

SCOTLAND.

APPEAL FROM THE COURT OF SESSION (1ST DIVISION).

MRS. ANNE ROUTLEDGE, otherwise }
 MAJENDIE, and her husband, the } *Appellants.*
 LORD BISHOP OF BANGOR. }
 CARRUTHERS and another—*Respondents.*

May 5, 7 ;
 June 29, 1816.

LEGITIMACY.
 —DAUGHTER,
 FOR A SUM OF
 MONEY, RE-
 NOUNCES TO
 HER FATHER
 HER CLAIMS
 UNDER HIS
 MARRIAGE-
 CONTRACT,
 AND DIES IN
 HIS LIFE-
 TIME.—WHAT
 IS THE EFFECT
 OF THE RE-
 NUNCIATION?

A., by his marriage contract, settles lands, on failure of heirs male, on the heirs female of the marriage, and the heirs male of their bodies; and cohabits ten years with his wife without issue. Wife misconducts herself, and divorce obtained, but is delivered of a female child, B., before the decree for the divorce. B. marries C., and with his consent renounces, for a sum of money, all claim under the contract, and dies before A., her presumed father. Held by the Court of Session that this renunciation was good against the son of B. *Sed per* Lord Eldon (C.), there is a difference between enabling a father to accelerate the implement of a contract by conveying the estate to his son or daughter (though he should afterwards obtain a re-conveyance), and laying down a rule by which an opulent father, without parting with the estate, may, by giving small sums of money to indigent persons who may become entitled, defeat the object of the contract any time he pleases: and the cause remitted for review to the division from which it came, with instructions to take the opinion of the other division.

In the course of the cause the legitimacy of B. was questioned; but *per* Lord Eldon (C.), concurring with the Judges below, the legitimacy of the child born *stante matrimonio* must be presumed.

Marriage,
 1731.

IN 1731, Francis Carruthers, of Dormont, married Margaret Maxwell, eldest daughter of Sir William

Maxwell, of Monreith; and in 1735 a post-nuptial contract of marriage was entered into between the husband of the one part, and the wife, with advice and consent of the trustees for her brother, of the other part; whereby, in consideration of the marriage and the wife's portion, Francis Carruthers bound himself, his heirs, &c. to make up titles to the estates, and to infeft Mrs. Carruthers in life-rent in a yearly annuity of 1,600 marks, &c., and to make due and lawful resignation of the estate of Dormont, and for new infeftment of the same to be made and granted to Francis Carruthers himself, and the heirs male lawfully to be procreated betwixt him and the said Mrs. Margaret Maxwell his spouse; whom failing, the heirs male of the said Francis Carruthers, his body in any subsequent marriage; whom failing, the heirs female to be procreated betwixt the said spouses, and the heirs male to be procreated of their bodies, the eldest daughter or heir female, and the heirs male descending of her always excluding the rest, and succeeding without division; whom all failing, to the said Francis Carruthers his heirs and assignees whatsoever. And then, in case the daughters of this marriage should be excluded by heirs male of the body of Francis Carruthers in any subsequent marriage, there was a provision that the daughter, if there should be only one, should have 18,000 marks; and if two or more, that they should have 20,000 marks, Scots money, to be divided as the father should think proper; and, if he made no division, then to be equally divided, &c. at the first term of Whitsunday or Martinmas after their respective majorities or marriage which should first happen.

May 5, 7;
June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

Marriage-con-
tract, 1735.

Heirs under
the contract.

Provision for
daughters in
case there
should be
heirs male.

May 5, 7;
June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

Female child
born May 28,
1741.

Divorce.

Alleged ille-
gitimacy of
the child.

In implement of the first obligation in this contract, Francis Carruthers made up titles to the estates in such a way as to vest in himself and his heirs the fee simple. These titles were completed in 1740. It was contended in the course of the cause that this contract was a contravention of an entail of 1708, made on occasion of the marriage of one of the Carruthers, of Dormont, with Mary Bell, of Winterhophead. But it is unnecessary, in the present state of the cause, to consider that entail more particularly, as it was not noticed by the Lord Chancellor; the judgment of the Court below having turned upon another ground.

For ten years there was no appearance of issue of the marriage; but on May 28, 1741, Mrs. Carruthers brought forth a female child, which was disowned by Mr. Carruthers, who had raised a process of divorce against his wife for adultery some months before the birth of this child. On Jan. 9, 1742, about seven months after the birth of the child, he obtained a decree in that action. It was stated in one of the cases that Mr. Carruthers had gone into England in the beginning of August, 1740, at which time Mrs. Carruthers was, as the husband had informed his counsel he was able to prove, in a situation in which women are not when with child; and it was stated also, that Mr. Carruthers had been advised by counsel to raise a Declarator of bastardy, to ascertain the illegitimacy of the child, which however was not done. Mr. Carruthers defrayed the expense of the girl's aliment till she was seven years of age; and then she was, by his orders, sent to the house of a farmer in Cumberland, or Northumber-

land, where she remained till August, 1758, when she married Henry Routledge, the son of a neighbouring farmer.

