

No 118.
 there, found to be regulated by the law of Scotland, altho' a proof was offered that he meant to have returned to the West Indies if his health had permitted.

Jean Macdonald, and other sisters of the deceased, brought an action against him to account for their brother's executry. The defender died during the dependence of this action, leaving his grand-son, Alexander Laing, his heir, as to the succession of his son. The rights of the parties turned upon the question, Whether William Macdonald had his domicil in Jamaica or in Scotland? Laing offered to prove, that the deceased meant to have returned to Jamaica, if his health had permitted, and that he had no intention of residing in this country. And

Pleaded; Moveable succession is regulated by the law of the country where the deceased resided *animo remanendi*. To which country this description belongs, is to be ascertained not merely by the place of his birth, or of his death, but by the whole circumstances in his situation; *See* case of Bruce against Bruce, No 115: p. 4617. Upon this principle, William Macdonald had his domicil in Jamaica.

THE LORD ORDINARY found, the succession was to be regulated by the law of Scotland, in respect that William Macdonald died in Scotland his native country, where he had resided several months before his death.

A reclaiming petition having been presented, the Court were of opinion, that the domicil of William Macdonald was in Scotland, and that the proof offered was incompetent, and therefore unanimously "refused" the petition without answers.

A second reclaiming petition, along with which were produced two letters of the deceased, as shewing his intention to return to Jamaica upon the recovery of his health, was appointed to be answered. Upon advising which, some of the Judges came to be of opinion, that the domicil of the deceased was in Jamaica. A considerable majority, however, remained of their former sentiments.

THE COURT "adhered."

Lord Ordinary, *Dunsinnan*.
 Clerk, *Colquhoun*.

For the Petitioner, *Jo. Burnet*. *Alt. Tho. Wilson*.

D. D.

Fol. Dic. v. 3. p. 224. Fac. Col. No 133. p. 306.

No 119.
 A marriage having been celebrated in England, then the domicil of both parties, and having been dissolved by the death of the wife in Scotland, to which their

1795. June 16.

REBECCA HOG against THOMAS HOG.

ROBERT HOG, a native of Scotland, in 1737, when settled in London as a merchant, married there an English Lady, with whom he received a fortune of above L. 3500. By marriage-articles, previously executed in the English form, it was provided, that Mr Hog should, from his wife's fortune, lay out L. 2500, or such other sum as should be necessary for the purchase of a real estate, yielding L. 100 a-year; and that the estate so purchased should be conveyed to trustees, for behoof of Mr Hog and his wife during their lives, and of the children of the marriage after the death of the survivor; the right of the children to be

subject to the disposal of Mrs Hog, both during the subsistence, and after the dissolution of the marriage.

Mr Hog accordingly purchased, and conveyed to the trustees, as directed by the articles, an estate, which Mrs Hog afterwards conveyed to Thomas Hog, her eldest son.

Mr Hog continued to reside chiefly in England till 1752, when he purchased the estate of Newliston, in Scotland, where he afterwards spent a great part of his time.

Mrs Hog died there in 1760.

After Mr Hog's death in 1789, Rebecca Hog, one of his daughters, brought an action against Thomas Hog, his general donee, in which, *inter alia*, she, as one of the executors of her mother, claimed a share of the goods falling under the *jus relictæ* at the dissolution of the marriage.

The points at issue came to be, *1mo*, Where Mr Hog had his domicile at the dissolution of the marriage? *2do*, Supposing he was domiciled in Scotland, How far the change of domicile, which had taken place after the marriage, could have any effect on the rights of the parties, particularly as marriage-articles had been previously entered into?

THE COURT, (26th November 1794, and 2d June 1795), found, that Mr Hog's domicile, at the dissolution of the marriage, was in Scotland.

On the *second* point, the pursuer

Pleaded; With the exception of questions relating to landed property, situated in a different country, and those cases where the contrary is fixed by positive agreement, every right which a person possesses in society is regulated by the law of his domicile; and when he changes it from one country to another, as he becomes amenable to the laws of the latter, so his rights are regulated by the rules which they establish. A person marrying in a foreign country could not import the municipal customs there acknowledged into Britain; and for the same reason, in so far as the rights of married persons differ in Scotland and in England, they must be affected by a change of domicile from the one to the other.

The claim of the wife's executors to a share of the husband's effects at the dissolution of the marriage, takes effect *vi legis*, and not from any presumed contract: The communion of goods which takes place during the marriage being little better than a name, any right depending on it may easily be disappointed by the husband *in liege poustie*; and consequently, by his changing his domicile to a country where the law does not acknowledge it. It must often have happened that parties domiciled in Scotland at the constitution of a marriage, should have been domiciled in England at its dissolution. But in no case have the wife's executors, in such circumstances, been known to claim the *jus relictæ*. Upon the very same grounds the present claim should be supported. The decision of the question of legitime between the same parties in reality determines the present, 7th June 1791, No 116. p. 4619. By changing his domicile

No 119.
domicil had, by that time, been removed, her executors were found to have no claim on the moveable effects of the husband, she having, by articles entered into before the marriage, stipulated to herself a provision out of the fortune which her husband was to receive by her.

