

No 49. of the wife's estate being in Mr Francis's hand, which would belong to the husband *jure mariti*, in so far as, Mr Francis, by the bond, has retention of 200 merks yearly, of the said 1000 merks yearly, addebted by Peter Rollo to James Butler, and assigned by him to the said Mr Francis.—THE LORDS sustained the defences proponed for George Hay the defender; and found, that the husband *jure mariti* had right to the yearly annuity of 1000 merks, notwithstanding of the seclusion of him by the provision of the bond.

Newbyth, MS. p. 89.

No 50. 1667. February 9.

A husband may renounce his *jus mariti*, in so far as it relates to his interest in his wife's moveables; but he cannot renounce it in so far as it relates to his administration and government of the family.

Mr ALEXANDER FOULIS and LORD COLLINGTON *against* TENANTS of INNERTYLE and LADY COLLINGTON.

SIR JAMES FOULIS of Collington, being in treaty of marriage with Dame Margaret Erskine, Lady Tarbet, she did dispone 36 chalders of victual, of her jointure in the north, to a confident person, that she might make use thereof, for the benefit of her children; and disponed 36 chalders of her liferent of the lands of Innertyle, to Adam Cunninghame of Woodhall, who transferred the same to Mr Alexander Foulis of Ratho, who granted a back-bond, bearing, that his name was made use of for the use and behoof of Collington and his Lady, and that to this effect, that the profit of the liferent should be applied to the aliment of their families jointly; and therefore obliged himself to dispone in their favours, and *de presenti* did dispone. The next day after this disposition, there is a contract of marriage betwixt Collington and the Lady, wherein there is this clause, that Collington renounces his *jus mariti* to the lady's liferent, or any other right he might have thereto by the subsequent marriage, and takes his hazard for what he may have any other way. Mr Alexander pursues the tenants upon his disposition. Compearance is made for the Lady, who *alleges* he hath no interest, because he is denuded by the back-bond. Compearance is made for Collington, who *declared* he concurred with Ratho, and consented he should have the mails and duties, to the effect contained in the back-bond, and that he would not make further use of the re-disposition, contained therein. It was *answered* for the Lady, That Collington's concurrence could not sustain this process, because Ratho was already *de presenti* denuded in favours of Collington and her; likeas Collington was denuded by his contract of marriage whereby he renounces his *jus mariti*, and all other right he can have to the liferent lands, in favours of the lady, and so renounces the clause of the back-bond, in so far as it is in his favours. It was *answered*, That the contract of marriage could not derogate to the back-bond, unless the back-bond had been *per expressum* discharged or renounced therein, because albeit the contract of marriage be a day posterior to the back-bond, yet both are parts of one treaty of marriage, and so in the same condition, as if they were in one writ, so that a posterior clause in general terms cannot take away a prior special clause of this moment; yea though it were in a contract less favourable than a contract of marriage, which is *uberrimæ fidei*, general clauses are not extended

above what is specially exprest, and the *jus mariti* being exprest, and the back-bond not exprest, it cannot be presumed, that they changed their minds in one night, to renounce the benefit of the back-bond ; but this conveyance was made of purpose, because Collington being in debt, if the right were constituted in a third party, and only to their behoof as an aliment, the creditors could not reach the same ; but it were the greatest cheat imaginable to conceive that the general clause subsequent, should evacuate the whole design, and take away the provision of the back-bond : Neither doth the general clause renounce all right that Collington had, or might have to the liferent lands, any manner of way, but only all right he could have by the subsequent marriage, any manner of way. *Ita est*, that he doth not claim right *jure mariti*, nor by the subsequent marriage, but by the paction contained in the back-bond ; and it is most certain that the *jus mariti*, which is most peculiar to this nation, doth not comprehend all rights a husband hath, in relation to the person, or means of his wife, but only the right of moveable goods, or sums, which without any paction, whatsoever way they come in her person, belong *ipso facto* to him, not by paction, but by law, and that *jure mariti*, or by virtue of the marriage ; so that albeit he could not have right, even by the paction, except that he were husband, or that marriage had followed, yet his paction is his title, and not the marriage, which is but *tacita conditio*, or *causa sine qua non* ; so that discharging, or renouncing of the *jus mariti*, or the benefit by the marriage, if it were posterior to the contract of marriage, would not take away the contract, and being in the contract, cannot take away the prior paction, and disposition granted by the wife, in favours of a husband, or a third party to his behoof. It was answered for the lady, That she adheres to the clear express terms of the contract of marriage, which renounces not only the *jus mariti*, but all other right to the liferent lands, by the subsequent marriage, which being a several writ, and a day posterior, must necessarily take away the back-bond, without considering the meaning of the parties, *quia in claris non est locus conjecturis* ; at least the meaning can be no otherways cleared but by writ, or the lady's oath ; otherwise the most clear and solemn contract shall be arbitrary, and may be taken away by presumptions or conjectures, and no man shall be secure of any right. *2do*, *Verba sumenda sunt cum effectu*. If this did not take away the back-bond, it had no effect, for the lady, before the contract, was denuded of her whole liferent, both of Innertyle and in the North, so that there was no need to renounce the *jus mariti*, or right by the marriage to the liferent lands. It was further alleged by the Lady, that albeit the renunciation could not reach the back-bond, in so far as it is a paction, so that it yet stood effectual for application of the liferent right, for the aliment of the Lady and Collington's family jointly, yet thereby they both had a communion and society equally, and the husband could pretend no right in the administration or management, but only *jure mariti*, in so far as he is husband, and therefore he acknowledging that he has renounced his *jus mariti*, cannot pretend to the administration of this aliment, but it must remain entirely to the Lady.

