

No 362. her lifetime and his, for her aliment, whilk bond contains an assignation to Mr John, and Mr William Livingstons, for her behoof, to the duties therein contained; the bond being suspended upon this reason, that by the narrative, it appeared it was for aliment to his wife, and that he was most willing to aliment her with himself, it is *donatio inter virum et uxorem* and so revocable; to this it was answered, that the husband being major *sciens et prudens* cannot quarrel it, especially being expressly bound by the bond never to revoke the same. THE LORDS found the letters orderly proceeded for bygones and ay and while he should aliment his wife.

*Newbyth, MS. p. 54.*

\*.\* See Earl of Argyle against his Lady. No 263. p 6054.

No 363.

A contract of separation *bona gratia* found to be effectual till revoked, and when revoked all things are revoked in *statu quo*.

1713. February 12. FORBES against ABERNETHY.

ALEXANDER FORBES of Blacktoun entered into a contract of separation with Isobel Hacket his spouse, and John Abernethy her son of a first marriage, whereby the man and wife agreed to live separately. Alexander Forbes renounced in favours of the said Isobel Hacket, her heirs, executors and assignees, all right he had or could pretend to the jointure, provided to her by her first husband, and obliged him never to molest her in her person or goods, and thereby renounced his *jus mariti* as if he had never been married to her: Isobel Hacket renounced and discharged in his favours, all right or claim of right which she had or could pretend to his means or estate, by contract, *jure relictae*, or otherways, as if their marriage had never been. Both parties obliged themselves never to quarrel or revoke this deed; and John Abernethy took burden for, and obliged himself, conjunctly and severally with his mother for her performance of the premises. After the parties had thus separated *bona gratia*, Isobel Hacket agreed with John Abernethy her son to restrict her annuity of 600 merks, which he was obliged to pay her, to 300 merks. Many years after this, Alexander Forbes and Isobel Hacket thought fit to go together again, and pursued John Abernethy for payment of the full 600 merks of annuity for all years and terms bygone notwithstanding the contract and rights following thereupon.

THE LORDS found the Lady's agreement with Mayen her son during the standing of the contract of separation, restricting her jointure to 300 merks yearly, is binding from the date of that restriction; but found the restriction to fall with the contract, and the Lady and her husband to have right to her former jointure of 600 merks per annum, how soon the separation was by mutual consent past from, and the parties came to be reconciled and cohabit.

Albeit it was *alleged* for the defender. That man and wife may contract, *L. 7. § 6. D. De donation. inter vir. et uxor.* And though true donations were revocable, remuneratory donations, such as this, are not, though the wife should have squandered away what she had received, *L. 7. §. 2. D. eod.* Blacktoun, who disposed his wife's jointure to her, her heirs and assignees, cannot quarrel the same after it is come in the assignee's person who *bona fide* contracted for onerous causes with the wife, especially considering, that husbands are liable *institoria actione* for contracts entered into with their wives, while *præposita negotiis*. Laws both divine and human allow of conjugal separation *bona gratia*, when neither party can live comfortably together, and our custom sustains pactions upon that head, March 14. 1634. Gib contra Miller, No 331. p. 6116.

In respect it was *answered* for the pursuers, that such a contract of separation is *contra bonos mores et fidem nuptiarum*, reprobated by the civil law, *L. 8. C. de repudiis. Novel. 117. C. 10. § 12.* and by our law, February 11. 1634, Drummond against Rollock, No 361. p. 6152.; February 6. 1666, Livingston against Begg, No 362. p. 6152. the renunciation of the *ius mariti* by the contract, doth still redound upon and accrue to the husband, Stair, Instit. B. 1. T. 4. § 17. Vallange of Possils against M'Dowal of Freugh, No 54. p. 5840, so that we need not run to the civil law, to distinguish betwixt pure and remuneratory donations. The decision betwixt Gib and Miller doth not meet this, for there the woman who had judicially ratified the contract, died without quarrelling the same, and her executor who impugned it, refused to restore what she received.

*Fol. Dic. v. 1. p. 413. Forbes, p. 662.*

1715. February 9. GORDON of Badinscoth *against* GORDON of Inverebry.

My Lady Kinnaird, by contract of marriage with the late Earl of Aboyne her first husband, is provided to a liferent of 5000 merks, which the Lord Kinnaird her present husband, with her consent, did assign in favour of Mr William Black, his heirs and donatars; and by a mutual obligement betwixt my Lord and him, the onerous cause thereof is declared to be for the entertainment and aliment of my Lady; which assignation was thereafter revoked by his Lordship as a *donatio inter virum et uxorem*. Thereafter Mr Black transferred the fore-said right in favour of Badenscoth elder, his heirs and assignees; and now the son, who is both heir and executor to his father, with concurrence of my Lady, having charged Gordon of Inverebry, as factor to the estate of Aboyne, and as personally decerned against *in foro*, as *intus habens*, in a former process at the instance of Mr Black, for payment of bygone annuities, and in time coming during his intromission, Inverebry suspends, and the question arising, Whether

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A revocation of a donation, found not to operate, until founded on, in questions relative to bygone annuities.