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[Fac. Coll., Vol. xvi., p. 572 ; *et* Buchanan's Cases, 121.]

MAJENDIE,
&c.
v.
CARRUTHERS.

Mrs ANNE MAJENDIE, formerly ROUTLEDGE, wife of the Right Rev. HENRY WILLIAM, LORD BISHOP of BANGOR, and her said Husband for his interest, . . . } *Appellants ;*

THOMAS CARRUTHERS, Esq., describing himself of Dormont, and his Guardians, *Respondents.*

Et e Contra.

House of Lords, 6th July 1820.

ENTAIL—PRESCRIPTION—POST-NUPTIAL CONTRACT—JUS CREDITI—DISCHARGE OF RIGHTS.—By a post-nuptial contract, lands subject to the limitations of an entail made in 1708, were settled on the heirs male of the marriage, whom failing, on the heirs female of the marriage. The only issue of this marriage was a daughter ; and on her marriage, her father entered into a transaction by which he paid her a sum in consideration of her discharging her rights of succession under this contract, which she did accordingly. The father then executed a new settlement of the estate. The daughter died in 1768, leaving a son. Her father died in 1773. The son brought an action of reduction (which, after his death, was carried on by the appellant, his sister), to set aside the above discharge, and all subsequent deeds. Held (1), That she was the heir female within the meaning of the post-nuptial contract 1735. (2), That the entail 1708 had fallen under the positive and negative prescription. (3), That the daughter had power to contract with the father and discharge her right under that contract.

By marriage contract and tailzie, entered into and made by John Carruthers, with consent of his father, on the one part, and Mary Bell, and her father, on the other part, he, John Carruthers, the father, with reservation of his own life-rent, disposed to his son, “and the *heirs male of his then marriage ;* whom failing, to the heirs male of his body of “any other marriage ; whom failing, to the heirs female of “the marriage without division ; whom failing, to the heirs “female of his body of any other marriage without division ; “whom all failing, to the heirs female of the said John Carruthers, elder, his own body, without division, all and “whole the five merk land of Dormont,” &c., and on the other hand, William Bell disposed to the said John Car-

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ruthers, younger, in liferent, and to the heirs male lawfully procreate betwixt him and the said Mary Bell, in fee, whom failing, to Mary Bell, her heirs or assignees whatsoever, all and whole the six merk land of Winterhopehead.

The tailzie contained the usual prohibitory irritant and resolute clauses against alienating or contracting debt, and against altering the order of succession, and these were made to apply to Dormont estate as well as to Winterhopehead.

John Carruthers, the father, died sometime after the year 1720. John Carruthers, his son, died in 1722, and was succeeded by his eldest son, Francis Carruthers, who was heir of tailzie and provision under the contract of marriage and tailzie 1708, to all the lands therein contained.

In 1731, Francis Carruthers married Margaret Maxwell, daughter of Sir Alexander Maxwell of Monreith.

Dated Nov. 27,
1735.

Four years thereafter, by a post nuptial contract of marriage, which, at that time, was not held in law to be an onerous deed, he resigned the lands of Dormont and others, for new infestment to “himself and the heirs male lawfully to be procreated betwixt him and the said Mrs Margaret Maxwell, his spouse; which failing, the heirs male of the said Francis Carruthers, his body, in any subsequent marriage; which failing, the heirs female to be procreated of the said spouses, and the heirs male to be procreated of their bodies, the eldest daughter or heir female, and the heirs male descending of her always excluding the rest, and succeeding without division; which all failing, the said Francis Carruthers, his heirs and assignees whatsoever.”

Francis Carruthers was thereafter served “nearest and lawful heir male of provision of the foresaid marriage betwixt John Carruthers and Mary Bell, his (grand?) father and (grand?) mother, in terms of the contract of marriage entered into between them.”

He was also served heir in general to John Carruthers of Dormont, his great grandfather, and nearest and lawful heir in special to Francis Carruthers of Dormont, his great-great grandfather, and was infest in the estate of Dormont.

Feb. 12, 1736.

He further obtained a charter of resignation from the Crown of the other lands of Knox and Twathels, &c., and likewise of the lands of Winterhopehead, in favour of himself and his heirs and assignees whatsoever; which charter bears that the lands of Winterhopehead, were resigned in virtue of the procuratory in the contract of marriage between John Carruthers and Mary Bell, to which the said Francis had

acquired right as heir of provision under that marriage contract; and on this charter he was infeft of this date.