In 1758 Mrs. Routledge and her husband raised an action against Mr. Carruthers, for implement of the obligation, in the contract of 1735, to pay 1000*l.* to the daughter on her marriage. The defence was that Mrs. Routledge was not the daughter of Mrs. Carruthers; and Mrs. Routledge was ordained to give in a condescendence of the facts alleged by her, tending to show that she was the daughter of Margaret Maxwell, born, *stante matrimonio*, betwixt Mr. Carruthers and the said Margaret. A condescendence was given in, and a proof adduced, establishing that Mrs. Carruthers was delivered of a female child on May 28, 1741; that the Pursuer was that person; and that she was the lawful wife of Henry Routledge. When the cause was in this state, the parties agreed to settle matters without further legal proceedings, and a contract, dated Oct. 26, 1759, was entered into between Mr. Carruthers, Mr. Routledge (taking burthen upon him for his wife), and Mr. James Ewart, accountant to the Bank of Scotland, a creditor of Routledge, and assignee of Routledge's claims on Mr. Carruthers; whereby Routledge and Ewart engaged that Mr. and Mrs. Routledge should renounce all claim under the marriage contract of 1735, competent to Mrs. Routledge, or any one deriving right from her, in consideration of 650*l.* which Mr. Carruthers agreed to pay. In order to carry this agreement into execution, a submission, dated Nov. 30, 1759, in which Mr. and Mrs. Routledge, Mr. Ewart, and Mr. Carruthers,

May 5, 7;
June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

August 1758.
Marriage of
the daughter.

1758. Action
by the daugh-
ter and her
husband.

Defence.

Arrangement
of 1759.

Arbitration.

May 5, 7,
June 29, 1816.

LÉGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

Renunciation
by the daugh-
ter.

Dec. 8, 1759.
Disposition
under which
Respondent
claimed.

Death of the
daughter be-
fore her pre-
sumed father.

were the parties, was entered into, and the matters in difference referred to the arbitration of Mr. Ferguson of Pitfour, and Mr. Alexander Lockhart, advocates; and a decret arbitral was made, Dec. 7, 1759, pursuant to the contract. On the same day a discharge and renunciation was executed by Mr. and Mrs. Routledge, and Mr. Ewart their assignee, of all claims in virtue of the marriage-contract of 1735; and on the next day, Dec. 8, 1759, Mr. Carruthers executed a disposition of his estate in favour of himself and the heirs male of his body; whom failing, in favour of his brother, William Carruthers, and the heirs male of his body; whom failing, to his own nearest heirs male whatsoever; and, upon the procuratory in this disposition, obtained a crown charter. Mrs. Routledge was under age at the time of the renunciation, and died, without having ratified it, in 1768. Her husband died soon after, and Francis Carruthers died in 1773, or beginning of 1774, and was succeeded by his brother William, who entailed the estates on himself; whom failing, on his eldest son, William Aikman Carruthers, and the heirs male of his body; whom failing, on his second son, and the heirs male of his body, &c. William died in 1787, and was succeeded by his eldest son, William Aikman Carruthers, who died in 1802, and was succeeded by his son, William Thomas Carruthers, the Respondent.

1806. Action
by the son of
the daughter
to set aside the
disposition of
1759.

There were three children of the marriage between Mr. and Mrs. Routledge, a son and two daughters. The son, in 1806, served himself heir of provision, before the Magistrates of Canongate, to Francis Carruthers, of Dormont, in terms of the marriage-

contract, and brought an action for setting aside the disposition of 1759, and subsequent conveyances, on the grounds:—1st, that they were in face of, and in direct contradiction to, the destination and obligations in the marriage-contract of 1735, in favour of the heirs of the marriage; 2dly, That they were executed in face of letters of inhibition, raised by Sir William Maxwell, &c; 3dly, That his mother having pre-deceased Mr. Francis Carruthers, who died without having married a second time, the writs called for had been executed in defraud, hurt, and prejudice of his just rights as the heir served, and retoured under the contract 1735. In order to bring forward the defence in the most convenient form, a counter-action was brought by the Respondent, to set aside the service before the Magistrates of Canongate, as clandestinely and irregularly obtained; this was conjoined with the principal action. In the course of the proceedings the pursuer, Routledge, died; and his sister Mrs. Anne Routledge, otherwise Majendie, wife of the Lord Bishop of Bangor, and her husband, for his interest, sisted themselves as parties in the cause, and are the present Appellants.

In defence to the principal action it was at first insisted that the pursuers had no title to pursue:—1st, Because Mrs. Routledge, the mother, was not the lawful daughter of Francis Carruthers; 2dly, That she was not the child of which Mrs. Carruthers had been delivered in 1741. To the first point it was answered that, for any thing that appeared in evidence, Francis Carruthers might have cohabited, and must be presumed to have co-

May 5, 7;
June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

Defence.
Illegitimacy.

