

No 12.

endeavouring *ob majorem cautelam* to have his will declared by writ, that he might have the greater freedom of disposing of his means, can never evacuate the nuncupative will, which is clear and formal in every respect; as the Lord Dirleton signed the last settlement of his estate, not only with his own hand, but also before two notaries and four witnesses, that if the holograph subscription had not been good, the writ might subsist by the notorial attestations, *et c. contra.*

*Replied* for the pursuer; The written testament produced cannot subsist as a nuncupative; because one who declares his intention to make his will in writ, excludes all nuncupative wills, though the writ should be null for want of the legal solemnities, as effectually as the written testament, had it subsisted, would have left no place for a nuncupative will. *Qui testamentum facere opinatus est, nec voluit quasi codicillos id valere, nec codicillos fecisse videtur, ideoque quod in illo testamento scriptum est, licet quasi in codicillis poterit valere, tamen non debetur.* Whence the lawyers conclude, *Si testator voluit facere testamentum in scriptis, et omiserit aliquas solemnitates in eo requisitas, quæ tamen sufficient ad nuncupativum, ne quidem valere ut tale, quia quod voluit, in scriptis scil. testari, non potuit, et quod potuit, scil. nuncupare, non voluit. Quia una species non potest contra voluntatem constituentis in aliam converti.* *Perez. ad Codicem Lib. 6. Tit. 23. N. 19. Voet. in Pandect. Lib. 28. Tit. 1. N. 10.* And though writs for sums above L. 100, subscribed by one notary and two witnesses, will be sustained for L. 100, it doth not follow, that a null written testament should subsist as a nuncupative, which is vitiosa transitio de genere in genus. But to run the parallel close, as in the foresaid case, it being the granter's will the writ should subsist for a greater sum than law allowed the same should be sustained for the sum allowed by law; so a nuncupative testament for L. 200 Scots, might *a pari* be supported for L. 100, because of his inclination *testari nuncupative*, which cannot be pretended in this case.

THE LORDS found, That the testament could not be sustained as a nuncupative legacy.

*Kol. Dic. v. 2. p. 308. Forbes, p. 531.*

No 13.

A letter is not sufficient revocation of a bond revocable at pleasure, though it is sufficient to stop an annuity payable during pleasure.

1753. February 15.

PATRICK MALDANE of Bearcross, Esq; one of his Majesty's Solicitors, *against* ARCHIBALD Duke of DOUGLAS.

THE Duke of Douglas, in 1718, granted bond to his sister, Lady Jean Douglas, for the sum of 30,000 merks Scots, bearing annualrent, but containing a power to his Grace to revoke the same at pleasure.

Afterwards, in 1736, the Duke granted to Lady Jean a bond of annuity, narrating, that, by bonds of provision, granted either by the deceased Marquis of Douglas, or by himself, she stood provided in the sum of 50,000 merks; and that the yearly annualrent of the said sum, being L. 138 : 17 : 9<sup>1</sup>/<sub>2</sub> Sterling, was not a sufficient fund for supporting her conform to her degree and quality; and therefore as a testimony of his brotherly love and affection to the said Lady Jean, he settles upon her, during his pleasure allenary, an additional sum of L. 161 : 2 : 2<sup>1</sup>/<sub>2</sub> Sterling, to be paid quarterly.

The Duke paid these annualrents and additional annuities regularly till Whitsunday 1749. But, in July said year, he wrote a letter to Mr Archibald Stewart, his doer, discharging him to make any further payments to Lady Jean; of which letter Mr Stewart acquainted Lady Jean; and, on the 2d of June 1752, the Duke executed a formal revocation of the bond for 30,000 merks, and of the bond of annuity.

Lady Jean Douglas being debtor to Mr Patrick Haldane by bond, dated 23d May 1743, he used arrestment in the Duke's hands of all sums of money due by his Grace to Lady Jean, and brought an action of forthcoming; and, amongst other things, insisted against the Duke for the annualrents of the 30,000 merks, and for the additional annuity since Whitsunday 1749.

*Pleaded* for the Duke; That these sums were only payable during pleasure, and therefore neither Lady Jean nor her creditors can demand them from the Duke. It was not necessary to make any intimation to Lady Jean, that he was not to continue the favour, it being a good answer to any demand for these sums from the Duke, to say, that he did not please to pay them any longer; but if any such intimation was necessary, it was sufficiently made by his Grace's letter to Mr Stewart in July 1749, with which Lady Jean was acquainted before Lammas that year.

*Answered* for Mr Haldane; That the annualrents and annuities continued to be due till formally revoked in June 1752; for, till that time, neither Lady Jean, nor her creditors, could know that his Grace was to withdraw his bounty; and, till she knew it, she was entitled to live up to the yearly income settled on her by her brother, and creditors to contract with her on the faith of it. An obligation, *si voluero dare spondeo*, is absurd; but one may bind himself to pay a yearly sum revocable at pleasure, and such sum will continue to fall due till actually revoked. The letter to Mr Stewart is not equal to a revocation; for though Mr Stewart was thereby discharged to pay, yet the Duke, or some of his factors, might have paid annualrents and annuities; at least, there can be no doubt that the annualrents of the 30,000 merks continued to become due till the bond was revoked.

“ THE LORDS found, That the additional annuities and annualrents of the 30,000 merks were due till actual revocation; and that the additional annuities were actually revoked by the Duke's letter to Mr Stewart, dated 10th July

No 13. 1749, and notified to Lady Jean before Lammas 1749, and therefore were only due to Whitsunday 1749; but found, that the annualrents of the bond for 30,000 merks were due till the date of the revocation of the said bond in June 1752.

Act. *Advocatus, Haldane & Hay.* Alt. *Ro. Craigie & And. Pringle.* Reporter, *Dun.*  
Clerk, *Kirkpatrick.*

B. *Fol. Dic. v. 4. p. 206. Fac. Col. No 66. p. 101.*

See APPENDIX.