JAMES HUNTER, (ROUGHEAD'S Trustee,) Appellant.— *Dr. Lushington.—Mr. Rutherford.* No. 36.

ISOBEL DICKSON, Respondent.—*Lord Advocate (Jeffrey)—Patton.*

Husband and wife.—A husband and wife having executed a contract of separation and aliment, whereby the husband bound himself to pay to his wife during her life and separation an annuity of 30*l.* per annum, in consideration of which she renounced all legal claims against him; and the husband having died while the contract of separation was unrevoked, held (affirming the judgment of the Court of Session), that the wife was not bound by that contract of separation, but was, on his death, entitled to her legal provision as his widow, the annuity not being fair, onerous, and adequate, in the pecuniary circumstances of the husband.

Sept. 19, 1831.

1ST DIVISION.
L. Meadowbank.

ISOBEL Dickson was married in 1814 to James Roughead, tenant in Jerdanfield, and resided with him until April 1815, when, not living happily together, they executed contract of separation and aliment. By this deed Roughead bound himself "to make payment to the said Isobel Dickson of the "sum of 30*l.* sterling during the said Isobel Dickson's life "and the continuance of the present separation, but declaring "that the said annual payment shall be in full of all claim "which she, the said Isobel Dickson, has or might have had "right to from or against the said James Roughead, or his "means and estate, either in virtue of her jus relictæ, or any "other right or privilege, though not here enumerated, to "which a lawful wife is entitled by law or otherwise."

On the other hand, she bound herself to live separate from him during her life, and "accept of the said sum of 30*l.* "sterling, settled on her in manner foresaid, in full of "all claim for separate aliment, board, clothes, or other ne-"cessaries and expenses of all kinds, which she can or might "demand by law from the said James Roughead, or his "means and effects, or can or might claim from his heirs, "&c., either in virtue of her jus relictæ, or in virtue of any "other right or privilege to which a lawful wife is entitled by "law or otherwise; all which rights and privileges she, the "said Isobel Dickson, hereby renounces for ever."

Sept. 19, 1831.

Two professional men were consulted about the deed, and the draft of it was revised by the wife and her brother, a farmer. On averaging the amount of the aliment, no state of funds was exhibited, but the husband said he could not make the provision large, and his farm was alleged to be at that time a losing concern. He was, however, possessed of visible means, and he had expectations from rich relations. In 1822 he succeeded to 5,143*l.* from a brother, and when he died in 1824 his whole funds (his own and what his brother had left him) were about 8,696*l.* It subsequently appeared that at the date of the separation his own free funds had, in fact, amounted to 2,711*l.*, of which 1,200*l.* was invested in heritable security. He left no lawful children, but conveyed his whole effects to Hunter and others, as trustees, for the purpose of dividing his free residue among his grand-children by a natural daughter. At his death his wife was enjoying her stipulated aliment, and living separate, under the subsisting contract of separation.

Isobel Dickson raised an action against Hunter, her husband's trustee, claiming her terce and jus relictæ, and, in support of her claim, she contended, that the deed of separation only regulated the rights of parties during separation, and was revocable quoad ultra as a donation inter virum et uxorem; and that, at all events, she was entitled to redress on the ground that a provision of 30*l.* per ann. was not a fair and reasonable allowance for the widow of a person who had died leaving nearly 9,000*l.* The trustee, in defence, founded on the pursuer's express renunciation of her legal rights, and maintained the irrevocability at any time of the contract, either as to the separation or the settlement of the interests, subsequent to the dissolution of the marriage; and that, even if the contract could have been recalled during the subsistence of the marriage, yet, having been acted on to the last moment, it could not, on the dissolution of the marriage, be revoked; and, that at the date of the contract, the aliment was adequate in comparison to the then actual state of the husband's funds. The Lord Ordinary ordered cases, on advising which, on the report of the Lord Ordinary, the Court (Feb. 1, 1827) found, "That the pur-
"suer is not bound by the contract of separation within men-
"tioned, and repel the defence founded thereon, and find that

" she is entitled to her legal provisions as the widow of James " Roughead deceased, remit to the Lord Ordinary to hear " parties, and to decide upon the amount of these provisions, " and to proceed further in the cause as accords."* Sept. 19, 1831.