May 5, 7 ;
June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

Chief defence.
Renunciation
of 1759.

habited, with his wife from the day of their marriage to the final separation; and that "*pater est quem nuptiæ demonstrant*": and as to the second point, it was answered that the identity of Mrs. Routledge was clearly established by the evidence. But the defence chiefly relied upon was, the settlement and discharge of 1759. The entail of 1708, under which the Respondent was said to be entitled, was also relied on; but this entail, as no opinion was given upon it, at least in the House of Lords, may be considered as at present out of the question. To the chief defence it was answered:—1st, That the discharge of 1759 only affected Mrs. Routledge's own right to succeed in the event of her surviving her father; 2dly, That Mrs. Routledge, who, at the time of granting this discharge, was not, and never afterwards became, the heir of the marriage, could not effectually discharge a right which never had belonged to her, to the prejudice of the true heir of the marriage.

All the Judges
below of opi-
nion that the
legitimacy
must be pre-
sumed.

Interlocutors,
1807.

Interlocutor,
1811.

Interlocutors,
1812.

The Lord Ordinary (Balmuto), and afterwards all the Judges of the first division, were of opinion that the preliminary defences could not be sustained, and that the legitimacy of Mrs. Routledge must be presumed; but the Lord Ordinary, by interlocutors of March 11, and July 11, 1807, sustained the defences founded on the submission, decret arbitral, and discharge of 1759. The Court, however (first division), by interlocutor of the 19th, signed February 21, 1811, sustained the reasons of reduction; but afterwards, by interlocutors of May 19 and 22, 1812, sustained the defences in the principal action, and repelled the defences in

the counter-action, and decerned. From the interlocutors of the Lord Ordinary, and the last two interlocutors of the Court, the Appellants appealed.

It ought to be noticed that no action of reduction of the submission and decret arbitral had been brought, and that the Judges were, on May 19, 1812, equally divided; till Lord Armadale was called in, whose opinion was unfavourable to the Appellants.

The points argued for the Appellant were:—1st, that Mrs. Routledge renounced only her claim to the 1000*l.*, and her own chance of succession, and that the decret arbitral carried it no farther; 2dly, That the decret arbitral itself was a nullity, not being in reality what it purported to be; 3dly, That Mrs. Routledge had no power to renounce more than her own chance of succession; and on this, the great point in the cause, the cases of *Campbell v. Campbell*, Kaimes, Rem. Dec. Jan. 1742—*Hay v. Lord Tweeddale*, Stair, July 21, 1676—*Panton v. Irvine*, March, 1684—*Cairns v. Cairns*, Jan. 31, 1705—*Lyon v. Garden*, July 26, 1715—*Anderson v. Heirs of Shiells*, Nov. 16, 1747—*Maconochie v. Greenlees*, Jan. 12, 1780; and the opinion of Lord President Blair in the case of *Cunynghame*, Dec. 20, 1810, were cited.

For the Respondent, on this last point, were cited the case of *Stewart of Burgh*, 1728, affirmed in the House of Lords, 1729, (very imperfect as a precedent from its not being known whether the renouncing son did, or did not, survive the father)—*Edgar v. Maxwell*, 1756—*Traill v. Traill*, 1737—*Allardice v. Smart*, 1720—Case of *Sinclair of*

May 5, 7;
June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?
Appeal.

May 5, 7;
June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN A
HIS LIFE—
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

Southdean, 1768—*Fotheringham v. Fotheringham*, 1792—*Moncrieff v. Moncrieff*, 1759. It was contended for the Respondent that the object and effect of the decret arbitral and renunciation were that they should be a complete discharge of the obligation in the marriage-contract, not only as to Mrs. Routledge, but as to all her descendants, substitute heirs of provision in the destination, and that no reduction of the decret arbitral had been attempted; that allegations made by the Appellants as to minority, lesion, fraud, and oppression, were irrelevant, as being *jus tertii* as to them, they not representing Mrs. Routledge; and were at any rate unfounded, &c. The entail of 1708 was also relied upon in behalf of the Respondent, while it was contended for the Appellant, that it was no entail at all. But for the reasons before-mentioned it is considered unnecessary here to notice it further.

Mr. Leach and *Mr. Horner* for the Appellants;
Sir S. Romilly and *Mr. Clerk* for the Respondent.

June 29, 1816.
Judgment.

Lord Eldon (C.) In this cause, which is one of very great importance, Mrs. Anne Routledge, otherwise Majendie, wife of the Lord Bishop of Bangor, and her husband for his interest, are the Appellants; and William Thomas Carruthers of Dormont, and James Carruthers his guardian, are the Respondents. It appears that in 1731, Francis Carruthers, of Dormont, married Margaret Maxwell, and that in 1735 a marriage contract was made between them, in which it was set forth that, in contemplation of the said marriage already solemnized, and tocher

Marriage-con-
tract, 1735.

after mentioned, the said Francis Carruthers bound and obliged himself to make up sufficient titles, in his person, to the estates after specified, and to infest his wife, Margaret Maxwell, in life rent, after his decease, in a yearly annuity of 1600 merks, to be restricted to 1000 merks in case of children procreate and existing at the dissolution of the marriage. The contract then proceeds to provide for, and secure, the heirs of the marriage as follows:—

