

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reason, that the said disposition being made *stante matrimonio* by a husband, it was in law revocable, and *de facto* was revoked by a new right made of the said sum in favour of Mary Scot his own mother, who was liferenter, and transferred by her in favour of Sir Andrew Birnie and his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 fore-said sum did belong to her by our undoubted law and practise, 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 practise, 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, disposes to her, a little after the marriage, the liferent of his

whole estate, and the property of all his money and moveables ; but six years thereafter, he makes a new settlement far short of the former, upon which she was infest. She now, with concurrence of the Lord Lindoris her present husband, pursues Sir James Stewart her son, for implement of the first disposition.

Answered for the defender ; That the first disposition never came to be a binding obligation upon the husband till delivery, it being always in his power to cancel and destroy it ; and, by the parity of reason, to alter or diminish it by any subsequent deed.

Replied for the pursuers ; That there can be no dispute in this point, not only by reason that the husband is custodier for the wife during the marriage, but that the nature of the writ is such, as could only take effect upon the decease of the husband, and therefore the writ was once a fair constituted obligation betwixt them, whether delivered or not. Nor could he any more conceal it, than he could a contract of marriage, it being *donatio propter nuptias*, which comes in place of a contract, and has the marriage itself and the natural obligation on the husband to provide his wife, for the cause thereof, which is certainly onerous. *2do*. By our constant practise, such provisions have been found irrevocable ; as 28th March 1635, Lady Lauriston *contra* Lady Dunipace, No 346. p. 6132., where the Lords expressly found, That *tam dos quam donatio propter nuptias*, might be constituted between man and wife after marriage ; and which being so constituted was not revocable, being done in competency of proportion. Which decision further determines, that where there was once a prior bond made betwixt the married persons, that behoved to be reputed in place of a contract of marriage.

THE LORDS found the bond of provision, though lying by the granter the time of his decease, not revocable, except in so far as it exceeded a competent provision.

Act. Lord Advocate et Graham. Alt. Nasmyth et Ferguson senior. Clerk, Mackenzie.
Fol. Dic. v. I. p. 411. Bruce, v. I. No 78. p. 94.

1756. January 20.

Ranking of the CREDITORS of KINMINITY.

IN the contract of marriage betwixt Alexander Sutherland and Mary Sutherland, Alexander settled his whole estate upon himself and the heirs-male of the marriage, &c. in common form, and a competent jointure upon his wife ; after which followed this clause : ‘ Provided always, likeas it is here-
‘ by specially provided and declared, That in case there shall be heirs male of
‘ the said marriage, then, and in that case, the said Mary Sutherland shall be
‘ bound and obliged, as by the acceptation hereof she binds and obliges her, to
‘ pay yearly to the said heir-male, and failing of him, to the heir-male of his

No 343.
An obligation in a contract of marriage, that a wife should pay a sum yearly out of her jointure to the heir-male of the marriage, and ta.