Several other interlocutors followed, having reference to the amount of the claims, which were ultimately settled at ——*l.*

Hunter appealed.

1. The contract of separation could not be elided by exception; it could only be taken out of the way by action of reduction.

2. The separation could not have been put uncited to except during coverture, for the party revoking must offer to adhere.

3. Even if revocation were competent after dissolution of the marriage, the respondent must show inadequacy in the provision; and that inadequacy must be struck, not according to the state of the husband's means and effects at his death, but at the date of the contract of separation.

Respondent.—1. The contract of separation is not challenged on the head of fraud, but inadequacy. The remedy, therefore, is clearly by exception.

2. If a provision to the wife be inadequate, the contract by which it was given to her can be revoked, notwithstanding the determination of the husband's life.

3. There was a gross inadequacy, and the period of ascertaining that fact is not limited to the date of the contract. At any time during the subsistence of the marriage the wife could have been relieved against the wrong done her. She has that remedy after his death. In law, the influence supposed to be possessed by the husband, and which may have induced or obliged the wife to accept an insufficient provision, will be presumed to have prevented her from vindicating her rights while he lived, and that influence prevailed.

---

* 5 Shaw and Dunlop, p. 266.

Sept. 19, 1831.

Lord Chancellor.—My Lords, in applying the Scotch law (which, as it appears to me, is not doubted or disputed on either side in argument,) to the facts in question between this widow and the trustee of her deceased husband, we may admit, that if on the ground of fraud (dolus in substantialibus), fraud having given rise to the contract, the arrangement between these married persons had been sought to be set aside, this ought to have been done by an action framed for the purpose, and suited to accomplish the object of the party; and that is a principal and substantive ground which was urged by the trustee in defence of the claim of the woman to her legal rights. But although fraud cannot be taken as the principal and substantial ground, inadequacy of consideration can, in the mode adopted, be brought competently within the cognizance of the Court, and made the ground of their decision. The reason why inadequacy of consideration may be made a ground of exception (as is the case here), supposing the contract is set up against the claim of the widow, without an action to reduce the instrument, appears to me to be, that donations between husband and wife during coverture are in their nature revocable by either party at any time, even by an instrument to operate after the coverture is determined; and where a contract has been made (for instance, for separation and a release of legal rights,) on a consideration which is grossly or glaringly inadequate, that contract, at least quoad excessum, is to be taken as gratuitous, and as falling within the principle that a donatio inter virum et uxorem is revocable by either party. It has been said, the contract of separation cannot be put an end to except during coverture; for, in order to put an end to that coverture, the party seeking to revoke must also tender himself or herself to the matrimonial duties by offering to adhere. No doubt, while the marriage subsists, that is perfectly undeniable as regards the contract of separation;—it cannot be determined unless in that manner and on that condition. But it is impossible to deny, on the authority of the cases to which we are referred, that revocation is competent after the coverture is determined, where the consideration is unequal. Even in the strongest case for the construction on the part of the appellants with which I am now dealing, the case of Palmer v. Bonnar, which deserves the greatest attention, because not only had it undergone much argument at the bar and upon the bench, but principally because among the majority who gave that judgment is to be found the venerable name of the late Lord President Blair, where the question was raised as to revocation after the decease of one of the parties had determined the contract, it was assumed by the Court and the President that if the consideration was grossly inadequate (which is the phrase), then the contract is revocable,

notwithstanding the determination of the life; and your Lordships will find nearly the same doctrine running through the cases which bear on this view of the matter. Sept. 19, 1831.