John Carruthers, the second, father to John Carruthers, the third (who was married to Mary Bell), continued to possess the estate of Dormont during his life, on apparen-
 as heir of the former investitures, but being bound by the contract of marriage and tailzie 1708, he could do nothing to infringe the rights so constituted. The same observation applies to his son, John, the third, who died about two years after his father.

It was stated that the marriage of Francis Carruthers was not attended with the birth of issue for ten years after the marriage. At that time it was alleged she became pregnant, and gave birth to a female child in May 1741. It was also stated, that the father disowned this child as not being his; and that a few hours before the birth of the child, he had raised an action of divorce, and on the 9th of January 1742 (seven months after the birth), he had obtained a decree of divorce against her. The appellant stated, on the other hand, that the legitimacy of the child was unquestionable, and that afterwards, and from her earliest infancy, she was recognised and regarded as the lawful daughter of Francis Carruthers. She was married in 1758 to Henry Routledge.

By the marriage contract of her mother and father in 1735, it was provided, in the event of the heirs female being excluded from the succession to the real estates, that the daughter, if there should be but one, was to have the sum of 18,000 merks, or £1000 sterling, payable at her majority or marriage, which ever events should first happen. This last event having first happened, she and her husband raised an action for her provision, as stipulated in the marriage contract between Francis Carruthers, her father, and Margaret Maxwell, her mother. This action was brought against her father, and the latter having been specially called on by the Lord Ordinary "to confess or deny in explicit terms if, " or not, he acknowledged the pursuer to be the daughter of " Margaret Maxwell, born during the standing of the mar- " riage betwixt him and the said Margaret," he repeatedly declined to do so; and was finally held as confessed, and decree pronounced against him, of this date. Afterwards this
 was opened up, and a proof allowed and taken.

At this stage, an extra-judicial arrangement was proposed by Mr Carruthers; and from the embarrassed circumstances

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of the pursuer then, was accepted of by her and her husband, namely, of £650, in full of all she and her husband could claim in full of her provision, under the marriage contract above alluded to. This agreement was made to form, by separate deeds, 1st, A submission to Mr Ferguson of Pitfour, advocate, and Alexander Lockhart of Covington, advocate, of “all questions, clags, claims, controversies, or demands of whatever nature, that either party has or can have against the other, and particularly all right or claim of succession, or other right or claim of whatever kind, which the said Elizabeth Carruthers and her husband have, or can pretend to, either now or at any time, or in any event that may hereafter happen, in virtue of the provisions mentioned in the said contract of marriage, in favour of the children thereof, either with regard to the succession of the estate of Dormont and others, provided by the said contract.” &c.

Dec. 7, 1759.

The decree arbitral accordingly found due to the said Elizabeth, the said sum of £650, in full of her claims of provision under the said contract, and by a separate deed she was made to discharge these as the “only child procreate of the marriage betwixt Francis Carruthers and Margaret Maxwell;” and it set forth, “We decern and ordain the said Francis to make payment of the said sum in full satisfaction to the said Elizabeth Carruthers and her husband, of all right and succession or other right, which they or any of them have, or can or may have, at any time, or in any event that may happen to the said estate of Dormont.”

When these deeds were executed, Mrs Routledge was a minor.

The day after this deed was executed, so anxious was Mr Carruthers to disinherit his daughter, that on 8th December 1759, he executed a disposition of his estate in favour of himself and the heirs male of his body; whom failing, to William Carruthers, his brother, and the heirs male of his body; whom failing, to his own nearest *heirs male* whatsoever. On the procuratory of resignation contained in this disposition, Francis Carruthers obtained a charter from the Crown, on which he was duly infeft.

Feb. 23, 1760.

Mrs Routledge died about the year 1768, and sometime afterwards her husband, leaving one son, John, the raiser of this action, and two daughters.

Francis Carruthers only died in the year 1773 or 1774, and was succeeded by his only brother, William Carruthers,

who served himself heir male of provision to Francis, of this date.

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It was stated, that William was not lucrutus by this succession, as it was burdened with debts equal to the value of the estate, but, having paid off these debts with his own funds he made, of this date, an entail of the estate of Dormont to himself; whom failing, to William Aikman Carruthers, his eldest son, and the heirs male of his body; whom failing, to the late Major-General Francis Carruthers, his second son; and failing him, to the other heirs therein mentioned; which was recorded in the register of tailzies, of this date.

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William Carruthers died in 1787, and was succeeded by William, his eldest son, who was fifteen years in possession of the Dormont estate, but never made up titles. He died in 1802, and was succeeded by the respondent, his only son, then an infant, and who has not made up any titles to the estate of Dormont.

