

No 312.

“THE LORDS adhered to the Lord Auchinleck’s interlocutor, finding, That the bond for L. 4800 was a *surrogatum* in place of part of the wife’s heritable subject, and did therefore belong to her; and that she was also a lawful creditor for the L. 2644: 8s. received by her husband, with interest upon both sums from the time of her husband’s death; and decerned.”

Act. *Johnstone.*Alt. *Montgomery.*

Fol. Dic. v. 3. p. 286. Fac. Col. No 153. p. 273.

1769. November 22.

ROBERT STEWART, *against* JANET MITCHEL, Relict of William M’Kinlay Merchant in Campbelton.

No 313.

Donatio inter virum et uxorem, though a consideration given, which in some measure gave it the appearance of a transaction, yet being very much to the wife’s prejudice, held to be revocable.

By marriage-contract, in the year 1729, betwixt Janet Mitchel and her husband, she was provided, *imo*, In an annuity of 200 merks out of a tenement in Campbelton; *2do*, In the liferent of one half of all the heritable subjects which her husband should acquire during the marriage; and, *3tio*, In case there were no children alive at the husband’s death, in the fee of one half of the whole free moveable goods and gear that should then be in communion. Of these provisions the wife accepted, in full of all she could ask by her husband’s death or otherwise.

No issue existed of the marriage; and on the 28th January 1760, after the parties had acquired considerable wealth, Janet Mitchel executed a deed, bearing to be for love and favour, and other causes; whereby she conveyed to her husband ‘ Her whole right in all corns, cattle, household furniture, lying money, ships, stock in trade, debts, or sums of money resting by bond, bill, or any other manner of way; with all other effects, heritable and moveable, pertaining, or which should pertain to him, or be in communion between them at the dissolution of the marriage, and to which her heirs or nearest of kin could claim right, in virtue of her contract of marriage, or on any other account whatever preceding that date;’ reserving only her annuity out of the tenement in Campbelton. By this deed the husband became bound to pay her L. 250 Sterling at his decease; or in the event of her predeceasing him, to her two nieces; failing of them, to her heirs and assignees; and with this proviso, that if either of her nieces should marry during her and her husband’s lifetime, each should receive L. 50, to be imputed in part of the said L. 250. The husband thereafter granted an obligation in these terms; and farther provided her in the fee of one half, and liferent of the whole of his household furniture.

In the year 1761 M’Kinlay executed a testament, nominating Robert Stewart the pursuer to be one of his executors; and in this deed he ratified the deeds above mentioned, and bequeathed to his wife whatever ready money or

webs of cloth should be in her custody at his death. M'Kinlay died in May 1767; on the 30th June, Janet Mitchel executed a revocation of the deed of 28th January 1760; upon which Stewart brought a counter-declarator against her, that she had no power to revoke; and at the same time insisted for L. 1900 as one half of her husband's executry.

The cause being reported on informations, it was

Pleaded for the pursuer; The principle upon which revocation was permitted between husband and wife was *ne mutuo amore se spolient*; and hence it was essential that the deed revoked be a mere donation. This was not the present case; the deed 1760 was not a donation, but a fair transaction *in re dubia*; whereby the wife, in place of an uncertain provision at her husband's death, accepted of a liquid provision, both for her own use and benefit and that of her nearest of kin. The principle of revoking donations betwixt husband and wife was derived from the Roman law, but by which fair transactions were justified. Voet. ad digesta; De ritu nupti, § 63. et in Tit. De donat. inter vir. et uxor. § 8. Bankton, b. 1. t. 5. § 96. Dict. of Decis. Div. 10. b. 1.

The circumstances of the case rendered the wife's provisions in expectation precarious; M'Kinlay being a seafaring man, the bulk of his fortune was invested in ships, boats, nets, &c. subject to accidents; and which his wife, upon his death, was ill calculated to manage to advantage. It was in his power also to have lent out his money upon bonds bearing interest, to no part of which would the wife have had any claim; and as, upon the faith of the above transaction, he had allowed his funds to remain as they were, the wife could not by her revocation after his death defeat his intention. The transaction, besides, was acquiesced in by the wife for seven years during her husband's life; it was in part implemented by payment of L. 30 to one of the nieces upon her marriage; and it was also homologated after the husband's death, by the widow's retaining possession of the whole household furniture, whereas by her contract of marriage she had right only to one half.

Pleaded for the defender; Though transactions betwixt husband and wife, which are fair and equal, cannot, as not being donations, be revoked; yet if the inequality is considerable, *quoad excessum*, they will be considered as donations; and hence, though executed in the form of contracts, liable to revocation, Children of Woolmet *contra* Douglas, No 12. p. 1730. The inequality in the present instance was very great. The wife, by the contract of marriage, was provided to the liferent of the half of the heritage, and to the fee of the half of the whole free moveables which should pertain to her husband at his death. In the year 1760, when the deed by her was granted, her husband had acquired to the extent of L. 3000; and as she was far advanced in life, and no prospect of children, her share of that sum would have been one half. The husband had it not in his power legally to alter these provisions in expectancy; and if any fraud had been attempted for that purpose, the Court would have given redress; yet all these provisions, except her annuity for 200 merks, she

No. 313. gave up for the sum of L. 250 ; which sufficiently proved the inequality of the transaction.

As to the supposed acquiescence and homologation, the wife's silence for seven years proceeded from the desire of peace, the same motive which had induced her to grant the deed ; and the L. 30 to one of her nieces was paid during the same period, and not by her, but by her husband. The great use of homologation was to supply the want of a consent *ab initio* ; but donations of this kind necessarily supposed full consent, though still revocable by the donor ; and hence, as the donation was only confirmed by the death of the donor, there was no inconsistency in supposing that the donee might acquiesce for years after the donor's death, and yet at last revoke. The wife's intromission with the household-furniture could not be ascribed to this deed, which gave her no right to any part it, but to her marriage contract, by which she had right to one half.

In giving judgment upon this cause, the LORDS proceeded upon the supposition that M'Kinlay's wealth, in 1760, was very considerable ? the Court, however, was much divided as to the *res gesta* being a transaction or a donation ; and by a narrow majority it was found, " That the deed executed by the defender, in favour of her husband, in the year 1760, was revocable by her ; and that it was actually revoked. And remitted to the Ordinary to proceed accordingly."

Lord Ordinary, *Stonfield*.
Clerk, *Tait*.

For Stewart, *Dean of Faculty, Lockhart*.
For Mitchell, *M^cQueen*.

R. H.

Fac. Col. No 3. p. 8.

1769. December 1. FOGGO against WATSON.

No 314.
A husband and wife granted a joint discharge of stipulations in their contract of marriage. Found revocable as donation.

By contract of marriage between Mr James Watson, one of the ministers of Canongate, and Anna Foggo, daughter of Walter Foggo, it was stipulated, that L. 300 Sterling should be paid to Mr Watson in hand, and L. 200 more at an after period ; which sums were accepted, in full of all that could be asked or craved ; by and through Walter Foggo's death.

When Mr Foggo died, it appeared, that each of his children would draw considerably more than L. 500, on an equal division ; and a contract was entered into, whereby Samuel, Katharine, and Janet Foggos, the three younger children, on the narrative, ' That they were sensible, that it was the inclination ' of their father to have made his eldest daughter equal with his other children,' became bound to pay L. 83 Sterling each, to Mr James Watson, his heirs or assignees ; and, on the other part, Anna Foggo, and James Watson granted a joint discharge for their several rights and interests.

Upon Mr Watson's death, his relict executed a revocation of her husband's right to the sums stipulated to be paid by her brother and sisters, upon the