“ And moreover in contemplation of the said marriage already solemnized, and tocher after mentioned, the said Francis Carruthers binds and obliges himself and his foresaids to make due and lawful resignation, &c., and for that effect he constitutes, &c. his lawful procurators, &c. to resign, and he by these presents resigns, &c. all and hails the five merks land of Dormont, all and hails the five pound lands of Twathats and Knox, &c. &c., in the hands of his immediate superiors thereof, or their commissioners foresaid, in favour of, and for new infestment of the same to be made and granted to the said Mr. Francis Carruthers himself, and the heirs male lawfully to be procreated betwixt him and the said Mrs. Margaret Maxwell his spouse; whom failing, the heirs male of the said Francis Carruthers his body in any subsequent marriage; whom failing, the heirs female to be procreated betwixt the said spouses, and the heirs male to be procreated of their bodies, the eldest daughter or heir female, and the heirs male descending of her always excluding the rest, and succeeding without division; whom all failing, the said Francis Carruthers his heirs and

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?
Provisions for
the heirs of
the marriage.

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

Provision for
daughters in
case of no
heirs male.

“ assignees whatsoever ; with the burden always
“ of the said Mrs. Margaret Maxwell her life rent
“ annuity above written, &c.” And then by another
clause certain provisions are destined to the daugh-
ter or daughters of the marriage, in case there
should be no heir male of that marriage, and that
the daughters should be excluded from the land
estate by the existence of heirs male of a subse-
quent marriage. “ And furthermore, in regard the
“ said Francis Carruthers his lands and estate, is
“ provided, failing heirs male of this marriage, to
“ the said Francis Carruthers his heirs male in any
“ subsequent marriage, whereby the daughters of
“ the present marriage may be excluded : there-
“ fore, and in that case, that the daughters of this
“ present marriage shall be excluded from the said
“ estate by the heirs male of the said Francis Car-
“ ruthers his body in any subsequent marriage,
“ the said Francis binds and obliges him, his heirs
“ and successors, to content and pay to the daugh-
“ ters, one or more, to be procreate betwixt him
“ and the said Mrs. Margaret Maxwell, the sums
“ of money following, in full of all portion natural,
“ legitim, executry, or what else they might claim,
“ through the decease of the said Francis Carru-
“ thers and Mrs. Margaret Maxwell, viz. :—If there
“ be but one daughter, the sum of 18,000 merks,
“ and if two or more the sum of 20,000 merks,
“ Scots money, to be divided among them as the
“ said Francis Carruthers shall think fit ; and in
“ case of no such division by the father, to be di-
“ vided equally after a *præcipuum* of 2000 merks
“ shall be set apart to the eldest daughter, and that

“ *at the first term of Whitsunday or Martinmas*
 “ *after their respective majorities or marriage*
 “ *which shall first happen, with ten per cent.*
 “ of liquidate expenses, in case of failzie, and
 “ annual rent of the said respective portions, so
 “ long as the same shall remain unpaid after the
 “ foresaid terms of payment ; and the said Francis
 “ Carruthers binds and obliges him and his fore-
 “ saids to furnish the said daughters with aliment,
 “ clothing, and education, according to their degree,
 “ until the foresaid portions become payable.”

Of this marriage there was issue one child, Elizabeth, born May 28, 1741. As to this child, whether legitimate or not, that is one point to be decided : and I concur with all the Judges below that, in law, she must be taken to be the legitimate daughter of Francis Carruthers.

This daughter was afterwards married to Henry Routledge, who brought an action in the Court of Session, concluding, “ that the said Elizabeth Carruthers being the only child of the said Francis, procreated by him of the marriage with the said Margaret Maxwell his spouse, she is therefore entitled to the whole provisions in the said marriage contract contained ; and therefore that the said Francis Carruthers, her father, ought and should be decerned and ordained to implement and perform to the said pursuer and her husband, for himself and his interest, the whole obligations, conditions, and provisions, incumbent upon and prestable by him, as in the said marriage-contract mentioned and conceived in her favours ; and particularly to make payment of the aforesaid 1000*l*.

June 29, 1816.

LEGITIMACY.
 —DAUGHTER,
 FOR A SUM OF
 MONEY, RE-
 NOUNCES TO
 HER FATHER
 HER CLAIMS
 UNDER HIS
 MARRIAGE-
 CONTRACT,
 AND DIES IN
 HIS LIFE-
 TIME.—WHAT
 IS THE EFFECT
 OF THE RE-
 NUNCIATION?

Child born
 before divorce
 obtained
 must be pre-
 sumed to be
 legitimate.

Marriage of
 the daughter
 to H. Rout-
 ledge, and
 action for im-
 plement of
 the contract,
 1735.

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?
Divorce.

Arrangement
of 1759.

Contract,
Oct. 26, 1759.

“ sterling of money provision obliged to be paid to
“ her as the only daughter of the marriage, at the
“ day of her marriage, which was August 13, 1758
“ years, and annual rents from that day and in
“ time coming during the non-payment: at least
“ the said defender should be decerned in payment
“ of the annual rents from the said day of marriage
“ and in time coming, &c.”

