

June 15, 1814.

HIGHLAND  
BOUNDARIES.

that the best mode of proceeding appeared to be, to remit the interlocutors for review generally, rather than to remit with any particular declaration or direction.

Judgment.

Judgment of remit accordingly, to review generally.

Agent for Appellant, MUNDELL.

Agent for Respondent, CAMPBELL.

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SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HEPBURN—*Appellant*.

BROWN and others—*Respondents*.

May 18, 20,  
June 6, 1814.

MUTUAL CON-  
TRACTS BE-  
TWEEN HUS-  
BAND AND  
WIFE.

A DEED or contract between husband and wife, which is in substance a gratuitous settlement upon the wife, or a pure donation on the part of the husband, is revocable by him,—*secus*, if it be a mutual contract between husband and wife, for consideration or onerous cause; or if it be only a rational provision, under the circumstances, for the wife; and the Court will not weigh in nice scales what is, or is not, too much. Therefore, where a mutual contract was entered into between a farmer and his wife, by which the survivor (there being at the time no children) was to have the absolute disposal of the whole of their property, of every description, with the exception of the lease of a farm on the one hand, and a small reversionary interest on the other—the husband having, at the time of the marriage, only a share of the stock (the whole stock being worth about 1000*l.*) of a farm, of which, soon after the marriage, he got a lease, (excepted as above,) and some time after,

and before the contract, became entitled, in right of his wife, to a sum of 375*l.* left her by her father, together with the reversionary interest excepted as above—it was held by the House of Lords, *reversing* the decision of the Court of Session, that, under these circumstances, her assignation and disposition to her husband of all (except as above) that she possessed, was, or might become, entitled to—her relinquishment of her rights at law—her binding herself to provide well for the children, if any there should be—formed a sufficient consideration on her part, and that the husband alone was not entitled to revoke the contract; the Lord Chancellor at the same time intimating an opinion, that, under the circumstances, the provision made for the wife by the contract could not be considered as excessive, though the parties afterwards accumulated property to the amount of about 5000*l.*

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**GEORGE CUNNINGHAM**, the son of a farmer in the county of Haddington, intermarried with Agnes Hepburn, the daughter of a neighbouring farmer, in 1761,—no previous marriage contract having been made between them. At the period of the marriage, George Cunningham lived with his mother, and, in the absence of an elder brother, managed a farm belonging to the family; the father being then dead, having left no other provision for his widow and children than the lease and stock of the farm. The stock was worth about 1000*l.* and the lease expired in 1763. What share of this fund belonged to George Cunningham did not appear; but in 1763 he got a new lease of the farm on his own account, and the stock was valued over to him. In 1774 he became entitled to a sum of 375*l.* in right of his wife, her father having died, leaving her that sum, together with the reversion of the share of an imbecile sister.

Marriage and  
pecuniary cir-  
cumstances of  
G. Cunning-  
ham and A.  
Hepburn.

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TWEEN HUS-  
BAND AND  
WIFE.

Deed of 1775,  
between hus-  
band and wife.  
The survivor  
to have the  
whole of their  
property.

In 1775—there having been no ante-nuptial contract—a deed was executed for the purpose of regulating the interests of the parties. By this deed it was stipulated between the husband and wife, that the longest liver of the two should have the absolute property and disposal of all that might belong to them at the dissolution of the marriage, with the exception of the husband's lease on the one hand, and the wife's eventual right to the patrimony of her sister on the other.

Cunningham and his wife had accumulated considerable property for persons in their line of life before 1783, the period when the lease expired. They then—having no children—removed to Haddington, where they lived till the death of G. Cunningham, in 1803.

Deed of 1795,  
by the hus-  
band, revok-  
ing the former  
deed.

