No 340.
A liferent provision to a wife, not otherwise provided, granted *stante matrimonio*, not revocable, if suitable to the circumstances of the party.

1662. *January.* The RELICT of Dalgleish *against* The DEBTORS of her Husband.

THE Laird of Logie gives a bond to umquhile Walter Dalgleish, and Margaret Home his spouse in liferent, and to their two daughters in fee, for a sum of money; whereupon there is a comprising deduced in favours of the spouse in liferent, and the two daughters in fee, and they infeft. Thereafter, the said Walter dispones the said lands to certain of his creditors, who are infeft, and in possession; the said Margaret Home, upon her liferent right and infeftment, pursues for mails and duties. It was *excepted*, that the pursuer's right is *donatio inter virum et uxorem*, revoked by the posterior disposition made to the defenders. It was *answered*, That the defunct's own right was but a liferent, the fee being in the person of the daughters; which fee, as the father could not revoke, nor could it be any ways quarrelled by the defenders, their right being long posterior thereto, no more could they quarrel the pursuer's liferent, which being but a mean and necessary provision for her aliment, she not being otherways provided by contract of marriage, it is not such a right, as could be revocable by any second disposition granted to the defenders, to whom the fee and property of the lands were disponed, without mentioning or reserving her liferent.

THE LORDS repelled the allegeance in respect of the answer.

Fol. Dic. v. 1. *p.* 411. *Gilmour, No* 21. *p.* 17.

*** In conformity with the above was decided Carmichael against Corsar, No 88. p. 5010.

No 341.
Donation by a man to his wife, where there was no contract of marriage, was found revocable only in so far as it exceeded a suitable provision.
See No 342. p. 6126.

1677. *June* 27. SHORT and BIRNIE *against* MURRAY.

THE deceased James Short having married Anna Murray, daughter to Polmais, without her father's consent, and without tocher or contract-matrimonial, he did, during the marriage, dispone to her in fee, a security for 10,000 merks due to him by Tillibardin and Marr, 'reserving his mother's liferent and his 'own;' he did also provide a tenement and twenty acres of land at Stirling, which was liferented by his mother, to himself and the said Anna, and their heirs; which failing, the heirs of his body, which failing, —— Brown his sister's daughter; but thereafter on death-bed, he disponed the fee of the 10,000 merks to —— Scot his mother, and expressly revoked the former disposition to his wife as to the fee; his mother dispones her right to her oyes, her son's nieces Sir Andrew Birnie's daughters. Anna Murray being now dead, Sir Andrew's daughters pursue reduction of the disposition granted by their uncle to his wife of the security of 10,000 merks, so far as concerns the fee, on this reason, that it was a donation betwixt man and wife revocable, and revoked expressly by

the said disposition to the disponer's mother. The defenders *alleged* absolvitor, because in all donations betwixt man and wife, there is a special exception of contracts of marriage, whether before or during the marriage; and, when there is no such contract, all provisions granted to wives, being *donationes propter nuptias*, are valid and irrevocable; and here there was no contract of marriage, but this disposition quarrelled was in place thereof, and bears expressly, 'to be 'in implement of a promise made the time of the marriage.' It was *answered*, That where there is no contract, all donations during the marriage are not sustainable in place thereof, for if the husband after the marriage give a competent provision, and thereafter give a second or third provision, both the posterior provisions may be revoked, because there is a prior competent provision granted; and therefore, such provisions are only sustained in place of a contract, in so far as they are competent and suitable to the quality and condition of the persons married; but if they be exorbitant, the excresce is a pure donation without all obligation, civil or natural, and so may be revoked, as in this case, the defunct did dilapidate the liferent of all his lands and money, and the stock of the money without any tocher. No 341.

THE LORDS found the disposition by the husband to the wife valid, in so far as it was a competent provision betwixt such parties, but revocable *quoad excessum* if it was exorbitant; and before answer, whether it was exorbitant or not, allowed both parties to produce what proofs or evidence they could, for clearing the estate of the defunct, and the burdens thereof, and what provision came in by the wife.

The pursuers did also *insist* for reduction of the substitution to the disponer's niece, as being left blank *ab initio*, and not filled up till the defunct was on death-bed, and who was prejudicial to the pursuers, who would be all heirs-portioners with Brown the defunct's other niece. It was *alleged* for Brown, That the writ is now in her hand filled up, and cannot be taken away but by writ or her oath. It was *answered*, That it was most competent to prove by witnesses that the writs were beside the defunct till his death or sickness, and were then filled up in the substitution in prejudice of the heirs. The defender further *alleged*, That the defender in his *liege poustie* gave warrant to the notary to fill up the defender's name, and oft times acknowledged the same, which was offered to be proved by the writer's oath. It was *answered*, That if the writ had remained in the writer's hand, his oath might be received for clearing the terms on which it was in his hand, but the defunct having gotten the writ from the writer, neither his oath nor any witnesses could prove the defunct's warrant or command to fill up the blank, which would infer a great insecurity if writs lying blank by defuncts might be made up after their death by the writer's oath.

THE LORDS did also allow both parties to adduce witnesses for proving where this writ was from the first subscribing thereof till the defunct's death, and when and how the blank substitution was filled up.

Fol Dic. v. 1. p. 411. Stair, v. 2. p. 531.

No 341.

*** Gosford reports the same case:

THERE was a reduction raised at the instance of the said Mary Scot and Sir Andrew Birnie, of a disposition made by James Short to Anna Murray, Polmais's sister, of the sum of 10,000 merks due by the Earl of Tullibardin and Murray upon an heritable security out of lands to himself and the said Anna in conjunct-fee and to the heirs of the marriage; which failing, to the said Anna Murray, his second wife; upon this reason, that the said disposition being made *stante matrimonio* by a husband, it was in law revocable, and *de facto* was revoked by a new right made of the said sum in favour of Mary Scot his own mother, who was liferenter, and transferred by her in favour of Sir Andrew Birnie and his children. It was *answered*, That the reason was noways relevant, because the said James Short having married the said Anna, daughter to the Laird of Polmais, without the consent of any of her friends, and, there being no contract of marriage, it was lawful to him during the marriage, to provide her to the fee of the said sum which was liferented by his mother, to the children of the marriage, and failing of them, to the said Anna his wife; and being noways provided *aliunde* there being no children of the marriage surviving, the foresaid sum did belong to her by our undoubted law and practique, and was not revocable. It was *replied*, That albeit there was not a contract of marriage, yet, if the provision was exorbitant and exceeded any right of terce that could have fallen to his wife, in so far it was *donatio inter virum et uxorem*, and was revocable. It was *duplied*, That by our law and frequent practique, provisions made *stante matrimonio* were never revocable, but at the instance of prior creditors of the husband, who could only quarrel the same upon pretence of exorbitancy; whereas no creditor was pursuer of the revocation; and, as the husband might lawfully have made this provision before the contract of marriage, so it was not in his power to revoke the same. THE LORDS did find, that an exorbitancy in the provision exceeding what in reason the husband would have given his wife by contract before the marriage was revocable; but ordained first a trial to be taken upon probation of the true condition of the estate; but did not find, that because he had given no tocher, that therefore it was *donatio inter virum et uxorem*, seeing both the children's fee and her's were burdened with the mother's liferent, who was yet living.

Gosford, MS. No 984. *p.* 664.

No 342.
Found in conformity with Short against Murray, No 341. p. 6124.

1715. *February* 18.

The LORD and LADY LINDORIS *against* SIR JAMES STEWART of Burra.

THE deceased Sir Archibald Stewart of Burra having no contract of marriage with his Lady, dispones to her, a little after the marriage, the liferent of his