

Grace is out of the question. If the debtor is not satisfied to remain in prison, he may bring a *cessio bonorum*. We must not confound the two reliefs,—that of the Act of Grace and that of the *cessio bonorum*.

COALSTON. Feelings of humanity draw one way; the rigour of the law possibly draws the other way. There are two decisions quoted: the earliest, the most merciful. I would follow it. But here a concealment is alleged, which implies fraud, and would remove every plea of favour.

AUCHINLECK. This is a distressing case. If Fulton has let Pollock out from oversight, he may be allowed to recommit him; but I would not allow recommitment, unless upon an obligation to aliment, until the debtor brought a *cessio*.

KAIMES. If a creditor shows any malevolence in repeating the commitment, the Court may interpose, and require an oath *de calumnia*.

JUSTICE-CLERK. There is no law so favourable to misfortunate debtors as the law of Scotland; no Court which gives a more summary and less expensive relief of *cessio bonorum* than the Courts of Scotland. That is the proper process for doing justice both to Pollock and his creditors. If a disposition, in order to obtain an Act of Grace, is to be equivalent to a *cessio bonorum*, the consequences will be fatal.

COALSTON. The granting the prayer of the petition will not discharge the diligence of other creditors, nor even the diligence of this creditor; for, *causa cognita*, he may still insist for committing his debtor.

On the 17th November 1769, “the Lords found the letters orderly proceeded, reserving to Pollock to liberate himself in an action of *cessio bonorum* ;” adhering to Lord Kennet’s interlocutor.

N.B. A reclaiming petition was ordered to be answered; and the cause was privately adjusted.

Act. W. Wallace. *Alt.* J. Dalrymple.

Diss. Coalston, Pitfour. [Auchinleck did not vote, being in the chair.]

1769. November 22. ROBERT STEWART *against* JAMES MITCHELL.

HUSBAND AND WIFE.

Donation, though a consideration given, which in some measure gave it the appearance of a transaction, yet, being very much to the wife’s prejudice, held to be revocable.

[*Faculty Collection*, V. p. 8; *Dictionary*, 6100.]

BARJARG. From the whole circumstances of the case, this seems a transaction rather than a donation, and I do not see such an inequality in the transaction as is sufficient to set it aside.

HAILES. I consider this as a donation. The wife gave up her probable expectation of £1500 for £250. Even as a transaction there is an excess, and the mutual contract, *stante matrimonio*, will not bind. The difficulty is as to the ratification and implement, by payment of £30 to her niece; that sum was

given upon the supposition that the deed was to subsist. An implied ratification, *stante matrimonio*, is not sufficient to validate this deed. It is said that the defender, in consequence of the mutual deed, intromitted with the household furniture. The answer is,—That immediately, or a few weeks after the husband's death, she revoked her part of the deed.

AUCHINLECK. The law has provided against donations between husband and wife, but has not precluded proper and onerous bargains. By means of the marriage-contract the wife might have got much or little: that depended upon the nature of the husband's subjects at the time of his death. A change of the nature of the subjects might not be good, if fraudulently altered; but why should the wife take advantage of the situation of the husband's estate, which may have been suffered to remain in the same condition in consequence of this transaction?

MONBODDO. If this business were no more than a donation, although in the shape of a transaction, it might be set aside. But I do not see that the wife gave up a certainty, nor that there was any inequality in the bargain, such as to make it a donation. The husband does not seem to have meant any injury to his wife. The wife, on her part, meant to secure something certain for her nieces. The payment of the L.30 was execution *pro tanto*.

PITFOUR. By the marriage-contract the wife had the half of the liferent of the heritage indefeasible, and the half of the property of the moveables defeasible; for the husband might have altered their nature by making a purchase of land in the course of ordinary administration. His power of vesting his moveables in bonds, whereby the marriage-contract would have carried nothing, seems to be a more limited power. However, he neither did this, nor is there any reason for believing that he would ever have done it. In such circumstances, a deed is executed by the wife, declared by the parties to be a donation, for it bears love and favour. It is obviously prejudicial to the wife.

JUSTICE-CLERK. This is a cause of consequence, as respecting that great privilege of our law which sets aside all donations between husband and wife. If we refuse to find this donation revocable, we, in a great measure, destroy that privilege. The husband's estate amounted to about L.3000. The widow's share must have been greater than the provision in the settlement. I am not to presume that the husband would have altered the situation of his estate: he was a trader, and in all probability would have so continued. In such circumstances a deed was executed by the wife to gratify the husband, but with great prejudice to the wife. This is purely a donation *quoad excessum*. If the husband had any intention of altering the nature of his estate, and has not done it, the law will not regret it.

COALSTON. The question is, Whether was this a rational transaction or not? This will appear from what the wife gave up, and from what she got. She had right to the liferent of half of the heritable subjects, and to the fee of half of the goods in communion. We ought to know the extent of the goods in communion. What the wife gave up was a claim both eventual and uncertain, as depending upon her surviving her husband, and upon the situation of his estate

at the dissolution of the marriage. The claim therefore might be more or less, or might be nothing at all.

KENNET. I think this was a donation; and that the marriage-contract was one-half of all moveable subjects to the wife. She renounces the liferent of the conquest as well as the right to moveables,—this was giving up too much.

GARDENSTON. I cannot regret that a widow should get what her marriage-contract gave her. The law has provided that a donation between man and wife may be revoked, and even a transaction, if unequal and prejudicial.

PRESIDENT. I go upon the supposition that the effects were very considerable at the time of the transaction. This was plainly a donation: I do not suspect the husband of fraud in obtaining it; but the law is calculated to prevent donations from affection, where no fraud intervenes. I will not suppose that the husband had any intention of changing the nature of the subjects, in order to disappoint his wife's claim. He was a trading man, and most of his property was vested in goods: it continued so vested until his death, and would probably have continued so, although the deed in question had not intervened.

On the 22d November 1769, “the Lords found the deed revocable.”

Act. A. Lockhart. Al. R. M'Queen. Reporter, Stonefield.

Diss. Kaimes, Coalston, Auchinleck, Barjarg, Elliock, Monbodd.

1769. November 24. BESSIE ROWAND, and OTHERS, *against* JAMES COCHRAN.

SALE.

Lands being exposed to Sale, and the articles bearing that the purchaser was to accept such progress as could be delivered, and to be debarred from objecting on that account, found to be an effectual sale, though the progress was defective.

[*Faculty Collection, V. p. 10; Dictionary, 14,178.*]

MONBODDO. A man buying by a lame progress, is like a man buying a lame horse, knowing him to be lame: he has no relief. There was no fraud here; but, on the contrary, the faulty part of the progress was produced, which the seller might have secreted.

JUSTICE-CLERK. The words of the articles of roup are irresistible. The sale would have been good, although the progress had been worse. The purchaser may have been ignorant or careless; but that makes no difference.

GARDENSTON. It would destroy the credit of all public roups were we to set aside this sale.

On the 24th November, “the Lords remitted to the Ordinary.” [It was understood that he should find the price due, upon turning the decret into a