In 1795 G. Cunningham executed a testamentary instrument, or trust deed, by which he assigned and disposed all his moveable and heritable property to his wife, in life-rent; then to trustees, for payment of debts and legacies, satisfaction of his wife's life-rent, and then for behoof of one George Milne, of Sydeserf, as residuary legatee; and he revoked the former settlement, which he stated as having been lost or mislaid, but which afterwards turned out to have been in the possession of his wife. In 1801 he purchased a house in Haddington, which he disposed to his wife in life-rent, and to G. Milne in fee. Cunningham died in January, 1803, and Milne in December, 1803, having executed a trust disposition in favour of the trustees under Cunningham's latter settlement.

Death of the

Upon the death of George Cunningham, his wi-

dow produced the deed of 1775, and brought an action of reduction to set aside the subsequent settlement. In the course of the proceedings Mrs. Cunningham died, and William Hepburn, (the Appellant,) executor of her will, sisted himself as a party. The Lord Ordinary pronounced this interlocutor:—

“ Finds, that the post-nuptial contract betwixt  
 “ the late George Cunningham and the Pursuer,  
 “ Mrs. Agnes Hepburn, was in substance a gratuitous settlement by Mr. Cunningham upon his  
 “ wife, which, *quoad excessum* of a rational provision, he was entitled to revoke: Finds, that said  
 “ settlement was effectually revoked by him, by the  
 “ deed of date 20th May, 1795, which also contains  
 “ a rational provision in favour of the Pursuer; and  
 “ therefore, assoilzies from the reduction at the  
 “ Pursuer’s instance, sustains the defences, and  
 “ decerns.”

To this interlocutor, the Court adhered, and an appeal was lodged.

Something was said as to the deed of 1775 not having been properly delivered, and as to the wife having infringed it by applying to her own exclusive use acquisitions which, under the deed, ought to have been brought into the common fund. But these circumstances were not much relied upon in argument, and not at all in judgment.

Argued for Appellant. (*Adam and Horner.*)—  
 The question was, Whether this was a gratuitous donation which the husband alone might revoke, or a mutual contract which he could not revoke with-

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MUTUAL CONTRACTS BETWEEN HUSBAND AND WIFE.

husband, and action by the wife to set aside the settlement of 1795.

June 18, 1806.  
 Interlocutor of the Lord Ordinary.

Whether the deed of 1775 was a donation to the wife which

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the husband  
could revoke,  
or a mutual  
remuneratory  
contract  
which could  
not be revoked  
without con-  
sent of both  
parties.

out consent of the wife? The law made a contract for the wife, if she made none for herself. The conventional provision might be executed antecedent or subsequent to the marriage. If antecedent, it had as a consideration the marriage itself,—the highest consideration, though there might be an additional consideration. A post-nuptial marriage contract was a contract of which marriage was the consideration, and not a donation. If the Lord Ordinary was right in the first part of the interlocutor, he was wrong in the second. The interlocutor stated, that where, in case of a gratuitous donation, there was an excess beyond what was reasonable, it ought to be set aside so far. But if revocable at all, it must be entirely so, and the only effect would be, to restore the wife to her rights at law. But the judgment was wrong in applying the rule of law to the circumstances of this case. The deed could not be revoked entirely but by both parties, and the husband could not revoke it in part, as it was not unequal or irrational. In Scotland there might be a contract between husband and wife. The husband had the right of administration, but the contract was good; and in Kames's Dictionary there was a distinct title, under the head of Mutual Contracts between Husband and Wife.

It was quite clear that the wife had the power, by such a mutual remuneratory contract as this, to disappoint her next of kin; and this therefore raised a consideration. The point was clearly established in *Crawford's* case. The contract was besides a disposition of her heritage, in case she had acquired any.