After the long period of possession had, and forty-six years after the discharge, the present action was brought by Mrs Routledge's son, John Routledge, and is now, after his death, continued by his sister, the appellant.

This action purported to be an action of reduction improbation, to set aside the disposition of the 8th December 1759, and whole subsequent conveyances of the estate on the following grounds, 1st, That they were in the face of, and in direct contradiction to the destination and obligations in the marriage contract in favour of the heirs of the marriage; 2dly, That they were likewise executed in the face of letters of inhibition raised by Sir William Maxwell and Lord Garlies, at whose instance execution was directed to pass on the contract, and so were reducible *ex capite inhibitionis*; and lastly, that his mother and grandmother, having both predeceased his grandfather, who died without entering into a second marriage, the writs called for had been executed in defraud, hurt, and prejudice of his just rights, as the heir served and retoured under his grandfather's contract of marriage.

Mr Carruthers also brought a reduction to set aside Mr Routledge's general service.

The defences by the respondent to the reduction, improbation, brought by the appellant's brother, contained a statement of the circumstances of Elizabeth Carruther's birth, and also set forth the divorce for adultery obtained against her mother,

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and alleged, from these, that there was good reason to believe that she was not, in point of fact, the daughter of Francis Carruthers. But the defences further stated, “that even “supposing, that at this distance of time the illegitimacy of “Mrs Routledge could not be legally established, every claim “which she and her husband, or the pursuer in their right “could make under the contract of marriage, founded on in “the summons, was finally settled and discharged by decree- “arbitral, and by deed of renunciation and discharge, in “consideration of full value received upwards of forty-six “years ago.” And that this discharge and renunciation of all their claims under the contract of marriage, in the estate of Dormont, left in the person of Francis Carruthers a fee simple estate, which he could dispose of at his pleasure, and which, accordingly, he did effectually dispose of by the destination in the deed he subsequently executed.

The appellants’ answer was, 1st, To the first defence, they maintained two propositions, *First*, they said, that according to the plain import of the award and discharge which followed upon it, Mrs Routledge gave up nothing but her own individual chance of succession under the contract, without affecting that of her children, or any other person who might be heir of the marriage at the death of Francis Carruthers; and *Secondly*, granting the intention of parties to be the reverse, and that the discharge was meant to operate against all the heirs of the marriage, it could not have that effect, because Mrs Routledge predeceasing her father, had no right to the estate of Dormont vested in her under the contract, which could be the subject of renunciation; in other words, the *jus crediti* was not in her, so as to entitle her to discharge that right, and consequently the heir of the marriage at the death of Francis Carruthers, who did not represent her, and was not bound by her deeds, became entitled, in virtue of her contract, to that estate.

After the conjoining the actions and certain procedure before the Lord Ordinary (Balmuto), who repelled the objections stated to the pursuer’s title to insist, “but reserved to “the defender to establish what he alleges respecting the “illegitimacy and non-identity of the pursuer’s mother.” A proof was allowed; and the whole cause resolved itself into three questions: 1st, The legitimacy of Mrs Routledge. 2d, Whether the deed 1708 was prescribed, and its effect, with reference to the contract 1735. 3d, The effect of the compromise and discharge. The Court at first pronounced this inter-

“ locutor : The Lords in the process of reduction improbation,
 “ at the instance of John Routledge against William Thomas
 “ Carruthers, do sustain the reasons of reduction of the dis-
 “ position, and other deeds quarrelled, and reduce, decern,
 “ and declare, in terms of the conclusions of reduction of
 “ the libel; and in the counter process of reduction at the
 “ instance of the said William Thomas Carruthers against
 “ John Routledge, they repel the reasons of reduction, sus-
 “ tain the defences, assoilzie and decern; but supersede ex-
 “ tract until the first box-day; they allow the said John
 “ Routledge to see and answer the same; the answers to be
 “ printed and boxed on or before the first sederunt day in
 “ May next, under an award of 40s. sterling.”

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There was another action brought at the instance of the respondent, for reduction of the contract of marriage entered into by Francis Carruthers, in 1736, as in contravention of the marriage contract and tailzie 1708, which was also conjoined.

