" *to a ſecond lady and younger childern, and that the appellant's intereſt* " *therein, cannot exceed the annual rent of* 100,000l. *Scots*" *be reverſed: And it is hereby further ordered and adjudged, that the appellant's life rent of* 1000l. per annum, *is a charge on the eſtate, until ſhe has drawn thereout* 100,000l. *Scots with intereſt thereof, from the deceaſe of the ſaid late Marquis, and no longer, and that the ſaid* 1000l. *per annum, be accordingly paid to the appellant, at the reſpective terms appointed for payment thereof, in the bond of proviſion, with intereſt to be computed for ſuch part thereof, as is now in arrear from the times the ſame ought to have been paid, until the ſame ſhall be paid: And it is further ordered that the Lords of Seſſion do direct proper diligences, both perſonal and real for the appellant's recovery of the arrears of the ſaid annuity, and all future payments thereof yearly, and termly as the ſame ſhall fall due, together with the intereſt for the before-mentioned arrears, from the times at which the ſame became due, until the ſame ſhall be ſatisfied.*

For Appellant, *Rob. Raymond. Ro. Dundas.*
For Reſpondent, *Dun. Forbes. C. Talbot. Will. Hamilton.*

Caſe 94.

Charlotta Marchioneſs Dowager of Annandale, and the Lords George, and John Johnſton, her Children, Infants, by their Mother and Guardian, *Appellants;*

James Marquis of Annandale: *Reſpondent.*

21ſt *Dec.* 1722.

Proviſions to heirs and children.—Preſumption of revocation.—A father executes a deed in favour of his heir giving him a locality over part of his eſtate, and aſſigning the tacks to him, with warrandice from fact and deed, and a power of revocation by *writ under the grantor's hand:* The firſt year the father marked the rents of the allocated lands, in his rentals, as to be paid to the ſon; the next year this was not done, and the factor received a letter to pay no more of the ſon's bills. The allocation was not thereby revoked.—But a deed of revocation found in the grantor's repoſitories after his death, though not publiſhed or recorded, revoked the allocation.

WILLIAM Marquis of Annandale, in 1686, married Sophia, the daughter and only child of John Fairholme, Eſq. who was poſſeſſed of a large eſtate, which afterwards came to the ſaid marquis. By the contract of marriage, the ſaid marquis in conſideration thereof, and of 80,000 merks Scots, paid down for the lady's portion, bound himſelf to reſign his eſtates for new infeftments thereof, in favour of himſelf and the heirs male of that marriage; and accordingly he afterwards executed a deed of entail on the 25th of February 1690, reſigning and ſettling all his lands and eſtates therein particularly mentioned to himſelf in life-rent, and to the reſpondent his eldeſt ſon of the ſaid marriage

in fee, reſerving to himſelf a power *inter alia* to charge the eſtate with debts to the amount of 40,000 merks Scots, with what portions he thought fit to youuger children, and with power alſo of giving what jointure he pleaſed to a ſecond lady.

On the 7th of March 1715, the late marquis by his deed reciting the ſaid ſettlements. and that in conſideration of the dutiful reſpect teſtified by the reſpondent, and for his convenient ſupport, he did out of his good pleaſure renounce and aſſign in his favour a part of the ſaid eſtate, of above 500*l.* ſterling per annum, value, aſſigned the tacks thereof to the reſpondent, and empowered him to receive the profits thereof at Whitſunday then next, for the half year preceding, and yearly thereafter with an expreſs clauſe in theſe words: "and we do hereby declare that "theſe preſents are to continue till we *recal the ſame by writ un-* "*der our hand.*" The warrandice run in theſe words, "this re- "nunciation and aſſignation we oblige ourſelves to warrant from "our own act and deed, done or to be done in prejudice thereof, "except the before-mentioned tacks."

In conſequence of this deed or allocation, that part of the eſtate appropriated to the reſpondent, was not inſerted in the rental ſigned by the marquis, and delivered to his factor, (as uſual,) as a rule for levying the rents, for the year 1715; and the reſpondent accordingly had the profits for a year and a half, ending at Whitſunday 1716. From thence however till Martinmas 1720, ſoon after which the late marquis died in January 1721, the rents and profits of the allocated lands were received on his own account. And in the rental delivered to Henderſon the factor after Martinmas 1716, ſigned by the late marquis, the allocated lands were again inſerted, the profits to be received for the uſe of the marquis.

