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Home, Div. 10. Sec. 1. *b. t.*; and February 1688, Gordon, *IBIDEM*, whereas a donation made after marriage by either party, may unquestionably be revoked. And there is another difference established in our law, that although, after marriage, a woman can grant no deed whatever (unless *mortis causa*) without consent of her husband, yet, before marriage, although after proclamation of bans, she is only barred from granting such deeds as are purely gratuitous.

THE COURT, by their first interlocutor, found the husband preferable for the annualrents of the sum in question; and, with that variation, adhered to the Lord Ordinary's interlocutor; but, on a reclaiming bill for the wife and her trustees, and answers for the husband, the case was considered to be a very special one, and to be determined upon its own circumstances, *viz.* The husband had uplifted and spent the L. 80 which he had agreed to accept of as tocher; and that was a sum that fell not under the *jus mariti*, as bearing interest. On the other hand, the wife had an indubitable claim to be alimeted by her husband; but he showed no fund other than that in question: Therefore, even supposing the trust-deed to be invalid, the question came to this, Was she not well founded in a plea of retention, both on account of the alimement, and likewise for indemnification *quoad* the L. 80 *indebite* uplifted by him?

The following judgment was pronounced, after appointing a curator *ad banc litem* to Barbara Blair, on a motion of her counsel:

" Find the said Barbara Blair entitled to uplift and retain the annualrents of the sum in question, until she is taken home, and properly alimeted in family by her husband; and, even in that case, find her entitled to the said annualrents, for repayment to her of such part of the L. 80 Sterling as has been already paid to her husband, or until sufficient caution is found by him to replace the same."

Act. *Nairne.*Alt. *J. Boswell.*Clerk, *Kirkpatrick.**Fol. Dic. v. 3. p. 279. Fac. Col. No 217. p. 167.*1793. *January 29.*

JANET MACDONALD, and John DUFF, her Husband, against DAVID DOIG.

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Every thing in the wife's possession, except her paraphernalia, is presumed to belong to the husband, till the contrary be

JOHN DUFF, in 1787, obtained a decree of *cessio bonorum*. In this action David Doig was called, among his other creditors.

Near two years after, Duff married Janet Macdonald. In an antenuptial marriage-contract, proceeding on the narrative of her being possessed of personal effects at least to the extent of L. 200, he renounced his *jus mariti*; and she conveyed to trustees the whole property which she then possessed, or should

afterwards acquire, without inventory or specification; but the trustees never took any possession.

Duff and his wife have ever since their marriage kept an alehouse.

In March 1791, David Doig sent a messenger to poind his household furniture. The messenger, on going to the house, was told that the furniture belonged to Janet Macdonald; and, on his insisting to proceed in executing the diligence, she paid him, under protest, L. 5 : 7 : 6, being the amount of the debt and expenses. But she afterwards brought an action for repetition of that sum, and for damages. The defender

*Pleaded*; It is no doubt true that a marriage contract may be so framed as to exclude the husband's *jus mariti* over the personal property of the wife; 23d June 1730, Walker, No 55. p. 5841.; 5th February 1745, Dalrymple against Murray, No 57. p. 5842. But it would be dangerous to give that effect to a contract like the present, where no inventory of the property conveyed was made up, and where, consequently, it might be made a cover for secreting the effects of the husband to any amount, and for any length of time, even where the wife had never had any property of her own.

At any rate, every thing in the wife's possession, and the money paid by her in the present case, must be presumed to belong to the husband till the contrary is proved. A presumption which is not removed by Duff having formerly been bankrupt.

*Answered*; If to exclude the diligence of her husband's creditors, it were necessary that the marriage contract should specify every article of the wife's property, no person in Janet Macdonald's situation in life could ever enjoy that benefit. Her property consisting of her stock in trade, as keeper of an alehouse, and a few articles of household furniture, being constantly liable to alteration.

The general terms of the contract create no suspicion of an intention to defraud in this case; where, on the one hand, the contract affords evidence that the wife had property; and, on the other, the husband having so recently obtained a *cessio bonorum*, renders it improbable that he can have any; unless he has fraudulently secreted it from his creditors, which is not to be presumed. And if the poinding attempted was illegal, the extorting money, in order to prevent it, must be equally so; 20th February 1782, Henderson against Buddo, *voce* SEQUESTRATION.

THE LORD ORDINARY had sustained the claim to the extent of repetition of the money, and expenses of process.

This interlocutor having been brought under review, by a reclaiming petition and answers, the COURT, on the 4th December 1792, adhered, "in respect no proof was offered by either party."

But upon advising a second reclaiming petition and answers, it was

*Observed* on the Bench; That the former interlocutor would have been attended with very dangerous consequences. Some Judges seemed to think, that

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proved; even although a few years before he had obtained a decree of *cessio bonorum*.

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a specification of the subjects in an inventory was absolutely necessary to make a contract of this nature effectual; for that although an actual and visible estate belonging to the wife might by an antenuptial contract be secured against the husband's *jus mariti*, a general stipulation that so much money should belong to her, would be liable to much abuse. But all agreed, that every thing in the possession of the wife must be presumed to be the husband's till the contrary was established, and that this presumption was not removed by his having formerly obtained a decree of *cessio bonorum*.

THE LORDS assolizied the defender, and found the pursuer liable in expenses.

Lord Ordinary, *Dreghorn*.  
Clerk, *Menzies*.  
D. D.

Act. *William Robertson, Cha. Hope.*

Alt. *John Dickson.*

*Fol. Dic. v. 3. p. 279. Fac. Col. No 19. p. 38.*

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## DIVISION II.

### Extent of the Husband's liability for the Wife's debts contracted before Marriage.

#### SECT. I.

Personal debts.—Annualrent of heritable debts.—Liable for heritable debts *in quantum lucratus*.

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1613.

HERIOT *against* WATSON.

IN a removing pursued by Helen Heriot, and Sir John Arnot her spouse, against Joan Watson, relict of umquhile William Small, the LORDS found, that the promise made by the said Helen, *tempore viduitatis*, might not be proved by her oath in prejudice of her husband.

The like found between the L. of Clardingston and the L. of Hordingston; and between the E. of Glencairn and Fenton.

*Kerse, MS. fol. 64.*