It appears that Francis Carruthers had brought a process of divorce against his wife, and obtained a divorce accordingly. It is unnecessary however to go through the statement as to the legitimacy or illegitimacy of this child, - as we must take her to be legitimate. But, in the course of the proceedings, an arrangement was made between the parties, and carried into effect by four different deeds. The first was a contract between Henry Routledge and James Ewart, accountant to the Royal Bank of Scotland, his creditor, on the one part, and Francis Carruthers of Dormont on the other. This contract, after reciting the marriage contract of 1735, and the claims made under it by Mrs Routledge and her husband, proceeds thus:—“ But, in order to remove
“ all claims or pretensions that they may have there-
“ upon, and also to remove and put a stop to all
“ processes they may have against one another, of
“ whatever kind or nature, they (that is, Mr. Rout-
“ ledge and Mr. Ewart on the one part, and Mr.
“ Carruthers on the other) hereby agree, in man-
“ ner after-mentioned, that is to say, the said Henry
“ Routledge and James Ewart bind and oblige them,
“ conjunctly and severally, their heirs, executors, and
“ successors, that the said Elizabeth Carruthers, and

“ her said husband, shall accept of 650*l.* sterling
 “ in full satisfaction of the whole provisions con-
 “ tained in the foresaid contract of marriage by
 “ right of succession, or any other claim or demand
 “ of whatever kind or nature, which the said Eliza-
 “ beth Carruthers, or her foresaid husband, or her or
 “ their heirs, or the said James Ewart, or any other
 “ persons deriving right from them, can demand or
 “ pretend to in any manner of way, by virtue of
 “ the said contract of marriage, or any other ways
 “ whatsoever, against the said Francis Carruthers,
 “ his heirs, executors, or assignees, now and for
 “ ever. And in order that the said Francis Carru-
 “ thers and his foresaids may be effectually secured
 “ against the same, or any future claim, that the
 “ said Elizabeth Carruthers, her said husband, and
 “ her or their foresaids, or the said James Ewart,
 “ may make, they hereby bind and oblige them
 “ and their foresaids, that they shall execute and
 “ grant renunciations, or whatever deed or deeds in
 “ writing which shall be thought proper and neces-
 “ sary, by the said Francis Carruthers and his fore-
 “ saids, or their lawyers, to effectuate and secure
 “ the premises, and to exclude all claims or pre-
 “ tensions they or their foresaids can have against
 “ him or his above-mentioned: and whereas the
 “ said Elizabeth Carruthers is now a minor, the
 “ said Henry Routledge and James Ewart bind and
 “ oblige them, conjunctly and severally, their heirs,
 “ executors, and successors, that the said Elizabeth
 “ Carruthers shall, upon attaining to the years of
 “ majority, judicially ratify, and, if needful, renew
 “ the said renunciations or deeds, or any other deed
 “ or deeds in writing, that may be thought proper

June 29, 1816.

LEGITIMACY.
 —DAUGHTER,
 FOR A SUM OF
 MONEY, RE-
 NOUNCES TO
 HER FATHER
 HER CLAIMS
 UNDER HIS
 MARRIAGE-
 CONTRACT,
 AND DIES IN
 HIS LIFE-
 TIME.—WHAT
 IS THE EFFECT
 OF THE RE-
 NUNCIATION?

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

“ for the said purposes by the said Francis Carruthers or his foresaids, for their farther security concerning the premises ; and they shall warrant the deeds to be granted as aforesaid to the foresaid Francis Carruthers and his foresaids, at all hands, and against all deadly, as law will. And, on the other part, the said Francis Carruthers obliges him, his heirs, and successors, to pay to the said Elizabeth Carruthers, Henry Routledge her husband, or to the said James Ewart, for their behoof, the foresaid sum of 650*l.* sterling, upon the day that the said deeds shall be delivered to him properly executed by the parties foresaid, with the interest thereof, from the time of executing the deeds, during the not-payment thereof.”

This contract was executed at Dumfries, and bears date October 26, 1759. Mrs. Routledge herself was not a party to it; but her husband, taking burden for her, in conjunction with Ewart, his creditor, thereby engaged, 1st, that Mr. and Mrs. Routledge should renounce the provisions contained in her father's contract of marriage, and every claim or demand in virtue of it, competent to her or any person deriving right from her; 2dly, that the value of this abandonment of all her claims should be 650*l.*, and no more; and it was agreed, that she and her husband should execute and grant renunciations, or whatever deed or deeds in writing, which should be thought proper and necessary by the said Francis Carruthers, or his foresaids, or their lawyers, to effectuate and secure the premises.

Arbitration.
Vid. ant.
Maule v.
Maule.

There followed on this a submission for a decret arbitral, a proceeding somewhat different from arbi-

tration in this country ; for here the grounds of dispute are referred to the arbitrators, and they determine on them. But it seems to have been not uncommon in Scotland for the parties to come to an agreement between themselves on the subject of the matters in difference, and then to put that agreement in the form of a submission and decret arbitral, for the purpose of giving it effect as such. Accordingly, on Nov. 30, 1759, a submission was executed between Elizabeth Carruthers and Henry Routledge her husband, and James Ewart, of the one part, and Francis Carruthers, of Dormont, on the other, which sets forth the contract of marriage and previous proceedings ; and, after mentioning that the said Elizabeth Carruthers and her said husband had made over their claims in virtue of the said contract of marriage to James Ewart, accountant to the Royal Bank of Scotland, in security of certain sums due by the said Henry Routledge to him, it submits and refers “ to the final sentence and decree arbitral “ to be given and pronounced by Mr. James Ferguson of Pitfour, advocate, and Mr. Alexander Lockhart, advocate, arbiters mutually chosen by the “ said parties ; and, in case of their variance, by an “ oversman to be named by them, which they are “ hereby empowered to do, all questions, clag’s, “ claims, controversies, or demands of whatever “ nature, that either party has or can have against “ the other, and particularly all right or claim of succession, or other right or claim of whatever kind, “ which the said Elizabeth Carruthers and her said “ husband have or can pretend to, either now, or at “ any time, or in any event that may hereafter

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?
Submission,
Nov. 30, 1759.

