CASES

DECIDED IN

THE COURT OF SESSION,

FROM

NOV. 16. 1826 TO JULY 11. 1827.

REPORTED BY

PATRICK SHAW AND ALEXANDER DUNLOP,
ESQUIRES, ADVOCATES.

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No. 148.

EARL of ELGIN and KINCARDINE, Pursuer.—*Sol.-Gen. Hope—Thomson—Robertson.*

Mrs. MARY HAMILTON NISBET FERGUSON and HUSBAND, Defenders.—*D. of F. Moncreiff—Fullerton—Skene.*

Husband and Wife—Aliment.—A party having married the heiress presumptive of an estate, the entail of which excluded the jus mariti; and having in his contract of marriage settled certain additional provisions on the children of the marriage, payable in the event of the succession of her or the heir of the marriage to this estate, in which event also an additional tocher stipulated to him was not to be exigible, and having divorced her on the head of adultery, after which the succession to this estate opened to her—Held,—1.—That he had no claim to the rents and administration of the estate, either by law, or by virtue of the contract of marriage;—2.—That his claim was not made better by his having raised an action in name of one of his children, a substitute heir of entail, to set aside the deed excluding the jus mariti, as in contravention of a prior entail, which, however, contained an exclusion of the courtesy;—3.—That he was not entitled to relief of the additional provisions to his children;—4.—That he was not entitled to demand the additional tocher;—5.—That no claim of damages lay against his divorced wife;—and,—6.—That it was incompetent for him to conclude against her for aliment to the children of the marriage, who, with the exception of one, had attained majority.

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2D DIVISION.
Ld. Mackenzie.
M'K.

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By deed of entail executed in 1701, John Lord Belhaven and Stenton settled his estate of Beil or Belhaven on a certain series of heirs, under various restrictions and conditions, among which were a prohibition to alter the order of succession, or to possess the lands on any other title than the entail, and a declaration "that neither the relicts nor husbands of the male or female heirs surviving them shall have right to any terce or courtesy of the said lands and others above specified, or any part thereof; but shall be altogether hereby excluded therefrom, notwithstanding of whatsomever law or practice to the contrair." In 1765, James Lord Belhaven, grandson of the entailer, setting forth that all the other male substitutes having failed, the estate would on his death devolve on females, executed a new disposition of entail in favour of the same series of heirs, and under the same conditions &c. as were contained in the deed 1701, with this additional restriction, that it expressly excluded the jus mariti of the husbands of heirs-female, as well as their right of courtesy. No infeftment followed on this deed; and upon the death of James Lord Belhaven, the succession opened to Mrs. Mary Hamilton of Pencaitland, (widow of William Nisbet of Dirleton,) who in 1784 executed a third deed of entail, whereby she disponed to herself and the heirs in the previous deeds the estate of Beil or Belhaven, and certain other lands not contained in the entail of 1701, under all the conditions and provisions of the tailzie of 1765, and particularly those regarding the exclusion of the jus mariti of the husbands of heirs-female. Mrs. Hamilton completed her titles by charter and infeftment under the last deed, which, along with that executed in 1765, was duly recorded in the Register of Tailzies. Mrs. Hamilton was succeeded by her son, the late Mr. Hamilton Nisbet, who made up titles in virtue of the entail 1784, and under this investiture he held the lands in 1799, when the pursuer Lord Elgin contracted a marriage with his only child, the defender, then Miss Mary Nisbet. By the antenuptial contract entered into between these parties, Lord Elgin settled on his wife, in the event of her survivance, an annuity of £1500 a year, to be suspended by the succession of her, or the issue of the marriage, to the estate of Belhaven. His Lordship further destined his estate, which he held in fee-simple, to the heirs-male of the present marriage,—whom failing, to the heirs-male of any subsequent marriage,—whom failing, to his heirs and assignees whomsoever; and he settled on the younger children, £5000, if one,—£7000, if two,—and if three or more, the sum of £10,000; which provisions were to be doubled "in the event of an heir of this marriage succeeding both to the aforesaid lands, (his Lordship's own estate,) and to the estate of Belhaven." On the other hand, Miss Nisbet and her father conveyed to his Lordship £10,000 as a marriage portion; and Mr. Nisbet bound himself and his heirs to pay a further sum of £10,000, which, however, was not to be exigible in the event of his daughter succeeding at his death to the estate of Belhaven. Of this

