

husband or his creditors, that exclusion is a quality of the donation and is effectual, otherwise the donation must cease and return to the granter, to the prejudice of both husband and wife. It was *replied, imo*, *Pactis privatorum non derogatur jure communi*; *2do*, This assignation by Southesk is no free donation, but for implement of his being cautioner for the Lord Sinclair who was debtor to the husband. It was *duplicated* for the Lady, That *hoc dato* the husband could not quarrel it, because by the contract betwixt him, his wife and son, there was an alimentary provision granted both to the husband and wife *separatim*, which contract being subscribed by husband, wife, and son, imports all their consents to every article in it, so that the husband having consented to this alimentary provision to his wife, could never come against the same. It was *triplicated*, That the husband's consent was from the whole complexly, wherein there is an aliment provided to himself and another to his wife; but his own aliment proves ineffectual by reason of the debts, and therefore he should have access to a share of his wife's aliment; *2do*, The husband did not renounce his *jus mariti*, and therefore his consent in favours of his wife returns to himself, as was found in a far stronger case betwixt the Lord and Lady Collington, No 50. p. 5828. where the Lady had assigned the half of her life-ent-right before her contract of marriage to the Laird of Ratho, who did by a back-bond declare, that that assignation was in trust for entertainment of Collington and the Lady's family; and some days thereafter, in the contract of marriage narrating the said assignation to Ratho, Collington did approve the same, and renounced his *jus mariti* as to his wife's aliment; and yet the LORDS found, "That the back-bond brought it back to Collington himself, and that he had power to dispose of it *jure mariti*."

THE LORDS found, That this assignation by Southesk being alimentary, and for implement of the foresaid contract subscribed by the husband, and being so small as did not exceed *victum et amictum* to the Lady and her two sons to maintain them, that the same was effectual, and did exclude the husband, albeit his own aliment proved ineffectual through the mismanagement of his estate, and that it was noways in the case of the Lord Collington, where the Lady by the back-bond had not a separate aliment; but that it was an aliment to the family for husband and wife, and behoved to be so employed by the order and direction of the husband as head of the family.

Stair, v. 2. p. 539.

1680. December 21.

ANDERSON against BRUCE.

No 26.

A PARTY having raised reduction of a decree-arbitral upon the head of iniquity, it was found, That he could not afterwards take the benefit of it in

No 26.

a process at the other party's instance against him, and that the other party was at liberty to pass from the decree-arbitral in his turn.

Fol. Dic. v. I. p. 597. Stair.

. This case is No 3. p. 607. *voce* APPROBATE and REPROBATE.

1711. July 19.

Dame HELINOR NICOLSON Lady GREENOCK *against* Sir JOHN SCHAW of Greenock.

No 27.

A bond granted by a husband to his wife, in respect of her disposing to their son the fee of her heritage found null *causa data non secuta*, because the disposition never being delivered nor judicially ratified, appeared cancelled in her custody after her husband's decease, and she was presumed to have cancelled it, altho' she offered to renew the disposition, which her son declined to accept of.

THE deceased Sir John Schaw of Greenock by his bond, August 19. 1700, narrating, That in respect Dame Helinor Nicolson his Lady, had, by a disposition of the same date, disposed to their son (now Sir John Schaw) the fee of her third part of the lands of Carnock and Plain; therefore he obliged him, his heirs and successors, to pay to her 8000 merks yearly during her lifetime, from the first Whitsunday or Martinmas after his decease; there was such a disposition signed by the Lady, with consent of her husband, in favours of their said son, dispensing with the not delivery thereof, in case the same should be found in the hands of either of them at their decease.

The Lady, after her husband's death, pursued Sir John Schaw her son, as heir to his father, to pay the 8000 merks for several years bygone, and in time coming during her lifetime.

Alleged for the defender; His father's obligation for the life-rent-annuity of 8000 merks, is of the nature of a mutual contract betwixt him and the pursuer, wherein she was to grant a valid disposition of the fee of a third part of Carnock and Plain to the defender, which appears not done; at least it doth not appear to have been either judicially ratified by her (which she was obliged to have done in the terms thereof), or to have been delivered to the defender; especially considering, that the clause dispensing with the not delivery, if found lying by either the pursuer or her husband, implies a power of resiling in either of them; and that the disposition was not delivered at the date thereof, and the not delivery dispensed with only in the event of its being found in the hands of either at their decease entire and uncanceled; again, the disposition appeared cancelled in the pursuer's custody since her husband's decease, whence law presumes that she cancelled it; because she might lawfully, and it was in her power to do it; consequently, the defender's father's bond is null, being granted *ob causam quæ secuta non est*, July 26. 1665, Brotherstones *contra* Ogle and Orrocks, *voce* PRESUMPTION; December 23. 1684, Lord Huntingtour *contra* Earl Lauderdale, No 42. p. 6387.

Replied for the pursuer; Her husband's bond is a clear obligation for one-rous causes performed under no suspensive provision or condition, and doth imply nothing to be unperformed by the pursuer; it is no more a mutual oblige-