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS,
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

“ happen, in virtue of the provisions mentioned in
“ the said contract of marriage in favour of the
“ children thereof, either with regard to the succes-
“ sion of the estate of Dormont, and others, provided
“ by the said contract to the heirs female of the said
“ marriage, or with regard to the provision of 1000*l.*
“ sterling to one daughter of the said marriage, in
“ the event of her being excluded from the succes-
“ sion of the said estate by an heir male of the body
“ of the said Francis Carruthers of any other marri-
“ age, in manner mentioned in the said contract, or
“ any claim which the said James Ewart has or can
“ pretend to in right of the said Elizabeth Carru-
“ thers or Henry Routledge, or any other claim or
“ demand which they or any of them have or may
“ have against the said Francis Carruthers or his
“ heirs, in any manner of way whatsoever.”

The decreets arbitral, which have it for their object to carry these agreements into execution, are made very promptly; and accordingly, on Dec. 7, 1759, the arbiters by their decret arbitral, after reciting the deed of submission, and that they had considered the claims or demands of Elizabeth Carruthers against her father, and particularly any right or claim of succession, &c. ordained “ the said
“ Francis Carruthers to make payment to the said
“ Elizabeth Carruthers, and to the said Henry
“ Routledge, her husband for his interest, and to
“ the said James Ewart in their name, as having
“ right for them in manner before mentioned, of the
“ sum of 650*l.* sterling, in full satisfaction to the said
“ Elizabeth Carruthers and her said husband, and
“ the said James Ewart, in their right, of all right

Decret arbitral, Dec. 7, 1759.

“ of succession, or other right which they, or any of
 “ them, have, or can or may have, at any time, or
 “ in any event that may hereafter happen to the
 “ said estate of Dormont and others foresaid, and
 “ of the foresaid provisions to the children of the
 “ marriage, in virtue of the foresaid contract, or any
 “ portion natural, executry, legitim, or whatever else
 “ the said Elizabeth Carruthers, her said husband,
 “ or the said James Ewart, in their right, may claim
 “ through the decease of the said Francis Carruthers,
 “ and that betwixt and the 15th day of Dec. instant,
 “ with the legal interest of the said principal sum,
 “ from the date of these presents, during the not
 “ payment of the same. And, in the next place, we
 “ decern and ordain the said Elizabeth Carruthers
 “ and the said Henry Routledge, for himself, his
 “ own right and interest, and as taking burthen upon
 “ him for his said spouse, and the said James
 “ Ewart, for his right and interest, and as taking
 “ burthen upon him for the said Elizabeth Carru-
 “ thers and Henry Routledge, to exoner, quit claim,
 “ and *simpliciter* discharge the said Francis Carru-
 “ thers, of all clags, claims, controversies, or
 “ demands, of whatsoever nature, which they, or any
 “ of them have, or can have, against the said Fran-
 “ cis Carruthers, for any cause or occasion preceding
 “ the date of the said submission; and particularly,
 “ to discharge, renounce, and overgive, in favour of
 “ the said Francis Carruthers, his heirs or assignees,
 “ all right or claim of succession, or other right or
 “ claim of whatever kind, which the said Elizabeth
 “ Carruthers, and her said husband, or the said
 “ James Ewart, in their right, have, or can pretend

June 29, 1816.

LEGITIMACY.
 —DAUGHTER,
 FOR A SUM OF
 MONEY, RE-
 NOUNCES TO
 HER FATHER
 HER CLAIMS
 UNDER HIS
 MARRIAGE-
 CONTRACT,
 AND DIES IN
 HIS LIFE-
 TIME.—WHAT
 IS THE EFFECT
 OF THE RE-
 NUNCIATION?

