

1751. July 16. GEORGE BELL *against* ELIZABETH SOMERVELL.

JOHN FORRESTER returning from Jamaica, where he had been engaged in trade, married Elizabeth Somervell; after which, he on the narrative that there were no marriage-articles executed betwixt them, became bound to pay to her in liferent, and to the children to be procreated betwixt them in fee, L. 666: 13: 4d. Sterling; and failing children, and in the event of her surviving him, the said sum to be intromitted with by her heirs and assignees, as she should think fit; and he bequeathed to her, in that event, his whole household plenishing, declaring these presents were granted by him, and accepted by her, in satisfaction of all claims competent to her or her next of kin, dispensing with delivery. He died within the year of the marriage.

Elizabeth Somervell pursued her husband's executor, and George Bell Merchant in Dumfries, cautioner in the confirmation, and obtained decret, of which Mr Bell insisted in a reduction.

Pleaded for the defender, The bond is not resolved by dissolution of the marriage, being granted *mortis causu*, as appears by the legacy in the same writ, and dispensation with delivery; so that it might have been revoked, which is contrary to the nature of a marriage-settlement; neither could the pursuer accept of it till after his death, contrary also to any such contract.

The resolution of contracts, when marriage does not subsist year and day, depends on the presumed will of the parties; and they may, and frequently do prevent it, by expressing their will to the contrary: Mr Forrester's will, in this settlement, appears from what has been already noticed from the deed itself; and, further, from what the pursuer offers to prove, that he was given over by physicians, and did not expect to live when he made it. The rule applies only to contracts of marriage, and not to deeds by one of the spouses in favour of the other; the defender made no settlement on her husband, which might also resolve, and so preserve equality; on the contrary, she, of the same date, made her testament, to which he subscribed as consenter, and bequeathed her portion of 6000 merks to her own relations.

Pleaded for the pursuer, The law, not the presumed will of parties, has determined the resolution of provisions *intuitu matrimonii*, though the parties may provide to the contrary; which obtains in other provisions of the law, as in the different channels of succession of heritage and conquest; and it has laid down this rule for marriage-settlements, whether in contracts or monolateral deeds. This bond is granted *intuitu matrimonii*, on the narrative no marriage-articles had been entered into, and in satisfaction of all other claims; and the legacy adjected could not alter the nature of the rest of the deed, as the granter has not expressed his will the bond should subsist, neither can it be gathered from it. The provision to children shews it was not made from a prospect of death, or *mortis causa*, as that, in the event of the wife's surviving, shews the other

No 153.

A bond, granted by a husband to a wife, narrating no marriage-contract, was executed between them, of a sum, the liferent to her, and the fee to the children; and failing children, and in the event of her surviving him, to her and her heirs, with a legacy of his household plenishing, dispensing with delivery. It was found to have been granted *intuitu matrimonii*, and to be dissolved by dissolution of the marriage within year and day, without issue.

No 153. event was likewise in view, of her predecease. Mr Somervell was ill before his marriage, as well as at the date of the bond; but it is plain the parties have not so relied on the judgment of physicians, if any such was given, as not to expect his longer survivance. With regard to the bonds remaining in the granter's power, it is apprehended, whatever he might have done in fact, he could not have justly destroyed it.

"THE LORD ORDINARY found that the bond was granted by Mr Forrester to the defender *intuitu* of the marriage then subsisting betwixt them; and, in regard that the marriage dissolved by Mr Forrester's death, within year and day, without a living child procreated of the same, therefore sustained the reasons of reduction, that the said bond was thereby become void." And, on two bills, and answers, 26th February, and this day, the LORDS adhered.

Act. R. Craigie, J. Erskine.

Alt. H. Home.

D. Falconer, v. 2. No 223. p. 268.

* * * Lord Kames's and Lord Kilkerran's reports of this case are No 373. p. 6161. *voce* HUSBAND and WIFE.

1752. December 1.

GRIZEL, MARGARET, and RACHEL MARJORIBANKS, *against* ANDREW MARJORIBANKS.

No 154.
No claim found to lie on a bond of provision to a younger son, at the instance of his next of kin, in respect he died before his father.

IN the year 1730, Andrew Marjoribanks of Marjoribanks, father of the above parties, executed a bond of provision in favour of his younger children. To each of his daughters he provided a certain sum, and 6000 merks to a younger son, Alexander. All these provisions were made payable at the first term after they should respectively attain the age of fifteen, with penalty and interest from the term of payment; and if any of the said children should die before majority or marriage, the portion of such child was to return to the disponent's eldest son for the time being. Alexander, above mentioned, attained the age of majority, but died before his father, in the year 1741. In the year 1742, Majoribanks being upon death-bed, restricted the provisions made to his three daughters, (the pursuers) to the sum of L. 525 Sterling; and declared that sum to be in full of all they could claim from him by and through his decease, or otherwise; and also revoked all former testaments by him made in their favour.

The pursuers, as three of the six nearest of kin to their brother Alexander, insisted against their eldest brother Andrew, for payment of their respective shares of the 6000 merks contained in Alexander's bond of provision; and *pleaded*, That the bond was due as soon as Alexander attained the age of fifteen; with this limitation, indeed, that if he died before majority, it should return to his father's eldest son; that therefore Alexander's right became absolute, and without limitation, from the time that he attained majority, and conse-