Then, my Lords, the question reduces itself to one of fact—the inadequacy. But in order to ascertain whether there is inadequacy of consideration, another question, and that of law and not of fact, is to be determined, namely, whether the consideration given by the one party, in respect to and in comparison with the rights surrendered by the other, is to be compared with the amount and value of those rights at the date of the contract executed, or at the determination of the matrimonial contract, that is to say, at the death of the husband. I was at first inclined to think, on general principles (for no doubt in other cases it would be so), that the comparison of the consideration with the value given up was to be taken at the date of the contract, and not at any subsequent time; but I am satisfied now by the case decided on the authority of the Lord Justice-Clerk, and that recent case not dissented from by his brethren, and I am still more satisfied from the reason of the thing, that there is a peculiarity in the irrevocable nature of the marriage contract, and that in those donations you are, upon the plainest principle, to regard not merely the date of the contract, but also the last period (at which it is admitted on the other hand the donation or contract of separation, with all its incidents and consequences, may have been validly put an end to,) namely, the decease of the husband. Because, if the contract is clearly revocable stante matrimonio up to the last hour of marriage, may we not, as the Court seems to have done in that case last cited in 1729, most fairly and consistently, and on the very principle of its revocable nature, assume, that as long as it continues unrevoked, it is to be regarded, not as a contract executed and finally concluded at the period from which it is agreed to be performed, but as a contract going on from day to day, inasmuch as either party might determine it at a moment's warning; it is so said by Erskine, impliedly, as well as expressly? Is it not to be taken as a contract perpetually renewing, to which the parties are perpetually giving their assent by their silence, and by not revoking it, just as they might at any moment, if they choose to revoke it, either expressly or tacitly, either by a deed of revocation or by notice to the party amounting to an express revocation, or by doing some other thing manifestly inconsistent with the duty imposed by the contract? If so, we are to take the respondent as standing in this situation. She might at any moment have given notice to revoke—(and so might the husband to the wife)—she might have gone up to the death-bed of her husband, and have said, "I am willing to adhere; let there be an end

Sept. 19, 1831. "of this contract." If she abstained from doing so, it was from a regard to the state of circumstances at the death of her husband, just as much as she had already done at the date of executing the contract. Then is not that state of his circumstances, in comparison with the consideration which she receives for her release of all her legal rights under the marriage contract, to be taken, not merely with a view to the date of the contract itself, when she may have been supposed to have compared them together, but also with a view to the death of her husband, inasmuch as she had a clear and unquestioned right to take them into consideration, and if she chose upon that consideration, to determine the separation in that contract? She no doubt did not take them into her sufficient consideration; she no doubt, either from fear that her husband might require her to adhere and come back again, or for some other reason, (so the law presumes, which has made so great an exception of this from all other contracts,) did not take into her consideration that inadequacy; but it is to protect her against that very want of consideration that the provisions of the law are intended —to protect against undue influence and blandishments—to protect the husband against the wife's blandishments, and to protect the wife from the husband's tyranny or his influence. Seeing that there is a consideration which is inadequate, the law will raise a presumption that the influence was in point of fact exercised, and therefore that the contract was unrevoked under the influence, and so not binding. For these reasons I strongly incline to agree with the view, that the time when you are to compare the husband's circumstances with the annuity he gave to his wife is not the time when it is admitted he had 2,700*l.*, 1,200*l.* of which was invested in heritable security, out of which she would have had a third for her life, or when, taking it at 2,700*l.*, she would have had (there being no children) a right to half the amount, say 1,350*l.*, but the time when it had amounted (by the decease of his brother) to somewhere about 8,000*l.*, and when consequently her share was increased to 4,000*l.* Now, is it not a grossly inadequate consideration for abandoning this claim that he should have given her 30*l.*? I say it is a consideration of the most glaring inadequacy, as regards the 8,000*l.*, at the period when you ought to take the computation. I do not know whether the Court of Session took it at the one period or the other, except as I may presume from a former case, which seems to be similar, as far as the statement of the Lord Justice-Clerk goes; but I think this woman giving (the man being at a very advanced period of life) the half of 2,700*l.* for the annuity of 30*l.* a year was inadequate, and glaringly inadequate, even if you take the date of the execution of the contract to be the period of comparison. It is

true, that if a better security had been given, 30*l.* might have been more adequate, and it is equally certain that the husband might have put away his fund, so as to avoid her jus relictæ effectually. But there is no such thing here. It is plain that the woman was just as uncertain, and exposed to just as great a risk, in getting the 30*l.* as she would have been if she had not made the contract, and retained her right to the moiety of the 2,700*l.* or of the 8,000*l.* There was no better security—no money was vested in trustees. If there were creditors, she was exposed to the risk of being prevented from competing with them at all; and at all events, if he were a bankrupt, she would only get so many shillings in the pound for her 30*l.* as would be her proportion with other creditors. On these grounds it appears to me that the Court of Session decided this case rightly. Sept. 19, 1831.