But at advising another reclaiming petition against this interlocutor, the Court pronounced finally this interlocutor:

“ The Lords alter their interlocutor reclaimed against, and in
 “ the action of reduction raised at the instance of the late
 “ John Routledge, Esq., and insisted in by the respondents,
 “ his representatives, they repel the reasons of reduction, sus-
 “ tain the defences, assoilzie and decern; and in the counter
 “ action of reduction, at the petitioner’s instance, sustain the
 “ reasons of reduction, repel the defences, and reduce, decern,
 “ and declare, in terms of the libel.” *

An appeal having been brought to the House of Lords, the whole question was there debated, whereupon their Lordships ordered and adjudged, “ that the cause be remitted
 “ back to the Court of Session in Scotland, to review the
 “ several interlocutors complained of in the said appeal, and
 “ thereafter to do as shall appear to be just; and the Lords
 “ think fit, in this cause, to require that the Judges of the
 “ Division to which this case is remitted do require the
 “ opinion of the Judges of the other Division, in the matters
 “ or questions of law in this cause.”

In making this remit the Lord Chancellor spoke, *vide* speech, Dow, vol. iv., p. 400.

By petition, the appellants applied to the First Division

* For Judges’ opinions *vide* Fac. Coll., vol. xiv., p. 572; et Buchanan’s Reports, p. 114.

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of the Court of Session, to apply this judgment, who ordered the cause to be stated in mutual memorials.

A preliminary point, as to Mrs Routledge's service and title under that service, having been disposed of, the First Division ordered the memorials to be boxed and transmitted to the Judges of the Second Division, and permanent Lords Ordinary, with a request that they should give their opinions in writing, either collectively or individually, on the following questions of law, arising therefrom.

Question 1. Was the pursuer's mother, Mrs Routledge, vested in the *jus crediti* under the marriage contract 1735, so as to give her power to discharge the obligation thereby incumbent on her father, either on receiving full and specific implement, or on such terms of compromise as her father and she settled, or as arbiters might decern?

2. Whether the decree arbitral was meant to regulate the succession of the estate, or was confined to the money provision?

3. Did Mrs Routledge, by her discharge and renunciation in 1759 following, on the relative agreement, submission, and decree arbitral, effectually discharge her *jus crediti* under the marriage contract 1735, so as to bar the claim of her son, John, who, by her pre-deceasing her father, became the heir of the marriage contract at his death; and but for that discharge and renunciation by his mother, would have taken the estate under the marriage contract?

4. Was the entail, in the former marriage contract in 1708, effectual to secure the estate to the heirs male of that marriage; and was it a valid and subsisting entail, binding on Francis Carruthers in 1735?

5. Supposing it to have been binding, is it cut off by prescription?

The following opinions were returned by the Lord Justice-Clerk, and those other Judges undernamed.

Answer to Question 1. We are of opinion that, in consequence of previous decisions, the pursuer's mother, Mrs Routledge, must be held as vested in the *jus crediti* under the marriage contract 1735, so as to give her power to discharge the obligation thereby incumbent on her father, either on receiving full and specific implement, or on such terms of compromise as her father and she might settle, or as arbiters might decern.

Answer to Question 2. We are of opinion that the decree arbitral was meant to regulate, and that its terms must be

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held to apply to the succession to the landed estate of Dormont, as well as the pecuniary provision to which Mrs Routledge might eventually have been entitled.

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Answer to Query 3. We think that Mrs Routledge, by her discharge and renunciation in 1759, did effectually discharge her *jus crediti* under the marriage contract in 1735, so as to bar the claim of her son.

Answer to Query 4. We are of opinion that the entail in the marriage contract of 1708 was, from the beginning, ineffectual, in so far as it relates to the lands of Winterhopehead; but that as to the lands of Dormont, and others, proceeding from the husband, it was in 1735, and in consequence of the titles afterwards completed by Francis Carruthers, effectual in terms of the Act 1695, c. 24.

Answer to Question 5. But it appears to us, that all obligations under the marriage contract 1708, is now cut off by prescription.

(Signed) D. BOYLE.
WM. ROBERTSON.
DAVID DOUGLAS.
AD. GILLIES.
D. MONYPENNY.

The following answers were returned by Lords Glenlee, Bannatyne, Craigie, Alloway, and Cringletie:—

To Query 1. Whatever might have been the effect of a conveyance by the pursuer's grandfather, of the whole estate settled by the contract of marriage entered into by him in 1735, in favour of the pursuer's mother, Mrs Routledge, and especially if she had survived her father; we are of opinion, that, as no conveyance was granted to her, and as she did not survive her father, she had no power to discharge the obligation in the said contract, any further than concerned herself, and the heirs who represented her.

Answer to Query 2. We think that the decret arbitral was meant to apply to the estate, as well as to the sum of £1000 stipulated in the marriage contract, so far as regarded the interest of those who were parties to the submission. But that it cannot, in just or sound construction, be held to extend to heirs of the marriage who were not themselves, and do not represent those who were, parties to the submission.

