

No 7.

An autum, eo quod penes actorem nunc sit, a revocatione discessum sit et reviviscat donatio, interloqui sustinuit: et alterius inquirendem censuit quando et quomodo ad actorem pervenerit.

*Dirleton, No 103. p. 40.*

No 8.

A second assignation having been granted, in order to do diligence, it was found the first was not thereby revoked.

1665. *January.*

SCOT against SCOT.

THE Laird of Wauchton being debtor to the deceast Sir William Scot of Clerkingtoun in the sum of 9000 merks, and Sir William having granted provisions to his children by assignations to bonds, among the rest, he did assign to his daughter Margaret to 6000 merks of Wauchton's debt, with power nevertheless to him to uplift, or otherways dispone upon the same during his own lifetime. Clerkingtoun, having otherways to do with money, did uplift and otherways dispone upon all the said debt, except 2000 merks, which was only left to Margaret undisposed of for her portion; and Wauchton being insolvent, Sir William trusts an assignation in the name of John Scot, to the effect he, for that and other debts owing to John Scot, and others who also trusted him, might deduce a comprising for their security; and John gives a back-bond, acknowledging his name to be trusted, and obliges himself to denude in favours of Sir William, his heirs and assignees. Sir Lawrence Scot, as heir served and retoured to Sir William, pursues John Scot for denuding himself in his favours as heir, conform to the back-bond. Compears the said Margaret, and *alleges*, That John ought to denude himself in favours of her; because her father having assigned the said 2000 merks, with power to him, in his own lifetime, to uplift and dispone thereon, and he having made no right thereof, being but in trust, the trust must be interpreted in the terms as the debt stood in Sir William's person the time of the said assignation made to John, which was affected with an assignation made to Margaret; and though he had otherways power to dispone, yet, when he made that disposition in favours of the said John, it was only in trust and security, and cannot be thought such a trust as alters his intention towards his daughter, having no other provision, unless he had *per expressum* declared it; likeas, the back-bond being in favours of Sir William, his heirs and assignees, the word 'assignee' must relate to the assignation formerly made by himself, unless he had granted a new one; and the adjection of the word 'heirs' only was to clear that the fee was still to be in his person, to use and dispose thereupon at his pleasure, which was also reserved to him in Margaret's assignation; so that, unless he had made a new assignation, or declaration of his mind that the former assignation should not stand, the debt and comprising cannot belong to his heir.

THE LORDS preferred Margaret.

*Fol. Dic. v. 2. p. 134. Gilmour, No 133. p. 96.*

\*\*\* Stair reports this case :

No 8.

1667. July 14.—SIR William Scot of Clerkington, having granted assignation to his daughter, Margaret Scot, of a sum due by Wauchton, pursues Sir Laurence his son, as haver, to deliver the same. It was *alleged* for the defender, That there was a clause in the assignation reserving a power to Sir William to alter and dispoñe during his life; and that he did assign this bond to John Scot. It was *answered*, That he took a back-bond from John Scot, bearing, that the assignation was granted in trust, to this effect only; that John Scot should do diligence thereupon. It was *answered*, That the back-bond bears John Scot to be obliged to denude in favours of Sir William Scot, his heirs and assignees, whereby the assignation is altered. The pursuer *answered*, That there appears nothing of the alteration of the defunct's mind, more than if he had apprized in his own name, whereby the bond would have been adjudged to him, his heirs and assignees; which is no more than if an assignee should use the name of the cedent; which would noways infer that, by adjudging land to the cedent and his heirs, they pass from the assignation.

THE LORDS found no alteration in the pursuer's assignation by the right made to John Scot in his back-bond; which also bore the right to John Scot, was made to do diligence, and for no other end.

*Stair, v. 1. p. 472.*

1674. December 15. KINLOCH against RAIT.

MR Robert Kinloch gave infeftment to Jean Rait, his spouse, in some parcels of his lands of Lethrie, bearing to be in satisfaction of the provisions in her contract of marriage; and thereafter gave her infeftment in the rest, for love and favour; after all, gave a bond of provision of L. 1000 in favours of Janet Kinloch, his daughter, with an infeftment of annualrent out of the saids lands of Lethrie. In a competition betwixt the mother and daughter for the rents of the lands, it was *alleged* for the daughter, That the infeftments granted to the wife were donations betwixt man and wife, *stante matrimonio*, revocable and revoked by the annualrent granted to the daughter; at least the infeftment granted for love and favour. It was *answered*, That here there was no express revocation, but an indirect conjectural revocation, which is not sufficient, seeing the husband might both grant a liferent of the whole land to his wife, and an annualrent to his daughter forth thereof, not to burden the wife's liferent, but to burden the fee.

No 9.

A donation by an infeftment granted by a man to his wife, above the provision in her contract of marriage, was found revocable *pro tanto* by an annualrent granted to his daughter out of the same lands.