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claim a share of the goods in communion.

est of kin to Anna Crawford, with concourse of her Husband, to account to them for the half of the moveable estate, which belonged to William Hogg senior at the death of his wife.

And the defender having put his defence upon the foresaid clause of acceptance in satisfaction, the Commissaries 'having considered the contract of marriage, and ample provisions therein in favour of Anna Crawford, sustained the 'defence, and assoilzied.'

Whereof the pursuers having complained by bill of advocation, the LORDS, on report, 'Remitted to the Ordinary to refuse the bill.'

The doubt lay on the construction of the last words of the clause, 'in and 'through her husband's decease,' which were pleaded by the pursuers to limit the acceptance to that event. But the LORDS considered, that wherever competent provisions are made for the wife, and accepted of in satisfaction of all further liferent, terce, moveables, *&c.* such provisions are always intended by the parties to be in satisfaction of all claim which the wife, or her nearest of kin, might have by the provision of law, whether she survive or predecease her husband; and that any dubiety, arising from the terms of such accepting clauses, is solely owing to the inaccuracy of the framer of the settlement; 2*do*, That the clause in the contract includes both events, of her predeceasing, and of her surviving her husband: She renounces all farther claim she can have to moveables; and the claim of the nearest of kin, when she predeceases, is still a claim in her right. And as to the last words of the clause, 'or any other manner of 'way through her said promised husband's decease,' if once it is established that the renunciation of moveables in general comprehends both events, these words were superfluous, and may probably have proceeded from the ignorance of the writer, and, so far from implying any intention to restrict, may rather have proceeded from an over anxiety to comprehend every claim. Decisions were also referred to, where, in cases pretty similar, though not precisely the same, the LORDS had found the renunciation to comprehend both events, as Boyse *contra* Sandilands, July 12. 1701, Lord Fountainhall, v. 1. p. 119. *voce* GENERAL DISCHARGES; and the late case of Thomson *contra* Laurie, February 19. 1743, C. Home, p. 373. *voce* HUSBAND and WIFE.

Fol. Dic. v. 3. *p.* 128. *Kilkerran*, (HUSBAND and WIFE.) *No* 11. *p.* 264.

1752. *July* 23.

MARGARET OLIPHANT *against* His MAJESTY'S Advocate.

No 31.
A man, in his contract of marriage, bound himself to provide a sum to daughters, in case his estate, which was entailed, should, by failure of certain heirs

BY contract of marriage dated in the year 1719, betwixt Laurence Oliphant of Gask and his wife, it was provided, 'That, in consideration the estate of 'Gask stood entailed to the heirs male of the body of the said Laurence; which 'failing, to the other heirs male; and that thereby the daughters were exclud-'ed; therefore the said Laurence binds himself and his heirs, that failing heirs 'male of that marriage, who should succeed to and enjoy the estate, so that the 'same should descend to another heir male; then, and in that case, to provide

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male, descend to other male substitutes. The estate was forfeited. The daughters were found, in that event, to have no claim.

'the daughters of that marriage thus, viz. if two or more, to 25,000 merks, &c. 'payable at the ages of fixteen, or marriage,' &c.

Of this marriage there was issue a son, and Margaret and Janet two daughters.

Laurence and his son, having joined in the rebellion 1745, were attainted. Whereupon Margaret and her husband claimed, 1*mo*, the sums in the contract of marriage, in case the son should happen to die before his father; and *pleaded*, that as the father could not disappoint her of this conditional debt by a voluntary deed disponing the estate, so neither could he disappoint her by his crime.

Answered for his Majesty's Advocate: The condition of this debt was, 'that 'in case there should be no son of this marriage who should succeed to the es- 'tate of Gask, then it should go to the other heirs male.' But this condition never can exist; for although the son were dead, yet as the estate is forfeited, no other heir male can succeed. It is absurd to say, that, because the son cannot succeed, therefore the daughters are entitled. The forfeiture of the estate affects the right of the whole issue of Laurence. He could have contracted debt on the estate to have been preferable to this provision: therefore his forfeiture will bar this provision.

'The Lords dismissed this part of the claim.'