Query 3. We are of opinion, that, Mrs Routledge, by the discharge alluded to in this query, did not effectually dis-

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charge the *jus crediti* under the marriage contract 1735, so as to bar the claim of her son John.

Queries 4 and 5. We agree with our brethren, that the destination of succession in the marriage contract 1735, was not rendered ineffectual by the entail in the contract of marriage 1708; and further, that this latter is now cut off, both by the negative and positive prescriptions.

May 26, 1819. The First Division of the Court, thereafter pronounced this interlocutor: "The Lords having advised the memorials, " and additional memorials, and having also advised with the " Lords of the Second Division of the Court, and with the " permanent Lords Ordinary of both Divisions of the Court, " and having re-considered the whole cause, in terms of the " remit from the House of Lords, they adhere to their former " interlocutor, of date 12th May 1812, and decern in terms " of the said interlocutor, in the two several processes therein " mentioned. And further, in the process of declarator, of " irritancy and reduction brought at the instance of William " Thomas Carruthers, and founded on the contract of mar- " riage and settlement of tailzie of 10th August 1708, the " Lords find, that all claim at the instance of the pursuer of " the said process, upon the said contract of marriage and " settlement of tailzie, is cut off by prescription, both positive " and negative; and therefore sustain the defences in the " said process, assoilzie from the conclusions of the same, and " decern."

Dec. 16, 1819. On reclaiming petition, the Court adhered.

Against the interlocutors pronounced and complained of in the former appeal, and the interlocutor of 25th May 1819, sustaining the defences for the respondent, the appellants, Mrs Majendie or Routledge, and husband, have brought their appeal to the House of Lords.

And the respondent has entered a cross appeal against the interlocutors of the 3d February 1818, from part of the interlocutor 25th May 1819, and from that of 16th December 1819, in which the objection to the title, and the point of prescription, are decided unfavourably to the respondent.

Pleaded for the Appellants.—1st, The destination in the marriage contract 1735, now to be considered, is to the heirs female of Francis Carruthers and Margaret Maxwell, failing heirs male of that marriage. Who were those heirs female? Mr Carruthers asserted that this was a very special destination, though in what its peculiarity consisted, he did not even attempt to point out, and could not have done so if he had

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attempted it. It is just a destination to the heirs female of a marriage—a phrase, as may be supposed, of frequent occurrence, and of no sort of ambiguity. It does not call to the succession, though this is the necessary import of the argument maintained on the other side, the first heir female (for example, Elizabeth Carruthers, the daughter of the spouses), and her alone. It comprehends every heir of the same description, every heir female descending of the marriage, however near or distant his or her degree of descent. It not only denotes successive generations, but gives a preference to more distant generations over those who are prior in descent.

“Words,” says Mr Erskine, “which have a fixed legal meaning ought, when made use of in settlements or securities, to be understood in that meaning. Thus, when lands are provided in a marriage contract to the heir male, and in default of him, to the heirs female to be procreated of the marriage,—the appellation of *heirs female*, which is a known legal term, denoting the heirs at law after the failure of the lineal male issue, must be so understood as to prefer the daughter of a son of the marriage to the eldest immediate daughter, because the eldest immediate daughter is not in such a case the heir-at-law.” And this doctrine was not contested by Mr Carruthers. “On general principles,” he observed (and the case must be governed by *general principles*, unless they are shown to be inapplicable to it), “it is perfectly true that where an estate is destined generally to the heir female of a marriage, this is sufficient to carry it to a grandson by a daughter, and then to a grand-daughter, both being in their order the heir female.”

Ersk. B. iii.,
tit. 8, § 48.

If, therefore, the provision here had been “to the heirs female to be procreated betwixt the said spouses, the eldest daughter or heir female, always excluding the rest, and succeeding without division,” no doubt or question could have been raised. John Routledge, as the eldest heir female (for such he was though of the male sex), would have first taken the estate. On his failure, it would have descended to his sister, and with her and her issue it would have remained till the family was extinct. The descendants of her younger sister, did any such exist, were the next in order; and no claim by the heirs general or the assignees of the granter could have been successful, unless all these individuals and their descendants were extinct.

