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In the *next* place, the respondents do deny that the presumption above-mentioned is the only, or, indeed, the chief reason why bonds bearing interest are accounted moveable before the term of payment. When personal bonds, with a clause of interest, came into practice, this distinction was thought of by lawyers, who were a good deal puzzled what to make of this new species of security. It is now a settled point, that a bond bearing interest is moveable before the term of payment, as much as a debt due by bill, or a sum of lying money; and, if so, the nature of a subject, as fixed by the determinations of law, cannot be altered from moveable to heritable, or, *vice versa*, by circumstances, or presumptions of a party's intention, which would lead to endless confusion and uncertainty. And much more ought that rule to hold in the present case, where interest only began to run from the term of payment, before which the bond was clearly a moveable debt, being neither a *feodum pecuniæ*, nor even a yearly profit to the creditor.

Upon the *second* point, The respondents are under no necessity of inquiring here, Whether this aliment must have been presumed to have been advanced *animo donandi*, or with a view of being afterwards repaid; for they maintain, that there was here no donation in the case, and that the defender, by alimending his sister, did no more than he was under a legal obligation to do, and what he could have been compelled to do by judgment of law, if he had refused. This is merely a fictitious claim, reared up, *ex post facto*, in order to disappoint the legal diligence of the pursuers.

THE COURT "adhered to the Lord Ordinary's interlocutor, and refused the desire of the petition."

Act. R. Blair.

Alt. Al. Bruce.

Clerk, Tait.

Fol. Dic. v. 4. p. 12. Fac. Col. No 92. p. 230.

1781. January 20.

PARTNERS of the WOOLLEN MANUFACTORY at HADDINGTON,
against ELIZABETH GRAY.

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A husband had been taken bound in his contract of marriage, to secure his wife's tocher assigned to him for her liferent use. He became insolvent, while the sum was *in medio*; and his credi-

By a contract of marriage entered into betwixt William Rose and Elizabeth Gray, in the year 1766, she assigned to him a bond for L. 500 Sterling, due to her by the Earl of Sutherland. On the other hand, he was obliged to have in readiness, by Whitsunday then next, the sum of L. 500 Sterling, to be laid out at the sight of certain persons, her friends, upon land, or personal security, and to take the rights in favour of himself and her, and longest liver of them two, for her liferent-use; likewise, as soon as the bond assigned in name of tocher was paid, to settle the farther sum of L. 500 Sterling, in the same manner. She was further entitled to the sum of L. 100, in lieu of her *jus relictæ*, if there existed children of the marriage, and to L. 200, if otherwise.

In the year 1770, Mr Rose failed in his circumstances. The partners of the woollen manufactory at Haddington, his creditors, used arrestments in the hands of the Countess of Sutherland, debtor in the bond assigned. In the forthcoming, Mrs Rose insisted for retention, till she should be secured in the provisions stipulated in the marriage-contract.

Pleaded for the Creditors; The assignation by Mrs Rose is unqualified and absolute. She was thereby divested of all right in the bond, which, being transferred to her husband, was attachable by his creditors, according to the common rules of preference.

It is impossible for creditors to know whether the husband has fulfilled his engagements to the wife. It is probable the friends nominated in the marriage-contract would not allow so many years to elapse, without doing their duty, by seeing them performed.

But, supposing no implement, the wife's plea of retention is inadmissible in the present case. This faculty of retention implies something to be done, or delivered by the party exerting it. Here there is no room for such exertion. The wife's case is the same with that of a seller of land, who, before receipt of the price, has granted a disposition, containing procuratory and precept; or of a husband, who, in consideration of the tocher promised by his wife, has infest her in security of her jointure. Although the price or tocher, by reason of the insolvency of the debtors therein, should not be paid, the purchaser, or his creditors, are entitled to take infestment, and the wife to insist in her security. The seller and husband, by fulfilling their part of the contract, have betaken themselves to the personal obligation, and must make it effectual, in the best way they can.

The case of a minute of sale of lands is totally different. Feudal property cannot be transferred by voluntary alienation, without procuratories of resignation, or precepts of sasine. A bargain concerning land, without these formalities, is incomplete. Something remains to be done by the seller, which a court of law will not oblige himself to do, without implement by the other party.

This doctrine is supported by various decisions, Sir John Hall *contra* Elizabeth Lorrimer, No 48. p. 4387; Sir Thomas Kennedy *contra* Jane Lyal, No 49. p. 4388. When those seeming to favour a contrary doctrine are attended to, they will be found to apply to particular cases, in which either the assignation was made with the express burden of the jointure, or the tocher not antecedently in the disposal of the wife remained in the hands of the person who became bound to pay it, or who was appointed trustee in the marriage-contract.

