to him of all claim competent to him by law, or out of the means of Mrs Murray, in and through the intended marriage any manner of way.'

The marriage being celebrated, Sir James Dalrymple of Newhalls, on whose estate the Lady's jointure was secured, refused to pay it to the factor appointed by the trustees with her consent, and presented a bill of suspension, in which he *pleaded*, That he could not pay safely, unless Mr Murray concurred in the discharge, for that the *jus mariti* could not be renounced effectually, the very benefit accruing to the wife by the renunciation falling under that right, and so reverting to the husband, in consequence of the marriage. Here was no real alienation of Mrs Murray's interest, the whole being in trust for herself, and her husband became her assignee by the marriage to the benefit of that trust.

*Answered*, This doctrine might have been listened to a century ago, but later practice has exploded it; and the LORDS found, 23d June 1730, Walker against her Husband's Creditors, That a husband might, in his contract of marriage, renounce his *jus mariti*, and that the reservation therein contained, though not exercised by the wife in favour of any third party, did not fall *sub communiōe*; and they found the same in a later case, between Hugh Campbell tobacconist in Edinburgh and his Wife. (See These cases *voce* HUSBAND and WIFE.

*2dly*, *Pleaded* for the suspender; by an express clause in the contract of marriage between Mr Hugh Murray, the Lady's first husband and her, repeated in the bond, by which Sir James is burdened with the payment of her jointure, she is tied up from alienating or burdening it, or any part thereof, without the express consent of certain persons therein named; and any alienation made by her, without such consent, is declared null; and therefore the trust-deed being made without their consent, has no effect, but the subjects remain still in her, and fall under the *jus mariti*.

*Answered*, This reason of suspension is not consistent with the former allegation; that there was no alienation; which is indeed so far true, that it was only an alienation in form, but not in effect; and therefore no consent was necessary. And if no deed had been done, it may be guessed from this suspension, that it would have been objected, that as it was not in Mrs Murray's power to make any assignation, the legal one by the marriage could not take effect; and there-

No 28.

A clause prohibiting a wife from alienating or burdening her jointure, without consent of certain persons, found no bar, upon entering into a second marriage, from disposing her jointure to trustees, for behoof of herself and children, in exclusion of the *jus mariti*.

No 28.

fore the money would have been refused to have been paid in that case to her husband, as in this it is to the factor.

THE LORDS refused the bill.

One of the LORDS *observed*, That Mr Murray being a party to the deed, the factor was appointed with his consent ; and therefore there was no place for all these questions. See HUSBAND and WIFE.

Reporter, Lord Minto.

*Fol. Dic. v. 3. p. 127. D. Falconer, v. 1. p. 64.*

No 29.

A contract, disposing to a wife the half of insight plenishing, household furniture, and other moveable goods, was found not to comprehend *nomina*.

1745. February 19.

MRS FRANCES KER against JOHN YOUNG.

FRANCES KER relict of William Lindsay of Wauchop, writer in Edinburgh, pursued John Young writer there, her husband's executor and trustee, for that by their contract of marriage, he had disposed to her, in case she survived him, ' the just and equal half, and if there were no child of the marriage in life at ' his death, the whole of the insight plenishing and household furniture, and ' other moveable goods that should be in his possession, or in common betwixt ' them the time of his decease, if he should be the first deceiver.

The question was, Whether such *nomina* as fall under the communion between man and wife, were due to the pursuer in virtue of this clause?

THE LORDS found *nomina* not comprehended.

Reporter, Lord Monzie.

Act. A. Macdowal.

Alt. Monrief.

*D. Falconer, v. 1. p. 79.*

1746. December 24.

MARGARET CRAWFORD and COCHRAN her Husband, against HOGG.

No 30.

A wife, in her contract of marriage, renounced all she could claim thro' her husband's decease.—She predeceased him.—Found, that her provisions were in lieu of all claims, whether she survived or predeceased her husband ; therefore, her nearest of kin could not

In the contract of marriage between William Hogg, senior, merchant in Edinburgh, and Anna Crawford, William Hogg became bound to employ 2400 merks of his own money, together with 7000 merks contracted to him in tocher, upon land, or other security, to himself and his spouse in conjunct fee, and to the children of the marriage ; and after certain other provisions with respect to the conquest, and to the household furniture, in the different events of children, or no children of the marriage, there followed a clause of acceptance in these words : ' And which she, with consent foresaid, hereby accepts of in full ' satisfaction of all further liferent, terce, moveables, or any other manner of ' way through her said promised husband's decease.'

Anna Crawford predeceased her husband ; and, after his death, a process was brought before the Commissaries of Edinburgh, against Mr William Hogg junior who succeeded to him, at the instance of Margaret Crawford, sister and near-