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marriage there were born one son and three daughters, (all of whom are alive, and three of them major); but in 1808, on the suit of Lord Elgin, it was dissolved by decree of divorce, on the head of adultery committed by the defender with Mr. Ferguson, whom she afterwards married, and against whom his Lordship obtained decree in an action of damages for the sum of £10,000.

In 1822 Mr. Hamilton Nisbet died without leaving any other child, and the succession to the estate of Belhaven opened to the defender, now Mrs. Ferguson, who made up titles as heir to her father under the
245 entail 1784, and entered into possession of the property. Lord Elgin then instituted the present action, and at the same time raised a summons of reduction in name of his youngest daughter, Lady Lucy Bruce, a minor, as one of the heirs of entail under the deed 1701, and of himself for his interest, to have the entails of 1765 and 1784, and the investitures following thereon, set aside as in contravention of the deed 1701, in so far as they imposed the restriction regarding the exclusion of the jus mariti, which was not contained in the original entail; but no procedure was had in this process, nor was it conjoined with the present action, which contained various separate and alternative conclusions.

I. The first conclusion was,—that, independent of the terms of the contract of marriage, "the pursuer, notwithstanding of the said divorce, has a good and undoubted title, jure mariti, to the rents of the said lands and estate of Beil or Belhaven and others, and that he is entitled to draw the same, and to the administration of the said estate, in the same way and manner as if the said divorce had never taken place, and that from the period of Mrs. Ferguson's succession, during all the days of the joint lives of the pursuer and defender;" and in support of this conclusion it was pleaded,—

1. By the law of Rome, (on which that of Scotland in relation to this matter is founded,) the effect of divorce on the head of adultery was, that the offending party forfeited both the dos and the donationes propter nuptias.[1] The dos among the Romans was not equivalent to the Scottish tocher, but was that part of the wife's property which fell under the jus mariti, all her other property being strictly paraphernal; and it also formed her provision at the dissolution of the marriage.[2] In the ordinary case, therefore, the offending wife only forfeited the dos; but if she had constituted her whole property as dos, (which she might do,)[3] she forfeited her whole estate.[4] By the law of Scotland, the jus mariti extends over the whole of the wife's moveables, and over the rents of her heritage, and the husband's right to these stands in the same situation in regard to divorce as his right among the Romans to the dos; that is

[1] Nov. 117, c. 8, Voet. t. 8, § 11. [2] Dig. de Jure Dotium; 1. Stair, 4. 11.
[3] 1. 4. C. 1. 72. D. de Jure Dotium.
[4] Hein. p. 4. § 29; Pothier de his qui sui, &c. art. 4. § 3.

to say, all these rights which fall, as the Roman dos did, under the jus mariti, are forfeited by the offending wife.[1]

2. The supposed rule, that the consequences of divorce are the same as if the offending party were naturally dead, is founded solely on a mode of expression, true as to some effects of divorce, being loosely repeated as to all, while in reality the effects are totally different, and rest on different principles. By dissolution in consequence of death, each party and their representatives succeed to their respective rights and provisions, and their share of the goods in communion; while, in the case of dissolution by divorce, the offending party not only loses all claims consequent to marriage, but forfeits all rights vested by the marriage in the innocent spouse, as, in the case of an offending wife, the tocher and share of the goods in communion.

