bound to pay a merk for each boll undelivered, and that by and attour performance. As to the plea, that the tenants were not able to perform their part, the pursuer contends he is not bound to inveigle himself in such questions, either of how much they paid, or were able to pay; his business is with the defender alone; if he cannot pay the number of bolls stipulated in specie, the rule of law must take place *loco facti impræstabilis*, &c. The pursuer stipulated for a certain quantity of meal yearly, the growth of certain lands, which he knew produced good meal; and if the defender either will not, or cannot perform, he ought to make up to the pursuer what he thus suffers by not performance.

Nor will the principles of the civil law aid the defender, which frees the seller, if the thing sold is lost or destroyed before delivery; because, in this case, he was bound to deliver the meal at Peterhead, and only after such delivery was the pursuer to run any hazard. *Si venditor ad traditionem tenetur*, is always deemed an exception from the general rule. Besides, the plea offered for the defender can never avail him. He gives his tenants what [eases] he thinks fit: what he gets he sells at such prices as he thinks proper; leaving it to the pursuer to make out the prices the best way he can. Sure this is not fulfilling the contract.

The Lords found the defender liable to the pursuer, for the current prices of what meal he received from the tenants.

No. 246. *page* 393.

1743. *July* 21. MARY M'QUHIRTER *against* ROBERT MILLAR.

IN the contract of marriage betwixt the said Robert Millar and Elizabeth M'Quhirter, he provided her to a tack of certain lands that he possessed, during her widowity; "And further obliged himself to provide her a livelihood of 1000 merks during all the days of her lifetime, and to the heirs to be gotten betwixt them; which failing, the one half of the sum of 1000 merks to return to the said Robert, and his heirs whatsoever: but prejudice to Elizabeth and her foresaids either to accept of the 1000 merks, or that portion of free goods that may fall to her by law, (if it shall please God first to call him;) being at her option, or her foresaids, which of them to take or leave."

The marriage dissolved by the wife's death, leaving issue but one son, who lived in family with his father, and, like other eldest sons of their rank, was assistant to him in the management of his farm. The son died without being confirmed executor to his mother, or establishing in his person any title to the third of moveables his mother was entitled to by law; whereupon Mary M'Quhirter, as nearest of kin to Elizabeth her sister, brought an action against Robert Millar, to account to her for his wife's third of moveables.

ARGUED for the pursuer,—That it was evident from the contract of marriage, that none of the provisions therein contained, were intended to be in satisfaction to the wife, or her nearest of kin, of the third of moveables which she was entitled to in the event of her predeceasing her husband: on the contrary, the only provision is her liferent, in case she survived him; therefore the present claim

stands unimpeached from any clause in the contract. *2dly,* The wife's third befalling to her nearest of kin, is a right of succession to that which was the proper estate of the wife: and that it does not vest in them *ipso jure,* but proper titles must be made up, by confirming the same *qua* executor to the wife; without which, they remain in *hereditate jacente* of the wife: consequently, it is of no moment in the present case, that there was a son of the marriage, who as nearest of kin to his mother, might have established proper titles thereto. This he neglected to do, and, by his death, the pursuer became nearest of kin to her sister. In such cases, it matters not who is nearest of kin at the wife's death, but to whom the right belongs, when the titles come to be made up. See 17th *February,* 1663, *Forsyth,*

ANSWERED for the defender,—That the present claim, as it is of the most odious kind, so it is excluded by the contract of marriage: which, after providing Elizabeth to the liferent of a tack during her widowity, provides her to the liferent of 1000 merks; and which sum is the only provision to the children of the marriage; without prejudice to the wife, either to accept thereof, or the portion of free goods that would fall to her by law. Now the wife's nearest of kin was Peter, her own son; and that sum being payable to the children of the marriage, must be understood, in satisfaction to them of their mother's third, which they, in case of her predecease, were to bruik free of her liferent; and his surviving his mother, entitled him thereto, without any confirmation; consequently that sum fell under Peter the son's testament, who made a will in favours of his father the defender; and which would belong to him as nearest of kin to his son without such testament.

But, in the next place, admitting the wife's nearest of kin were not cut out of this claim by the contract, yet it is believed the same cannot be effectual at this day. The wife was fifteen years dead before this claim was brought; all that time the defender alimented his son till his majority; the effects were managed in common, the defender being his son's administrator in law: which aliment must have more than exhausted the third of moveables. Further, when the son came to be of age, he gave him a third of all the stocking he had upon the ground: which was altogether a free gift in him, as the aliment furnished to the son more than exhausted any claim to the third.

For it appears, from the proof adduced in this cause, (while it depended before the inferior court,) that the defender and his son possessed the farm together, and that the son was as much master of the one third as the defender was of the other two. Nay, one of the two witnesses adduced, says, what is very remarkable, that he bought at one time one cow from the son, and two from the father. In short, the defence resolves in this, that the son possessed his mother's third, was satisfied therewith; and the same being consumed, and the property altered, all the wife's succeeding nearest of kin must be equally excluded, as if he had been confirmed executor to his mother. A confirmation is only requisite to make up a title of property in the subjects; and if the property is otherwise made up, the claim is extinguished. See the Act 1690.

REPLIED,—The arguments for the defender would not hold; for he was in possession of the goods and whole moveable effects during the marriage, *jure mariti;* he was debtor to his wife's nearest of kin for her third share, or the values

thereof; he continued to possess as formerly after the wife's death, without making any division with her nearest of kin. And because it happens that he was administrator-in-law to his son, he will construe his own possession to have been the son's possession: and will thereby have the present claim defeated; when he is not able to show that any division was made, that he accounted for, or paid over the values, or obtained any acquittance from the son for the third. It is unnecessary therefore, to enter into that point of law, how far possession attained is sufficient to avoid the claim of any after nearest of kin, as no division appears ever to have been made. And as to the testimonies of the two witnesses, they amount to no more than what every body would have believed without them, viz. That the son lived in family with his father, and was assistant to him in the management of the farm; and it is very whimsical to infer a division from the accidental circumstance of one of the witnesses buying one cow from the son, and two from the father, especially as he does not say that the cow bought from the son was any part of the father's stock. Besides, it is well known the defender was possessed of other moveables of different kinds, money, household-plenishing, debts, &c. and it is not pretended there was ever any division of these.

The Lords found that the children of a marriage, attaining possession of their mother's third of moveables in communion, need not confirm these moveables, in order to bar those who, upon the death of these children, shall become nearest of kin to the said defunct wife, from claiming the said moveables; and found sufficient evidence to presume in this case, that the defender's son did attain possession of his mother's share of moveables.

4 *No. 247. page 395.*