

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THE COURT found, "That the bond of annuity was revoked, in so far as concerned the subjects contained in the disposition to the defender, and that it was revoked by said disposition."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

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which was conveyed to his widow, one by the marriage contract, the other two by the deed 24th May 1751.

In the dispositive clause of this deed, after enumerating all the heritable subjects above-mentioned, there was the following reservation and saving clause: " Saving and reserving, &c. to the said Margaret Scott my spouse, in case, &c. that back tenement of land, &c. to the liferent whereof she is provided by our contract of marriage aforesaid ; as also it is hereby expressly provided and declared, that the said Robert Milne my nephew, and the other heirs of tailzie, &c. shall, by acceptation hereof, be bound, burdened, and obliged to contract and pay to the said Margaret Scott my spouse, in case she shall survive me, the two liferent annuities after mentioned, viz. the sum of 1200 merks, to which she is provided by the foresaid contract of marriage, and the sum of 600 merks, to which she is provided by an heritable bond granted by me, dated 5th July 1757 ; in both which annuities she stands infest, &c.' "

Upon Logie's death and examination of his repositories, the pursuer objected to part of the provisions in the widow's favour. He made no challenge of the two annuities of 1200 and 600 merks, nor of the liferent of the tenement in Montrose, nor of the assignment she had obtained of the whole executry free of debts ; but he objected to the other two liferent provisions, viz. that of the other two tenements in the town of Montrose, settled by the deed 24th May 1751, and that of the mansion-house, yards, and parks of Newmanswalls, provided by the deed dated 24th May 1762.

In his action accordingly he *maintained*, 1st, That as neither of these two deeds had been delivered, but remained in the granter's custody, they gave no *jus quesitum* to the defender ; and as they remained as much under the granter's power as if they never had been executed, they were liable to revocation, and had accordingly been revoked by the after disposition in the pursuer's favour. 2dly, Though delivery had not been requisite, they were revokable at any time during the granter's life, as *donationes inter virum et uxorem*, and were accordingly revoked by the said settlement in the pursuer's favour.

The necessity of delivery to render these deeds effectual was but faintly maintained ; so that their character as *donationes inter virum et uxorem*, and the implied revocation in virtue of the settlement 23d March 1767, was the point insisted on.

Pleaded for the pursuer ;

Though the land of Scotland so far deviated from the Roman law, that donations betwixt husband and wife stood good, unless revoked by the granter, yet it was equally certain that no express revocation was necessary ; an implied revocation was as effectual as the most express one ; and it was held that every posterior deed, contradictory to or inconsistent with the deed of donation, was a virtual revocation ; and so far even had this doctrine been carried, that the simple contracting of debt posterior to the donation had been judged effectual to annul it, so far at least as to give a preference to posterior creditors. Lord

Stair, B. I. T. 4. § 18. 16th July 1722, Scott, No 72. p. 3673. Lord Bankton, v. I. p. 132. § 99.

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It was a general rule in the construction of all deeds, and even in the construction of different clauses in the same deed *quod posteriora derogant prioribus*; so that if the deeds under challenge were inconsistent or incompatible with the after disposition in the pursuer's favour, the last must prevail. That they were so was clear. They contained an assignment to the rents, mails, and duties of the subjects; and by the after disposition these very subjects were *per expressum* disposed to the pursuer, and a special assignment also made of the rents, mails, and duties; so that as these could not belong to both parties, the last deed executed necessarily operated a revocation of the former.

The disposition in the pursuer's favour furnished undubitable evidence that Logie intended a revocation of the deeds in question, and that it was in fact carried into effect. This disposition was evidently intended to be the ultimate and permanent settlement of the heritable estate; and all the several burdens with which it was meant to be affected fell naturally to be engrossed and particularly distinguished. In that deed, accordingly, several burdens were mentioned; and in the saving clause of the disposition he expressly reserved the liferent of the tenement in Montrose, to which his wife was provided by her marriage-contract; and farther made it a condition of the disposition, that the pursuer, and the heirs substitute, should make payment to her of the two annuities provided, viz. the 1200 merks by the marriage-contract, and the 600 merks by the after deed. When the granter of the deed therefore ratified some of the provisions, and did not at the same time ratify and confirm the others in the defender's favour, it could admit of no other construction than that it was his purpose to establish one set of deeds and to recal the other. Such accordingly being the intention of this disposition, it amounted to an implied revocation of the deeds challenged; which, in point of law, was as effectual as if it had, in positive terms, been so expressed.

Pleaded for the defender;

As the deed of the 24th of May 1751 was not only rational and just, but granted for onerous causes, and of a remuneratory nature, the late Logie's power to revoke it, even expressly, might well be called in question. So long as it was under his power, he might no doubt have cancelled it; but as soon as it was voluntarily out of his custody, it could not have been revoked at all. Though it was found therefore in his repositories, in consequence of its having been actually delivered, and of his being the natural custodier of his wife's papers, yet it was there found uncanceled; and as it was not either by being cancelled, or by an express deed, *de facto* revoked, it could not be found to be so tacitly by implication; which would never be presumed where the power of revocation was in any degree doubtful.

The doctrine of tacit revocation, upon which alone the pursuer's plea depended, was founded on the presumed intention of a person granting a deed

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seemingly inconsistent with a prior deed he had executed. But as it was merely a presumption from which the inference was drawn, it was of course to be elided by circumstances, either directly establishing a contrary presumption, or indirectly doing so by reconciling the jarring deeds, and removing the inconsistencies in the last as dangerous to the subsistence and effect of the former. Whatever, accordingly, might be the effect of the deed in 1767, as to the subjects thereby conveyed, it was no fair inference to presume that a revocation of the two previous deeds in 1751 and 1762 was thereby intended. If a revocation of any of these deeds had been intended, no reason occurred why the late Logie did not, at the time of granting the disposition 1767, either cancel these deeds, or expressly revoke them, either by a separate deed or special clause in the disposition; and as he had not done so, the presumption was, that he must have believed and intended that they were still to subsist.

It was also a rule in law, that special rights required special revocations, and that such rights could not be derogated from by general dispositions. This rule was strictly applicable to the present question. The disposition in 1767 in favour of the pursuer was of a most general nature, and intended merely as a settlement of the granter's succession after his death. The description under which the lands were thereby conveyed, viz. 'the lands of Newmanswalls, the manor place,' &c. and under which it was maintained the subject of the liferent deed in 1762 was revoked, was the usual general description contained in all the former title deeds of the estate, and such merely as, according to form and practice, were conceived to be necessary in a conveyance. Such a general settlement, therefore, conceived in the ordinary words of style, could not be presumed to infer a revocation of these partial rights of liferent, which had been granted to the defender at a former period under different and more special descriptions, and which were only eventual and temporary burdens upon the fee, the final and absolute settlement of which was the object of the deed.

In giving judgment, their Lordships were of opinion, that the last deed in 1767 was that which was principally to be regarded in fixing the rule as to the settlement of the granter's affairs; and when, in this total and universal settlement, he expressly reserved only certain provisions made to his wife, he did not mean that the rest should stand.

They accordingly, July 24. 1770, "Sustained the reasons of reduction, and remitted to the Ordinary to proceed accordingly."

Lord Ordinary, *Gardenstone*.
For Mrs Scott, *Scott, Rae*.

For Robert Scott, *Lockhart, Wight*.
Clerk, *Gibson*.

R. H.

Fac. Col. No 35. p. 95.