As to the question of excess, the contract was sufficiently reasonable. The wife, it ought to be kept in view, was entitled to half the goods in communion. It had been said, that she had no property at all in this fund till her husband's death. This was not true, though the husband, no doubt, had the absolute management. Cunningham's property at the time of the marriage was wholly of that description which belongs to married persons jointly, the half of which, on the death of the wife, passes to her representative, or next of kin, exclusive of the husband, if she had not renounced or disposed of the right. The renunciation was an important consideration; for otherwise, in case of her predeceasing him, the consequence might to him have been ruinous. It was in vain to say that he might have invested the common property in securities excepted by the law from the *communio bonorum*. To have done so purposely would have been fraudulent and injurious to the husband himself. The contract was not then in substance a gratuitous settlement on the wife. Besides, the wife was certainly not entitled to revoke what she had thereby granted or renounced; and if it was irrevocable by the wife, and good against her representative, it was difficult to contend that it was revocable by the husband. There existed a great number of contracts resting on the security of the law as stated for the Appellant, and it would make wild work if that law were now subverted.

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Palmer v.  
Bonnar, Fac.  
Coll. Jan. 21,  
1810.

The following decisions, which have settled the law upon this subject, are to be found collected and abridged in the Dictionary of Decisions, (*voce Hus-*

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*band and Wife*.) vol. i. p. 410, as follows:—A post-nuptial contract of marriage is not reducible as a *donatio inter virum et uxorem*. (Stair, Nov. 2, 1664, *M'Gill v. Ruthven*.)—The like, though the contract was so far unequal, that it was found reducible by the wife upon minority and lesion. (Forbes, July 25, 1710, *Chalmers v. Husband's Creditors*.)—A mutual general disposition betwixt a wife and her husband during the marriage, no contract having preceded, is no *donatio*, even *quoad excessum*. (Bruce, M. S. July 31, 1716, *Sterling v. Crawford*.)—In another case, a bargain betwixt husband and wife during the marriage, whereby a contract of marriage was first passed from, and the longest liver to brook (have right to) all, was found onerous, and not revocable as *donatio*. (July 13, 1733, *Shearer v. Somerville*, Dict. vol. i. p. 411.)—A case decided in the end of 1798, or beginning of 1799, but which has not been reported, *Kelly v. Executors or Relations of Smith*, was determined upon the same principles. (*Vide* also case of *Chisholm*, Jan. 26, 1669, Dict. 6137.—*Lauriston v. D—e*, 1635.—*Haliburton v. Porteus*, 1664.—*Macpherson v. Graham*, Kilk. (Dict. 6113.)—*Inglis v. Lorimer*, 1676.—Stair, b. 1. t. 4. s. 18.—Bankton, b. 1. t. 5. s. 96.—Erskine, b. 1. t. 6. s. 29, 30.)

Ersk. b. 1. t. 6. s. 29, 30. Argued for Respondents. (*Romilly and Abercromby*.)—Every deed between married persons, whatever be its form, is revocable by the donor, if it be gratuitous, or imports a donation. Mutual remuneratory grants are binding on both parties, but

where the onerous cause is simulated, and a donation appears to be intended, the grant is revocable as a pure donation. There was no foundation for the distinction suggested as to post-nuptial contracts of marriage. In the cases referred to by the Appellant, the question was, whether the deed imported a donation. This question was lately decided in the case of *Steven v. Dunlop*.

This previous deed was clearly gratuitous, as the husband received nothing except that to which he was entitled by virtue of the marriage. But a valuable consideration was farther attempted to be raised, by contending that a wife was entitled to her share of the goods in communion, and that by the deed in question Mrs. Cunningham relinquished such right.

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Children of  
Woolmet,  
Stair, Nov. 20,  
1662.—Ste-  
ven v. Dunlop,  
Feb. 1, 1809.

