

Next, as to other things (besides the *paraphernalia*) disposed to the husband and revoked, it was *alleged* for the defender, That there being bonds bearing annualrent, to which the husband had no other right but by the said disposition; besides the half of the husband's moveables, which truly were the moveables belonging to the wife, as being brought by her to her husband during the marriage; from these, and also from the bonds bearing annualrent, he had no other pretence to exclude the nearest of kin, but the foresaid gratuitous disposition, which is now revoked, and which the defenders alleged could not exclude them; because that right was of its nature revocable, as being a donation betwixt man and wife, and in its nature a testamentary deed.

No 326.

Answered for the pursuer; That the deed behoved to be irrevocable, in respect there being no contract previous to the marriage betwixt the parties, the first deed after marriage must be understood to come in place of a contract, and irrevocable, and more especially in this case, where the settlement was equal, viz. a total provision to the wife of the husband's effects, in case of her surviving him, which, though not in the same writ wherein she disposes to him, yet is done by another of the same date.

Replied for the defender, That the dispositions being posterior to the testaments, it clearly appears that the parties intentions were, that, as to the disposal of what belonged to each of them, it should be alterable during their life, otherwise it is not to be thought that the parties would have conceived the securities in a testamentary strain; and as the testaments were the first settlement, they must be considered as the rule; and the disposition, which is posterior, making the right irrevocable, is *in tantum* a donation; for this is to be considered in the same way as if, in one and the same deed, a person had made a testament, and a general assignation *mortis causa*; which deed would have been wholly influenced by the testament, and so made revocable, though the disposition had not bore to be revocable; besides, that though the assignation could be by its nature interpreted irrevocable, yet it was certainly still revocable *quoad excessum*.

“ THE LORDS found the disposition to the husband irrevocable not only *quoad* the wife's moveables, but also with respect to the *paraphernalia*.”

Aff. Archibald Hamilton. Alt. Boswall. Clerk, Robertson.

Fol. Dic. v. 1. p. 410. Bruce, v. 2. No 31. p. 41.

1750. January 3. M'PHERSONS against GRAHAMS.

ANN COLQUHOUN, widow of Duncan Graham, second son to Graham of Duchray, intermarried with Alexander M'Pherson, without any contract of marriage; and he having nothing to provide her in, did, upon that narrative, by a postnuptial deed, renounce in her favour, and in favour of the children of the marriage, his *jus mariti*, whereby he was entitled to the liferent of the annual.

No 327.
Renunciation of the *jus mariti* in a postnuptial contract, not revocable as a donation.

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