

No 360. 1615. February 9. MUIRHEAD *against* DANISTON.

IN an action betwixt George Muirhead and Janet Daniston, the father of said Muirhead, the LORDS found the contract of marriage null and void, in so far as Mr James, in his own time, had provided her to an annual rent of 4 merks, which was above the annual rent of L. , in which Mr James was obliged to infest her; and that, notwithstanding there was no relation made, that the same was for fulfilling of the contract of marriage, and also, notwithstanding of the 4 merks, to which she was provided, was alleged to be her own gear, which she got from her first husband, which they offered to prove by the contract itself, which bore, that the sum of merks was promised to them by Mr Samuel Ellis, for the price of the half of the wares, being in the stamp shop, whereof the said Samuel and Andrew Ellis, first spouse to the said Janet, were partners.

Kerse, MS. p. 64.

S E C T. XI.

Contract of Separation, *bona gratia.*

1624. February 11. DRUMMOND *against* ROLLOCK.

No 361.

A contract of separation *bona gratia*, found null, in consequence of which money saved by the wife during the separation, was found to belong to the husband.

THE Lady Athol having borrowed 1000 merks from the Lady Burgh, she granted to her a bond thereupon, with a blank for inserting the name of the creditors to whom it should have been paid. This bond being assigned by her, and delivered to one Alexander Drummond, who inserted his own name therein, and charged the Lady Athol, and Captain Rollock her husband for the same; who suspending, that the bond was blank the time of their subscription, and the sum pertained to the Lady Burgh, from whom they borrowed it, at the which time she was clad with a husband, who yet lives, to whom the same must appertain, and in whose prejudice the Lady could not assign the same nor any other name could be inserted therein, to prejudice his right thereof; and the charger alleging, that the Lady and her husband, by a voluntary separation made betwixt them, of their mutual consent were divorced, like as the husband, in respect of that separation, had given her a certain sum of money for her sustentation; of the which sum this sum now acclaimed is a part, and so the husband can have no interest to claim any part of this

sum, especially seeing this charger had furnished her for her aliment, as much as would exhaust a great part of this sum; and the husband compearing by his procurator, concurred with the suspender, and insisted in the reason with him. THE LORDS suspended the charges raised by Drummond upon his bond, and found the same, the sum therein contained, to pertain to the said husband, and that he had right thereto, and that the wife could not make any right thereof, nor insert any name in the bond to the husband's prejudice, the money being acknowledged to be hers; and found, that this voluntary separation betwixt man and wife, not being lawfully authorized by a legal and judicial sentence, ought not to be sustained, nor allowed; and therefore found, that no deeds depending thereon, whereby any monies were provided to her by her husband, ought to be effectual, but was altogether null, whenever it was drawn in question: And whereas it was *alleged* by the charger, that a great part of the money was applied for the wife's aliment; they found, that being condescended, and lawfully qualified, ought to be allowed *pro tanto*, to produce execution to the charger for the same.

Act. *Stuart.*

Alt.

Clerk, *Gibson.**Fol. Dic. v. I. p. 412. Durie, p. 702.*

1666. February 6.

LIVINGSTON *against* BEGG.

THOMAS BEGG having granted a bond to Livingston's wife, bearing, that in respect he thought it convenient that they should live apart, he obliged him to pay her a certain sum of money yearly for her aliment, and obliged him never to quarrel, or recal that obligation; being charger thereupon, he suspends on this reason, that it was *donatio inter virum et uxorem*, and so he might recal the same; and now offered to cohabit with his wife, and aliment her according to his means. It was *answered*, that he had renounced that privilege, in so far as he had obliged himself, never to recal, or come against this obligation. It was *answered*, that though he had expresly renounced that privilege, yet the renunciation was *donatio inter virum et uxorem*, and he might therefore recal, and come against both.

THE LORDS found the reason of suspension, and reply relevant in time coming; but not for the bygone time, during which, the wife had actually lived apart, and alimented herself.

Fol. Dic. v. I. p. 412. Stair, v. I. p. 348.

* * * Newbyth reports the same case:

THOMAS BEGG upon a narrative, that he did not find it convenient to keep table and diet with Elibabeth Begg his spouse, and that it was just she should be entertained, therefore he is obliged to pay her 250 merks yearly, during

No 361.

No 362.

A contract of separation *bona gratia*, found effectual till it was revoked, and therefore a separate aliment found to cease after revocation, but sustained as to by-gones.