

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 imagned 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.

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the charger, having my Lady's concurrence, hath sufficient title to exoner the suspender, notwithstanding of my Lord's revocation?

It was *objected* by the defender against the charger's title, *1mo*, That the right to Mr Black being only a trust, it was personal and could not be assigned. *2do*, That as such it could not be in *bonis defuncti*, the trust having died with Old Badinscoth, and therefore the charger could not make up a title thereto, either as heir or executor to his father. *3tio*, That the charger is a Papist, and therefore, by the 3d act, 9th sess. King William's Parliament, he is incapable to succeed to any body, or to be factor or chamberlain. *4to*, My Lord Kinnaird having revoked the very assignation in favour of Mr Black for my Lady's behoof, as being *donatio inter virum et uxorem*, it cannot now subsist, even though my Lady concur.

*Answered* for the charger to the *first*, That the right, though granted in trust, is not only in favour of Mr Black, but likewise of his heirs and donatars; and Mr Black's translation to old Badinscoth, runs in the same strain; which also answers the *second* objection. To the *third answered*, That the original trust was not conceived in favour of the present charger, but first of Mr Black, and then of the late Badinscoth, who were not Papists; so that only *per accidens* the trust was devolved upon the charger; and therefore, notwithstanding the act of Parliament, the Lady might very well oblige the charger either to renounce to be heir to his father, or enter, and thereby establish proper titles in his person, in order to denude himself, or obtain payment for her behoof; specially seeing the next Protestant heir was not compearing for his interest. To the *fourth answered*, That the Lord Kinnaird being to go abroad, it was a duty incumbent on him by the law of nature, and as a Christian, to settle upon his Lady a competent provision for her aliment; and therefore this settlement was not a gratuitous, but most onerous deed, specially since it was but moderate, and not out of my Lord Kinnaird's estate. For that a husband can constitute an aliment to his wife, is plain from the opinion of our lawyers, particularly Lord Stair, who B. 1. Tit. 4. § 9 says, 'That alimentary provisions are so personal to the wife, that *inhærent ossibus*, and recur not to the husband or his creditors, though constituted by the husband.' Thus, also Lord Dirleton in his *Doubts. voce ALIMENTA*, speaking of an aliment once constituted, says, 'Mirum igitur advocatos primi ordinis tanto conatu et boatu summa ope annisos, ut iudicibus persuaderent, aut imponerent, asserentes alimentum uxori constitutum juri mariti obnoxium esse; quod enim ossibus hæret; nec a persona cui competit avelli, aut alienari potest, illud nec juris ministerio, aut fictione transfertur.' Where also he cites a decision observed also by Lord Stair, 13. July 1677, the Lady Darsie *contra* the Laird of Darsie, *voce MUTUAL CONTRACT*, where the Lords found this, though there the husband did not renounce expressly the *jus mariti*, and the aliment was out of his proper estate, and he himself destitute of an aliment; none of which took place in the present case, which therefore must be much stronger; the reason whereof is, that by the constitution of the aliment the husband is fully denuded; as

the Lords have also found in a parallel case betwixt the Laird of West-Nisbet and the Laird of Moriston, 27th March 1627, *voce* PERSONAL and TRANSMISSIBLE.

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THE LORDS repelled the objections against the charger's title, and found my Lady Kinnaird hath right to all annuities due, preceding the revocation by my Lord, and until the same was founded upon, the sums now charged for being appropriated for an aliment to my Lady; and found the revocation could not exclude her Ladyship, in so far as concerns a suitable aliment, since it was made use of, and in time coming, during their separate abode.

Act. Arch. Ogilvy.

Alt. Ro. Dundas.

Clerk, Mackenzie.

Fol. Dic. v. 1. p. 412. Bruce, No 62. p. 75.

1757. *January 4.* MARJORY CRAMOND *against* ROBERT ALLAN.

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ROBERT ALLAN and Marjory Cramond, spouses, having lived for some years in very bad terms, agreed at last to a separation, which was executed, at the sight of the friends of both parties, by a writing, in which he obliged himself to pay her, of separate aliment, L. 5 yearly, during their joint lives; which was about one-sixth of his free estate; and she obliged herself to renounce all farther claim of aliment or separate maintenance.

Agreement settling the amount of a separate maintenance, revocable by the wife.

She received this separate maintenance for five years; but, at the end of that term, sued her husband for a higher separate maintenance; *pleading*, That she might revoke the former agreement as a bargain betwixt husband and wife.

*Answered*, The reason on which donations *inter virum et uxorem* are revocable, is, *Ne mutuo amore se spolient*; but here was no donation of that kind, nor any fear of that consequence; and the agreement was a settlement consented to by the wife's friends, and acquiesced in by her for five years.

' THE LORDS found the agreement revocable.'

Act. Rae, Lockhart.

Alt. J. Dalrymple, Craigie.

J. D.

Fol. Dic. v. 3. p. 288. Fac. Col. No 5. p. 7.

1797. *November 28.* CATHARINE LAWSON *against* DAVID MACCULLOCH.

DAVID MACCULLOCH and Catharine Lawson, his wife, in May 1795, entered into a voluntary contract of separation, by which he became bound to pay her an annuity of L. 30, which she accepted of, in full of aliment, terce, and every legal claim which might arise to her, either during her husband's life, or at his death.

The parties were afterwards reconciled, and in December 1795, they entered into a postnuptial contract of marriage, by which Mrs Macculloch was provided in a jointure of L. 30 yearly.

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A voluntary contract of separation, by which a wife accepted an annuity from her husband, in full of every legal claim, found not to bar