No 33.

such a transaction can admit of, that these provisions are stipulated to the wife, and accepted of by her, in lieu of the claims which she would otherwise have had by law on her husband's estate, and of the interest which she would have had in his moveables. And it seems plain, that the casual omission of a clause of renunciation cannot, in justice or in reason, alter the nature of the transaction.

With regard to the act 1681, cap. 10. it appears by the *Regiam majestatem*, lib. 2. cap. 16.; Balfour, tit. Wife's dowry and terce; and Sir Thomas Craig, lib. 2. dieg. 22. § 25. That originally the provision of terce took place only, where no special provision was otherwise settled upon the wife; and that it was not even in the husband's power, in those days, to settle any higher provision upon his wife than this legal terce. Afterwards, some decisions had run greatly into the other extreme; for which reason the act 1681 was made, fixing it for the future, that the legal terce was presumed to be excluded, unless where expressly reserved in the contract. This act, therefore, did nothing more than bring back the law to where it formerly stood.

'The Lords found, That the provisions in the contract of marriage were in full of all the legal provisions; and that therefore the defenders had no claim upon any part of the pursuer's moveables.'

Reporter, *Lord Kames.* Act. *Iloy Campbell.* Alt. *Monro, Burnet.*

Fol. Dic. v. 3. *p.* 128. *Fac. Col. No* 105. *p.* 246.

No 34.

An heiress, in her contract of marriage, disponed her lands to herself and husband in conjunct fee and liferent, and to the heirs of the marriage in fee, declaring that should there be children existing at the husband's decease, her liferent should be restricted to an annuity; the residue to belong to the children. The husband died bankrupt. Found

1782. *August* 5. Blairs *against* Bell and Others.

Jean Scott, proprietrix of the lands of Belrenmont, in her contract of marriage with Bryce Blair, in consideration of the provisions stipulated to her, and her children, disponed these lands, 'to and in favour of herself, and the said 'Bryce Blair, in conjunct fee and liferent, and to the heirs to be lawfully pro-'created of the said marriage between them in fee; which failing, to the heirs 'lawfully to be procreated of the said Jean Scott's body in any other marriage; 'which also failing, to the said Bryce Blair, his heirs and assignees whatsoever; 'But declaring, that in case there be children, one or more, male or female, 'procreate of the said marriage, and existing at the death of the said Bryce 'Blair, and that the said Jean Scott survive him, then, and in that case, she 'hereby, during the existence of the said child or children, restricts and limits 'her liferent to an annuity of L. 30 Sterling yearly, upliftable forth of the said 'lands; the remainder of the rents, and profits thereof, being to go to the child 'or children to be procreate of the said marriage.'

Bryce Blair died in bankrupt circumstances, leaving a widow and six children of the marriage; upon which event, several questions arose respecting the construction of the clauses above recited.

No 34.
that the children had right, during their mother's life, to the residue of the rents, which were not affectable by the creditors of the father.

The *first* was, Who was fiar in these lands? Which the Lords decided in favour of the husband's creditors, 11th August 1781.

The *next* was the import of the clause restricting the widow's liferent, in case of children, to an annuity of L. 30 Sterling, Whether these children were to take the residue as assignees from the mother, or as heirs of provision to their father, in which case it would be affected by his onerous contractions?

Pleaded for the Creditors, It is now a fixed point, that these lands were made over to the husband in absolute property. By the ordinary rules of law, therefore, whatever burden is taken off them must accrue to the husband, and make a part of his estate. Hence, after satisfying the widow's annuity, the rents of this estate must, on the event of children, belong to the husband, and can only be taken by the child or children as heirs of provision to him.

The present case in no manner differs from that which daily occurs, when a certain share of the moveables is provided to the wife, if there be children, and a larger share if there be none. The object of such clause, without doubt, is, that a larger fund may remain for supporting the children; but it can, upon no principle of law hitherto known, be converted into a provision in their favour unaffectable by their father's debts. Had such been intended, a clause of a very different nature would have occurred, obliging the widow to bestow the residue, after L. 30 Sterling, among her children; and their right would have been made to depend, not upon her life, but upon their own, or to subsist till their marriage or majority.

Answered for the Children, Although the fee of these lands, by the conception of the marriage contract, vested in the husband, yet the liferent right, antecedently in the wife, is by the same deed, and at the same instant, reserved to her, unattachable for the husband's debts; and had no children existed, or if the children should predecease their mother, this total liferent would remain in its full force. The restriction, therefore, stipulated in the event of children, was purely intended in their behalf, not of the husband, his heir, or their creditors, who, during the life of the widow, can, in no possible event, have the smallest interest therein; and every doubt on this head is removed, by a clause directing, in the most explicit terms, that the 'remainder shall go to the child or children 'of the marriage.' Hence this provision will be enjoyed by them, not in the character of heirs to their father, of whose fortune it at no time constituted a part, but by virtue of the express conveyance and allocation contained in the marriage contract. It might have been stipulated, in the same words, to a distant relation or stranger, in which case it is clear that no service would be necessary for making up right to it. Where a person in his marriage contract, gives his wife a larger share of his moveables or estate in the event of no children, and a smaller if children exist, no right can from thence arise to the children. The subjects excepted, originally belonging to the husband, and nowise destined to the children by any particular settlement, must continue in their

No 34. former situation. But such case is widely different from the present; and no argument can, with propriety, be drawn from the one to the other.

THE LORDS gave contrary judgments; but at last found, 'That the children 'of the marriage between the deceased Bryce Blair and Jean Scott, have right, 'during the life of their mother, to the excrescence of rents, after paying to 'her the liferent annuity of L. 30 Sterling, and that the same are not affectable 'by the creditors of the father.'

Lord Ordinary, *Kennet.* For the Creditors, *Ilay Campbell, Elphinston.*
For the Children, *Rae, Wight.* Clerk, *Home.*

Fol. Dic. v. 3. p. 128. Fac. Col. No 62. p. 98.

SECT. V.

Dubious Clauses.—Revocation of a Tailzie.—Liberty to contract Debts.—Conjunctly and Severally.—Just and Lawful Debts.—Liferent and Fee.—Back-Bond.—Importing Property or only Servitude.

1638. *July* 28. FARQUHAR *against* M'KAIN.

No 35. Parties were bound 'conjunctly and severally, ilk one for his own part.' This was interpreted to mean, that each was liable only for a half.

ONE Patrick Farquhar having charged James M'Kain for L. 700, conform to his bond, of this tenor, viz. bearing, 'That the said James M'Kain and John 'Gordon bind and oblige them, conjunctly and severally, to pay the said sum 'at the term contained in the bond, ilk one of them for their own part;' these were the very words, in respect of the which clause, terminating the prior words of 'conjunctly and severally,' and resolving in payment, ilk one of them of their own parts;——THE LORDS suspended the charges against M'Kain for the half of the sum, and found him only debtor of the one half thereof, and not of the whole.

Durie, p. 861.

1665. *December* 20.
Sir RORIE M'LAUD *against* WALTER YOUNG and JOHN GOVAN.

No 36. A clause, dubious, interpreted against the writer.

WALTER YOUNG, JOHN GOVAN, and HENRY HOPE, by a letter written to any that they should buy cows from in the Highlands, desired that they might use the bearer of the letter kindly, and, for whatever quantity of cows they bought,