

No 345. though there were no contract, unless the assignation did bear, *in implement of her contract of marriage*. See PERSONAL and REAL.

Fol. Dic. v. I. p. 411. Stair, v. 2. p. 480.

S E C T. VII.

Remuneratory Donations.

1635. March 25. L. LAWRISTON *against* LA. DUNNIPACE.

No 346.

A literent infestment granted to a wife *stante matrimonio* found not revocable, as being a remuneratory donation, the wife having brought a considerable tocher with her, and there being no contract of marriage.

In a reduction, at the instance of the Laird of Lawriston, against La. Dunnipace, of a bond granted by her umquhile husband to her, *stante matrimonio*, and long after the marriage, whereby he obliged him to infest her, during her lifetime, in the lands enumerated in the bond, which he obliged him to make worth 30 chalders of victual to her yearly, and that in recompence of the tocher of 11,000 merks, which, by that bond, he had confessed he had received from her, and also in recompence of a third, and terce, of whatsoever lands which she might claim by his decease; which bond, with the infestments given to her, following thereupon, was desired to be reduced by the pursuer, upon this reason, because the same was *donatio facta inter conjuges stante matrimonio*, and so in law was revocable, and the same was revoked, in so far as thereafter, after that bond, and infestment thereupon, her umquhile husband had disposed these lands to this pursuer for relief of the cautionry, wherein the pursuer was bound, for her said husband, to his creditors; and which burdens he was compelled to pay to the said creditors; which disposition he alleged to be a tacit revocation of the said bond and infestment given to the defender; and the defender contending, that tacit revocations have no place to revoke donations betwixt married folks, neither of the law, nor of the practice of Scotland, especially where the posterior disposition made by the husband was only a wadset, and so only an hypothecation granted for warrandice of his cautionry, and was not an heritable and irredeemable alienation; for which the defenders alleged *Novel. Constit. 162. Authent. Collatione 9. cap. 1.* Attour, they *alleged*, that this right to the Lady could never be revoked, but in law was irrevocable either by tacit or express revocation, because it was not *donatio simplex et propria*, which is only subject to revocation, but the same was *donatio remuneratoria*, given by the husband in compensation of her tocher-good, and also in satisfaction of all terce, which donation might be also

constituted *post matrimonium*, where the tocher-good was truly paid (as really it was offered to be proved in this case,) as if it had been constituted before the marriage, *in initio*: The pursuer contended, it was *donatio revocabilis*, and was in law revocable, as well tacitly as expressly, as well by hypothecation as by irredeemable alienation, *per leg. 8. § 1. C. De inofficiosis donat. ; et hic in glossa dicitur solo eventu fieri revocationem, licet non intervenerit consilium revocandi*; for which he *alleged*, *Leg. 12. Cod. De donat. inter vir. et ux. ; et L. 2. Cod. De dote cauta, &c. Idem clare dicit lex, 32. § 5. D. De donat. inter vir. et ux., ubi glossa dicit, sola pignoratione donationem revocari*; Likeas the pursuer's disposition must be reputed an irredeemable alienation, seeing albeit there was a reversion therein, yet it was provided, that if the same was not redeemed at the time convened upon in their contract, that the land should be irredeemable thereafter for ever; whereupon he had obtained declarator in her husband's own lifetime, finding the lands to be irredeemable; likeas the sums, for which he had taken order with the creditors, were more than the worth of the lands extended to. And whereas it was *alleged*, that the bond libelled was *donatio* given in recompence of her tocher-good, and so not revocable in law, he *answered*, that it could be reputed no otherways but *pura donatio*, because he produced a prior bond made by the husband to the defender, long after their marriage also, but long before this bond now quarrelled, by the which he obliged him to infest her in lands worth 20 chalders of victual, in recompence of her tocher, which, by that bond, he confessed he had received; in respect whereof, she having a conjunct fee provided to her before this bond controverted, and which was answerable to this tocher, this posterior bond behoved to be found a donation revocable, and revoked, and not to be remuneratory; and where the bond quarrelled would appear to be given in satisfaction of her terce, that ought not to be respected as a cause, seeing it was uncertain, and depended *ab eventu*; likeas in effect when he died, he stood infest in no lands, but all was sold or evicted from him, whereby her terce was not of any worth, and by that bond she never accepted of these lands for her terce, nor never renounced the same, so that it was in her option thereafter to claim a terce, if it had been for her advantage, and she could not have been excluded therefrom by that bond, nor yet by the infestment and sasine given to her thereon, although the defender contended, that the bond was accepted by her as effectually by taking of the sasine of the lands contained in the bond, as if by contract made betwixt them, and subscribed by her, she had accepted the same for her terce, and had renounced, *per expressum*, all right to her terce; *quo casu*, being so done by contract, and subscribed by her, it would have undoubtedly bound her. THE LORDS repelled this alleageance and duply, in respect of the reason and reply founded upon the anterior bond; for albeit the LORDS found, that *tam dos quam donatio propter nuptias* might be constituted betwixt man and wife after they were married, and which being so constitut-

