

No 330.

thereon,) seeing it was of the same date, and betwixt the same parties, and before the same witnesses; and so it was found thereby, that it was *donatio remuneratoria*, which *de jure inter conjuges valet*; albeit the reducer alleged, that it could not be called *remuneratoria donatio*, seeing the renouncing of the assignation done on death-bed, which was thereby null in the law, was no benefit, for which the bond quarrelled might be maintained to have been given in remuneration, by reason he got no more thereby, than before was conditioned to him by the contract of marriage, and which could not be prejudged by that assignation done on death-bed, neither did the bond make any reference to the said contract of agreement, and had nothing to do therewith, but was a several writ not done *eo intuitu*: which reply was repelled, and the bond sustained.

Act. Aiton & Stuart.

Alt. Nicolson.

Clerk, Gibson.

Fol. Dic. v. 1. p. 410. Durie, p. 522.

1634. March 14.

GIB against MILLER.

No 331.

A contract, though made betwixt husband and wife *stante matrimonio*, whereby he reponed her to all he got by her, and she renounced all she could claim by his death, was sustained.

ANDREW GIB having married Christian Hume, the relict of a prior husband, after they were married, they not living in concord together, and *stante matrimonio* they make a contract betwixt them, with consent of the bairns of the prior marriage, and friends, whereby it was convened, that her husband should reponer her to all the goods and monies which he had received by her marriage, and pertaining to her, and that she should therefore renounce all part and portion of all gear pertaining to him, which she might claim by his decease; there-after the wife dying, and her testament being confirmed, whereby her bairns got all the gear pertaining to her, another (by these bairns' motion) takes a dative *ad omnia* to the half of the goods, pertaining to the husband, not confirmed in the wife's testament, and pursues the said husband therefor; who, defending himself with the said contract, and the pursuer *answering*, that it was a writ against law, done betwixt husband and wife, who cannot contract *stante matrimonio*, and therefore is null; for otherwise all women might be prejudged heavily, who might be induced to prejudge themselves the time of their marriage, if such writs were permitted; the LORDS not the less sustained the exception; and found the contract lawful, albeit done betwixt man and wife the time of their marriage, because it was *contractus mutuus*, containing therein a donation reciprocal and *vicissitudinarie*, which is not prohibited in law; and none could quarrel the contract, except they would restore that which was received by the woman, and render it back again to the husband; for it were iniquity that the wife should prejudge the husband, by receiving from him, and not to render again what was received, if any would have her free of the contract; for *jura subveniunt læsis et deceptis, et non lædentibus et decipientibus*; likeas the woman after the contract compeared judicially, and ratified the same,

and died, never quarrelling, nor revoking the same before her decease; in respect whereof, the LORDS found the contract sufficient and lawful, as said is.

Act. *Hepburn.*

Alt. *Nairn.*

Clerk, *Gibson.*

Fol. Dic. v. I. p. 410. Durie, p. 712.

No 331.

1635. February 26.

SLUMAN against KER.

JOHN SLUMAN heir served and retoured to Margaret Sluman wife to Mr Robert Ker of Broomlands, intented action of reduction against Mr Robert for reducing the contract of marriage made between him and the said umquhile Margaret, with consent of her curators, viz. the Chancellor, the Earl of Roxburgh, Mr James Drummond, Mr Francis Hay, and John Learmont; by which contract she disposed to the said Mr Robert her future husband, certain lands and tenements. The reason of reduction was, That by the common and civil law, no minor may dispoise their lands and heritage, either by way of vendition, donation, *nomine dotis, vel propter nuptias*, or otherwise, *sine decreto judicis*; and all deeds done otherwise by minors, and their tutors and curators, to their own or their heirs prejudice, are null, and they and their heirs may seek restitution against such deed within the time prescribed by law, viz. twenty-five years of age. But so it is, that the time of the said contract, she was fourteen years old, and died before she was twenty-one, and the contract containeth a disposition of her whole lands and heritage, in favour of Mr Robert and his heirs, failing of heirs to be procreated betwixt them; which disposition was to her and her heir's enormous hurt and lesion, the lands being worth 12,000 merks to buy and sell, for which she got no recompence, in so far as by the contract she was only provided to a liferent of 1000 merks by year, out of the lands of Broomlands, which was no way equivalent to the heritable right of her own lands, in regard of which disposition, without the authority of a Judge, in her minority, and being now revoked by her heir before she could have been twenty-five years, the said contract and disposition, with all that has followed thereon, should be reduced, &c. Withall, the pursuer produced a practick where Margaret Forrester, father's sister and heir to Elisabeth Forrester, had obtained a decret of reduction of a contract of marriage made betwixt Alexander Trail, son to the Laird of Blebo, and the said Elisabeth, upon the same ground. It being *alleged* by the defender, that the contract was solemnly subscribed with consent of the curators foresaid, unto whom the least suspicion of not fair dealing cannot be imputed, being persons of that quality; that there was no disparagement in the match, the defender being a gentleman of means, who might have got as much, or more, in tocher with another, having regard to his estate; that the recompence was equivalent; all her estate not exceeding 10,000 merks, (as was cleared,) and he having provided her in 1000 merks by year, and the liferent of the superplus, that could be got for her:

No 332.

A disposition by a lady, minor, with consent of her curators, in favour of her husband, found effectual.