3. It being the law that the offending party forfeits all rights vested by the marriage in the innocent spouse, the question comes to be,—what is vested in the husband by the marriage? All moveables are undoubtedly carried by force of the marriage, and would be forfeited by divorce on the head of the wife's adultery. But the liferent of her landed estates is assigned to the husband by the marriage, equally with the property of her moveable estate. The nature of the right so acquired by the husband is, not that it attaches to each year's rents as they become due, but it extends to the whole period of his wife's lifetime as an unum quid; and the ipsum jus mariti, so far as regards this right, may be adjudged to the complete exclusion of any subsequent diligence or conveyance. This right no doubt falls by the death of the wife, in the same way as the right to her share of the goods in communion; but, like that also, it does not fall, but is necessarily forfeited to the husband upon the divorce of the wife for adultery; and so it was found in the old case of L. Innerwick, March 1589, (M. 329.) Accordingly, if it were adjudged by her husband's creditors, she could not vacate their just and onerous rights by her own delict; nor, in like manner, can she vacate the rights of the husband himself, which are equally onerous, and possessed in virtue of a contract which he has not violated, but which has been broken on her part only.

4. This legal assignment of all moveables belonging to the wife, and of the liferent of her heritage, is not confined to rights falling to her during the marriage, but extends to property to which she succeeds after its dissolution. Thus it has been found that legacies to a wife, not payable till her husband's decease, go to his executors, as falling under his jus mariti,[2] as does a sum assigned to the wife, but not intimated till after the husband's death;[3] and even as to a contingent debt, the con-

[1] 1573, c. 55; 1. Stair, 4. 20.
[2] Nicolson, June 15. 1627, (M. 5798;) Lady Pulteney, Dec. 18. 1807.
[3] Scott, Jan. 29. 1663, (M. 5799.)

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dition attaching to which does not exist till the dissolution of the marriage, it is at least a doubtful matter whether it also does not fall under the jus mariti.[1] Such being the case, even where the dissolution happens by death, it must much more clearly be so where the dissolution happens by divorce; for the party can never by her delict deprive her husband of rights which he would have enjoyed notwithstanding her natural death; nor can she gain to herself an advantage by this breach of the contract, so as to acquire rights, or deprive her husband of rights which he must have enjoyed, had the contract not been violated on her part, and necessarily dissolved by her delict, prior to her succession to such rights as her husband must and would have enjoyed jure mariti, had the marriage not been so dissolved. But further, the right in the defender to the estate of Belhaven, though a future right, and perhaps to a certain extent a contingent right, was yet a right absolutely vested in her person as heir of entail at the date of the marriage; and although the succession did not open until after the dissolution of the marriage, it did open during her life, and therefore in such time as would have brought it under the jus mariti of her husband, had the marriage not been dissolved by her delict; and as she could not, by a culpable breach of contract, gain to herself, or take away from her husband, a right which she would not have acquired by a strict performance of the contract, she consequently cannot, on any principle of law or equity, claim the exclusive possession of the rents of an estate which she would not have been entitled to possess, had she faithfully performed her part of the contract, and not violated it by a delict.

5. The circumstance of the exclusion of the courtesy in the entail of 1701 of the estate of Belhaven cannot affect this claim, as it is not rested on courtesy, but on the jus mariti, which the defender could not defeat, to her husband's prejudice and her own advantage, by her delict and culpable breach of the contract; and besides, courtesy, in the ordinary sense, has reference only to the case of the wife's death, and an exclusion of it cannot affect a right of enjoyment before that event has happened,—the more especially in the present case, as the clause in the entail expressly mentions the event of the *survivance* of the husband.

6. The exclusion of the jus mariti in the entails of 1765 and 1784 might no doubt have been a complete bar to the pursuer's claim, had it not been that the insertion of this additional restriction was ultra vires of the makers of these entails, as being in contravention of the prior deed of 1701, in virtue of which they held the estate, and that an action of reduction of these deeds had been raised at the instance of one of the substitute heirs under the deed 1701.