A wife, however, has no actual or indefeasible right to the goods in communion. Her husband may lay out the whole of them in the purchase of land; or upon bonds bearing interest, by which the right of the wife is altogether excluded. But he cannot by will, or any deed which is not to take effect until his death, disappoint either her, or his children, of their respective rights; viz. her of her *jus relictæ*, (which, on the event of there being children, amounts to a third, and in the event of there being no children, to a half of the property, which is termed simply moveable,) and children of their legitim, which is in the same proportion. But a wife has not, more than her children, any thing in virtue of this right which she can convey. She has a mere *spes successionis*, which may be destroyed, by the husband during his life-time, but



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cannot be defeated by any instrument which is not to take effect until his death. She herself cannot even divest herself of this right; for if the provision made for her by any post-nuptial contract of marriage, to which she was a party, should appear not to be equal to her legal claims, it is unquestionable that she may reject the provision, and betake herself to her legal claims. Nor can a wife divest herself during the marriage of any right to which she is entitled. (*Maclelland v. Executors of Hathorn*, Dec. 22, 1758.—*Watson v. the Executors of Gordon*, June 17, 1774.—*Scott v. Lady Cranstoun*, August 10, 1776.) Mrs. Cunningham's right therefore to the goods in communion raised no consideration by which the deed in question could be supported.

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Observations  
in Judgment.

*Lord Eldon* (Chancellor.) The case stated was this:—In 1761 George Cunningham and Agnes Hepburn intermarried. At this time the fortune of the Cunningham family consisted of the stock and produce of a farm, worth altogether about 1000*l.* to some part of which George Cunningham was entitled. In 1763 he got a lease of the farm on his own account, and his wife, on the death of her father, became entitled to 375*l.* and a reversionary interest in the share of a sister. This was a fortune which was said, for their situation in life, to be considerable.

Prior to the marriage there had been no contract executed; but in 1775 they agreed to regulate the interests that might be affected by the death of either of them. Their Lordships knew, that by the law of Scotland, the wife, at the death of the

husband, was entitled to half the goods in communion, unless it had been otherwise settled; while, by the death of the wife, the husband was deprived of the half of these goods, which went to her next of kin. They therefore agreed, that the survivor of them should have the whole, except his lease on the one hand, and the patrimony of her sister on the other; and a deed was accordingly executed, and recorded in the Sheriff Court of Haddington.

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By this deed, "it was contracted, agreed, and ended, between George Cunningham, farmer in Whitekirk, on the one part, and Agnes Hepburn, his spouse, on the other part, in manner and to the effect following; that is to say, The said parties; considering that they have been married several years without child or children now existing, and without having hitherto entered into any contract or other settlement, whereby the said Agnes Hepburn is not secured in a provision or share of her husband's means and effects, as her merits, and his inclination and regard, entitle her to, and as has been communed and agreed upon between the said parties since their said marriage; in contemplation whereof, and *the assignation to the tocher and others aftermentioned*, the said George Cunningham, by these presents, with and under the provision after specified, assigns, transfers, and disposes from him, his heirs, executors, and all others his assignees, to and in favour of himself and the said Agnes Hepburn, his spouse, in conjunct life-rent during their joint lives, and to any child or children to be procreated between them in fee; whom failing, to him, the said

Post-nuptial marriage contract, 1775.

Recital.

Conveyance and obligations by the husband.

