

adjudged for. I thought the case of Wiseman ill determined: the case of Auchinbreck well.

AUCHINLECK. We must determine by general rules. If people have not their interest paid punctually, they must borrow money to support themselves. It is no matter whether that was actually the case here or not.

COALSTON. If the creditor had been nimious in diligence I would have followed the judgment in the case of Wiseman; but no such thing here. On the contrary, the charge against him, is, that he was too indulgent. The penalties are not sufficient to indemnify him for the want of his money.

PITFOUR. Though general rules should be observed, yet the Court ought not to give up its Prætorian powers. The objections to the adjudication are slender; but, as slender objections have been sustained against an expiry of the legal, why not against an adjudication? I would strike off some part of the penalties.

PRESIDENT. Penalty in a simple bond is different from a penalty in an adjudication. The case of Auchinbreck is strong. Lord March was no rigorous creditor. There is a difference between a question among onerous creditors and a question with the heir. Objections might be sustained in the former case which would not in the latter.

On the 30th June 1772, "The Lords repelled the objections, and found Lord March entitled to his full penalties."

*Act. H. Dundas. Alt. J. Montgomery.
Reporter, Pitfour.*

1772. July 1. ELIZABETH SUTHERLAND *against* ROBERT SYME.

HUSBAND AND WIFE.

- I. A husband and wife having, by a contract, agreed to live separately, and that the husband should pay her an annuity, which she accepted in full of her legal claims; and the annuity having been paid until the death of the wife,—*found* that a revocation privately executed by her, previous to her death, was not effectual.
- II. An heritable subject belonging to the wife, having been sold by her, with her husband's consent, and the price uplifted by him,—*found* that he was bound to account for it to her representatives.

In 1733, the defender was married to Jean Reid. In 1762, a contract was executed between them, which proceeded on the narrative, "Whereas the said Robert Syme and Jean Reid, finding that it is both disagreeable and inexpedient for them to live together, have agreed to live separately: and, as there is no contract of marriage betwixt them,—for supplying that defect, and for the said Jean Reid her better accommodation and subsistence," &c. By this contract, the defender, besides allowing his wife to take with her a quantity of household furniture, agreed to pay her an annuity of L.30 during her life. On the other part, "and in consideration of the premises, the said Jean Reid has

accepted, and hereby accepts of the foresaid yearly annuity of L.30 in full of all that she can ask or claim from the said Robert Syme, in name of terce of lands, half of moveables, or others whatsoever, that she might claim or pretend to, in and through his decease before her, and in full of all that her nearest in kin can ask or claim, in and through the decease of the said Jean Reid, before the said Robert Syme ; all which is hereby discharged."

This deed was implemented by both parties, till the death of the wife, which happened in 1769 ; she, on the one hand, having lived separately, and, on the other hand, the defender having regularly paid her annuity. On the death of the wife, however, it appeared, that, in 1765, she had executed a general disposition of her whole property in favour of the pursuer, her niece ; and which disposition contained, *inter alia*, a revocation of the foresaid agreement and postnuptial contract of marriage, on the narrative—that she had been compelled to enter into it : that it had never been ratified by her : and that, being executed *stante matrimonio*, to her undue lesion, it was revocable by her at any time.

Upon this title, the pursuer raised an action against the defender, concluding, *Imo*, For reduction of the foresaid contract, and to have it found that the pursuer was entitled to such share of the defender's effects as his wife's executors would have drawn if no such agreement had existed : *2do*, That the defender should account to the pursuer for the price of some heritable subjects which had belonged to his deceased wife ; and which, during the marriage, had been sold by her with her husband's consent, and the price uplifted by him, but which he had never accounted for. The case was reported to the Court upon informations.

PLEADED BY THE PURSUER :—

As to the *first* point,—The contract of separation was a revocable deed, and was, accordingly, revoked by Jean Reid.—*Ersk. i. 6. 18 ; Cramond against Allan, 4th January 1757.* As to the *second* claim ; the subject of which the price is sought was an heritable property belonging to Jean Reid, the price of which, on its being sold, became hers, and did not fall under the *jus mariti*. It is proved that the defender received the price ; which throws upon him the burden of proving that he either accounted for it to his wife, or that her claim for it was discharged.

PLEADED BY THE DEFENDER :—

On the *first* point : *Imo*, The deed was not in its nature revocable. It was a postnuptial contract of marriage, as well as a contract of separation, and was a fair and onerous deed, as the annuity stipulated in favour of the wife was a full equivalent for her legal claims, which she renounced. Such reciprocal settlements are not revocable.—*Voet, lib. 24. tit. 1. § 10. Bank. lib. 1. tit. 5. § 95. Ersk. lib. 1. tit. 6. § 18. M'Gill, 22d November 1664. Chalmers, 25th July 1710. Stirling, 31st July 1716. Gib, 14th March 1634. Stewart, 21st February 1606. 2do*, Supposing this contract had been in its own nature revocable, the deed of revocation, executed by Jean Reid in 1765, cannot be effectual, because it never was intimated to the defender that she was dissatisfied with the previous contract ; and, from that time till her death, she homologated it by receiving payment of the annuity of L.30. In such circumstances, it would be contrary to good faith to give any effect to the deed of revocation.

