

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.

No 343.
the heir-male
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creditors, and
the heir-male
was found to
have right to
the said sum
without re-
presenting his
father.

' body allenary, but to none of the said Alexander Sutherland his other heirs,
' the sum of 200 merks Scots money, and two chalders of meal or the price
' of the said two chalders in money, conform to the fiars of the commissariat
' of Murray, in the option of the said Mary Sutherland. And further, if it
' shall happen the said Mary Sutherland to marry another husband after the
' said Alexander his decease, then, and in that case, she binds and obliges her,
' to pay yearly to the said heir-male, and to the heirs-male of his body, but to
' none of the said Alexander his other heirs, the sum of 100 merks Scots mo-
' ney, and one chalder of meal, or the price thereof, in manner above-men-
' tioned; and that by and attour the said 200 merks and two chalders above
' written, and that out of the first and readiest of the mails and duties of the
' said liferent-lands; with the payment of which money and victual, in the
' respective events aforesaid, the said liferent-lands and this present right are
' burdened.'

At the time of this contract, Alexander was clear of debt, and Mary brought a fortune with her suitable to the provisions.

Afterwards Alexander contracted great debts. Of the marriage there was an heir-male, who, upon Alexander's death, renounced to be heir to him; the creditors of Alexander took decret *cognitionis causa*, and brought the estate to a sale.

In the ranking of the creditors, Mary Sutherland claimed to be ranked for her whole jointure. The creditors *objected*, That, in terms of the proviso, there being an heir-male of the marriage, she should be cut off from 200 merks and two chalders of meal yearly of her jointure.

The creditors laid their plea thus: That the proviso was no other thing than a restriction of the wife's jointure in a certain event, and of consequence an enlargement of the father's fee in that event; but, as the fee of the estate was provided to the heir-male of the marriage, only as a right of succession to his father, so the benefit of the restriction was provided to the heir-male only as a right of succession in the same manner; and both the restricted sum and the fee of the estate being provided to him only *per expressum* as heir-male to his father, he has no more interest in competition with his father's creditors in the former than he had in the latter. He cannot take either except as heir, but to be heir of line he has already renounced; and, if he claims as heir of provision, the sum which he takes must be subjected to his father's debts.

Answered for Mary Sutherland; The provision was not a restriction of the wife's jointure to enlarge the husband's fee, but merely an obligation upon the wife to aliment the heir-male after his father's death. The mother brought a suitable portion with her, she had a right to demand this aliment for the heir; the father was clear of debt, he had a right to give it; the present creditors saw both him thus denuded and her thus bound, and yet contracted with him. If a third party had settled an annuity upon the lady for behoof of the heir-male of the marriage, or if Alexander had settled an annuity upon a third par-

ty, under an obligation to pay a part of it to his heir-male, no creditor could have touched it. It would be odd if parents were the only persons barred by the law from taking care of their own children, when they follow out the same methods which would protect their own gifts to the children of others. To entitle the heir-male to take the aliment in question, there is no occasion for his connecting himself with his father. In the proviso it is only the *hæres designative* that is intended, it is not the *hæres actu*; it is sufficient for him to stand in such a relation, that he might be entitled to serve to Alexander if he thought fit.

“ THE LORDS found, That the provision in the contract of marriage to the heir-male does not diminish the lady’s liferent, nor does it belong to the creditors; and therefore preferred the lady to the Creditors for her full liferent,” See PROVISION TO HEIRS AND CHILDREN.

Reporter, *Justice Clerk.* For the Creditors, *Burnet.* Alt. *Ferguson.* Clerk, *Gibson.*
J. D. *Fac. Col. No 177. p. 264.*

S E C T. VI.

Provisions granted, *stante matrimonio*, to the Husband, in place of Tocher, whether revocable.

1673. *January 22.*

WATSON against BRUCE.

JANET WATSON pursues a reduction of an assignation made by her to Mr Walter Bruce, on this reason, That it was to the behoof of umquhile Mr Robert Bruce, her deceased husband, and taken in the name of Mr Walter, his brother, because her husband could not consent with her in favour of himself, and that being to her husband’s behoof, it was a donation betwixt man and wife revocable, and now revoked by her.

In this cause, the LORDS, before answer, ordained Mr Walter to give his oath how he got this assignation, and for what cause. He deponed that he paid no money for it, but that he got it in security of L. 1000 owing to him by his brother, and that he received it from Mr William Hog, who said he had warrant from his brother and wife to deliver it, and that a long time before his brother’s death. The pursuer now *alleged*, That the assignation was in trust to the behoof of the husband, Mr Walter’s brother, and qualified the trust by these evidences; *imo*, That the assignation was granted by her, when she was near the time of her delivery, in expectation of death, and did dispoise all that she had in the world, even the abuilziements of her body; and did contain se-

No 343.

No 344.

A woman being married without a contract, and during the marriage, having conveyed to her husband the liferent provision she had by a former husband; this was found a donation revocable, since the husband got of her means *aliunde*, *jure mariti*, what was reckoned a suitable tocher.