

charger's house, and so must be presumed to be *donatio propter nuptias*; neither can he have any allowance upon the account of alimentering the charger's wife, because it is presumed that the mother alimentered her *ex pietate materna* for these years before her mother was married to the suspender; and the charger's wife being about twelve years of age that time, the suspender ought not to have allowance for years subsequent, because she served them in the house in the condition of an ordinary servant; as also, the suspender having intromitted with the wife's first husband's hail moveables, and having given bond for the sum charged for to the charger's wife, for her part, he cannot crave allowance or retain any part of the same upon the account of aliment. THE LORDS found that any furnishing by his mother to the charger's daughter after the bond, is not competent *hoc loco*, but reserve action therefor, as accords of the law; and found the qualification that the father in law furnished horse, cart, and servants, to carry the goods and plenishing to the charger's house, relevant to infer that the same were gifted; and remit to the Ordinary to enquire if the first aliment acclaimed by the suspender before the charger's wife's age of twelve years was before or after the bond charged upon.

Fol. Dic. v. 1. p. 404. Sir P. Home MS. v. 1. No 203. and 277.

* * Harcarse reports the same case.

1682. *December.* FOUND that a discharge, granted by a woman after proclamation of marriage, which is in place of intimation, did not prejudge the husband, unless the receiver could prove the onerous cause.

Harcarse, (CONTRACTS OF MARRIAGE.) No 351. p. 86.

S E C T. III.

What if there has been no Proclamation?

1667. *December 18.*

JOHN AUCHINLECK *against* MARY WILLIAMSON and PATRICK GILLESPIE.

MARY WILLIAMSON, Lady Cumlidge, having taken assignation to several debts of her husband's, apprised the estate from her son; and in September 1662, disposes the estate to her eldest son, reserving her own liferent of the mains and mill, and with the burden of 5,000 merks, for John Auchinleck her

No 243.

A widow having a jointure, entered into a treaty of marriage with a second husband. It was settled, that the eldest

No 243.
son, who was
burdened
with a life-
rent, should
grant a tack
of the life-
rented lands
to the intend-
ed husband ;
but, at the
same time,
she privately
disponed the
liferent to her
second son.
The marriage
having taken
place without
a formal con-
tract or pro-
clamation of
banns, the
Lords reduc-
ed the assign-
tion.

second son ; at that same time her eldest son grants a tack to Patrick Gillespie, bearing expressly, that because he was to marry his mother, and to possess the mains at the next term, therefore he sets the land for an inconsiderable duty, for a year after his mother's death ; there was no contract of marriage betwixt the said Mary and the said Patrick, but they were married in December there- after, and he possessed it till this time, and now John Auchinleck pursues for mails and duties bygone and in time coming, as having assignation to the reservation granted by his mother. It was *alleged* for Patrick, That as for by- gones, absolvitor, because he was *bonæ fidei* possessor, by virtue of the reserva- tion in favour of his wife, belonging to him *jure mariti*. *2dly*, The assigna- tion made to the pursuer was most fraudulent, being granted at the time of the agreement of marriage betwixt the said Patrick and his wife, and there being a provision granted to the pursuer of 5000 merks, the said Mary did most fraudfully at that same time assign the reservation, and so left nothing to her husband, but a woman past 60 years. It was *answered*, That where there is a solemn contract of marriage, and proclamation, deeds done thereafter cannot pre- judge the husband, but here there is neither contract nor proclamation alleged ; and albeit there had been fraud in the mother, the son (being a boy and absent) was no way partaker thereof, and cannot be prejudged thereby. It was *an- swered* for the defender, That he hath a reduction depending of this *ex capite fraudis*, and if the wife could do no fraudulent deed after the agreement of mar- riage, it will thereby be null, whether the son was partaker or not, unless he had been an acquirer for an onerous cause, and albeit there was no contract of marriage in writ, yet the foresaid tack evidences an agreement of marriage.

At advising of the cause, the LORDS thought this conveyance a very cheat, and it occurred to them that the marriage and *jus mariti* are a legal assignation ; and there having been nothing done by the son to intimate this assignation, or to attain possession thereby before the marriage, the husband by the marriage had the first complete right, and was therefore preferable ; and likewise they found the husband free of bygones, as *bonæ fidei* possessor ; and found that the reason of reduction upon fraud, after the agreement of the marriage evidenced by the tack, bearing the narrative of the intended marriage, of the same date with the pursuer's right and the disposition to the eldest son, relevant to reduce the pursuer's assignation, in so far as might be prejudicial to the husband.

Fol. Dic. v. 1. p. 404. Stair, v. 1. p. 496.

* * * Dirleton reports the same case :

MARY WILLIAMSON Lady Cumlidge, having right not only of liferent but also to the fee of the said estate by comprising, and being about to marry with Patrick Gillespie her second husband ; for settling and preventing questions be- twixt her children and her husband, she did dispone the fee of the lands to

her eldest son, with the burden of 5,000 merks to be paid to her second son at his age of 21 years, and to entertain him in the interim; and at the same time her eldest son did grant and set a tack to the said Patrick, for a year after his mother's decease if he should survive her, of her liferent lands reserved in the disposition, mentioning their purpose of marriage, and that he was to stock the said land, and that his wife might die before him; upon which considerations the said tack is set; at the same time, the said Mary did privately dispoise her liferent in favours of her second son John Auchinleck, who intended a pursuit against her and her said husband for the mails and duties of the lands for diverse years. It was *alleged*, That the said right being a private latent right, the defender ought to be free of bygones as being *bona fide* possessor by virtue of his wife's infestment, and his *jus mariti*. It was *answered*, That he and his wife are *eadem persona*, and she being his author, cannot pretend that they possessed *bona fide* in prejudice of a right made by herself.

THE LORDS found the allegiances relevant.

It was further *alleged*, That the disposition made to the pursuer was most fraudfully granted in prejudice of the defender after treaty of marriage, and the said public transactions in order thereto, which were equivalent to, and in lieu of a contract of marriage; the wife having no other thing besides to dispose of besides her liferent, to which the husband has right *jus mariti*; so that a contract was not necessary as to that; and that the said right was retained by the mother, and not delivered until she was married, at which time she could not prejudge her husband, and that the defender had a reduction depending upon the reasons foresaid.

THE LORDS found the allegiance relevant; and found that an assignation not intimated, and not being made for an onerous cause, could not prejudge the husband, having by his marriage a public right equivalent to an assignation, and therefore assoilzied.

It was not considered whether the right was delivered or not, being found latent as said is. See PERSONAL and REAL.

Dirleton, No 123. p. 50.