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“ George Cunningham, and Agnes Hepburn,  
 “ spouses, and longest liver of them two, his or  
 “ her nearest heirs, executors, or assignees, in fee,  
 “ all and sundry goods, gear, and effects, debts, and  
 “ sums of money, &c. and every other moveable  
 “ subject, heirship moveables included, that shall  
 “ happen to pertain and belong, or be addebted and  
 “ owing to him by any person or persons, by bonds,  
 “ bills, &c. or any other manner of way, at the  
 “ time of the dissolution of the said marriage: and  
 “ the said George Cunningham hereby nominates  
 “ and appoints the said Agnes Hepburn, his spouse,  
 “ in case she shall survive him, to be his sole exe-  
 “ cutrix, hereby secluding and debarring all others  
 “ from that office: and in like manner the said  
 “ George Cunningham binds and obliges him and  
 “ his foresaids to provide and secure all and what-  
 “ ever lands, tenements, annual rents, wadsets, ad-  
 “ judications, apprisings, or other heritable subjects  
 “ or debts, that shall be conquest or acquired by, or  
 “ shall fall to him during the life-time of his said  
 “ spouse, (his lease or leases of the said farm of  
 “ Whitekirk excepted,) to and in favour of himself  
 “ and her in conjunct life-rent during their joint  
 “ lives, and to any child or children that shall hap-  
 “ pen to be procreated between them, in fee; which  
 “ failing, to him, the said George Cunningham,  
 “ and Agnes Hepburn, spouses, and to the sur-  
 “ vivor and longest liver of them two, her or his  
 “ nearest heirs, executors, or assignees, in fee, as  
 “ said is; and he binds and obliges him and his  
 “ foresaids to warrant the premises from all facts  
 “ and deeds done or to be done by him or them

Warrants.

“prejudicial thereto: provided always, as it is  
 “hereby specially provided and declared, that the  
 “said Agnes Hepburn shall be bound and obliged,  
 “in the event of her surviving the said George  
 “Cunningham, to pay all his just and lawful debts  
 “and funeral charges, and to aliment, educate, and  
 “sustain the child or children of the said marriage,  
 “if any be, as well as to put them to decent trades  
 “or employments, and at their majority or mar-  
 “riage to make payment to them of a share or pro-  
 “portion of the goods and gear in communion,  
 “equal to a half thereof, in such proportions as the  
 “parties shall agree, and failing thereof, to be di-  
 “vided equally among the said children, if any be;  
 “which provisions above mentioned (under the de-  
 “clarations and stipulations aforesaid) the said  
 “Agnes Hepburn accepts in full of all terce and  
 “third of lands, third or half of moveables, that  
 “might or could fall to her by her said husband’s  
 “death, *or which her heirs, executors, or nearest*  
 “*of kin, can claim by her own decease, in case he*  
 “*survives her.*”

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Proviso for  
 payment of his  
 debts, and for  
 maintaining  
 children.

Acceptance by  
 the wife in lieu  
 of legal pro-  
 vision.

The obligation on the part of the husband, then,  
 was to permit her to succeed to his whole property  
 (except as far as concerned the lease) if she survived  
 him. She accepted of this in lieu of her terce and  
 half, and became bound, in case they should have  
 any children, to aliment, educate, and put them  
 out to trades, and to pay them a share of the goods  
 in communion, equal to a half of the whole.

On her part, she “assigns, transfers, and *dis-*  
 “*pones,*”—and on that last word some of the Judges  
 had put a comment, as if she meant to bind her

Conveyance  
 by the wife to  
 her husband.

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real property,—“ from her, her heirs, executors,  
 “ and all others, her assignees, to and in favour of  
 “ herself and the said George Cunningham, her  
 “ husband, in conjunct life-rent during their joint  
 “ lives, and to any child or children that shall hap-  
 “ pen to be procreated betwixt them, in fee; which  
 “ failing, to her, the said Agnes Hepburn, and  
 “ George Cunningham, spouses, and to the survivor  
 “ and longest liver of them two, his or her nearest  
 “ heirs, executors, and assignees, in fee, all and  
 “ sundry goods, gear, and effects, debts, and sums  
 “ of money, and every other thing, of whatever  
 “ kind or denomination, which presently do or may,  
 “ during the standing of their said marriage, fall,  
 “ accrue, pertain, and belong, or be addebted and  
 “ owing to her, by any person or persons, by bonds,  
 “ bills, conveyances, or otherwise, with all action,  
 “ instance, and execution, competent thereon, and  
 “ particularly without prejudice to the generality  
 “ aforesaid, all and whole the sum of 375*l.* sterling,  
 “ (or such part thereof as is not already paid,) being  
 “ her tocher, share, and proportion, of her said fa-  
 “ ther’s means and effects, and to which she has  
 “ right on or through his decease, conform to his  
 “ last will; settlement, and deposition, dated, &c.  
 “ or other writs granted by her said deceased father  
 “ for that effect; together with the said bonds, bills,  
 “ conveyances, or other writings, and all that has  
 “ followed or may follow thereon, obliging her and  
 “ her foresaids to warrant the premises from all  
 “ facts and deeds done, or to be done, by her or  
 “ them, prejudicial hereto, in any sort; it being the  
 “ will and intention of both parties that the longest

Warrants.

