

No 327. rent of 5000 merks, in which she was secured by her contract of marriage with Duncan Graham her former husband ; which the heir of the said Duncan Graham did, during the subsistence of the marriage between the said Ann Colquhoun and M'Pherson, pay, partly to them, and partly, with M'Pherson's consent, to the children of the said Ann by her former marriage.

The marriage having dissolved by the death of Ann Colquhoun without children, M'Pherson, with a view to dispute the payments made to the children of the said Ann, and the effect of his own renunciation, brought a process against the heir of Duncan Graham, for the resting annualrents of the 5000 merks, to which he claimed right *jure mariti*.

And the ORDINARY, before whom the question came, found ' That his renunciation was, so far as concerned the wife, a donation *inter virum et uxorem* two years after the marriage, and as such revocable, and revoked ; and found the defender liable to account to him for the said annualrents.'

But, upon advising a petition against this interlocutor, with the answers thereto, the LORDS found, ' That the renunciation was not a donation *inter virum et uxorem*, and as such revocable ; but found, that it did not import a discharge to the debtor ; and remitted to the ORDINARY to proceed accordingly.'

THE LORDS were of opinion, That a man's renouncing his *jus mariti* in a certain subject, even by a postnuptial settlement, (where there was no settlement formerly made by him) in favour of his wife, or, as in this case, in favour of her and the children of the marriage, is an onerous settlement which he cannot revoke ; but then still the debt was due, and whether to the wife's heirs, other than the children of the marriage, or to the husband himself, notwithstanding his limited renunciation, was the question ; and it seemed to be the opinion of the COURT, That there being no children of the marriage with M'Pherson, so far as was unpaid to the wife, it would belong to him.

*Fel. Dic. v. 3. p. 288. Kilkerran, (HUSBAND AND WIFE.) No 16. p. 268.*

#### S E C T. IV.

#### Mutual Contracts.

1606. February 26.

STEWART against STEWART.

No 328. THE Captain of Downe, called Stewart, was pursued by her who had been his wife, to pay to her 500 merks which he had received with her in tocher good, because they were divorced. In his defence it was *alleged*, that he should be

assoilzied, because, before the divorcement, they being willing to be separated, they had contracted, the said Stewart for himself, and his said wife for herself and Paton, her mother's brother, for her, and taking burden as cautioner for her, by the which he had bound himself to pay to her 500 merks, in full contentation of all that she could pretend or crave by the marriage; and which sum he had paid to Paton, and reported his acquittance thereof. It was answered, that that contract was made *stante matrimonio*, and was null, and could not exclude her from her action of the law. Nevertheless, the LORDS found the exception relevant; albeit in my opinion it was *illicitum pactum* betwixt the husband and the wife, *et propter turpem causam*, and so was null of the law.

*Fol. Dic. v. I. p. 410. Haddington, v. I. No 1062.*

1611. July 5.

BARCLAY against NAPIER.

IN an action of suspension pursued by Mr William Barclay *contra* Napier, who charged him upon the contract of marriage, the LORDS sustained the charges upon the contract, *licet matrimonium nunquam fuerit in facie ecclesie celebratum*.

*Kerse, MS. fol. 64.*

1630. June 29.

COCHRAN against DAWLING.

PATRICK COCHRAN being obliged in Robert Dawling's contract of marriage with the said Patrick's daughter, to make her equal with the rest of his bairns, the time of his decease, the said Patrick thereafter, by the space of four or five days before his decease, which was seven years after the said contract of marriage, makes his eldest son assignee to all his goods, whereby the said clause of the contract, if the assignation had subsisted, had been elided; whereupon Robert Dawling having raised action to annul the said assignation, as done on death-bed, and to his prejudice, in the said clause and contract of marriage; the said assignee, and he, by intercession of friends, agreed by contract to annul the assignation, in so far as thereby the said Robert his contract was prejudged; and at that same time, the said Robert grants a bond to the said assignee his wife's brother, to infest her in liferent in 400 merks yearly, wherein no mention nor relation was made to the said contract; which bond being desired to be reduced, because it was *donatio inter virum et uxorem*, and was revoked, the LORDS found the bond neither reducible nor revocable; for it was found to be a part of that contract, whereby the foresaid assignation was renounced, (albeit it was a distinct several writ, having neither relation thereto, nor dependence

No 330.

A grant by a husband in favour of his wife, given in consequence of a treaty with her relations, to relinquish a claim by which she would have been deprived of a right she was entitled to, was found no donation by the husband, and not revocable.