The marquis afterwards wrote a letter to Henderſon the factor, which the appellants ſtate to have been written from London, the 14th of February 1717, and received by Henderſon ſome time in the ſame month or in March thereafter, but which the reſpondent ſtates to have been without date; this letter taking notice that *his ſon* had drawn bills on Henderſon for 25*l.*, diſcharged Henderſon from accepting or paying them. And after the death of the marquis, there was found in his cābinet a deed, bearing date the 12th of May 1718, reciting the ſaid deed of allocation, and that the marquis had formerly by letters to his factors and chamberlains recalled and ſtopt the precepts which he had given for payment of the ſaid allocation, and he not only ratified what he had ſo done, but did thereby revoke the ſaid ſettlement, and any other ſettlement or allocation granted to the reſpondent and declared the ſame void and null. With regard to this revocation, it was ſworn by Henderſon the factor, that the laſt time, the late marquis was in Scotland, he told Henderſon, that he had made a written revocation of the allocation, and that a paper which he held in his hand was the revocation, though it was not then read to, or by Henderſon.

The

The late marquis by his laſt will and teſtament left his perſonal eſtate ſubject to the payment of his debts contracted ſince the ſettlement of his real eſtate in 1690; for which the reſpondent was not bound, to the Marchioneſs Dowager, his ſecond lady, whom he named executrix, in truſt for his children of that marriage, (which Marchioneſs Dowager and her children are the appellants in this cauſe.) This was all the proviſion which theſe two ſons had from their father, and which, after deducting the debts affecting the ſame, amounted to a very moderate ſum. This will was proved in Doctors Commons, after a caveat and conteſt on the part of the reſpondent, and he in the mean time confirmed himſelf executor to his father in Scotland, and took poſſeſſion of the perſonal eſtate in that country.

The appellants having brought an action againſt him to denude him of the executry, he commenced a proceſs before the Commiſſary Court of Edinburgh, concluding that he ſhould be found a creditor upon the perſonal eſtate for the yearly value of the lands which had been allocated to him, for the year 1716, and thereafter till the day of his father's death. The commiſſaries on the 4th of December 1721, "found that the allocation was not recal-"led by any writ under the marquis's hand, and decreed *cogni-"tionis cauſa*, conform to the libel." And on the 23d of January thereafter the commiſſaries "repelled the defence founded on the "revocation 12th May 1718, in reſpect of the latency of that "deed, during the late marquis's lifetime, whereby the reſpond-"ent could not apply for a legal modification in place of the al-"location."

The appellants brought a bill of advocation before the Court of Seſſion, and their Lordſhips on the 17th of July 1722, "found "that the allocation by the late marquis in favour of the reſpond-"ent was revocable only by a deed under the deceaſed marquis's "hand; and that neither the putting the allocate lands in the "rentals given to Mr. Henderſon, and his accounting to the late "marquis for the ſame, nor the letter to the ſaid Henderſon, "were ſufficient to infer a revocation, and that the deed of revo-"cation lying in the late marquis's cabinet, at his deceaſe, with-"out publication or intimation, cannot take effect from the date "thereof; and that the late marquis's ſaying to Henderſon he "had made a revocation, which he ſaid he then held in his hand, "but did not read to Henderſon, nor allow him to read, (as "mentioned in Henderſon's oath,) was not ſufficient to interrupt "the reſpondent's right to the rents of his locality."

The appeal was brought from "a decree of the Lords of Seſ-"ſion of the 17th of July 1722." Entered, 12 Oct. 1722.

Heads of the Appellants' Argument.

The allocation was, by the expreſs words of it, revocable at pleaſure; and whatever motives it was founded on, it was granted and accepted on that condition on which alone it could ſubſiſt. Nor in fact was there any onerous conſideration for it; the late Marquis having made other diſtinct conceſſions to the reſpondent,

when he enlarged his father's faculty of charging the eſtate with debts. The only conſideration was that of reſpect and duty then paid by the reſpondent to his father, as the deed itſelf mentions: and the reſpondent's withdrawing that duty and reſpect, and going beyond ſea without his father's knowledge, were the motives of recalling the allowance, as is ſet forth in the deed of revocation.