Intendment of  
the parties.

“ liver of the two shall bruik and enjoy, and have  
 “ the free and absolute property and disposal of all  
 “ that shall belong to them, or either of them, at  
 “ the dissolution of the marriage, by the death of  
 “ either party.”

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Then followed an exception as to her wearing-apparel, &c. and her eventual interest in the provision made for her sister.

They lived many years after, and the husband, without consent of his wife, in 1795, executed another deed, which was as follows:—

“ Considering that upwards of thirty years ago I  
 “ executed a settlement, which has since been lost  
 “ or mislaid, whereby, to the best of my recollec-  
 “ tion, in the event of no children existing at the  
 “ dissolution of the marriage between me and Agnes  
 “ Hepburn, my present spouse, *all our means and*  
 “ *estate* were conveyed and to be taken up and en-  
 “ joyed by the longest liver of us, and the heirs and  
 “ successors of the longest liver: and whereas, not-  
 “ withstanding the said Agnes Hepburn has already  
 “ considerable sums of money in her own right,  
 “ provided to her exclusive of my *jus mariti*, the  
 “ interest of which sums she has for several years  
 “ applied to her use; yet it is nevertheless incum-  
 “ bent on me to make a suitable and rational provi-  
 “ sion for her in the event before mentioned.” On  
 this narrative, the instrument purports to assign and  
 dispoise to Mrs. Cunningham, in *life-rent*, and upon  
 her decease, to George Robertson, Robert Brown,  
 and Walter Lockhart, and the survivor and sur-  
 vivors of them, and their assigns, in trust, the

Testamentary  
 instrument  
 made by Mr.  
 Cunningham  
 in 1795.

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whole property and effects the testator should die possessed of; and the purposes of the trust are, that his said wife, whom he appointed his sole executrix, should turn his property into money, and apply the same, 1st, in payment of his debts; 2d, in payment of an annuity to his wife; 3d, at her decease, in payment of certain pecuniary legacies; and the residue for the use and benefit of George Miln, of Sydserf: *and this instrument also purported to recall and revoke the settlement formerly executed by him, as above mentioned, said to be lost or mislaid, and all other dispositions or settlements of the premises. This latter instrument remained unrevoked at his death.*

Grounds of  
action.

The present cause had been instituted for the purpose of trying whether the first settlement was a contract binding on both husband and wife, and whether the second could by the law of Scotland operate as a revocation of the other.

It appeared that in the Court below a great deal of stress had been laid on a comparison of the value of the effects of the parties. But it did not appear to him that in this case any argument of weight could be drawn from a comparison of the value of the effects.

A question had arisen as to the delivery of the first instrument, but that did not seem to have been much pressed; so that the case was finally reduced to this point,—whether the Court below was right in the conclusion, that the deed or contract was not binding on the husband, on the principle stated in the interlocutor, that it was “in substance

“ a *gratuitous* settlement on the wife, which, *quoad*  
 “ *excessum* of a *rational provision*, he was entitled  
 “ to revoke.”

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Grounds of  
 judgment be-  
 low.

Then the proposition on which the judgment was founded was this,—that the settlement was *gratuitous*; and that therefore, in as far as it was *excessive*, it might be revoked. It appeared then, that, if it was not gratuitous, or if it was not beyond a rational provision, it could not be revoked.

