1743. *February* 18.
KATHARINE THOMPSON *against* GILBERT LAWRIE, Defender.

No 351.
A clause in a marriage-contract, discharging all claims competent to the wife, or her nearest of kin, in the event of the husband's decease, found to have effect even in the event of the wife predeceasing the husband, and that her nearest of kin were excluded from any share of the husband's moveables.

BY contract of marriage betwixt the said Gilbert Lawrie and Helen Thompson, he provided her in the liferent of 1,000 merks, in case she survived him, &c.; 'which provision she accepted in full of all terce of lands or annualrents, 'third or half of moveables, conquest, and all others, she, her executors, or 'nearest of kin could claim, by and through the decease of the said Gilbert 'Lawrie, any manner of way, excepting his good will only.' For the which causes she assigned him to several jointures she had by former husbands; and she having died without leaving any issue of that marriage, Katharine Thompson, a daughter of her's by a former marriage, brought an action against Gilbert Lawrie, for an account and payment of her mother's share of the moveables.

Pleaded for the defender, That the defunct's right was, by the above clause in the contract, transacted upon and discharged, and could not descend to her executors. In support whereof, the defender offered to prove, by such of the communers at this settlement as were still alive, that the whole claims, which either his wife, or her executors, could have upon his moveables, were understood to be transacted upon and discharged; and as this was undoubtedly the intention of parties, neither could the clause admit of any other construction; for Helen Hutchinson accepted the provisions stipulated in full, not only of her terce of lands, which would have been excluded by a provision of liferent, though not expressed, but also, in full of her third, or half of the moveables which fell under the communion; she transacts upon her interest in the communion; and if that interest was renounced and extinguished, she could have no claim to a division of the moveables upon the dissolution of the marriage, and consequently no claim could descend to her nearest of kin; for it was a claim that did not take its rise from the dissolution of the marriage, whether by the death of one party or another, but was founded on the communion, or *societas mobilium*, which the law establishes amongst married persons; which, if renounced or discharged at entering into the marriage, the foundation of the claim is totally cut off; and it can have no effect in favour of the wife's representatives. If the clause had gone no further than to declare Helen Hutcheson's acceptance of the provisions in the contract, in full of all terce of lands or annualrents, and third or half of moveables, there could have been no doubt that her interest in the communion being once excluded, could not revive again in favours of her executors, unless it had been so provided; nor can any such provision or reservation be inferred from the following part of the clause; 'And all others, she, 'her executors, or nearest of kin can claim, by and through the decease of the 'said Gilbert Lawrie, any manner of way, excepting his good will only.' For, by it, the claim of the wife, and of her nearest of kin, are distinguished from

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one another; the last can be understood only to take place upon her predeceasing her husband, as the first does upon her survivance. They have no claim to divide the husband's moveables, but upon the wife's predecease; if she survives, that claim is competent to herself, and not to her nearest of kin; so this addition shows, that the claim which is competent to the wife's nearest of kin upon the dissolution of the marriage, was actually under the view of the parties, and meant to be comprehended under this discharging clause. See Fountainhall, 12th July 1701, Executors of Boyes, No 31. p. 5049; and 25th July 1738, Freebairn, *see* APPENDIX.

Answered for the pursuer, That, during the marriage, the wife might not improperly be termed joint proprietor with the husband, though it is, in reality, but a *quasi dominium;* as he has not only the administration, but the total disposal of the fee. Upon the dissolution, however, of the marriage, the husband's prerogative ceases, the society is at an end, the communion is dissolved, and the wife's share of the property comes to have its full force, when a division of the substance falls to be made. Thus the law stands, except where there is a paction to regulate or renounce, in whole, or in part, the respective rights of husband or wife, *e. g.* the defender might have renounced his *jus mariti*, by the contract, to one of the jointures his wife had, which, surely, would not have cut him out of the other. This case is the same with the present, at least, it is very similar; for it is obvious that the renunciation in the clause, is singly calculated for the event of the marriage's being dissolved 'by or through 'the decease of the husband,' from which the other is a far different event, when it is dissolved by and through the decease of the wife; for, in this case, by the common law, the division must be made against the husband still living, who must himself exhibit the goods, and submit to a partition thereof. Now, how is it possible to construct a renunciation, in the event of the husband's decease, to discharge or cut off a claim competent by the law against the husband still living; and as the two cases are different, so the reason of the difference is solid; for the wife may consent, in case of her survivance to accept the jointure which then takes place, in full of her share of the moveables; because, in that event, she may take a full equivalent for what she has renounced by the jointure; whereas, in case of her predecease, all that she brings to her husband is by him taken, without any recompence, unless her executors remain entitled to take her share of the moveables, accruing to them upon her death. See Forsyth, No 5. p. 2939. As to the defender's offering to prove by witnesses what passed at the settlement; it was *answered*, The same was neither true nor competent, since the articles as they stand, and were perfected by the parties in writing, must be the rule. And as to what is said, that the wife's total interest in the communion was renounced, and consequently no claim could descend to her representatives; it was *answered*, That, taking the whole clause together, it was plain, it was only renounced in a certain event; if, indeed, she had renounced all terce of lands, third, or half of moveables

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competent to her, 'by and through the said marriage;' such words would have operated a total extinction or renunciation of the wife's right, as that comprehends all possible events; whereas the words 'by and through the decease of 'the husband,' is quite another thing, and comprehends only one event.

THE LORDS repelled the defence, and found the pursuer not excluded by the contract of marriage, from claiming a share of the goods in communion, in the event of the wife's predeceasing the husband.

But, on advising a reclaiming petition and answers,

THE LORDS found, that Helen Hutcheson having accepted the provisions made her in the contract of marriage, in place of all third, or half of moveables, conquest, and all others, she, her executors, or nearest of kin can claim; that her nearest of kin are thereby excluded from any claim to a share of the husband's moveables; and that the words, 'by and through the decease of the said Gilbert Lawrie,' cannot be understood to restrict the former clause, so as that the executors should only be excluded in the event of her husband's predecease; since, in that event, the executors, or nearest of kin, would have had no claim to any share of the husband's moveables, but that the said words, 'by and through the decease of the said Gilbert Lawrie,' do apply to the wife herself, and not to her nearest of kin; and assoilzied.

C. Home, No 229. p. 373.

SECT. VIII.

Revocation how barred.

1575. *June* 16. MURRAY *against* LIVINGSTON.

No 352.

MARRIAGE being dissolved upon account of adultery; found that the adulterous person was barred from revoking.

Fol. Dic. v. 1. p. 412. Colville.

*** See this case, No 2. p. 328.

1678. *February* 15. GORDON *against* MAXWELL.

No 353.
A wife was allowed to revoke a dis-

MARY GORDON, being heretrix of the lands of Robertoun, having by her first marriage a son, dispones her land to Robert Maxwell, who disponed the same