

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.

No 344.

veral sums of money and goods belonging to her, and an annualrent provided to her in liferent by her first husband, without reservation of either liferent or aliment to herself; and it cannot be thought that any person in their wits could have given such an assignation to a stranger, if it had not been to her husband's behoof; *2do*, Her husband, notwithstanding of this assignation, did uplift many and great sums belonging to his wife, extending to 20,000 merks, and did uplift the annualrent provided to the pursuer by her first husband, during all the days of his life, which was twenty years after the assignation, without the least quarrel by Mr Walter, his brother, who, if the assignation had been to his own behoof, would have had right to all these sums; *3tio*, Mr Walter hath subscribed witness to several discharges of his brother's, of the liferent; *4to*, Mr Walter, by his oath, pretends not that he paid any thing for the assignation; and though he depones that his brother was owing him L. 1000, that ought not to be received without instruction by way of quality in his oath; neither is his oath clear that his brother was his debtor at the date of the assignation; but when he got the assignation, which, though he says he got long before his brother's death, which may be, yet not within a dozen of years of the date thereof, neither was it delivered by the pursuer, but was delivered by Mr William Hog, who was never entrusted by her, but was her husband's advocate; so that trust being easily presumed amongst persons who were so conjunct, and where there was no anterior onerous cause, and *in dubio*, trust is far easier presumed than donation. It was *answered*, That this assignation being Mr Walter's own evident, and in his own hand, it cannot be taken away, but by writ, or his own oath, and presumptions are not relevant; *2do*, Though presumptions were receivable, they could but infer a presumptive probation, which is always taken off by stronger presumptions, much more by the positive oath of a minister, who depones that it was for his own behoof, and for onerous causes; *3tio*, Though there were no oath, the presumptions alleged are not relevant, because Mr Walter's forbearance to make use of his assignation, was in respect that his brother had no children, and he had hope to succeed him, and therefore would not offend him. It was *replied*, That the oath not being referred by the party, but taken *ex officio ad informandum religionem judicis*, it could exclude no other probation by writ, or other evidences inferring trust.

THE LORDS found the evidences of trust relevant and proved, and declared that the assignation was to the behoof of Mr Robert, the pursuer's husband, and that as to the liferent constituted by her former husband, which was only now remaining, it was revocable as a donation between man and wife, except in so far as Mr Walter should instruct that his brother was his debtor at the date of the assignation.

Compearance was then made for a creditor of Mr Robert, the husband, who alleged that this assignation, albeit it were to the behoof of the husband, or granted to the husband himself, is not revocable, because there being no contract of marriage betwixt Mr Robert and the pursuer, an assignation by her to

her husband must be understood as in place of the contract of marriage, Mr Robert having received no other tocher; and being a person of good quality, deserving all that the pursuer had; and by the Lords frequent decisions, *provisions to wives during the marriage that had no provision or contract before, are never found revocable.* It was answered, That such rights are valid, when granted expressly for supply, either of jointure or tocher, or when the same is remuneratory, and the husband gives a jointure suitable; and any thing the pursuer got from her husband, was within two chalders of victual, not given at the time of this assignation; and he had by his wife above 20,000 merks, which is more than sufficient; and it cannot be thought that her assignation to a liferent, constituted by her former husband, which uses not to be assigned in so far as concerns the wife's right, if she survive her husband, should be a remuneratory donation in place of a tocher.

THE LORDS found that the assignation to the pursuer's liferent, constituted by her former husband, was a donation revocable, unless her husband had given her a suitable liferent, equivalent to the sums he got by her, or that it had been expressly given her in place of tocher. See PROOF.

Fol. Dic. v. 1. p. 411. Stair, v. 2. p. 157.

1676. December 15.

INGLIS contra LOURY.

JOHN INGLIS pursues William Loury to deliver up to him a bond of 500 merks, granted by East Sheils to umquhile Loury, and which she did assign to young East Sheils. It was alleged for the defender absolvitor, because he offered him to prove that this bond was assigned by the said Loury to her husband, to which assignation the defender hath right by progress. It was answered, That the allegiance ought to be repelled, because that this being an heritable bond bearing annualrent, granted to the wife before the marriage, it did not fall to the husband *jure mariti*; and therefore the wife's assignation *stante matrimonio*, is still revocable, *nisi morte confirmetur*. It was replied, That though this allegiance holds true, while it is in the husband's person, yet it cannot be extended against singular successors, obtaining assignations for onerous causes; 2do, If there was no contract of marriage, this assignation is valid in place of a contract, or at least it did expressly bear for *implement of a contract*.

THE LORDS found that the assignation of an heritable bond being a donation by a wife to her husband during the marriage, that the same was revocable by the wife at any time in her life, even after her husband's death, by a posterior assignation, which was effectual against every singular successor, though acquiring *bona fide* from the husband for onerous causes; and found, that albeit a provision to the wife, during the marriage, where there was no contract or prior provision, is not revocable, the man being naturally obliged to provide his wife, this does not hold in an assignation in favours of a wife granted to her husband,

No 344.

No 345.
A disposition by a wife to her husband, of an heritable bond during the marriage, found revocable by her as a donation, though there was no contract, nor had she brought any other tocher with her.