The soundness of this view, and the extravagance of the opposite doctrine with unjust consequences to which it unavoid-

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ably leads, were illustrated by a variety of cases which it is unnecessary here to repeat. Mrs Majendie shall only add, that the whole doctrine in the cross appeal upon this point, proceeds on a view clearly erroneous. He assumes, 1st, That the succession in favour of heirs female was limited to the daughter, if there was but one, and to the eldest, if there were two or more of Mr and Mrs Carruthers, in the face of an express destination, unambiguous in its nature, in favour of heirs female to be procreated of the bodies of Mr and Mrs Carruthers. He assumes, 2dly, That the destination was to the daughter of Mr and Mrs Carruthers, and the heir male of her body. Now, John Routledge, he goes on to maintain, was the heir male of Elizabeth Carruthers' body, and was served in that character, and Mrs Majendie who was an heir female of her mother's body, must be excluded by the assignees, the heirs female of the first heir female not being called.

Enough has been said as to the first of these positions, namely, that the destination now adverted to, is only in favour of the daughter of the spouses. The second position, that failing the first heir female, the *jus crediti* is limited to the heir male of her body, and that John Routledge was accordingly served heir male of his mother's body, shall now be considered. Now, this is equally at variance both with the law and the fact. It is not true in point of law, that the destination was limited to the first heir female, and the heirs male of her body; and it is not true in point of fact, that John Routledge was served heir to his mother, either as the heir male of her body, or in any other character. If he had, the present discussion would very speedily have terminated. He claimed and was served, as is proved by the terms of his retour, as heir *female* of provision in general to his grandfather under the marriage contract.

2d, The second point regarding the effect of the deeds obtained from Mrs Routledge by her father in 1759, is of chief importance in the present cause. The respondent maintains, that by a decree-arbitral in 1759, proceeding on a submission to which Elizabeth Carruthers was a party, and by a discharge of the same date with that decree, the obligation undertaken by Francis Carruthers was extinguished, and the right of the heir of the marriage for ever foreclosed.

The terms of the destination have been already adverted to. According to the conception of it, daughter or daughters might be excluded from the land estate, in case of an heir

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male of the marriage succeeding; and, in that event, it was provided that one daughter (if there should be but one), should be entitled to 18,000 merks Scots (£1000 sterling), and two or more should have 20,000 merks, to be divided as their father should think fit, payment being (according to the contract), to be made at the first “term of Whitsunday or Martinmas, “after their respective majorities or marriages, which shall “first happen, with 10 per cent. of liquidate expenses in “case of failzie, and annual rent of the said respective por- “tions, so long as the same shall remain unpaid after the “foresaid terms of payment; and the said Francis Carruthers “binds and obliges him and his foresaids, to furnish the said “daughters with aliment, clothing, and education, according “to their degree, until the foresaid portions become payable.”

The marriage was dissolved without issue male; and, in 1759, Mrs Routledge, under the description of the only child of Francis Carruthers, procreate of that marriage, brought her action, in the circumstances and manner already alluded to. Now, as to the deeds which followed, namely, the submission, decree-arbitral, and discharge, the appellant contends they were carefully limited to *her own eventual* right of succession, and that they cannot, in sound construction, be extended beyond that individual and eventual right. *Her* competency to execute any discharge or renunciation of a more extensive description, is a separate question, and will be considered separately. 1st, The first of these propositions was attempted to be obviated or excluded upon the score of irrelevancy. It was said that if the sole *jus crediti* of the contract was vested in Mrs Routledge, she has discharged that full right, and that any further discharge or mention of the right of her children, or of those who came to be vested with the characters of heirs of the marriage, would have been altogether superfluous; and it was likewise urged that an investigation into the circumstances of the case, or the situation of the parties, cannot possibly lead to any satisfactory result, inasmuch as these circumstances cannot be perfectly known at this distance of time, and because the respondents' action does not and cannot rest upon any averment of fraud in the conduct of the parties, or of enormous lesion in the transactions concluded betwixt them. The discharge was not meant to extend beyond Mrs Routledge's individual hope of succession, so as to affect others called to succeed by the marriage contract after her, and this is made plain from the documents themselves. But, supposing a contrary view

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to be entertained, this would necessitate a situation which, in law, has never been recognised. It would support the idea that the mother had a right and power to discharge the rights of her children, or those substituted or called after her. What right had she to discharge? Nothing, assuredly, but her own eventual right, which, eventually, may be said to have never emerged, because of her predeceasing her father. Besides, the destination was to the heir of the marriage, that is, to that person who, at the death of the father, shall be the legal heir, and take up the succession as such; and that was John Routledge. But, besides a right or *jus crediti* to the estate, there is a *jus crediti* in the right to succeed to it in the event of the succession opening to the individual who is presumptive heir of the marriage for the time. This right becomes, of course, unavailable to any presumptive heir who shall predecease his father, during his father's lifetime, and the actual and effectual right vests only in the person who actually is heir at the father's death. But the respondent says, that the heir presumptive has a *jus crediti* which he may effectually discharge. The answer is obvious; he has certainly a *jus crediti*, and may discharge it; but it is only a conditional and eventual right, not properly as a creditor for the estate, but as a creditor in the right of succeeding as heir to the estate, free from any gratuitous deed of the father to the prejudice of that right of succession. He has a *jus crediti* to a right of succeeding as heir at his father's death, provided, of course, that he survives his father; and this eventual right of becoming heir, upon survivance, he may discharge, but no more. It was precisely this kind of right or *jus crediti* that Mrs Routledge had in her, and that she had discharged; but having predeceased her father, the event never arrived, and another heir, whose right she could not discharge, then emerged.