2do, The caution demanded by Mrs Rose, if any is at all exigible, is by much too extensive, subjecting the creditors to the whole provisions in the wife's favour, which may far exceed the sums affected by this competition. It is incontestible, that the annualrents, during the subsistence of the marriage, may be

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tors were not found entitled to attach it, until they should find security for the provision in the event of her survivancy.

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attached, without finding security. And, as the principal sum, if lying untouched in Lady Sutherland's hands, could only secure Mrs Rose, so far as L. 500 Sterling would go, the circumstances of her husband's creditors having attached that sum, ought not to enlarge her security.

Answered for Mrs Rose, In mutual contracts, one party cannot insist for implement, without fulfilling his part of the engagement. The tocher stipulated from the wife, and the provisions from the husband, are mutual causes of each other. The husband, therefore, or his creditors, who, by their diligence, substitute themselves precisely in his stead, cannot demand the tocher, until the provisions are secured to the wife.

These principles are supported by many authorities and decisions in the Dictionary of decisions, under the present title, *see* 12th January 1761, *Monro, infra, b. t.*; 27th January 1765, *Corrie contra Philp, infra, b. t.*; *Erskine's Larger Institute, B. 3. T. 3. § 86.* To elude these authorities, the creditors fall upon a singular argument. They are obliged to maintain, that a trustee, or third party, consenter to a marriage contract, has a better and broader right than the party principally interested.

2do, The necessary consequence of sustaining the right of retention in this case is, that the creditors cannot attach this fund, without subjecting themselves to the whole obligations incumbent on the husband. As he could not insist for the use of the tocher, and, at the same time, refuse giving security till the dissolution of the marriage, his creditors must be exposed to the same restriction.

THE LORD ORDINARY found, 'That, although the creditors could not evict the principal sum in Lady Sutherland's hands, without finding security to the wife for her provisions, in the event of her surviving the husband, yet they might attach the annualrents as they fall due, without finding such security.'

The creditors reclaimed against this judgment, so far as it sustained the wife's demand. THE LORDS ordered a hearing on the general point, Whether a wife, assigning sums, by way of tocher, without restriction or limitation, could plead retention therein, in security of her provisions? And the unanimous opinion of the Court seemed to be, that the wife, by the assignation, was completely divested, and, in a competition with her husband's creditors, could only rank according to her diligence. Here, however, on account of the circumstances of the case, they obliged the creditors attaching the principal sum to find caution for the wife's provisions, to the extent of the sums recovered.

The circumstances weighing with the Judges, in the determination of this case, are distinctly set forth in the interlocutor.

'THE LORDS having advised this petition, with the answers thereto, and having heard parties procurators thereon in their own presence; in respect that, in the marriage contract between Mrs Rose and her husband, she did not rely upon his personal security, for implement of the provisions thereby stipulated

in her favour ; but he is taken expressly bound, that, as soon as he should recover payment of the tocher thereby assigned to him, he should secure the same, to the amount of L. 500 Sterling, in favour of himself and her, and longest liver of them two, for her liferent use ;—therefore, and in respect that the tocher assigned is still *in medio*, and that her husband is insolvent, the LORDS find, That the same cannot be affected by the husband's creditors, until they find sufficient caution to her for payment of the provision, in terms of said contract, in the event of her surviving her husband, to the extent of the sums which they shall receive ; and remit to the Lord Ordinary to proceed in the cause accordingly.'

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Lord Ordinary, *Monboddo.* Act. *Ilay Campbell.* Alt. *Crosbie et Hay.* Clerk, *Orme.*
C. *Fol. Dic. v. 4. p. 13. Fac. Col. No 18. p. 34.*

S E C T. II.

Contract performable at different periods.—Effect of non-performance, and of over-performance.—If the one party repudiate, is the other free?—Whether irritancy implied by failing to perform at the day.—Effect of improper performance.—Contract for mariners wages.—Contract between master and servant.—Contract of affreightment.—Contract not signed by all parties.—Obligation *ad factum præstandum.*

1628. November 14. CUMING against CUMING.

IN an action Cuming against Cuming, the buyer of land having given a bond to pay the price thereof to the seller, and which bore the sum to be owing for the price of land ; and, at the date of the said obligation, the seller, by a back-bond, binding himself to the buyer, to ratify the alienation made by him at his perfect age, and if he fails, to pay a great sum contained in the back-bond, which exceeded far the price contained in the buyer's bond foresaid, obliged so be paid for the lands ; and the seller thereafter having made another assignee to that bond, given to him for the price of the land, which was pure and simple, and affected with no condition ; and which assignee having charged therefor ; it was found, That albeit the bond assigned was pure, yet it was affected with the condition of the back-bond made of the same date ; and it was respected as a part of the said alienation, and as if it had been inserted in the bond, and

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Process was not sustained for payment of a bond, bearing to be for the price of land, until the seller should ratify his bargain at his majority, he being then minor, in respect by a separate back bond he was bound to grant this ratification.