As to the *second* point; the price of the heritable subject in question fell under the *jus mariti*, and any claim for it is moreover barred by the foresaid post-nuptial contract.

The following opinions were delivered :—

AUCHINLECK. This woman revokes, and then draws her aliment. I should be heartily sorry if there were law for this; but I think there is none.

HAILES. If marriage be *individua vitæ consuetudo*, it is hard to perceive how a contract of separation can be a contract of marriage: there should have been first a marriage-contract and then a contract of separation. The ambiguity arises from making one deed serve for two: Be this as it will, although Jean Reid might have revoked, she did not. Every half-year's aliment which she received was virtually a departing from this supposed and latent revocation. It is said that her receiving the aliment was nothing; for that, at any rate, she would have been entitled to an aliment. That I deny, unless *causa cognita*: besides, how do we know that a court of justice would have settled her aliment at £30 per annum? or that Mr Sime would not rather have taken her back and lived with her, than have paid such aliment? The pretence that the receiving £30 was necessary for her subsistence, is nothing; because, if she had revoked and insisted for an aliment, the Court would have given her an *interim* aliment. As to the price of the heritable subject, the presumption is, that Mr Sime received it; but, as it was not demanded from him while they lived together, or when they separated, it must be considered as spent by the mutual agreement of husband and wife.

KAIMES. At the instant of separation the wife is little in the husband's power: there is no appearance here of *donatio inter virum et uxorem*, which is revocable. Thinks that the price of the heritable subject must go to the wife's heirs.

MONBODDO. The first claim is destitute of foundation. Contracts betwixt man and wife are valid deeds: the contract here is not *dicis causa*, but fair and rational. The wife cannot be allowed to revoke: The contract was not only made, but implemented. As to the second claim for the value of the heritable subject, it is well founded: the price was paid to the man and wife. The presumption is, that he intromitted with it.

KENNET. This is both a marriage-contract and a contract of separation. It could not be revoked: it has not been revoked. As to the price of the heritable subject, the money was received in 1737: the wife never insisted to have it re-employed. This is, in effect, a consent that the husband should use it as his own: no mention was made of it at the time of the contract of separation.

PITFOUR. As to the second point, the acquiescence of parties shows what was intended.

ALVA. Here an onerous deed and no revocation: But there is no evidence that the price of the heritable subject was to go to the husband.

COALSTON. All are agreed as to the first point. As to the second, there is a legal presumption that the price was received by the husband. No evidence that it was applied to the wife's use, or was discharged by her. It is not sufficient that the wife neglected to bring an action against the husband.

AUCHINLECK. Mr Sime can only be liable in terms of his own declaration ; for there is no other evidence of his having received the money.

PRESIDENT. There seems here to be a marriage-contract, rational in order to bar the claim of communion. As to the second point ; a small subject belonging to the wife is sold,—the price is received by the husband,—the wife does not desire to have it re-employed. Covenants ensue after this, and no mention is made of that price. In such circumstances, I shall presume every thing to liberate the husband.

GARDENSTON. The wife is barred by the discharge ; but there is more difficulty as to the second point. I think that the executor is entitled to recover the price of the heritable subject : The price belonged to the wife ; the moment that the sale was made, she became creditor in it. If so, how can she be divested of it by the act of the husband, without her consent ? If there was any acquiescence, she revoked it by her act of separating from her husband. The contract of separation has no respect to this subject.

On the 1st July 1772, the Lords found the postnuptial contract valid and not revoked ; but found the wife's executrix not barred from the legal claim for the price of the heritable subject.

Act. R. Blair. *Alt.* Cosmo Gordon.

Reporter, Gardenston.

Diss. as to second point, Auchinleck, Pitfour, Kennet, Hailes, President.

1772. July 7. JAMES WILSON *against* ROBERT ARMOUR and JANET SMITH.

PASSIVE TITLE.

Intromission to a trifling extent, and without fraud, found not to infer a Passive Title.

[*Faculty Collection*, VI. 21 ; *Dictionary*, 9,833.]

KENNET. It is impossible that the defender could be liable *gestione pro hærede*, because he was not heir, and because he intromitted with the writings at the desire of the pursuer. The passive title of intromission is not proved, because the intromission was very trifling.

MONBODDO. A general intromission, or with the *animus* of being heir, is sufficient to constitute the passive title. Such was the Roman law, and such our law in Durie's time. That law has been revived by a late decision in the case of *Milmine*.

KAIMES. In disorderly times men were apt to lay to hands ; there was a necessity of strictness. Now, in more civilized times, there is no occasion for such strictness, unless when there is evidence of fraud or of intentional concealment.