

*** Stair reports this case :

No 8.

1667. July 14.—SIR William Scot of Clerkington, having granted assignation to his daughter, Margaret Scot, of a sum due by Wauchton, pursues Sir Laurence his son, as haver, to deliver the same. It was *alleged* for the defender, That there was a clause in the assignation reserving a power to Sir William to alter and dispoñe during his life; and that he did assign this bond to John Scot. It was *answered*, That he took a back-bond from John Scot, bearing, that the assignation was granted in trust, to this effect only; that John Scot should do diligence thereupon. It was *answered*, That the back-bond bears John Scot to be obliged to denude in favours of Sir William Scot, his heirs and assignees, whereby the assignation is altered. The pursuer *answered*, That there appears nothing of the alteration of the defunct's mind, more than if he had apprized in his own name, whereby the bond would have been adjudged to him, his heirs and assignees; which is no more than if an assignee should use the name of the cedent; which would noways infer that, by adjudging land to the cedent and his heirs, they pass from the assignation.

THE LORDS found no alteration in the pursuer's assignation by the right made to John Scot in his back-bond; which also bore the right to John Scot, was made to do diligence, and for no other end.

Stair, v. 1. p. 472.

1674. December 15. KINLOCH against RAIT.

MR Robert Kinloch gave infeftment to Jean Rait, his spouse, in some parcels of his lands of Lethrie, bearing to be in satisfaction of the provisions in her contract of marriage; and thereafter gave her infeftment in the rest, for love and favour; after all, gave a bond of provision of L. 1000 in favours of Janet Kinloch, his daughter, with an infeftment of annualrent out of the saids lands of Lethrie. In a competition betwixt the mother and daughter for the rents of the lands, it was *alleged* for the daughter, That the infeftments granted to the wife were donations betwixt man and wife, *stante matrimonio*, revocable and revoked by the annualrent granted to the daughter; at least the infeftment granted for love and favour. It was *answered*, That here there was no express revocation, but an indirect conjectural revocation, which is not sufficient, seeing the husband might both grant a liferent of the whole land to his wife, and an annualrent to his daughter forth thereof, not to burden the wife's liferent, but to burden the fee.

No 9.

A donation by an infeftment granted by a man to his wife, above the provision in her contract of marriage, was found revocable *pro tanto* by an annualrent granted to his daughter out of the same lands.

No 9.

THE LORDS found, That seeing the annualrent of the daughter was not suspended as to its effect till the mother's death, that it did import a revocation of the mother's liferent *pro tanto* as to what was granted for love and favour.

Fol. Dic. v. 2. p. 133. Stair, v. 2. p. 293.

* * * Dirleton reports this case :

THE deceast Mr Robert Kinloch, portioner of Lethrie, having granted, after he was married, a liferent right to his wife, by infestment in some of his lands, in satisfaction of any further provision, did thereafter give her an additional jointure and infestment in other lands; after which he gave a right of annualrent, forth of the additional lands, to his daughter Janet Kinloch.

The daughter, and her husband Mr John Dickson, did intent a poinding of the ground, upon the said right of annualrent; in which process Jean Rait, relict of the said Mr Robert, compeared, and defended upon her foresaid rights, being anterior to the said infestment of annualrent.

It was *replied* for the pursuer, That, as to the first right for provision of the wife, she did not make question but that, being in satisfaction of any other provision, as said is, the additional right granted thereafter was for love and favour, and *donatio inter virum et uxorem*, and revoked tacitly by the pursuer's infestment or annualrent.

THE LORDS found accordingly, That the said posterior right was revoked by the annualrent *pro tanto*, without prejudice to the relict of the superplus, if any be, the annualrent being satisfied.

Reporter, *Newbyth.*

Clerk, *Gibson.*

Dirleton, No 204. p. 91.

* * * This case is also reported by Gosford :

IN a double poinding raised by the tenants of Lethrie, as being distressed by decreets at the instance of both the said parties, compearance was made for Janet Kinloch, who craved preference upon her infestment of an annualrent of L. 1000, and a decret of poinding of the ground: There was likewise compearance made for the said Jean Rait, who craved to be preferred, because, long prior to Janet Kinloch's infestment, she stood infest in a parcel of the said lands as her liferent and provision by her contract of marriage; as likewise, she produced two posterior infestments out of other parcels of the said lands granted by her husband, which were both prior to the said Jean's; and *alleged*, That the husband's possession being the wife's possession in law, she ought to be preferred as having the first rights clothed with possession; neither could the same

be taken away by any posterior right granted by a father to his daughter who was not a true and lawful creditor, their provisions being ambulatory and revokeable by the father during lifetime. It was *answered* for the said Janet, the daughter, That notwithstanding she ought to be preferred to the two last infestments granted to the relict Jean Rait, because her first infestment being given in full satisfaction of her contract of marriage, the subsequent infestments were only donations *inter virum et uxorem*, and so were revokeable by the husband, and *de facto* revoked by the right made to his daughter; and albeit he was not obliged to grant the same, yet it being *debitum naturæ*, and perfected and made public by infestment, it is always preferable and ought to be sustained as a revocation of any voluntary deed by the father, which depends not upon any contract of marriage. THE LORDS did prefer the daughter to the relict as to her last two infestments, seeing they could only be interpreted to be for love and favour, and were not for implement of her contract of marriage, or granted as a remuneration for any supervenient advantage that did accresce to the husband by the wife, and therefore the daughter's right, though posterior, being perfect and public, and such as could not be reversed or questioned, but at the instance of prior creditors of the father's, it ought to be preferred to the relict's right which was revokeable in law, and done by this right made to the daughter, which they did interpret to be a sufficient ground thereof.

Gosford, MS. No 723. p. 438.

1679. *January 29.*

AIKMAN *against* The HEIRS and SUCCESSORS of David Boyd.

JOHN AIKMAN pursues the successors of David Boyd, who was his tutor, to compt, and charges them with the sums contained in an assignation granted by his father to the pursuer, and also for the equal half of the defunct's other goods and sums belonging to the pursuer, as one of the two executors and universal legatars by his father's testament. The defenders *alleged*, That the pursuer had no right to the sums assigned, because the defunct granted two assignations, one to the pursuer, and another to his daughter, and both were on deathbed, and so were in effect but legacies; and the defunct, by his testament, having named his son and daughter his executors and universal legatars, without reservation of the prior assignations, the last in testaments and legacies excludes all former. *2do*, These assignations bear expressly clauses, "Reserving to the defunct to uplift the sums and dispose thereof at his pleasure;" so that thereafter having made an universal legacy, which is a disposal of all his moveable rights, the assignations granted by him with that reservation are thereby void. It was *answered*, That an universal legacy, without any particular goods or sums given upon testament, or any mention of the sums formerly assigned, can only be extended to the moveables over and above the two as-

No 100
An universal legacy found not to derogate from prior assignations on deathbed.