1685. *January.*

LADY BATHGATE *against* COCHRANE of Barbachlay.

No. 264.

A Lady judicially ratified an assignation to part of her jointure, but retained the assignation in her custody. She was not bound by the assignation notwithstanding the ratification.

The Lady Bathgate being infeft upon her contract of marriage, in an yearly annual-rent of 2500 merks, having pursued a poinding of the ground, and there being compearance made for ——— Cochrane of Barbachlay; it was alleged for him, that the Lady did dispone 1300 merks of the said annual-rent in favour of Muirhead of Braidysholm, and did ratify the disposition judicially; and it is offered to be proved by Braidysholm's oath, that the disposition was to the behoof of the Lady's husband, and so was a renunciation and extinction of the annual-rent *pro tanto*. Answered, That the disposition was never a delivered evident, being still in the pursuer's own hand; and if it had been delivered, as it was not, yet being *donatio inter virum et uxorem*, it was revocable, and she now revokes the same. Replied, That the pursuer cannot allege that the disposition was not delivered, seeing she did ratify the same judicially, which is sufficient to prove the delivery; and she cannot revoke the disposition, she having judicially ratified the same upon oath.

Duplied, That it was ordinary for women to ratify dispositions judicially, and yet retain the disposition and ratifications in their own hands until affairs were finally ended, so that the judicial ratification cannot infer the delivery of the disposition; as also the judicial ratification cannot be rejected, seeing it is not subscribed by the pursuer but only by the clerk, and it was not done before the Judge-competent, being done by the Sheriff of Edinburgh within the precincts of the Abbey, which is *extra territorium*. Triplied, That the judicial ratification of a right must infer the delivery as well as the registration or intimation thereof, and the ratification ought to be sustained, albeit the pursuer be not subscribing; because it is offered to be proved by her oath, That she compeared judicially, and ratified the disposition and judicial ratification, which being *actus voluntariæ jurisdictionis*, may be done and expede before any Judge having jurisdiction, albeit *extra territorium*, seeing it is not necessary it should be done *pro tribunali*; but in any private house, whether it be within or *extra territorium*. The Lords found the allegeance of not-delivery of the disposition relevant, seeing it was still in the Lady's own hand, and that it was not elided by the judicial ratification.

Sir P. Home MS. v. 2. No. 686.

1706. *January* 1. TROTTER *against* PITCAIRN and His LADY.

No. 265.

A woman after making her testament, executed an assignation of

Jean Ramsay, relict of Sir Patrick Brown of Coalston, in her testament, by way of missive letter, nominates the Lady Pitcairn, her niece, her sole executor and universal legatar; but some months after this testament, she assigns a bond of 1,000 merks, owing to her by Mr. Watt of Rosehill to the Lady Idington, her

No. 265. a bond, which assignation lying in her repositories at her death, was found effectual.

brother's relict, in life-rent, and to Rachel and Jean Ramsays, other two of her nieces, in fee. After her death, her cabinet and papers being sealed up of consent, the Lady Pitcairn breaks up the seals, and takes out the writs; and being pursued by Doctor Trotter and his children for delivery of the said 1000 merks bond and assignation in their favour, it was alleged, The assignation was null and ineffectual, never being delivered in the defunct's life-time, nor bearing any clause dispensing with the not-delivery. Answered, 1*mo*, Dr. Pitcairn or his Lady cannot object this, because, by your violent and summary meddling with the writs when sealed up, you have forfeited and lost all right you had to the executry, both by the common law, L. 35. C. De Legat. where the abstractor of a testament can claim no benefit thereby when discovered, and by ours. 2*do*, The assignation being posterior to the testament, (which is ambulatory usque ad supremum vitæ halitum), is a plain alteration and revocation of it, in so far as concerns the sum assigned, and derogates therefrom: This assignation being of a particular subject, it must have the effect of a special legacy, L. 18. et 24. De adim. et transfer. legat. 3*tio*, Though writs *regulariter* require delivery, yet this rule suffers sundry exceptions; as, 1*mo*, Of bonds granted by parents to children in familia; because there it is supposed the father keeps them as their tutor and administrator, and his custody and possession is theirs, and which was even extended to a bastard son, 25th February, 1663, Aikenheads, No. 253. p. 16994.; 2*do*, Where the assignation reserves the granter's life-rent, or a power to alter, delivery is not requisite; for the granter has a clear and plain interest to retain them, 19th June, 1668, Lauder and Hadden, No. 256. p. 16997. See also the act of sederunt, 13th February, 1692, and 13th February, 1679, Cathcart against Corsclays, No. 97. p. 12325. Yea, 3*tio*, It was extended to a disposition made by an uncle to a nephew, that, because of the relation, he was presumed to keep it for the assignee's behoof, unless it could be instructed he had done some deed to recal or evacuate it, 23d June, 1675, Bruce, No. 260. p. 17000. And here the Lady Coalston could not deliver it to all the three who had interest in it, and would not registrate it, that taking away her power of altering, and therefore she kept it for her use. Replied, Whatever has been allowed in bonds of provision to children, there is no reason in law to extend that to remoter relations extra familiam; and it is a solid principle, That non pactis, sed solis traditionibus transferuntur rerum dominia; and though she resolved to give this bond to her good-sister in life-rent, and her two nieces in fee, yet that resolution was alterable; and the opening of the seals was of no moment, seeing they were not put on by the authority of any Judge or Magistrate. The Lords, by a plurality of six against five, (two being non liquet,) found this assignation needed no delivery, and therefore sustained it; and repelled the objection of not-delivery, especially it being of a date posterior to the testament.

Fountainhall, v. 2. p. 305.