No 50.

THE LORDS found that the clause in the contract of marriage, did not derogate to the back-bond ; and as to the point of administration, they considered it to consist in two things, in uplifting the rent, and managing the liferent-lands; and on the application thereof to the use of the family, and managing the affairs of the family. As to the first, they found that both parties having entrusted Ratho, the trust of management of the rent could not be taken from him without Collington's consent ; and as for the management of the family itself, they found, that it neither was, nor could be renounced by the husband in favours of the wife, and that any such paction, though it had been clear and express, taking the power and government of the family from the husband, and stating it in the wife, is *contra bonos mores*, and void, and that the *jus mariti*, as it is properly taken in our law, for the husband's interest to the wife's moveables, being renounced, cannot be understood to reach to the renunciation of the husband's power to rule his wife and family, and to administrate the aliment thereof.

Fol. Dic. v. 1. p. 389. Stair, v. 1. p. 438.

* * * Newbyth reports the same case :

THERE is a pursuit at the instance of Mr Alexander Fowlis, as having right by translation from Mr Adam Cunningham, who had right from Dame Margaret Erskine to her liferent lands of Innertyle, and half lands of Tyrie, during the second marriage, against the tenants of the said lands, for the duties of the crop 1666. In this process there is compearance made for the Lady Collington, who *alleged* that Mr Alexander Fowlis of Ratho cannot pursue, because his right is qualified with a back-bond, declaring that it was to the behoof of Sir James Fowlis of Collington, and the said Lady, and the aliment of their family, and *per verba de presenti* he is denuded of the same ; and whereas the Lord Collington concurs, he cannot be admitted to concur, but the Lady must be preferred ; because, albeit the back-bond by Ratho be conceived in my Lord and my Lady's favour, for alimentering the family ; yet my Lord, as husband and head of the family, cannot pretend to the intromission with the said duties ; because, by the contract of marriage, which is posterior to the back-bond, he has not only renounced his *jus mariti*, but also all right that should accresce to him by the subsequent marriage, or any other manner of way ; and seeing he could have claimed no right by virtue of the back-bond, if the marriage had not ensued ; and by the contract, he having renounced all right in the contract, in the general and comprehensive terms foresaid, the said renunciation does denude him of any right he could acclaim by the back-bond ; and as the contract is clear, and does exclude him, so it is likewise clear to have been the meaning and intention of the parties, as appears by his missive letter, written by him to the Lady ; and conform to the said intention and agreement, the Lady has ever since the marriage uplifted, and had the sole intromission with