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

“ to, either now, or any time, or in any event that
 “ may happen after the date of the said submission,
 “ in virtue of the provisions mentioned in said con-
 “ tract of marriage, in favour of the children thereof,
 “ either with regard to the succession of the estate of
 “ Dormont and others before mentioned, provided
 “ by the said contract to the heirs female of the said
 “ marriage; or ‘with’ regard to the provision of
 “ 1000*l.* sterling, to one daughter of the said marri-
 “ age, in the event of her being excluded from the
 “ succession of the said estate by an heir male of the
 “ body of the said Francis Carruthers of any other
 “ marriage; and also, to renounce and discharge all
 “ portion natural, legitim, executry, or whatever else
 “ the said Elizabeth Carruthers, and her said hus-
 “ band, or the said James Ewart, in their right, may
 “ claim, or pretend to, by and through the decease
 “ of the said Francis Carruthers; and for that
 “ effect, to execute and deliver to the said Francis
 “ Carruthers, or his foresaids, a valid, formal, and
 “ effectual discharge and renunciation, in the terms
 “ before-mentioned, containing a clause of absolute
 “ warrandice by the said Elizabeth Carruthers, Henry
 “ Routledge, and James Ewart, and all other clauses
 “ necessary. And upon payment of the foresaid
 “ sum, we decern and declare the said whole claims
 “ to be discharged and renounced, and the said
 “ Francis Carruthers, and his foresaids, to be free
 “ thereof, and acquitted therefrom for ever.” I just
 observe here that nothing is expressly said as to the
 children of Mrs. Routledge.

Dec. 7, 1759.
Discharge by

On the day when this decree arbitral was signed,
 a discharge and renunciation was obtained from Mrs.

Routledge, described as *Elizabeth Carruthers, only child procreate of the marriage betwixt Francis Carruthers, and Margaret Maxwell, and from Henry Routledge her husband, and James Ewart, their assignee, which recites the terms of the decree, and then proceeds in these words: "Therefore, know ye, " that I the said Elizabeth Carruthers, with the special advice and consent of my said husband; and " I the said Henry Routledge, for myself, my own " right and interest, and as taking burthen upon me " for my said spouse, and we both, with mutual " advice and consent; and I the said James Ewart, " for my own right and interest, and as taking burthen upon me for the said Elizabeth Carruthers " and Henry Routledge,—have exonerated and discharged, as we by these presents, exoner, quit " claim, and *simpliciter* discharge the said Francis Carruthers, his heirs and successors, of all clags, " claims, controversies, and demands, of whatever " nature, which we or any of us have, or can have " against the said Francis Carruthers, for any cause " or occasion preceding the date of the said submission; and particularly, we, for our respective rights " and interests, and as taking burthen, in manner " before-mentioned, have discharged and renounced, " and by these presents, discharge, renounce, and " overgive, to, and in favour of the said Francis Carruthers, his heirs and assignees, all right of succession, or other right, which I the said Elizabeth Carruthers, and my said husband, or I the said James Ewart, in their right, have or can pretend " to, either now or at any time, or in any event that " may hereafter happen, in virtue of the pro-*

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RENOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RENUNCIATION?
Mr. and Mrs.
Routledge,
and Mr.
Ewart.

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?
Marriage,
1731.

“visions mentioned in the said contract of marriage,
“in favours of the children thereof, either with
“regard to the succession of the estate of Dormont,
“and others before specified, provided by the fore-
“said contract to the heirs female of the said marri-
“age, or with regard to the sum of 1000*l.* sterling,
“provided to one daughter of the said marriage, in
“the event of her being excluded from the succession
“of the said estate, by an heir male of the body of
“the said Francis Carruthers, of any other marriage;
“and also, to have renounced and discharged, as we,
“by these presents, for our several rights and inter-
“ests, and as taking burthen in manner foresaid,
“renounce and discharge all portion natural, legitim,
“executry, or whatever else I the said Elizabeth
“Carruthers may claim or pretend to, by and
“through the decease of the said Francis Carru-
“thers, with all action or execution competent to us,
“or any of us, concerning the premises.”

Your Lordships will permit me here to mention that it was contended, on the one hand, to have been the intention of the parties in these proceedings, that Mrs. Routledge should compromise, for this sum of 650*l.*, not only her claim to the sum of 1000*l.* in case there should be an heir male, but that the proceedings were intended as a discharge and renunciation of the succession of Elizabeth to the estate in case there should be no heir male, and that too to the extent of precluding any children of hers who might be heirs under the contract from succeeding to the estate, though she should predecease her father.

The next day, Dec. 8, 1759, after the discharge

was granted, Mr. Carruthers executed a disposition of the estate of Dormont in favour of himself and the heirs male to be procreated of his body; whom failing, in favour of William Carruthers, his brother, and the heirs male of his body; whom failing, in favour of his own nearest heirs male whatsoever: and on the procuratory of resignation contained in this deed he was infest.

Mrs. Routledge died in 1768, before Mr. Francis Carruthers of Dormont, who died in 1773, or 1774. Of the marriage between this Elizabeth and Mr. Routledge three children were born; a son and two daughters. John, the only son, being advised that he had right to the estates of Dormont, on Feb. 1, 1806, served himself heir to Francis Carruthers of Dormont, under the marriage-contract: and this was an action of reduction, at his instance, to set aside the disposition of Dec. 8, 1759, and subsequent conveyances, as being in direct contradiction to the obligations in the marriage-contract of 1735; contending, 1st, That it was never intended to renounce the right of Elizabeth to the succession in case there should be no heir male, but only her right to the 1000*l.* in case there should be an heir male; and 2d, That, as she was not heir in the life-time of her father Francis, she could not make a renunciation of the right; and if she could, she could renounce only her own right, and that she could not prevent her son from succeeding in the event of her dying before Francis Carruthers.

