

1680. January 23.

HUME against HUMES.

UMQUHILE Helen Sinclair, in her contract of marriage with Alexander Hume, contracts 1800 merks in name of tocher, and the husband contracts 3000 merks, and is obliged to employ both sums to him and her in conjunct fee, and the heirs of the marriage; which failing the 3000 merks to return to any person he should name, and L. 100 Sterling to return to any person she should name; and she having named John Hume, her son of a former marriage, he obtained a decret against George and William Humes, as representing their father the husband, which they suspend on this reason, that before the nomination in favours of the charger, the said Helen Sinclair did nominate the said Alexander Hume her husband. It was *answered* for the charger, That the nomination in favours of her husband was after the contract of marriage; and albeit it was before the marriage, yet it was *donatio inter virum et uxorem* revoked by the nomination in favours of the charger. *2do*, It is null, as *contra fidem tabularum nuptialium*, the contract of marriage being the solemn contract of the greatest trust, made by the consent of the friends of either party, and no private paction inconsistent therewith is allowable, especially seeing where no reason can be shewn for the change; so it is to be presumed, that either party being induced to disadvantageous terms, it is to shun the disgrace of being deserted, which is most powerful as to the woman, and of more force than marital reverence, for women so deserted do seldom come to so good a match as they might have had before: And it would be a very pernicious preparative, if after contract the man could desert, unless the woman would renounce a share of her jointure, or the woman's parents would cause her desert, unless the husband would renounce a part of the tocher, and to enforce that, donations after contract of marriage are revocable, albeit before the marriage be solemnized: It is known, that if a wife, after her contract, dispoise any part of her tocher or liferent, or if the husband dispoise or burden the liferent-lands, neither of these deeds would be effectual; which doth infer that neither party can prejudge one another by deeds to a third party; and by the same reason, nor by deeds by the one to the other. *3tio*, Our contracts of marriage are not *sponsalia de futuro*, but bear present acceptance of one another for man and wife, and the obligation in the future, is to solemnize the marriage, which is not essential to marriage; *4to*, The reason of law for revocation of donations betwixt man and wife being *ne mutuo amore se spoliunt*, which holds more strongly in *actu amoris* before the marriage, than after. It was *answered* for the charger, That whatever the style of contracts of marriage be, yet they are still in the nature of *sponsalia*, and marriage is only accounted from solemnization, or cohabitation, as man and wife; yea, this contract being so important, there is always *locus penitentiae*, till it be consummated; and therefore there is little hazard of mutual donations before marriage, which do seldom occur; but after marriage the hazard is not only from mutual

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Donation betwixt a husband and wife found not revocable, being after the contract of marriage, but before the marriage itself.

No 304. love, but from the importunity or disquiet of the one party by the other; and albeit deeds of either party in prejudice of the other, after the contract of marriage is published by proclamation in the church, are found null; yet that is as being in defraud of the prior contract of marriage. And as to deeds altering the terms of the contract of marriage, the pretended fear of desertion is no *justus metus*, and such alterations are frequent, and can be least controverted in this case, where neither party contracted with parents, but both were widows: *2do*, The nomination of the husband is no alteration of the terms of the contract, but is an exercising of the faculty given to the wife thereby; and there can be no reason given, why she might not as well nominate her husband, as the pursuer her son, who was nominated after the husband's nomination, yet before the contract of marriage.

THE LORDS sustained the first nomination in favours of the husband, and found it not revocable, as done between man and wife, being before the marriage, and found the husband's nomination was not an altering of the terms of the contract, but an exercising the faculty in the contract given to the wife thereby. See PACTUM ILLICITUM.

Fol. Dic. v. 1. p. 412. Stair, v. 2. p. 746.

* * * Fountainhall reports the same case :

By contract of marriage she (Helen Sinclair) hath a power to dispose upon L. 100 Sterling, reserved her: Betwixt the contract and the marriage, she exercees the said faculty, and gives it to her husband. This assignation and nomination is afterwards quarrelled, as reducible, and *contra fidem pacti dotalis*. *2do*, Deeds done by wives betwixt the proclamation and marriage are null.—See Durie for this. Yet *sponsalitia largitas et pacta de lucranda dote in eventum dissoluti matrimonii* are lawful and irrevocable pactions. It is answered, *post sponsalia*, she is reputed *uxor*, and then donations betwixt them are revocable, for in *favorabilibus destinatio actui proxima, (ut sponsalia) pro ipso actu habentur*. And *verba de presenti accipio te in uxorem, &c. ponunt verum matrimonium, et non licet ab eo recedere, sed coguntur implere, nisi justa pœnitentiæ causa intercesserit*. See Sanchez. de Matrimonio, lib. 18. disput. 27 & 28. Zypæus in notitia juris Belgici, et de jure pontificio libro 4. page 178. et sequ. Covaruvias de sponsalibus. Answered, These words do only import *futuritionem actus*, and are *pacta incontinenti apposita*, and may be resiled from; *Sed vide Gronenwegen de Legibus abrogatis Cod. tit. de Sponsalibus*, page 573 & 574. As also Carpzovius *definit consistoriali 2 & 17 num. 4to*, who are both protestant lawyers. Abraham Avesel in his book *de bonorum connubialium societate et pactis dotalibus tractatum*. 2 page 87 reprobates *omnes antapochas contra tabulas dotales*. Item *Argentæus ad consuetud. Britannix donatio*, art. 220, page 70. The reasons to prohibit donations *inter sponsum et sponsam* is as great as *inter conjuges vid. l. 1. et seq. D. De donatione inter virum et uxorem*. THE LORDS were unwilling to determine

the general point, how far private pactions betwixt the contract and the marriage may derogate from the contract. But in this case, as it was circumstantiate, they found it valid, because the wife was not *pauperior facta* by it, and so found it not revocable.

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Fountainball, MS.

1681. *December 1.* AGNES JOHNSTON *against* ROBERT MELVIN.

FOUND that a husband's contracting of debt, and exhausting his estate, is a tacit revocation of an anterior gratuitous provision made to his wife *stante matrimonio*, which otherwise would be valid after his death.

No 305.

Harcarse, (STANTE MATRIMONIO.) No 867. p. 246.

1683. *February.* HARVEY and SEATON *against* LUMISDANE.

RIGHTS made by husbands to their wives *stante matrimonio*, do not recur to the granters *jure mariti*, if not revoked expressly or tacitly, otherwise the revocation were not a necessary remedy in law.

No 306.

Harcarse, (STANTE MATRIMONIO.) No 876. p. 248.

1683. *March.* HENDERSON *against* SAUGHTONHALL.

FOUND, that moveable bonds taken in a wife's name, or assigned to her *stante matrimonio* by her husband, do not recur back to him *jure mariti*, nor need to be confirmed if not revoked; and that the contracting of a debt by a husband, after a gratuitous deed in favour of his wife, if the husband became otherwise insolvent to pay all, is a tacit revocation of what is so given to the wife, though the act of Parliament 1621 would not reach her, which only provides for the security of anterior debts.

No 307.

Harcarse, (STANTE MATRIMONIO.) No 875. p. 248.

1684. *March.* CRAIG *against* MONTEITH.

ORNAMENTA *morganetica* gifted during the marriage, are not revocable by husbands. They have the privilege of *paraphernalia*, and are not affectable by the husband's debts.

No 308.

Fol. Dic. v. 1. p. 409. Harcarse.

* * * See this case, No 44. p. 5819.