248 II. The second conclusion of the pursurer's summons was, that "in

[1] Dirleton, voce Jus Mariti.

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case it shall be held that the legal consequence of the said divorce is to exclude his jus mariti over the rents of the said lands and estate, and right of administration thereof during the joint lives of the parties," it should still be declared that his claim was well founded, in respect of the special provisions in the contract of marriage, and this on the ground that the obligations come under to settle his fee-simple estate on the heir-male of the marrage, and to double the provisions of the younger children in the event of the succession to Belhaven opening to his wife, were undertaken by him in consideration of his wife's expected succession to that estate, and in contemplation of drawing the rents as a fund for enabling him to make these provisions in favour of the children of the marriage, and therefore that the defender could not by her delict deprive the pursuer of the onerous consideration in respect of which he came under these obligations.

III. The summons, in the third place, concluded, that in the event of the pursuer failing in the two previous conclusions, the defender should be found liable to relieve him of the obligations so come under by him in consideration of his wife's expected succession to the estate of Belhaven, and also to make payment to him of £10,000 "as a solatium, and in name of damages, arising from the consequences of the said decree of divorce, and for the loss suffered by the pursuer in consequence of the effect of the said decree upon his right to the said rents, either jure mariti, or under the said contract of marriage, or in any other way."

IV. A fourth conclusion related to the additional tocher of £10,000 stipulated by Mr. Hamilton Nisbet in the contract of marriage, but under the declaration that it should not be exigible, "if the said Mary Nisbet, or her issue by the present marriage, shall, at the death of the said William Hamilton Nisbet, succeed to the estate of Belhaven, as heir of the investiture thereof;" and its purpose was to have it declared, in the event of the pursuer's claim for the rents being repelled, that the defender was bound to make payment of this sum, in respect that "in consequence of the said divorce, arising from her delinquency, the pursuer does not draw the advantages arising from her said succession, in consideration whereof the said sum of £10,000 was, in that special event, declared in the said contract of marriage not to be exigible."

V. The fifth and last conclusion was,—to have it found that the defender "is bound to contribute out of the rents of the said estate of Beil or Belhaven, in case it should be found that the pursuer has no right thereto, or out of her own other funds, or out of both the said rents and funds, a proportional part of the expense of maintaining and supporting the children procreated of the marriage contracted betwixt her and the said pursuer, suitable to their rank, station, and prospects."

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The Lord Ordinary, on advising mutual memorials, found "that sufficient grounds are not stated to support any of the conclusions of the

No. 148. libel," and therefore assoilzied the defenders simpliciter. The Court unanimously adhered.

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Lord Pitmilly.—Although the claims on the part of the pursuer are urged in a paper of very great length, our opinions may be delivered very shortly. I had not proceeded very far in the perusal of the memoral, when I came to be of the same opinion with the Lord Ordinary. As to the first conclusion, it is altogether groundless, even if the jus mariti were not excluded by the titles. I cannot conceive how he could possess any jus mariti after the dissolution of the marriage, as he would thus have right to the liferent of the heritage on two inconsistent grounds,—courtesy and jus mariti. But at all events it is cut off by the existing investitures, which exclude the jus mariti. As to the reduction, it is enough to say that a reduction is necessary; and until the titles be reduced, they must exclude the jus mariti. The second conclusion assumes that the pursuer became bound for the provisions on the faith of getting the rents of Belhaven. The answer to that, however, is quite invincible. The contract never could contemplate this as the onerous cause of the provisions, as the jus mariti was excluded; and besides, it is not the event of the lady, but of the heir of the marriage succeeding, which is the condition of the increased provisions. The conclusion for damages is just another shape for the same claim, and the same answer applies, as it does also to the fourth conclusion. The last conclusion for aliment cannot possibly be sustained in an action where the children, being major, are not parties, and do not require aliment.

