

1765. February 7.

CHRISTIAN KIRKPATRICK *against* SHORT.

No 30.

A gratuitous bond of annuity, containing a power to alter was presumed revoked by a posterior special disposition containing the whole subjects of the grantor.

JANET GRIERSON, upon the 20th of July 1761, granted to Christian Kirkpatrick her niece, a gratuitous bond for an annuity of L. 6 Sterling, to be paid yearly, during all the days of her life. In this bond she reserved power to herself to alter; and provided that the same should be sufficient, in so far as not altered by her; or, though it should be found in her custody, or in that of any other person, with the delivery of which she thereby dispensed.

This bond was delivered to Christian Kirkpatrick some time before the death of her aunt. Thomas Short, a nephew of Janet Grierson's, had afterwards the influence to procure from her a special conveyance to her houses, which were her whole estate, excepting a little furniture, that scarcely defrayed the expenses of her funeral. This disposition, which was likewise gratuitous, contained the following clause: "Reserving to me my liferent-right of the premises, and power to alter it *etiam in articulo mortis*. And I oblige myself to warrant this disposition to Thomas Short, from all facts and deeds done, or to be done by me to the contrary; all of which I hereby recal, declaring this to be my only settlement with regard to the matters here contained; which I also declare to be sufficient, though lying by me undelivered at my death."

Upon the death of Janet Grierson, a process was commenced at the instance of her niece, against Mr Short, in whose favours the above-mentioned disposition was granted. The arguments insisted upon by the pursuer were, that her bond of annuity, though gratuitous, constituted her a creditor to her aunt, and gave her a right to insist against the defender, who was bound by his acceptance of the disposition, in which were contained the whole effects of the grantor; and which deed, though special in appearance, was a general one in effect. She *contended*, That, if a person disposed part of his estate gratuitously, his creditors might sue for reduction upon the statute 1621, if the rest of his estate was not sufficient to discharge their debts. That reduction upon that statute had been allowed, in many cases, by the Court of Session, to gratuitous, as well as to onerous creditors; and therefore, though the settlement of the defender had contained a part only of the deceased's effects, in place of the whole, which it really did, this action of competition would have been competent to the pursuer, as there remained no other fund out of which her annuity could be paid.

The defender, on the other hand, *insisted*, That the pursuer's annuity was effectually revoked by the disposition granted to him: That this disposition was special, and inferred no representation of the deceased; consequently could never subject the defender to the payment of her debts. If she could qualify herself to be a creditor by her gratuitous and revokable deed, she would be entitled to insist upon the act 1621; but that this was impossible for her to do, and the power of revocation had been exercised by the settlement in favours of

the defender. That there was no inconsistency between the pursuer's bond of annuity and the disposition to the defender; both were gratuitous; she was entitled by the one to a certain sum, in name of annuity; and he had a right by the other, to certain subjects therein particularly enumerated and specially disposed: That, if she could discover any other person who represented the defunct, she might insist for payment; but the defender was not that person, nor this action competent against him.

THE COURT found, "That the bond of annuity was revoked, in so far as concerned the subjects contained in the disposition to the defender, and that it was revoked by said disposition."

Act. Montgomery.

Fac. Col. No 3. p. 5.

1770. July 24.

ROBERT SCOTT of Logie, *against* MARGARET SCOTT, Widow of James Scott, late of Logie.

By marriage contract, dated 5th November 1728, Margaret Scott, in the event of her surviving James Scott her husband, was provided in an annuity of 1200 merks, and in the liferent of a tenement in Montröse; and this provision she accepted of in satisfaction of her terce or third of moveables, excepting the third of the household-furniture, if there were children of the marriage, and the half if there were none.

There were no children of the marriage; and thereafter James Scott of Logie made the following provisions in his wife's favour:

By a deed, dated 24th May 1751, she got an additional liferent provision of other two tenements in the town of Montrose; by a deed dated 1st July 1751, within the space of five weeks from the former, she was assigned to the whole executry that should belong to Logie at his death, free of all debts which might then be resting owing; by a deed dated 5th July 1759, she was provided in an additional liferent annuity of 600 merks; and, lastly, by a deed dated 24th May 1762, she was provided to the liferent of the mansion-house of Newmanswalls, the only mansion-house upon the estate, with the offices, garden, and inclosures contiguous.

Upon the 23d March 1767, Logie executed a deed, wherein, upon the recital of his having no issue of his own body, he disposed to the pursuer, his nephew, then Robert Milne of Hatton, and to a certain series of heirs, the several heritable subjects, the same as those contained in his marriage contract; and amongst these the lands Newmanswalls, with the manor place, yards, orchards, &c. as also three tenements in the town of Montrose; the liferent of

No 30.

No 31.

Implied revocation of a *donatio inter virum et uxorem*, by a posterior deed.