the rents; and his renunciation of his *jus mariti* would be *frustra*, and would have no effect, if it should not denude him of all right that he can claim by the back-bond.—To this it is *answered*, That the pursuit behoved to be sustained, and the Lady could crave no preference upon the grounds foresaid; because, upon the treaty of marriage betwixt the said parties, the Lady having in jointure above 80 chalders of victual, the greatest half thereof, which lay in the north, was disposed to Balfour; and the estate in Fife, in regard of Collington's condition at that time, and that it might not be affected by his creditors, was conveyed *ut supra*; and Ratho, by his back-bond, being denuded of the same in favour of my Lord and Lady, for aliment of their family, my Lord, as *dominus* and head of the family, must have the uplifting and the disposing of the same, for the use and end to which it is destined; and the contract of marriage, albeit posterior, and the renunciation of his right thereby, cannot be extended to, nor derogate from his right and settlement by the the said back-bond; and that he should have renounced his *jus mariti* by the said contract, was necessary, not only for securing the estate in Fife, which, albeit by the back-bond was destined for the use and end foresaid, yet the said back-bond being in favour of my Lord, the benefit thereof might have been acclaimed by his creditors, for excluding of whom it was necessary, that by the contract he should have likewise renounced his *jus mariti*, and all other right. Likeas the said renunciation was necessary for excluding my Lord, who likewise might have acclaimed right to the estate in the north, disposed to Balfour in trust, and to the behoof of the Lady. Likeas the renunciation of the said contract had several other effects, viz. to exclude him from the Lady's moveables, and from any other estate which would accresce to her during the marriage; and the renunciation having the said effects, and being put in the contract to that purpose, they cannot be heard to allege that the said renunciation was effectual, if it should not take away the right and settlement by the back-bond, to which effect to extend the same is absurd; and without any warrant, in-so far it is evident that it was intended, and *actum inter partes*, that the south and north-estates should be in different conditions; and that the Perth estate should be so settled, that the husband should have no pretence of right thereto; and the estate in the south should be conveyed in that manner, that his creditors should be excluded, and the same should be secured as an alimentary provision for the family; and if it had been intended that the settlement by the back-bond should have been taken away by the contract of marriage, the back-bond needed not at all have been conceived in my Lord's favour, and might have been destroyed after the marriage, whereas in effect it was *pars tractatus*, and of the same date, at least of the day before the contract; and seeing, if the Lady has no right during the marriage, but by Ratho's back bond, and by the said back-bond the the duties are only applicable for the use of the family, as the Lady would not apply the same to any other use, so my Lord, as head and husband upon whom it is incumbent to aliment the family, must of necessity have the uplifting of

No 50. the duties for the said use and end ; and the Lady, as she could neither pursue nor defend without the husband's concurrence, and his being called, far less can she comply with her husband ; and albeit he had out of his goodness hitherto suffered the Lady to meddle, the same cannot debar him for the future ; and the missive letter contains nothing but *verba officiosa*, and compliments of a passionate lover to his mistress. Likeas by the same letter he gives her the same power over his estate as over her own ; and it is not to be imagined, that he intended to subject all his interests to her disposing ; and the settlement and back-bond was clear two years after ; and if such a preparative should be sustained, it would be pressing examples, and of dangerous consequences ; and albeit the renunciation had expressly related to the husband, yet it may be contended in law, that his right revived by the subsequent marriage, and he with far better reason might pretend to the estate in the north, albeit hitherto he has never moved any question for the same.—THE LORDS found, That the husband was not prejudged by the renunciation of his administration of the wife's estate ; but that he had the sole power and interest to dispose thereupon, and employ the same for the maintenance of the family.

Newbyth, MS. p. 92.

1670. June 30. GREIGS against JAMES WEMYSS.

No 51.
A contract of marriage, providing that the means and estate of either party should return to themselves, failing children of the marriage, and should not be under communion, was sustained, though it was pleaded to be contrary to the *jus mariti*, which, it was alleged, the husband could not renounce.

By contract of marriage betwixt James Wemyss and umquhile Judith Nairn, it was agreed that the means and estate of either party, contained in an inventory of the date of the contract, should return to either party, failing bairns of the marriage, and should not be under communion. Thereafter, the wife provides a daughter of a former marriage, to a part of her means in the inventory, with her husband's consent ; by which contract it is provided, that in case the marriage dissolve within year and day, or in case at any time thereafter, there being no children, the tocher should return to the said Judith Nairn. And the said Judith leaves in legacy 1200 dollars due by the Estates of Bremen, which was a part of her inventory, to her husband and her three children of the first marriage, there being no children of the second marriage ; whereupon John, Charles, and Judith Greigs, pursue the husband for the legacy, as having uplifted this sum from the Estates of Bremen.—The defender *alleged, first*, That the clause in the contract of marriage, taking away the communion of goods, and making even the moveable estate of either party to return, is against the law of Scotland, inconsistent and ineffectual ; for any reservation or provision in favour of the wife, doth, *ipso facto*, return to the husband *jure mariti*, which *jus mariti* neither is nor can be discharged. *2dly*, Albeit the first contract of marriage were consistent, yet the sum in question being provided to one of the daughters of the first marriage by her contract, upon condition to return to the wife if the marriage dissolved, the marriage dissolving, it comes back to the