No 119. to Scotland, Mr Hog did not mean to give his children a right of legitim which he could not disappoint. They acquired it however by the act of the law. But if the right consequent on marriage had been regulated by any contract supposed to have taken place at its commencement, it must have regulated the rights of the children as well as of themselves.

Neither is the question affected by the marriage-articles. If indeed the provision there made, had been declared to be in satisfaction of all other claims; full effect must have been given to it. But as it is confined solely to a reservation out of her own fortune, it must be presumed that every thing else was left to contingency. The marriage-articles can have no stronger effect than if they had been framed in Scotland, where nothing, short of an express exclusion, cuts off the *jus relictæ*; Ersk. b. 3. t. 9. § 16. ; Bank. b. 1. t. 5. § 123.

Answered; The patrimonial rights of parties, at the constitution of a marriage, are regulated either by express contract, or by the law of the country where the husband is domiciled at the time. The latter takes effect both *vi legis*, and by an implied contract, which is as little capable of being afterwards defeated as a written one.

To hold that this implied contract can be affected by the husband's change of domicile, would be attended with very unequal consequences. His domicile, and consequently that of his wife, may be changed without her consent; and even though she, foreseeing that the law of the country to which he means to remove is unfavourable to her rights, should refuse to accompany him.

Besides, the implied contract begins to have effect immediately upon the constitution of the marriage, and complete mutual restitution is afterwards impossible. By the law of Scotland, the husband becomes proprietor of the wife's moveables: She, on the other hand, acquires right to a certain portion of the husband's effects at the dissolution of the marriage. By the law of England, the husband does not acquire the same right over the personal property of his wife, but she, on the other hand, has no *jus relictæ*. Now, it would be unreasonable that a husband, who, by having his domicile in Scotland at the constitution of the marriage, had got possession of a large personal property belonging to his wife, should, by afterwards removing to England, have it in his power to disappoint her of her *jus relictæ*, the equivalent allowed her by the law. On the other hand, it would be unfair, where the original domicile was in England, and the new one in Scotland, that the husband's estate should be subject to the *jus relictæ*, while no communion of goods had previously taken place.

The right to legitim depends on principles entirely different from those which regulate the *jus relictæ*. The former has no reference to any contract, either express or implied, but is entirely a question of succession, and consequently regulated by the law of the father's domicile at his death.

The marriage-articles are to be considered as a declaration by the parties, how far they wished their rights to be different from those constituted by the

law of the place where they were then domiciled. They are framed upon the supposition, that the wife would otherwise have had nothing. No 119.

Even if they had been entered into in Scotland, they would have cut off the *jus relictæ*, upon the general presumption, that conventional supersede legal provisions; 24th February 1763, Mackinnon against Macdonalds, No 33. p. 2278.; 28th Nov. 1781, Riddell against Dalton, *voce* IMPLIED DISCHARGE AND RENUNCIATION.

THE LORD ORDINARY having considered the contract of marriage, by which Mrs Hog was "provided only to an annuity out of tenements to be purchased with a part of her own fortune, but had no provision made to her out of her husband's estate; found, That the claim of Mrs Hog's Representatives is not excluded by her contract of marriage with her husband, &c.; but found, That when parties marry in one country, and afterwards remove to another, in which the legal rights of married persons are different, the change of domicile ought not to operate any change on any of the rights pre-established in them in the country in which they married; and that all those rights ought to be preserved and enforced by the law of the country to which they have removed, unless they be incompatible with the religion and morality of that country," and therefore repelled the claim.

Both parties reclaimed, and a hearing in presence was ordered. When the cause was advised, a diversity of opinion took place; but a majority of the Court thought, that there was no occasion to determine what might be the effect of a change of domicile where there was no contract of marriage. The question here is, (it was observed), What was the understanding of parties in framing the marriage-articles? Both were domiciled in England, where the rights of husband and wife are accurately defined; the marriage-articles were meant to fix the amount of the wife's claim on the personal estate of her husband, and there could be no view to other claims which were not there provided for, and which probably were unknown to the parties and their men of business. The marriage-articles, indeed, contain, what, in the circumstances of the parties at the time, was a very rational provision for Mrs Hog.

THE LORDS "repelled" the claim.

A reclaiming petition was (7th July) refused without answers.

Lórd Ordinary, *Dreghorn*. Act. Solicitor-General Blair, *Jo. Clerk*. Alt. Dean of Faculty, *Erskine, Geo. Fergusson, M. Ross, Honyman*. Clerk, *Sinclair*.

E. D. *Fol. Dic. v. 3. p. 224. Fac. Col. No 176. p. 415.*

1797. *January 20.*

GEORGE ROSS and Others, Representatives of the late Richard Louthian, *against* SARAH AGLIANBY.

RICHARD LOUTHIAN died possessed of considerable landed property in England and Scotland. On the 17th September 1782, he executed a settlement

No 120.

A widow having accepted a conventional provision out of landed property in