The action was commenced before the separation of the Court; but the cause was heard after that

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?
Death of Mrs.
Routledge be-
fore that of
her presumed
father.

1806. Action
of reduction.

June 29, 1816.

LEGITIMACY.

—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-

TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

First judg-
ment of the
Court. Four
Judges
against one,
that the action
was well
founded.

Reclaiming
petition, and
interlocutor
altered.

separation, before the first division, and it was decided by four Judges against one that the action was well founded; Lord President Blair being at the head of the four Judges, and stating that he was perfectly satisfied that Mr. Ferguson, afterwards Lord Pitfour, did not mean that Elizabeth should renounce, and would not have permitted her to renounce, more than her own interest in the 1000*l.* or in the estate; and that he was also clearly of opinion that, as she predeceased her father, her discharge could not affect the interest of her son.

A reclaiming petition was presented against this interlocutor, and a change of Judges had taken place in the interim. It appears that, on this second consideration of the cause, the Judges were equally divided till Lord Armadale was called in. The Lord President Blair had died; and the next President was of opinion that the parties did mean that the whole rights should be renounced, and that, though Mrs. Routledge died before her father, the renunciation operated so as to destroy the right of her son: and he compared it to this case, that, if the father had conveyed the estate to the daughter, he would thereby have implemented the contract; and if she then reconveyed to the father, that would bind her heirs, though she predeceased her father; and that so in this case, where the father parted with nothing, the renunciation of the daughter bound the son. Then the Lord Ordinary was called in, and carried it against the previous judgment. At the first hearing, therefore, the then Lord President and three other Judges, against one, were of opinion that the

action was well founded. At the last hearing three Judges were in favour of the former decision, and three against it, and the Lord Ordinary's casting vote carried it against the former judgment: and thus it stands as to judicial opinion.

This cause is important to the parties in point of value, and it is of very great consequence to the landed interest in Scotland. There is a wide difference between enabling a father to accelerate the implement of his marriage-contract, and laying down a rule by which an opulent father, by giving small sums to distressed persons who may become entitled to the succession under his marriage contract, may deprive them of their rights any day he pleases. Now this has been determined, that when a father parts in his life-time with the estate, and it is then re-conveyed to him, this binds the succession. And this also seems to have been determined, that if a child renouncing happens to outlive the father, in as much as the right of the individual renouncing has thus accrued, he and those coming after him are bound. But the distinction here is; that the daughter was not heir, but died before her father; and then the question is, whether there are cases where the renunciation of children in these circumstances, dying before the father, have been held effectual. A great variety of cases have been cited as authority for this, and especially that of Stewart of Burgh. That case has been particularly observed upon, as a decision of the House of Lords. But it is not certainly known whether in that case the son outlived the father; and it does not

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

appear to me that the case was very fully considered; and, upon looking at it with accuracy, it may be found to be doubtful whether there are not circumstances in that case, distinguishing it from the present case, which have not yet been observed.

Now I can take it upon me to say that this case has been examined with the most laborious attention by my noble friend (Lord Redesdale) and myself, and we have an inclination of opinion on the question, though I shall not at present intimate what it is: for your Lordships will recollect that we may do infinite mischief by deciding a case of this consequence before we clearly know what the Court below, looking at all the circumstances of the case, think the law to be. Considering therefore the importance of the subject in point of value to the parties, the importance of the question to the landed interest, and the weight of judicial authority on both sides, this does appear to me that very species of case contemplated by the statute dividing the Court of Session into two bodies, when it provided that, when cases proper to be remitted, such as this, arose, they should be remitted to the same division from which they came, but, by virtue of your authority, calling upon their brethren of the other division for their opinions. My humble advice therefore is, that this cause be remitted to the division from which it came, and that they should be required to call for the opinion of the other division according to the exigency of the statute; intimating however that I have no doubt as to the

Cause remitted to the first division, with instructions to call for the opinion of the second division.

legitimacy of the daughter, which is a point decided' June 29, 1816.
in the cause.

The cause was accordingly remitted for review,
as to the principal point.

Agents for Appellants, SPOTTISWOODE and ROBERTSON.
Agent for Respondent, CHALMER.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

DALY and another—*Appellants*.
KELLY—*Respondent*.

A. and B. claim under separate wills as devisees of C., and upon suit at the instance of A. the will in favour of B. set aside, and that in favour of A. established. B. then sets up a bond of the devisor for 40,000*l.*, being more than the value of the whole property, on which bond he brings action at law and obtains judgment, whereupon A. amends his bill, and prays and obtains injunction to restrain execution.

A., after the will in his favour had been established, and before action on the bond, gives to D., his solicitor and attorney, a mortgage of the lands devised as a security for past and future costs in the proceedings, and for money advanced by D. to A. D. does not make himself a party, but suffers the suit to proceed in the name of A. as the sole Plaintiff.

Decree in 1800 for payment of the sum in the bond, with interest from the time of the devisor's death instead of from its date, so that the bond was partly relieved against; and *per* Lord Redesdale afterwards in Dom. Proc. the bill must be understood as having submitted to have the relief made

May 10, 1813.
Feb. 7, 15, 25;
May 21, 1816.

MORTGAGEE,
PENDING A
SUIT, &c.