3d, On the cross appeal. In regard to the contract of marriage, 1708, the respondent maintained that by that deed, the whole lands were put under the fetters of a strict entail, and, therefore, the marriage contract, 1735, was executed *in fraudem* of that contract and deed of tailzie; but the answer to this proposition is at once obvious, that now all claim upon that contract and tailzie has been cut down, both by the negative and positive prescription—a plea which the Court below had no hesitation in unanimously sustaining.

Pleaded for the Respondent.—1st, As to the validity of the decree-arbitral and discharge, it is necessary, in judging of

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these points, to look at the nature of the appellant's action. The appellant does not represent, nor is served heir to her mother. She is not entitled to reduce, and has not attempted to reduce the submission, decree-arbitral, and discharge on the head of fraud, circumvention, facility, concussion, oppression, or the like. The appellant has no right to bring such action. The action which the appellant has raised, is insisted on in her own right alone, not founded on any right that was in the person of her mother. The sole ground of this action is a denial that her mother had any right in her to discharge so as to prejudice the right of the appellant.

2d, When a man binds himself, in his contract of marriage, to settle his lands upon himself and the heirs of the marriage, it is in the power of the eldest son, or heir of that marriage, effectually to discharge the father's obligation, so as to enable him to alter the order of succession, or otherwise dispose of the estate, without being liable to any claim under the contract. But while the respondent maintains that the heir of the marriage has a power to *discharge* the contract, and that the father may, in consequence of such discharge, freely settle the estate as he pleases, he does not maintain that the *heir* has a power to *convey* the right under it to a third party during the father's lifetime. The appellant has uniformly endeavoured to confound these two propositions, although the difference between them in law, is as clearly marked as any distinction in the law of Scotland. But then, it has been denied by the appellant, that the heir of the marriage can, without specific implement, effectually discharge the contract, so as to disappoint the other heirs of the marriage, in the event of *his predeceasing the father*. The appellant has always assumed that this plea is made out, by merely asserting, without any authority whatever, that in such cases, during the life of the father, the heir of the marriage has no right in him to *discharge*, because he has no power in him during the lifetime of the father, to make an effectual conveyance of the right under the contract to a third party.

There is in this mode of reasoning, a plain evasion of the true question. The respondent maintains that the heir of the marriage has in him, during the father's life, all the right that is necessary to enable him to *discharge* the contract in favour of the father himself; but that, on the other hand, he has no right which he can transfer to a third party.

3d, The appellant has endeavoured to create doubt as to the *import* and *meaning* of the decree-arbitral and discharge. But,

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in truth, this point is involved in the question of *power*. And if it shall be satisfactorily shown, that Mrs Routledge had in her the only *jus crediti* of the contract, and full power to discharge every right under it, no doubt can be entertained that the *decree-arbitral* and discharge were granted, and are effectual deeds for that purpose. The argument of the appellant on this point is, that there was no intention to discharge anything more than the *spes successionis*, as it is termed, of Mrs Routledge individually, because she had no power to discharge *more*, and was not supposed by the learned arbiters, to have power to discharge more. This involves necessarily an inquiry as to what is understood by the law of Scotland upon this question of power. That the terms of the deeds themselves are amply sufficient to discharge the whole obligations of the marriage contract, is a proposition no lawyer can dispute. The question, therefore, is, Could Mrs Routledge discharge the obligations of the contract? If the whole *jus crediti* was in Mrs Routledge exclusively,—if she could take implement during the lifetime of her father, or discharge, on what terms she pleased, the obligations of the contract,—and, if having the sole *jus crediti* under the contract vested in her, her discharge was sufficient to extinguish the obligations of that contract, it is plainly idle to allege that the discharge could have mentioned any right either actual or eventual, of her children; for, *ex hypothesi*, the whole right was in Mrs Routledge, and her discharge extinguished the obligation. Hence it would have been an absurdity and contradiction in terms, to make Mrs Routledge discharge for her children, whose claims were necessarily and for ever cut off by the discharge of her own right.