Lord Alloway.—I am entirely of the same opinion. As to the first conclusion, I cannot conceive on what it is founded. The jus mariti rests on the subsistence of the marriage; and how is it possible that it can be exerted after its dissolution, and over a subject which the lady did not succeed to for fifteen years after the marriage had been dissolved by the husband's voluntary act! If, however, there could be any doubt on the general point, it would be completely removed by the specialty, that at the date of the marriage the estate stood on an investiture excluding the jus mariti;—and will the mere raising an action of reduction have the same effect as if decree had been obtained in it! The title to pursue is not yet sustained; and I should conceive it to be a very difficult matter to make out any interest in Lady Lucy Bruce to set aside an entail which gives her a right to succeed to considerable estates not contained in the original entail, and to which she would have no right otherwise. The conclusion for damages is still less capable of being supported. The exclusion
250 of the jus mariti removes every foundation for it; and besides, the pursuer brought himself into his present situation by his own act and deed in pursuing a divorce. On the other points I entirely concur with Lord Pitmilly.

Lord Justice-Clerk.—In this unusual and unparalleled case, I confess my difficulty was more in the perusal of the papers than in forming an opinion. I lay out of view altogether the action of reduction, and consider the case as under the existing investitures, and I am satisfied that there are no grounds on which to rest any of the conclusions of this summons. As to the claim on the jus mariti for the rents of lands not succeeded to until long after the dissolution

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of the marriage, I conceive it to be a contradiction to found on the jus mariti after dissolution of the marriage; but at all events, if there were any doubt on the general argument, it is entirely precluded by the exclusion of the jus mariti in the existing investitures. In regard to the second conclusion, I can find nothing in the contract giving such a right as here claimed over the estate, which was then under investitures excluding it. The third conclusion is for damages in consequence of the divorce. I never heard of such a claim, further than the penal consequences which have already followed. The fourth is just a claim of damages under another shape; and as to the fifth, for aliment to the children, although it may at first sight appear more plausible than the others, it is equally untenable when we attend to this, that it is insisted in by the father of children all major but one, who is also near majority, and not in name of the children. It is just in the same situation as an action by an entire stranger, and there are no grounds for sustaining it.

Pursuer's Authorities.—1.—(1. and 2.)—Novell. 117. c. 8; Voet. 48. 1. 5. § 11; 1. Stair, 4. 20. § 11; 1. 4. C. and 1. 72. D. de Jure Dotium; Hein. p. 4. § 59; Pothier, Art. 4. § 3, de his qui sui, &c.; Græneiwegan de Leg. Abrog. Art. Nov. 117; Christinæus ad Leg. Mechlin. t. 2. Art. 13. Ad. 6; 2. Craig, 22. 35; 1. Erak. 6. 46; Auchinleck, Dec. 18. 1540, (339); L. Innerwick, March 1589, (329); Countess of Argyll, Dec. 19. 1573, (327); Murray, June 16. 1575, (328); Lady Buquhanan, May 16. 1579, (329); 1573, c. 55.—(4.)—Nicolson, June 15. 1627, (5798; Scott, Jan. 29. 1663, (5799); Lady Pulteney, Dec. 18. 1807, (F. C.); Corrie, Feb. 27. 1765, (5772); Fotheringham, Feb. 7. 1695, (5764); Dirleton, voce Jus Mariti.—(6.)—Dundas, Nov. 29. 1774, (15430); Menzies, June 22. 1785, (15436.)

Defenders' Authorities.—1. Stair, 4. 22; 4. Wallace's Pr. 15. 297; Lady Manderstoun, March 21. 1637, (1741); Anderson, Feb. 8. 1734, (333); Justice, Jan. 13. 1761, (334); Wedderburn's Trustees, Jan. 29. 1789, (10426.)

(See 1. *Bell*, 634.)

J. A. Cheyne, W. S.—J. Dundas, W. S.—Agents.