With respect to the other point, the alleged concealment of the funds of the husband at the time the contract was entered into,—which rather goes to the question of costs,—though a bad reason may have been given for the judgment, yet, if there is a good reason, that is no ground for reversing. In the view I take of this case, thinking there is not a competent consideration, I think the Court came to a right decision. Indeed I greatly doubt whether the alleged concealment was made a substantive ground, or whether it was not dealt with as rather illustrating the inequality of the provision, and showing that it was grossly unequal, and that she would never have thought of entering into it if she had had a thorough knowledge of his circumstances; it is merely found in the learned reporter's note.* We are in want of every thing that would give distinct and clear information as to the grounds on which that judgment was pronounced,—we have not a single statement of what any one said; but it did not probably enter into the minds of the learned Judges in disposing of the question, from finding it very little urged by the parties; it is scarce mentioned by one party, and not at all by the other. Upon those grounds I am disposed to move your Lordships that the interlocutor here be affirmed; but taking the whole of the circumstances into consideration, I am not inclined to think that any costs should be given.

---

* The note was as follows:—"The Judges were of opinion, that as no statement of "Roughead's funds had been exhibited at the date of the contract, as the annuity "was not a fair and adequate provision, and as no security had been granted even for "that small provision, it could not be considered as truly onerous, and therefore "it was not binding on the pursuer to the effect of preventing her from revoking "it, and claiming her legal provision." 5 Shaw and Dunlop, p. 267.

Sept. 19, 1831. The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities.—Gib. 14th March 1634 (Mor. Dec. 6116); M'Gregor, 22d Jan. 1820 (F. C. xx. 86. No. 18).

Respondent's Authorities.—M'Diarmid, 17th May 1826 (4 S.D. 581); Hardie, 12 Feb. 1823 (2 S.D. 213;) 1 Bell's Com. p. 648, 5th edit.; Palmer v. Bonnar, 25th Jan. 1810 (F.C.); Gaywood, 3d June 1828 (6 S.D. 909); 1 Ersk. 6, 18; 1 Bank. 5, 99; Earl of Eglinton ——— (Mor. Dec. 6151); Crammond, 4th Jan. 1757 (Mor. 6157); Lawson, 28th Nov. 1797 (Mor. 6157); Scott and others, 10th Aug. 1776 (Mor. 6108); M'Gillan, 22d Dec. 1758 (——); Stewart, 22d Nov. 1769 (Mor. 6100).

SPOTTISWOODE and ROBERTSON,— JOHN M'QUEEN,— Solicitors.

No. 37. WILLIAM M'DONALD of St. Martins, Appellant.

MACKIE AND COMPANY, Respondents.—*Dr. Lushington.*

Process—Reparation.—A person raised an action against tradesmen employed by him to furnish pipes for supplying his house with water, concluding for repayment of the sums paid to account of the price, and for damages in respect of the insufficiency of the work; held (reversing the judgment of the Court of Session), that having stated the facts on which he founded in his summons and condescendence, which the defenders fully and explicitly answered, it was too late thereafter to deny the relevancy of the facts condescended on, and therefore the case remitted to the Court of Session, with instructions to direct an issue to be framed to try the question.

Sept. 21, 1831.

2D DIVISION. Lord Medwyn.

WILLIAM M'DONALD of St. Martins raised an action against Mackie and Company, plumbers in Perth, setting forth, that wishing to supply his house of St. Martins with water, he contracted with the defenders to execute the work, and furnish pipes for the same, of proper materials, and in a sufficient and workmanlike manner; that the defenders, having thus undertaken the work, proceeded in the execution of it; and that every thing was done exclusively under the direction of them or their workmen; that their operations being completed, it was discovered that the pipes laid by them were totally inefficient for the purpose which had been in view; that at no time