Their Lordships would recollect its being noticed at the bar, that suppose the husband could have made such a deed as the second, he could only propose to his wife to elect between the provision there made for her and her rights at law. That however was not the question which he meant to put forward, but only this,—Whether the deed was gratuitous, or whether it was excessive, or, in other words, more than a rational provision?

Without stating at length the subsequent interlocutors, it was a circumstance of fact, that the Court had been so divided as to render this decision,—the judgments of the Court being always to be treated with the greatest respect,—of as little authority as it was possible for a decision of the Court of Session to be. Much difference of opinion had prevailed among Judges of high character; but it was agreed on all hands, that if the first contract was on the part of the husband a pure donation, it could not bind him: but that if it was a mutual contract for consideration, it would bind him; and that the representatives, or next of kin, of the wife were entitled to the benefit of it. In considering

A gratuitous grant from a husband to his wife is revocable by him.



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whether the first deed was gratuitous, there had been some difference among the Judges below, whether the wife's real property would have been bound. But it did not appear necessary here to decide whether it would or not.

The husband then, at the time of the execution of the previous deed, had only the lease of the farm, (which was excepted,) and the stock on the farm, which appeared to have been the whole of his personal property. Their Lordships were aware, that by the law of Scotland, if she had pre-deceased her husband, her next of kin would have taken the half of the goods in communion; that was, as he understood it, one half of the stock on the farm. Under such circumstances, what was there irrational or gratuitous in the contract, when she agreed not to claim her terce, to educate the children, put them out to decent trades or employments, and secure a provision for them equal to half the goods? Nor was this the only view in which the question was to be considered. If she pre-deceased her husband, her next of kin would be barred; and if she relinquished for them, it was very difficult to say that this deed was gratuitous, or a pure donation. If not gratuitous, could it be justly said not to be a rational provision? Or were they to weigh in nice scales what was, or was not, too much?

The contract (1775) neither gratuitous nor irrational.

In deeds between husband and wife, for a rational provision to the latter, it was not to be weighed in nice scales what was, or was not, too much.

Judgment.

He proposed, therefore, that it should be declared that this deed was not gratuitous, but that it was binding on both, and was not revocable by the husband alone; and to reverse the judgment

so far as it was inconsistent with this declaration, and to remit to the Court below to proceed accordingly.

Agent for Appellant, CHALMER.

Agent for Respondent, MUNDELL.

June 6, 1814.

MUTUAL CON-  
TRACTS BE-  
TWEEN HUS-  
BAND AND  
WIFE.

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IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

WHEELER—*Appellant.*

D'ESTERRE—*Respondent.*

PAROLE agreement in 1782, for a lease for three lives not then named, nor any stipulation as to who should name them, at a rent of *l.* 15s. per acre. Tenant enters, and considerable improvements are made, and, in 1784, or 1785, the rent is reduced to *l.* 10s. per acre. Tenant names the lives in 1786 or 1787, one of them not in existence in 1782, and evidence that the landlord approved of them, but none of the improvements made subsequent to that declaration. Bill in 1796 for specific performance of agreement of 1782. Agreement denied; but decree by *Lord Clare*, in 1798, for execution of a lease for the lives named in 1786, at a rent of *l.* 10s. per acre. This decree reversed by *Lord Redesdale* as to the execution, but—it being doubted whether the fact of substantial improvements by the tenant was so clearly established as to take the case out of 7 Will. 3, cap. 12, (Irish statute of frauds)—farther inquiries ordered as to the improvements, and report that they had been made with the landlord's money. Exceptions to this report over-ruled, and decree, in 1806, by *Lord Chancellor Ponsonby*, dismissing the bill, and this decree affirmed on appeal, the *Lord Chancellor* being of opinion (*Lord Redesdale* concurring) that the bill ought to have been dismissed in the first instance, on the grounds

June 24, 1814.

AGREEMENT  
—LEASE.