

No. 313. gave up for the sum of L. 250 ; which sufficiently proved the inequality of the transaction.

As to the supposed acquiescence and homologation, the wife's silence for seven years proceeded from the desire of peace, the same motive which had induced her to grant the deed ; and the L. 30 to one of her nieces was paid during the same period, and not by her, but by her husband. The great use of homologation was to supply the want of a consent *ab initio* ; but donations of this kind necessarily supposed full consent, though still revocable by the donor ; and hence, as the donation was only confirmed by the death of the donor, there was no inconsistency in supposing that the donee might acquiesce for years after the donor's death, and yet at last revoke. The wife's intromission with the household-furniture could not be ascribed to this deed, which gave her no right to any part it, but to her marriage contract, by which she had right to one half.

In giving judgment upon this cause, the LORDS proceeded upon the supposition that M'Kinlay's wealth, in 1760, was very considerable ? the Court, however, was much divided as to the *res gesta* being a transaction or a donation ; and by a narrow majority it was found, " That the deed executed by the defender, in favour of her husband, in the year 1760, was revocable by her ; and that it was actually revoked. And remitted to the Ordinary to proceed accordingly."

Lord Ordinary, *Stonfield*.
Clerk, *Tait*.

For Stewart, *Dean of Faculty, Lockhart*.
For Mitchell, *M^cQueen*.

R. H.

Fac. Col. No 3. p. 8.

1769. December 1. FOGGO against WATSON.

No 314.
A husband and wife granted a joint discharge of stipulations in their contract of marriage. Found revocable as donation.

By contract of marriage between Mr James Watson, one of the ministers of Canongate, and Anna Foggo, daughter of Walter Foggo, it was stipulated, that L. 300 Sterling should be paid to Mr Watson in hand, and L. 200 more at an after period ; which sums were accepted, in full of all that could be asked or craved ; by and through Walter Foggo's death.

When Mr Foggo died, it appeared, that each of his children would draw considerably more than L. 500, on an equal division ; and a contract was entered into, whereby Samuel, Katharine, and Janet Foggos, the three younger children, on the narrative, ' That they were sensible, that it was the inclination ' of their father to have made his eldest daughter equal with his other children,' became bound to pay L. 83 Sterling each, to Mr James Watson, his heirs or assignees ; and, on the other part, Anna Foggo, and James Watson granted a joint discharge for their several rights and interests.

Upon Mr Watson's death, his relict executed a revocation of her husband's right to the sums stipulated to be paid by her brother and sisters, upon the

ground, that the claim to an additional share of her father's effects, was a right competent to herself, and not to the husband; and therefore, that the allowing the sum to be taken payable to him, was a donation *inter virum et uxorem*.

No 314.

Answered; After the discharge in Mrs Watson's contract of marriage, she had no right to any farther share of her father's effects. Though, therefore, Mr Watson may be said to have received a donation, it was not received from his wife, but from her brother and sisters. Mrs Watson could not convey to her husband a right which was not in herself; and it is an established principle, that nothing can be considered as a donation, which does not take from the person supposed to make it. See L. 5. § 13. L. 28. § 2. L. 31. § 7. *D. de Donat. int. vir. & ux.*

' THE LORDS found, that as the pursuer, and her deceased husband, in their contract of marriage, accepted of the tocher therein contracted by the pursuer's father, in full of all they could ask of him; so the grant made afterwards to the pursuer, was no other than a donation upon the part of the mother and younger children; and that, as they made it directly to Mr Watson the husband, so he owed it entirely to their generosity, and the regard it would appear they had for him, and not to the pursuer, though her being Mr Watson's wife probably was the origin of the connection; and therefore sustain the defence and assoilzie the defender.'

Act. *Nairne*.Alt. *Blair*.

G. F.

Fac. Col. No 101. p. 357.

1774. June 17.

Mrs BETTY WATSON *against* The HEIR and EXECUTORS of Captain
ALEXANDER GORDON.

JAMES WATSON granted bond for L. 400 Sterling, bearing interest from Martinmas 1749, to his sister Miss Betty, who afterwards intermarried with Captain Alexander Gordon; but there was no marriage contract executed between them.

In 1763, Captain Gordon having taken a resolution to dispose of his commission, and betake himself to half-pay, he accordingly bargained with a Captain upon the Irish establishment, by which Mrs Gordon was secured in a pension of L. 25 *per annum*.

Some time thereafter, the Captain did make a purchase of a small farm which had been offered for sale; it being previously understood, that Mrs Gordon's L. 400 should be given in aid of the price; and accordingly L. 300 of it was got from Mr Watson the debtor, and applied in part to pay the price. The Captain infest himself in the lands, and Mrs Gordon granted an assigna-

No 315.

A wife's assignation to her husband of a sum due to her by bond, to aid him in the purchase of a small estate, and from which, besides a pension as his widow, she enjoys a teice, found revocable as *donatio inter virum et uxorem*.