

law of the place where they were then domiciled. They are framed upon the supposition, that the wife would otherwise have had nothing. No 119.

Even if they had been entered into in Scotland, they would have cut off the *jus relictæ*, upon the general presumption, that conventional supersede legal provisions; 24th February 1763, Mackinnon against Macdonalds, No 33. p. 2278.; 28th Nov. 1781, Riddell against Dalton, *voce* IMPLIED DISCHARGE AND RENUNCIATION.

THE LORD ORDINARY having considered the contract of marriage, by which Mrs Hog was "provided only to an annuity out of tenements to be purchased with a part of her own fortune, but had no provision made to her out of her husband's estate; found, That the claim of Mrs Hog's Representatives is not excluded by her contract of marriage with her husband, &c.; but found, That when parties marry in one country, and afterwards remove to another, in which the legal rights of married persons are different, the change of domicile ought not to operate any change on any of the rights pre-established in them in the country in which they married; and that all those rights ought to be preserved and enforced by the law of the country to which they have removed, unless they be incompatible with the religion and morality of that country," and therefore repelled the claim.

Both parties reclaimed, and a hearing in presence was ordered. When the cause was advised, a diversity of opinion took place; but a majority of the Court thought, that there was no occasion to determine what might be the effect of a change of domicile where there was no contract of marriage. The question here is, (it was observed), What was the understanding of parties in framing the marriage-articles? Both were domiciled in England, where the rights of husband and wife are accurately defined; the marriage-articles were meant to fix the amount of the wife's claim on the personal estate of her husband, and there could be no view to other claims which were not there provided for, and which probably were unknown to the parties and their men of business. The marriage-articles, indeed, contain, what, in the circumstances of the parties at the time, was a very rational provision for Mrs Hog.

THE LORDS "repelled" the claim.

A reclaiming petition was (7th July) refused without answers.

Lórd Ordinary, *Dreghorn*. Act. Solicitor-General Blair, *Jo. Clerk*. Alt. Dean of Faculty, *Erskine, Geo. Fergusson, M. Ross, Honyman*. Clerk, *Sinclair*.

E. D. *Fol. Dic. v. 3. p. 224. Fac. Col. No 176. p. 415.*

1797. *January 20.*

GEORGE ROSS and Others, Representatives of the late Richard Louthian, *against* SARAH AGLIANBY.

RICHARD LOUTHIAN died possessed of considerable landed property in England and Scotland. On the 17th September 1782, he executed a settlement

No 120.

A widow having accepted a conventional provision out of landed property in

No 120.
England, is
not entitled
to claim a
terce out of
her husband's
lands in Scot-
land.

of his Scotch property, and in October following, he made a will, by which, after narrating, that 'I have, by a deed under my hand, bearing date 17th September, in the year 1782, settled every thing relative to my affairs in Scotland,' he disposed of his whole English property. By these deeds he settled the greater part of his fortune on his wife Sarah Aglianby.

The settlement with regard to his Scotch property was afterwards set aside, in an action at the instance of Mr Louthian's heirs-at-law, on grounds of fraud and undue execution.

Sarah Aglianby, on thus losing the property of the lands in Scotland, claimed her terce out of them.

She was opposed by Mr Louthian's Heirs, who stated, that as she still held her husband's English property, in virtue of his will, her claim of terce was excluded by the act 1681, c. 10.

Mrs Louthian

Pleaded; The sole object of the act 1681, was to operate a just distribution of the husband's property in Scotland, and can have no effect upon a provision made on his wife from lands in a foreign country. The Court cannot judge of the validity of such provision, and will not deprive her of her terce on account of it. As the heir might claim a share of the moveable succession, without collating lands situated in a foreign country, so may Mrs Louthian her terce, without renouncing her right to the property in England.

2dly, It is evident from the preamble of the act 1681, that it was not meant to apply to cases where the husband intended that his widow should have her legal as well as conventional provisions. Now, as Mr Louthian, besides the English estate, gave his wife the property of the lands in Scotland, it must be presumed, that had he known that his settlement as to them was to be found ineffectual, he would at least have been desirous that she should have had her terce from them; 29th Nov. 1791, Jankouska against Anderson, *voce* TERCE.

Answered; *1st*, The statute 1681 enacts, in general terms, that any provision made by the husband on the wife, and accepted by her, shall exclude her from the terce, unless the contrary be expressed; the lands in England, given in this case to Mrs Louthian, must therefore have this effect.

If Mrs Louthian is afraid that her provision from the English estate may prove ineffectual, on her renouncing it, the opposition to her present claim shall be withdrawn.

2dly, From the grounds on which Mr Louthian's settlement was reduced, it cannot be considered as his deed, or as affording any evidence of his intention.

The question came to be tried in an action of count and reckoning, at the instance of Mr Louthian's heirs-at-law against his widow.

THE LORD ORDINARY found, "That in order to bar a claim to the terce, it is not necessary that the conventional provision should be constituted over lands in Scotland: Found it acknowledged that the defender is possessed of a settlement made by her husband in her favour of an estate belonging to him in Eng-

land; and, in respect it is not alleged by the defender that any other person is in possession of that estate, or competing with her for it, or that she herself is not in possession of it, in terms of her said settlement; and farther, in respect that she does not offer to convey her right to that estate in favour of the pursuer, or even to repudiate her husband's settlement thereof, found, That she is not entitled to claim a terce out of the lands in Scotland.'

No 120.

On advising a reclaiming petition, with answers, one Judge thought that the reference in Mr Louthian's will to the disposition of his lands in Scotland, together with the whole other circumstances in the case, afforded evidence, that her husband truly intended to give her a provision, equal at least both to the terce and to the lands in England; and that on this ground, the judgment should be altered.

THE LORDS "adhered."

Lord Ordinary, *Justice-Clerk Braxfield.*
Clerk, *Menzies.*

Act. *G. Fergusson.*

Alt. *Honyman.*

R. D.

Fac. Col. No 10. p. 21.

See No 11. p. 2044.

See Stranger of Middleburgh against Smith's Executors, 8th December 1626,
voce PROOF.

See No 27. p. 1796.

See APPENDIX.