Margaret's second claim was founded on the following facts. In the year 1731, her father Laurence granted a bond for 9000 merks to James Oliphant his father; who, of even date, assigned the same to the said Margaret and Janet. The assignation contained this clause, viz. 'with power also to the said Laurence, 'if he shall find reasonable cause, to disappoint his said two daughters, and 'settle the above sums upon any one of them, or upon all or any other of his 'children; but always so, that the same should be settled upon any one of the 'children, one or more, procreate betwixt him and his said spouse.' The subscriptions to the said bond of 9000 merks, and assignation thereof, were afterwards cancelled, although it was not known by whom.

In the year 1739, Laurence granted two bonds of provision; the one to his daughter Margaret of 10,000 merks, payable at her marriage or his own death; and the other to Janet of 9000 merks, under this provision, that in case of her death before himself, or before her marriage, 5000 merks thereof should accrue to Margaret. And each of these two bonds contained a clause, making them revocable at the pleasure of the granter.

Whereupon Margaret claimed, 2*do*, her proportion of the said bond of 9000 merks granted by her father, and assigned to her by her grandfather. She produced a letter of the same date with the bond and assignation, sent by her said grandfather to her mother, recommending to her 'to be careful of the inclosed 'writs;' which, although they are not named in the letter, the claimant contended could be no other than the said bond and assignation. If this was doubted, she offered proof by her mother's oath. Upon this she *pleaded*, That it was a presumption, her father, upon his executing the said new bonds of provision in the 1739, had cancelled the subscriptions of the said old bond and

assignation. This, she *contended*, he had no power to do; although she allowed that, by the clause above-mentioned, he had power to have given the sum to any other child of the marriage. In case this claim should be allowed, she is satisfied that it should be deducted out of the said new bonds of provision. No 31.

Answered, This bond and assignation were cancelled, therefore could not be the foundation of a claim, and there was no evidence the father had done it. 2*do*, Although the father had done it, he had power so to do in virtue of the clause above-mentioned; seeing the cancelment was a virtual assignation to the eldest son, who was a child of the marriage; and by his forfeiture it fell to the Crown.

'THE LORDS also dismissed this claim.'

Margaret claimed, 3*tio*, her interest in the new bonds of provision dated in the 1739, For that, in the *first* place, the clause making them revocable at the father's pleasure, being a personal faculty, could not be transmitted to the Crown by the *forfeiture*. The like had been uniformly determined by the courts in England, and had been followed in many cases adjudged in Scotland after the rebellion 1715; particularly in the cases of the late Earl of Nithsdale, of the Earl of Panmuir, of the children of Stirling of Keir, and of the children of Scrymgeor of Bowhill*. In the *next* place, if it shall be allowed that these new bonds came in place of the cancelled bond, they must be considered as granted for a valuable consideration. If so, as Laurence had no power to deprive the claimant and her sister of their right in that old bond, the power of revocation in the new bonds must be held *pro non adjecto*.

Answered, 1*mo*, These new bonds do not appear ever to have been delivered; therefore, without respect to the power of revocation, they cannot be considered as debts binding the forfeiting person, or which might have affected his estate on the day mentioned in the vesting act.

With respect to faculties of revocation passing to the Crown by forfeiture, it is to be observed, that, in all the cases mentioned for the claimant, conveyances had been made to third parties, and possession had followed upon them: but the case here is quite different; the bonds in question never were delivered; so there was no right transferred to the claimant, and therefore there was no necessity of a revocation. Were the claimant's doctrine to be established, all forfeitures could easily be eluded.

2*do*, There is no proper evidence of the father's having cancelled the old bond, and of the new bond's having been granted in lieu of it. But further, though this were made out, it would not supply the want of delivery.

THE LORDS seemed to think, that as these new bonds never were delivered, and were revocable, they did not bind the forfeiting person at the time of the forfeiture.

'They dismissed also this claim.'

Act. *Ja. Ferguson, Dav. Greme.* Alt. *Lord Advocate, And. Pringle.* Clerk, *Gibson.*

Fol. Dic. v. 3. *p.* 127. *Fac. Col. No* 30. *p.* 48.

* *See* These cases *voce* FORFEITURE.