The power of revocation plainly extended to the aliment itſelf, and not to a power only of altering the lands out of which it was to be levied, as was contended by the reſpondent: and the warrandice cannot alter the caſe, but muſt follow the nature of the deed. Nor could there be any reaſon for a *declarator* in this caſe, which would have been neceſſary only if the reſpondent had fallen from the aliment by any penal irritancy.

The rentals for the year 1716, and ſubſequent years, all ſigned by the late marquis, whereby the rents of the allocate lands are directed to be received and applied to the marquis's uſe, and the late marquis's letter to Henderſon forbidding him to pay the reſpondent's bills, are a ſufficient revocation of the allocation. In the worſt view, it was revoked by the deed of May 1718; and there was no occaſion for publiſhing ſuch revocation, or giving notice of it to the reſpondent. But the reſpondent had ſufficient notice thereof, by having the payment of his bills ſtopt, after which he never drew ſixpence out of the eſtate, nor ever attempted it: which alſo ſhews the reſpondent's opinion of and acquieſcence in the revocation.

The late marquis conſidered the allocation as fully revoked, as is evident in this, that his perſonal eſtate is the only ſubject he appropriates for the proviſion of his younger children, which he muſt have known to be ineffectual, if the arrears of this aliment, or any part thereof, were a burden on this ſubject; and he would doubtleſs in that caſe have exerciſed the power he had by the ſettlement of providing for the younger children out of his real eſtate.

Heads of the Reſpondent's Argument.

By the deed of 1715, the power of revocation is confined to be *by writ*, that is a deed, under the grantor's hand; and could not be revoked by implication. Though the late marquis's receiving the rents to his own uſe ſhould amount to an implied revocation, it will be of no force in this caſe, as not anſwering the proviſo in the deed.

Nor will the letter written to the factor, forbidding him to anſwer his ſon's bills out of his effects, amount to a revocation: for as this letter is without date, ſo it does not mention the reſpondent's name; and the late marquis had at that time another ſon of age, and the prohibition is only not to pay the bills out of *his effects*, that is, the grantor's, but did not relate to the rents belonging to the reſpondent. Beſides, the factor being examined upon oath, ſwears, *that he never had any miſſive letters or written orders*, recalling the ſaid allocation, or ſtopping payment thereof to the reſpondent;

reſpondent; nor did he know or ſuſpect where any ſuch might be.

The deed of revocation, now ſet up, was never publiſhed or heard of, nor any notice given thereof to the reſpondent, till after he had commenced his action; and it is acknowledged to have been found in the late marquis's ſtrong box or ſcrutoir after his death, and therefore was an incomplete deed of no force, never delivered or executed ſo as to take effect.

The warrandice in the ſaid deed of 1715 againſt the acts or deeds of the late marquis, ſhews plainly that the intention of the ſaid power of revocation was only as to an allocation or commutation of the lands out of which the aliment iſſued, but not to revoke the aliment itſelf; for in that caſe the warrandice would take place, which is the laſt covenant in the deed, and conſequently will controul whatever goes before it, and either does or ſeems to contradict it. And beſides this, by the law of Scotland every proprietor of an eſtate, much more a nobleman, is obliged to aliment his eldeſt ſon, ſuitably to his eſtate and quality.

After hearing counſel, *It is ordered and adjudged, that ſo much of the ſaid interlocutor complained of in the ſaid appeal, whereby the Lords of Seſſion found "the allocation by the late Marquis of Annandale in favour of the reſpondent was revocable only by a deed under "the deceaſed marquis's hand; and that neither the putting the "allocate lands in the rentals given to Mr. Henderſon, and his accounting to the late marquis or his commiſſioners for the ſame; nor "the letter to the ſaid Henderſon were ſufficient to infer a revocation," be affirmed: And it is further ordered and adjudged, that the reſt of the ſaid interlocutor be reverſed; and it is hereby further declared and adjudged, that the ſaid deed of revocation bearing date the 12th day of May 1718 do take place from the date.* Judgment, 21 Dec. 1722.

For Appellants, *Rob. Raymond.* *Ro. Dundas.*
For Reſpondent, *Dun. Forbes.* *Will. Hamilton.*