

Five months after, while the suit betwixt Mr M'Alister and his wife was still in dependence, Mrs Drummond executed a general settlement in favour of Mr Maxwell of Kirkconnel, and assigned to him all her bonds, and particularly this one; in lieu thereof, she, however, obliged him to pay L. 100 to Mrs M'Alister, but forgot to seclude her husband's *jus mariti*.

Mrs M'Alister succeeded in her declarator of marriage; after which her husband's Creditors arrested the sum due by Kirkconnel to Mrs M'Alister, as *in bonis* of her husband.

Objected for Mrs M'Alister, The same reasons which induced Mrs Drummond to seclude Mr M'Alister's *jus mariti* at the date of her first deed, subsisted for secluding it at the date of the second. By the second deed, her intention was only to alter the security, but not to alter the object of her benefaction. She changed the debtor, and gave a more sponisible one, a landed gentleman; but she did not mean to change the creditor, or to put Mr M'Alister in place of his wife, whom he was at that very time renouncing.

' THE LORDS preferred Mr M'Alister's creditors.'

For Creditors, *Lockhart.* For Mrs M'Alister, *Jo. Dalrymple.*

J. M.

Fol. Dic. v. 3. p. 309. Fac. Col. No 119. p. 279.

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signed to her heir all her bonds, particularly the above-mentioned one, in lieu of which she obliged her heir to pay to the former assignee L. 100, but forgot to exclude the *jus mariti*. Though it was pleaded that the grantor's intention was evident from the first deed, and that the reasons for excluding the husband and still subsisted, the *jus mariti* was found not excluded.

1764. January 26. COUNTESS OF CROMARTY against The CROWN.

THE estate of Cromarty standing entailed in favour of heirs-male, the Earl in his contract of marriage, *anno 1724*, ' became bound, in case of children of ' the marriage who shall succeed to, and enjoy the estate, to infest his lady in ' a liferent locality of 40 chalders victual; and in case there be no children of ' the marriage who shall succeed to and enjoy the estate, he became bound to ' make the said locality 50 chalders.' To which there is added the following clause: ' That if, at the dissolution of the marriage, there be children who ' shall succeed to, and enjoy the estate, but who shall afterwards decease during the life of his said spouse, she, from that period, shall be entitled to 50 ' chalders, as if the said children had not existed.'

The Earl of Cromarty being forfeited in the year 1745, having issue both male and female, a claim was entered by his lady for her jointure of 50 chalders, to take place after her husband's death. *Objected* by his Majesty's Advocate, That she is entitled to 40 chalders only, there being sons of the marriage, who, but for the forfeiture, would succeed to the estate. *Answered*, That taking the words of the contract strictly, according to common law, the claim must be restricted to 40 chalders, because it cannot be said literally that there are no children of the marriage who can succeed to, and enjoy the estate. But here the forfeiture is plainly a *casus incogitatus*, about which the parties interposed no will; and equity dictates, that the lady ought not to suffer by this over-

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A person settled on his wife a jointure, and in case of no children, a greater. Being attainted, his wife was found entitled to the larger jointure, because, though he had children, they could not succeed to him.

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sight, but that the same ought to be supplied by the Court, provided it can be made evident what would have been the will of the parties, had the event been foreseen. About this there can be no doubt; for, if the Earl was willing to give a jointure of 50 chalders to his spouse, in case his brother or his nephew should succeed to his estate, *multo magis* in the case of a forfeiture.

'The claim accordingly was sustained for 50 chalders.'

Sel. Dec. No 213. p. 278.

1781. February 2.

Dr JOSHUA M'KENZIE *against* LEGATEES of Mrs ELIZABETH HOLTE.

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A lady conveyed to a person, for behoof of his son, a sum which, in case of the son's death, was to devolve to the children of three families equally. This legatee having died, it was found that the sum must be divided among the children of the three families *in capita*, and not among the families collectively; that children born after the testator's death, but before the legatee's death, had right to a share; that the issue of those children who died before the legatee, were entitled to their parent's share; but that the heirs of those who died without issue before the legatee's death, had no claim.

Mrs ELIZABETH HOLTE, by her last settlement, conveyed to Dr M'Kenzie her whole funds, in trust, for behoof of his children; 'but, in case of the death of James M'Kenzie (one of them), she appointed the sum of L. 700 to be paid and divided by her said trustee, equally among the children of Janet M'Kenzie, and the children of Anne M'Kenzie, and the children of Anne Monro.'

James M'Kenzie having died, the legacy became due to the persons above-mentioned. Some difficulty, however, occurred in the mode of distributing it.

Of the children of the different families, one was not born till after the death of the testatrix, and several others who had survived the testatrix were pre-deceased at the time of James M'Kenzie's death, and one of these had left issue.

Doubts, therefore, arose concerning the following points; *1mo*, Whether the division prescribed by the settlement should be made *in capita*, or *in stirpes*; *2do*, Whether the child born after the testatrix's death was entitled to a share; and *3tio*, Whether the issue or next of kin of such of the children as survived the testatrix, but died before James M'Kenzie, had also a right to a portion.

In order to obtain, for the direction of his conduct, the judgment of the Court upon the different claims resulting from these particulars, the trustee called all the parties interested into Court, by a process of multiplepointing, when appearance was made for a considerable number of them.

Some of the Judges, in reference to the first point, were of opinion, that the mode of expression used by the testatrix, in the above quoted clause of the deed, especially in the repeated insertion of the particle 'and,' seemed to indicate an idea of a division between the several families collectively, and not among the children of them all, as mere individuals.

The judgment of the Court, however, was as follows:

'Find that the sum of L. 700, bequeathed by Mrs Elizabeth Holte, in the event of the death of James M'Kenzie, to the children of Janet and Anne M'Kenzie, and Anne Monro, falls to be divided amongst the said children equally *in capita*; and that each of the said children who existed at the death of the said James M'Kenzie, though born after the death of the testatrix, has