

father might seek back again the said bonds, and alter or cancel them at his pleasure; but real securities or lands being expedited by the father to his bairns, are not retreatable by him.

No 234.

Act. *Learmont & Hay.*Alt. *Belsbes.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 155. Durie, p. 348.*

1630. June 11.

FAIRLIE against FAIRLIE.

ONE Fairlie being heir to her brother Fairlie, and Richard Maxwell, her spouse, pursue Mr Patrick Forrest, as haver, and Eupham King, as maker of an assignation to some obligations made by her in favour of the said umquhile Fairlie, her son, to whom the pursuer was heir, for delivery of the assignation; wherein the defender haver producing the assignation, the mother, who was maker, alleged the summons was not relevant, never reporting that the same was delivered to the defunct in his own time, before his decease, or that it was delivered to this haver to the assignee's behoof, nor noways qualifying, that the same ever became the said defunct's evident. This allegiance was repelled, and the summons and action was sustained and found relevant, bearing, That the assignation produced called for was made in the defunct's favour, and that the same was out of the cedent's own hands, and was in the hands of this defender, who produced the same, who was father-in-law to the assignee, (the assignee having married his daughter,) and whose having the same, without any qualification how he received the same, and from whom, was found to be a presumption that the same was become the assignee's evident; in respect whereof, the LORDS found it not necessary to libel or reply that the writ was in the assignee's hand at any time before his decease, or that the haver had received it to the assignee's use, or to make any other qualification or probation, that the writ had become his evident in his lifetime; but without any such qualification or probation, except only upon production of the said assignation by the haver thereof, they found, that the same should be delivered to the assignee's heir, as an evident proper to the defunct, and so now to the heir.

No 235.
An assignation executed by a mother in favour of her son, and put into the hands of his wife's father, was presumed to be for the son's behoof, and consequently became his evident upon delivery.

Act. *Stuart & Cunningham.*Alt. *Nicolson & Aiton.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 156. Durie, p. 516.*

1676. November 14.

INGLIS against BOSWELL.

A FATHER having granted bonds of provision, in favour of his children being *in familia*, and having thereafter contracted debt, it was found, That the creditors, though posterior, are preferable to the children; and though, in other cases, it

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No 236. is presumed, that bonds or writs being in the hands of those to whom the same are granted, were delivered *ab initio*; yet, in the case of children, the presumption lies against them, that they are still in the hands of their parents, so that they are masters of the same; and *eo ipso*, that thereafter they contract debt, they revoke the said provisions, in so far as they may prejudice their creditors; unless it be offered to be proved, that they were delivered, and were the children's evidents, the time of the contracting the said posterior debt.

Reporter, *Newtown.*

Clerk, *Hay.*

Fol. Dic. v. 2. p. 155. Dirleton, No 334. p. 187.

* * * Stair reports this case:

THE Earl of Dalhousie being addebted to umquhile John Boswell by bond, the said John grants a bond of provision to his son John Boswell of 2500 merks, and assigns him to so much of the Earl of Dalhousie's bond in the year 1645; thereafter, in the year 1648, the said John Boswell, by contract of marriage with his daughter, assigns to John Manson, in name of tocher, 5000 merks of the same bond; after which contract, John Boswell, the son, obtains payment from the Earl of Dalhousie of a part of the sum assigned to him, and now there remains not enough in the Earl of Dalhousie's hand to pay both the assignees; therefore there is a competition betwixt the children of John Boswell the first assignee, and Major Inglis, as having right from Manson the second assignee. It was *alleged* for the first assignee, That their priority should prefer them, having obtained payment of a part, which is equivalent to an intimation, before any intimation or diligence upon the posterior assignation.— It was *answered*, That the contract of marriage is a cause onerous in favour of the husband, who is a stranger; and therefore creditors are always preferable to bairns' portions, though prior, and therefore are ambulatory in the parents' power, and consequently revockable directly or indirectly by contracting of debt, especially where the children are in family, and they are always accounted fraudulent and latent deeds to insnare posterior creditors contracting with them.

THE LORDS found, That bonds of provision in favour of children while they are in the family, if they be delivered without evidence of fraud, are valid rights, and not revokable; but that they are presumed to be retained in the parents' hands, and so are not presumed to be delivered, as if they were granted to strangers; and therefore they preferred the contract of marriage, unless it were proved by witnesses, that the bond was delivered to John, or was registered, or some deed done importing delivery thereof to him.

Stair, v. 2. p. 462.

* * * Gosford reports this case :

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In a double pointing betwixt the said parties, for preference to a sum resting by the Earl of Dalhousie to George Boswell, it was *alleged* for Major Inglis, that he had right to a tocher of 5000 merks from John Manson, to whom the said George was obliged, by contract of marriage, to pay the foresaid sum, and thereupon, as a true creditor, craved, that the Earl of Dalhousie might be decreed to pay him what sums of money he was duly resting to the said George. It was *answered* for the Children of the said George Boswell and their tutor, That they ought to be preferred notwithstanding, because their father, before the contract of marriage with Mason, had granted a bond of provision to his children, and, for their farther security, had assigned them to the sums of money due to them by the Earl of Dalhousie, and so having the first right, they ought to be preferred in this pursuit, especially, seeing the competition being betwixt children, all their provisions by bond or contract of marriage, granted by their father, were but *meræ donationes*, or if they be constructed to be *debita naturalia*, and so found in law, then the rest of the children having both the first obligation, and a particular assignation to that same bond for security, they ought to be preferred. It was *replied* for Major Inglis, That notwithstanding of these answers, he ought to be preferred; and as to the first, there is a great difference betwixt tochers which a father is obliged to pay by contract of marriage, and where he gives bond to the rest of the children for a portion natural, the first being not only a true and lawful debt, but a privileged debt amongst lawful creditors, whereas the other is always reputed *mera donatio*, and all lawful creditors preferred; and as to the second, it cannot militate, because, albeit it was prior, and did bear an assignation, yet remaining still in the possession of the father, he had power to revoke the same, and could not hinder him to contract debt thereafter, nor prejudge posterior creditors, as being a latent deed. THE LORDS did prefer Major Inglis, unless the rest of the children would prove, that not only their father granted the bonds of provision bearing the foresaid assignation, but that likewise he had actually delivered the same before the contract of marriage with his daughter and Manson, and that the children had absolute power thereof, so that the father could not revoke, as being master of the bond and assignation.

Gosford, MS. No 981. p. 580.

1685. December 2. LADY BATHGATE *against* COCHRAN of Barbachly.

In the pointing of the ground pursued by the Lady Bathgate, upon an infertment of annualrent of 2500 merks out of the land of Bathgate, there

No 237.