

No 369. lands, it was found, That he who married a widow, deceasing within year and day, his relict should have no conjunct-fee, nor terce of his lands.

*Fol. Dic. v. 1. p. 413. Haddington, MS. No 638.*

1634. July 23.

MAXWELL *against* HAIRSTAINES.

No 370.

Marriage having dissolved within year and day, all things are restored *hinc inde*, whether the husband or wife were formerly married or not.

THOMAS MAXWELL having married the relict of umquhile Matthew Hairstaines, in their contract of marriage she assigns to him and his heirs, the sum of 3000 merks of that 6000 merks which was addebted to her by John Hairstaines; after which marriage she dies within the year. There being no bairns procreated betwixt them, the said Thomas thereafter pursues the said John Hairstaines for payment of the 3000 merks, conform to the said contract; who *excepting*, That the pursuer had no right by virtue thereof to the said sum, in respect the wife, whose money it was, died within the year, there being no bairns born of that marriage; this exception was found relevant, albeit the pursuer *replied*, That this party had no interest to propone this allegiance, he being only debtor, who could be put *in tuto* by this sentence; and also *replied*, That this allegiance holds not where the wife, so deceasing within year and day, was a widow, as this pursuer's wife was; for albeit when a virgin married dies within the year, *omnia hinc inde restituuntur*, yet it is not so where the wife was married before. Which reply was repelled; for the defender was found to have sufficient interest to exclude the pursuer's right; and also it was found alike to infer restitution, whether the wife dying was a maid the time of her marriage or not; and sicklike in the husband, whether he had been married before, or that he had never been married before; but because the pursuer replied, that the only bairn of the defunct woman, and who would be extrix to her in law, and so have only interest to the sum acclaimed, concurred and assisted this pursuit, therefore the defender was ordained to allege farther.

Act. Gibson.

Alt. Cunningham.

Clerk, Gibson.

*Fol. Dic. v. 1. p. 413. Durie, p. 732.*

1682. November. The CHILDREN of WALTER LAW *against* MR JOHN LIDDEL.

No 371.

A MAN having granted a bond of L. 1000 to his wife *stante matrimonio*, payable to her in case there were no children of the marriage, and the marriage having dissolved within the year, and a pursuit being raised upon the bond;

It was *alleged* for the defender; 1. That marriage dissolving within year and day, all provisions *intuitu matrimonii* are null, unless there be a clause dispensing with the dissolution. 2. The husband having intromitted with L. 1000 of

the tocher, it is presumed he gave a bond for the repayment, and which *de facto* was repaid. No 371.

*Answered* for the pursuer; That provisions between husband and wife, or third parties, in contemplation of marriage, do indeed resolve upon the dissolution thereof within the year; but this bond was granted after the marriage.

THE LORDS generally inclined to sustain the first defence; but some being unclear as to that, the LORDS determined upon the second, that the husband being debtor, by intromitting with L 1000 of the tocher, the granting of the second bond was intended in satisfaction of that debt, seeing *debitor non præsumitur donare*; and here the bond bore 'love and favour,' and onerous causes.

*Harcarse*, (STANTE MATRIMONIO.) No 872. p. 247.

1743. February 19. MARGARET GORDON *against* STEWART and Others.

No 372.

FOUND, that even where marriage dissolves within year and day, the relict is entitled to mournings.

The point was new; the mournings were considered to be due in this case, not so properly as a legal consequence of marriage, as that the wife, being a part of the husband's family, ought to have mournings, as what the respect due to the husband's family required, as it did, that servants get mourning.

*Fol. Dic. v. 3. p. 289. Kilkerran*, (HUSBAND and WIFE.) No 6. p. 258.

1751. February 22. ELIZABETH SOMERVILLE *against* GEORGE BELL.

No 373.

JOHN FORRESTER of the island of Jamaica, had it long in view to make his addresses to Elizabeth Somerville, so soon as his circumstances should permit him to marry. One of his letters to her dated in March 1739, has the following paragraph: "I'll settle upon you, in case of death, L. 100 per annum, to be paid upon the Exchange of London. As to your own fortune, I want none, nor did I ever court you with that view; if you have a mind to give it to any of your relations, I'll with all my heart consent, for I thank God I do not want it. I'll take care to support you as well as your dear heart can wish. As to your jointure, it shall be preferable to any sister you have, &c." In the year 1743, Mr Forrester came home, and the marriage was celebrated 27th December that year, but without the formality of a marriage-contract. Being upon death-bed, April 1744, and without the least prospect of recovery, he executed a deed, which became a subject of dispute in the Court of Session. It proceeds upon the narrative, 'That there was no contract of marriage, but only some verbal conditions; therefore, in execution of his just intentions, he becomes bound to pay the sum of L. 666 : 13 : 4 Sterling, to his spouse in life.

Where marriage dissolves within year and day, post-nuptial contracts fall.