

inability to implement is no reason for insisting that the other party should implement to him. It is in fact the very reverse, and the reason why no implement can be demanded, while the *locator operarum* can have no hire for what he does not perform. And accordingly, it is laid down by all the authorities, that where the voyage cannot be performed, there is no title to the freight: Voet. Tit. *Locati Conducti*, § 27. Postlethwaite, *voce* Freight. Beawes' *Lex Mercatoria*. Savary, *voce* Freight, and Magen's Collections.

No. 1.

As to the freighter's insuring or not insuring the freight, it makes no difference; for the insurers would have had the same action against the defenders, which the pursuers now have. And as to the argument founded upon the after offer of Mr. Inglis, it is evident that in the contract of freight the owner must perform with good faith and alacrity, and otherwise it would be most imprudent in the freighter to trust him after his refusal with the execution of the voyage. Nor was it in consequence of any change of mind that the subsequent offer of proceeding in the voyage was not accepted of, but on account of the poor emigrants having been all dispersed before it was made.

Some of the Judges were of opinion, that even though there had been a total disability to proceed in the voyage, the defenders were liable in repetition of the freight. A condescence, however, was ordered, with regard to the facts relative to the requisitions made by Mr. Hogg, for Mr. Inglis to proceed in the voyage, and relative to the disposition of the emigrants, and their families, to proceed in the voyage, before Mr. Inglis's offer. Upon advising which, the Court adhered to their former interlocutor.

Lord Ordinary, *Haites*. Act. *Geo. Ogilvie*. Alt. *Dean of Faculty Dundas, Craobie*.

J. W.

1777. July 30.

DAME MARY WIGHTMAN, Wife of SIR JAMES FOULIS of COLLINGTON, BART. and MRS. JANET WIGHTMAN, Spouse to JOHN BROWN in Easter Salton, and their said Husbands, Pursuers, against GEORGE WILSON, and his TUTORS and CURATORS, Defenders.

THE deceased George Wilson, mason in Edinburgh, grandfather of the defender, in his contract of marriage, (7th April 1758,) with Miss Wilhelmina Wightman, his second wife, provided her, in the event of her surviving him, with £100 Sterling of jointure *per annum*, and the whole of the household furniture. She was likewise to have the disposal, of the sum of £500 Sterling, payable at the first term of Whitsunday, or Martinmas, next after the decease of the longest liver of him and his said future spouse: And with full power to her to appropriate, distribute, and divide the said sum, to and

No. 2.  
Particulars of  
the case  
No. 52.  
p. 9201.  
referred to.

No. 2. ‘ amongst her children, and failing of them without lawful issue, to and  
 ‘ amongst her other friends, and relations, to whom she shall think fit to divide,  
 ‘ and appoint the same to be paid, by a writing under her hand at any time of  
 ‘ her life,’ &c.

On the other hand, Miss Wightman conveys the whole subjects belonging to her, to her said husband, ‘ *which subjects thereby conveyed, are computed to be worth at least £700 Sterling.*’

The marriage dissolved in 1766, without issue, by the death of Mrs. Wilson, who had taken advantage of the faculty, contained in the marriage contract, and had disposed of the £500, in favour of Mr. Archibald Wightman, her uncle, and his heirs. George Wilson himself, did not die till the year 1776, when a demand for this £500 was made upon his heir by the pursuers, the daughters of Mr. Wightman, in whose favour the reserved faculty in the contract of marriage had been exercised.

Upon this sum being refused to be paid, the pursuers brought an action, which came before Lord Monboddo Ordinary. In defence against this claim, it was pleaded by George Wilson, that the heirs of Miss Wightman were barred, *exceptione doli*, from making this demand; for that this reserved faculty had been granted to her in the view of her subjects, conveyed by that contract of marriage, being worth at least £700 Sterling, as therein stated, whereas it was denied that the deceased George Wilson had ever received effects to the amount of £200 Sterling by Miss. Wightman.

The pursuers answered, that the obligations were by no means co-relative, and that whether or not the late George Wilson had received value to the extent of the £700, that still a positive obligation, in that contract of marriage, must be binding upon his heirs. And that it was impossible, that his heirs could call in question whether the defunct had received effects with his wife to the amount of £700, as he himself, during the existence of the marriage, and for ten years after it, never quarrelled that deficiency.

The Lord Ordinary pronounced the following interlocutor, (17th June 1777.) ‘ Having considered the representation for George Wilson, &c. answers, replies, and duplies, with the note of decisions referred to, Finds, *1mo*, ‘ That provisions to a wife in a contract of marriage, are by law presumed to ‘ be made in consideration of the marriage, not in consideration of the tocher, ‘ unless there be words in the contract, from which the contrary can be inferred, ‘ which is not the case here; *2do*, That the wife’s whole effects, being conveyed ‘ to the husband in this contract of marriage, and computed to amount to ‘ £700, the presumption in law is, that they did amount to that sum; and as ‘ the husband acquiesced in this valuation of them, during the eight years that ‘ the marriage subsisted, the legal presumption cannot now be taken away, at the ‘ distance of 18 years, by any proof, or contrary presumption; therefore, adheres to the former interlocutor, and refuses the desire of the representation.’

