

No 6. new grounds, not then represented, viz. that the aliment being given by a grandmother it was presumed to have been done *ex pietate*, especially seeing there was no paction for aliment alleged on, which ought to be when the party alimented is come to the age of 14 years; for then he is capable of pactioning; as also in respect the assignation granted to the Bishop of ———, bore this quality, that in case of James Sinclair the cendent's reconvalescing he should be in his own place again; which proved that the assignation was but *donatio mortis causa*, and not for the onerous cause of aliment; and, 3tio, Because of the documents adduced to prove it was paid, or that he was *alibi* all that time, either as an apprentice in Edinburgh, or as a soldier abroad; and upon these and sundry other complex grounds, they annulled the act of litiscontestation and probation following thereon, (though some of the grounds were formerly proponed, and others were competent and omitted), and gratified Robert Barclay the Quaker with an absolvitor; who stood at the bar with his hat off, and gave the Lords a relation of a part of the case, and gave the Chancellor the compellation of 'my Lord.'

Fountainball, v. 1. p. 223. & 243.

1714. December 17.

STRACHAN of Glenkindy against DUMBAR of Grangehill.

No 7.
Although a bond of provision, granted to a daughter bore *secluding assignees*, yet, she was not thereby precluded from assigning the same to her husband in her contract of marriage.

THE deceased Grangehill, by his bond of provision in favours of Mary Dumber his eldest daughter, binds to pay to her, her heirs, &c. 'secluding assignees,' 8000 merks after her marriage; and in testament, names certain friends, by whose advice his children (who were then minors) should be ordered. With consent of these, she having entered into a contract of marriage with Sutherland of Kilminity, they assigned the apparent husband, his heirs, &c. to the said sum, and he transferred the same to Glenkindy; and it being controverted what the import of the words 'secluding assignees' should be, even though there were children of the marriage,

It was *alleged* for Grangehill, That the assignation could not be sustained, though in a contract of marriage, because assignees were expressly excepted in the body of the writ.

Answered for Glenkindy, that such exceptions were only to be understood to seclude voluntary rights to extraneous persons, and not legal assignees, such as the husband became by the marriage; for if it were otherwise, it would overturn the design of the bond, the cause whereof rendered by the father in the preamble was, 'for his said daughter's creditable and honest provision, and settlement in the world,' by which it is plain to have been the father's design that the said sum should go to his daughter *nomine dotis*.

Replied for the present Grangehill, That the clause in the bond was clear, secluding assignees in general, and therefore there was no ground for the above distinction.

No 7.

Duplied for Glenkindy, That the above interpretation was sufficiently cleared by the terms of payment in the bond, viz. the one half at the term of Whitsunday, after expiration of year and day of the marriage, and the other half at the next Whitsunday thereafter; so that the very payment to the wife made it belong to the husband *jure mariti*; and there being no clause obliging the husband to re-employ (which the father would have done if he had designed the fee of the money to have for ever continued with her heirs), he justly claims the yearly annualrents even after the marriage, with as good ground as the principal sums, both being provided and payable in the same manner.

THE LORDS found, that though the bond of provision to the daughter secludes assignees, yet that did not hinder her to assign the same to her husband, by contract of marriage; and therefore found the defender liable, and repelled the defences.

Act, Horn.

Alt. Se.

Clerk, Robertson.

Fol. Dic. v. I. p. 305. Bruce, v. I. No 22. p. 30.

1735. January 29.

CRAIK against CRAIK.

No 8.

WILLIAM CRAIK having one son, Adam, and one daughter, Jean, made a settlement of his estate in favour of Adam, and the heirs male of his body, &c. which failing, to his daughter Jean, &c. which failing, to the heirs female of his son's body, &c. with this provision, that none of the heirs of entail should have liberty to disappoint the course of succession by contracting debts unnecessarily, or by making deeds or conveyances in prejudice thereof. After the father's death, Adam, the son, in his marriage contract, made a new settlement of the estate, wherein he preferred the heirs female of the marriage to his sister Jean, and her heirs; and he also dying without issue male; in a competition betwixt his eldest daughter, Mary, who claimed the estate upon this settlement, and her aunt Jean, who claimed it upon the former, the LORDS found, that Adam Craik could not, in his contract of marriage, settle the succession in favour of his own daughters, preferably to his sister. Mary here *urged* the onerosity of the contract of marriage, the obvious answer to which was, that however onerous with regard to the husband and wife, it is merely gratuitous with regard to the heirs of the marriage, especially with regard to remote substitutes, such as Mary, who is postponed not only to the heirs male of the marriage, but to the heirs male of any other marriage.—See APPENDIX.

Fol. Dic. v. I. p. 304.