4th, As the law now stands, the heir of the marriage has not merely a *spes successionis*, like other heirs of provision, but a *jus crediti*. But no fact in the history of the law is more certain, than that, till the beginning of the seventeenth century, when a man became bound, by his contract of marriage, to settle the estate on the heirs of the marriage, the import of the obligation was no more than that a *simple destination* in their favour should be inserted in the investiture. It was held that the father had power to alter or revoke such destinations, so it was decided in the case of Aikmans, 20th December 1550. But this part of the law underwent a change, depriving the father of his power to alter the investiture, and giving to the heir of the marriage a *jus crediti*, defeasible, of course, by the father's onerous debts and deeds,

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and even subject to his right to alienate the entire subjects for onerous causes. The question, therefore, is, Can the heir of the marriage, as creditor under the contract, during his father's life, accept of implement of the contract in whole or in part. The respondent conceives that he may accept of implement, and discharge the obligations, and has full power so to do. There can be only one heir of provision having a *jus crediti* at one and the same time, and that this *jus crediti* is not descendible to any other, but is extinguished at his own death, if he dies before his father, or without making up titles as heir of provision.

The plain truth is, that the debtor and creditor together can discharge the whole obligation; because the *jus crediti* being wholly in the one, and the condition which qualifies it being under the power of the other, if the condition is, waved or discharged (which it is clear the father can do, if he can give implement at all), then the creditor can discharge the obligation. Thus the consent or will of the father as well as the act of the creditor, concur, in making the discharge good and effectual.

The other heirs male in the contract, were like the extraneous heirs in other contracts of marriage, heirs *in destinatione*, but they were not heirs *in obligatione*. Nothing is more common in contracts of marriage than to settle the estate upon a series of heirs to succeed, failing the children of the marriage; but it was never held that the father came under any obligation to those stranger heirs. None of these heirs could succeed on any other footing than as heirs in the destination, which the father could alter or not, at his pleasure. It never was supposed, therefore, that any extraneous heir, though called by the contract, had a *jus crediti* under it. On the other hand, when the heir of provision discharges the contract, nothing is thereby discharged but the father's obligation, as the destination still remains, and it is commonly inserted in the investitures. Attending to these things, it cannot be doubted that Mrs Routledge had power to discharge the contract; in which case, the whole obligation on the father was extinguished.

On the cross appeal, the appellant has no *title* to pursue the present action, because, by the marriage contract, 1735, she is not heir of provision under that deed. The destination was, to heirs male of his body, whom failing, "To heirs female to be procreate betwixt the said spouses, and the heirs male "to be procreated of their bodies." The appellant is not an

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heir male of the body of her mother; and therefore, has no title to sue.

Besides the deed of entail and contract of marriage, 1708, is an effectual and subsisting title, and that being a subsisting and effectual title, it affords a good defence to the action of the appellant on the marriage contract, 1735. The latter deed was granted in prejudice and in contravention of the rights of the heirs of entail, and contrary to the powers of Francis Carruthers, who executed that deed in 1735.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellants, *R. Gifford, Mat. Ross, Wm. Erskine.*

For the Respondents, *John Clerk, James Moncreiff, John Hope.*

[Hunter's Landlord and Tenant, vol. ii., p. 476.]

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ROXBURGHE
v.
ROBERTON.

JAMES DUKE OF ROXBURGHE, . . . *Appellant;*

JOHN ROBERTON, late Tenant of Newton, *Respondent.*

House of Lords, 17th July 1820.

LANDLORD AND TENANT—LEASE—STRAW OF THE WAY-GOING CROP.—Held under a clause in the lease, that the landlord was entitled to prevent the disposal of the straw or hay of the way-going crop, it being provided, that it should always be spent on the farm.

Dec. 28, 1815.

In a lease granted to the respondent of the farm of Newton, belonging to the appellant, there was the following clause: "at no time shall the said John Roberton, or his foresaids, sell or give away any of the hay or straw of said farm, which shall always be spent on the ground." The tenant at the expiry of his lease, gave notice, that he meant to sell the whole straw of that crop, unless the appellant would take the crop, both corn and straw, at a valuation, insisting that the above clause in his lease did not refer to the last year of the lease; whereupon the Duke brought a suspension and interdict (injunction). The Lord Ordinary held, that the above clause could "not be held as applicable to the hay or straw of the out-going crop." And to this, the Court, on two several reclaiming petitions, adhered.