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ed, was not revocable, (being done in competency of proportion,) yet there was once a prior bond made betwixt them, that behoved to be reputed to come in the place of a contract of marriage; after which, whatever was done betwixt them, behoved to be thought to be of the nature of a pure donation which was subject to revocation, and which was found as revocable in law by a tacit revocation, as by an express, and which the LORDS found to be revoked by the disposition made, as said is, to this pursuer; neither was it found to be a remuneratory donation, or that it was not revocable, because it bore to be given in satisfaction of her terce, in respect the wife had not subscribed the renunciation of the terce, and that she was not bound thereto; for she might ever have claimed her terce, if it had fallen out profitably to her, nevertheless of that bond, which the LORDS found tied her not thereto, and that the same was not accepted by her, by the sasine taken thereon, which might have been taken without her knowledge, and which also, in her lifetime, she might have renounced and revoked, as done to her prejudice. And where the defender *alleged*, that she never accepted the prior bond, that was repelled, because she had registrated the same herself after her husband's decease, which was found an acceptance; yet nevertheless of the premises, the LORDS found the reason and reply relevant, only to reduce this posterior bond (found, as said is, to be a donation revocable) in so far as it exceeded 24 chalders of victual, and found, that it should stand for that quantity, viz. 20 chalders of victual, contained in the first bond, and four more; for the which they found, that the second bond should stand valid to her, and no further, for there was no terce fell to her. But this cause being again called, and at length reasoned before the Lords, upon the 22d July 1635, the contrary to this decision, in just opposite terms, was decided; and the last provision made to the Lady was sustained, and found good, notwithstanding of the posterior disposition made by the husband to his creditor, the pursuer.

Act. Nicolson & Stuart.

Alt. Advocatus Regius & Primrose.

Clerk, Gibson.

Fol. Dic. v. I. p. 411. Durie, p. 764.

* * * Spottiswood reports the same case :

SIR David Livingston of Dunnipace, after his marriage (there having been no preceding contract of marriage between him and his wife) gave a bond to his wife to infeft her in liferent of 20 chalders of victual. Nothing having followed upon this bond, thereafter he infefteth her in certain of his lands, worth 30 chalders of victual, principal and warrandice. After his decease, this last infeftment was sought to be reduced by the Laird of Laurieston, (unto whom Sir David in his own time had disposed his whole estate, for relief of his cautionaries he had paid for the said Sir David) upon this ground, as being *donatio inter virum et uxorem*, which is reprobated by law, and revocable; likeas, the

said Sir David did revoke it by giving of the foresaid infeftment of his whole estate to Laurieston thereafter, which was a tacit revocation of the former done in favours of his wife. *Alleged* by his relict, The infeftment could not be reduced *ex hoc capite*, as being *donatio inter virum et uxorem stante matrimonio*, because it was not *pura donatio*, but *remuneratoria*, given to her in recompence of her tocher-good, being 11,000 merks, which she offered to prove she brought with her to her husband, which sort of remuneratory donations are lawful, both by the common law and our practice; especially the liferent right made to her not being exorbitant, but proportionable to her tocher, having regard to the custom of the country, and to her husband's estate the time of the granting the said infeftment, which was no less than nine score chalders of victual. *Replied*, It cannot be said to have been given in recompence of the tocher, which once being given by her husband to her, whatever he did after in her favours, must be counted *mera donatio*, and so revocable. *Duplied*, The first bond was but an imperfect deed whereupon nothing followed, but remained still in her husband's custody, which she never accepted, nor was obliged to know, having got another perfect right from her husband; neither could she be the better of it at all, it being only a personal bond which would be ineffectual to her, her husband having neither heir nor executor to fulfil the same to her. *Triplid*, Offered to prove that she had accepted of the said bond, in so far as she had caused registrate it in her husband's time; and so having once made use of it, she could not have the benefit of the second right, which was revoked, as said is: And as to that, that it would be unprofitable to her, the pursuer was content her infeftment should be good to her, in so far as it did not exceed the first bond, and craved it to be reduced only *quoad* the superplus of 20 chalders of victual. *Quadruplied*, The registration of the bond cannot be said to be an acceptation of it, especially it being registrated diverse years after the other infeftment made to her. To the other she would not enter in capitulation with the pursuer, but her infeftment behoved either to fall *in toto*, or stand *in toto*. THE LORDS found the answers made to the reason of reduction, reply, and triply relevant, and absolved the defender.

In this cause there was much dispute by the advocates, *de donationibus inter virum et uxorem*, how far they are revocable, and if the disposition made by the defender's husband to the pursuer's father, after the infeftment given by him to her, was a tacit revocation or not, it not being an absolute alienation, but only for relief of cautionry, and whether *L. 12. C. De donat. int. vir. et uxor.* were revoked by the 162 *Novel*, and sundry other things incident to that purpose. But the LORDS past over all these, and assoilzied upon that ground, that the infeftment was given her in recompence of her tocher, having no respect to the first bond, which they thought but an imperfect deed.

Spottiswood, (HUSBAND AND WIFE.) p. 161.