A reclaiming petition was presented by George Wilson and his tutors against this interlocutor: In which they contended, that mutual contracts required implement on both sides, otherwise they cannot be enforced by the one party against the other; and that this holds with respect to contracts of marriage, appears by the following case, 4th July 1732, Creditors of Watson, where the Lords, 'found the defence of the mutual cause of the portion not being performed, relevant to assoilzie the defender.' No. 48. p. 9196. There are also many other cases to the same purpose, mentioned in the Dictionary, *voce* PRESUMPTION. When, therefore, Mrs. Wilson's funds were given up at £700, which in reality did not amount to £200, it is submitted, if this was not a deception, whereby it must be presumed, that the husband was led to give her higher provisions than he would otherwise have done; and particularly, that he gave her the disposal of £500, upon the faith and belief, that he was to get £700 with her. That although the husband never challenged this deficiency, during the existence of the marriage, yet it was no sooner dissolved in 1766; than he ordered a memorial to be laid before counsel, for advice, on account of Mrs. Wilson having made him believe that her money and effects were worth £700, when it was known to him and others, that he never touched of either above £200.

It was answered by the pursuers, That there is every reason to presume, that the effects received by Mr. Wilson, in consequence of his marriage with Miss Wightman, amounted fully to £700. But whether it did, or did not, it is impossible to prove at this late period, and after the death of both parties; and therefore as Mr. Wilson, neither during the marriage, nor for the ten years which he lived after it, ever took the proper means of challenging the deficiency, the sum mentioned in the marriage contract must be held as paid, *presumptione juris et de jure*. But even supposing that Mr. Wilson had not received the whole of the £700, nor indeed any part of it, Mr. Wilson became bound absolutely to pay £500, *in contemplation of the marriage*, which was of itself a sufficient onerous cause, as every husband is bound to provide property for his wife; and which excludes all idea of this £500 being relative to or commensurate with the sum, at which her effects are *computed* in an after clause of the contract. It was never asserted on the part of the wife, that her effects were of a certain value. It is only said, that they were *computed to be worth at least* £700. Now the very expression in itself implies uncertainty, and if the provisions Mr. Wilson intended for her were to be regulated or influenced by the value of that computation, he ought to have made the proper enquiries with regard to it. Although Mr. Wilson had married Miss Wightman without a six pence, still he might have given her, with great propriety, the whole stipulations mentioned in the contract. They cannot therefore be supposed, in the least degree, to depend upon the extent of the value of the subjects received by her. The present case is entirely different from those founded on by the defenders. For in those cases there had been a specific sum contract-

No. 2. ed for, which was not the case in the present.—The Court upon advising this petition with answers, adhered to the Ordinary's interlocutor, and allowed expense of extract.

Lord Ordinary, *Monboddo*.

Act. *M'Laurin*.

Alt. *J. Campbell*.

*D. C.*

1805. *March 1.*

MACDONELL *against* DIXON.

No. 3.

A servant under a previous contract of service, cannot enlist as a soldier.

MAJOR JAMES MACDONELL of the 78th regiment, in the month of August 1804, inlisted Patrick Devayne and William Kelly. Devayne was under articles of agreement to serve as a workman in the Dunbarton Glassworks, for the space of eighteen years, with a breach in his favour at the end of nine years. Kelly's engagement was, until he gave a month's premonition of his intention to leave the works.

John Dixon, the manager of the Dunbarton Glassworks, presented a petition to the Sheriff, praying, that Devayne and Kelly should be incarcerated, until they found caution to return and fulfil their respective services.

The Sheriff (20th August 1804) decerned in terms of Mr. Dixon's application.

Major Macdonell, on the other hand, applied to the Justices of Peace, complaining, that the men had been prevented from being attested and joining the regiment by the interference of Mr. Dixon; and praying for an order upon them to join the regiment.

The Justices, (3d September 1804,) 'In respect of the articles of agreement with Patrick Devayne, &c. adjudge and prefer the said Mr. Dixon to the service of the said persons, during the respective periods still unexpired, of their several indentures and agreements; adjudge and prefer the said Mr. Dixon, to the service of the said William Kelly, until he gives a month's premonition, according to the verbal agreement subsisting between them, as stated by himself in his declaration; and prohibits and discharges the complainer, Major Macdonell, from troubling or molesting the said Mr. Dixon, or any one of the said defenders accordingly; but without prejudice to him to claim them thereafter, if he shall be so advised; and decern.'

Against this judgment a bill of advocation was presented by Major Macdonell, and the case reported by the Lord Ordinary.

The advocator

Pleaded: A contract between a master and servant is a species of location, by which the service of the one is exchanged for the wages of the other. If the master is deprived of the services of the servant, by the interference of another, has he any power over his person to compel him to serve him? Do-