and the creditor was infeft. Found, that the additional jointure was thereby revoked. No 6.

Fol. Dic. v. 2. p. 133. Durie.

*** This case is No 346. p. 6132., *voce* Husband and Wife.

1667. *January* 31. Henderson *against* Henderson.

No 7.
Although a party had, by only an informal deed, altered the order of succession, the intention being evident, his heirs were found obliged to implement it.

Umquhile Henderson grants a writ in favour of Allan Henderson, whereby he appoints the said Allan to be his heir, and donatar to all his lands and estate, and assigns him to the rights and evidences thereof; with power to enter by the superior: But in the narrative, it bears the ordinary narrative of a testament, and has a clause subjoined to all, in case of his return, he may alter and annul the same, there having nothing followed in his life. The said Allan pursues Henderson his apparent heir to fulfil the former writ, and to enter heir and resign in his favours, conform to the meaning thereof. The defender *alleged*, Absolvitor; 1*mo*, Because this writ is no disposition, but a testament or a donation *mortis causa*, in which no disposition of land can be valid; 2*do*, Albeit this could be a disposition, yet it is not done *habili modo*, there being no disposition of the right of the land, or any obligement to infeft; neither can a person be consituted heir, but either by law or investiture, or at least by an obligement to grant investiture; 3*tio*, This being *donatio mortis causa*, expressly revocable by the defunct at his return, it is ambulatory and conditional; *ita est*, he returned and granted commissions and factories, whereby his mind appeared to be changed.

The Lords repelled all these allegeances, and sustained the summons, because though the writ was informal, yet they found the defunct's meaning was to alienate his right from his heirs to this pursuer, to take effect after his death; and albeit he returned, seeing he did no deed to annul or recal this right, this was effectual against his heir to complete the same.

1667. *November* 14.—Henderson insisted in the cause mentioned January 31. 1667, which was again fully debated above; and it was *alleged*, That the writ in question was a testament, or at least *donatio mortis causa*, or at least a conditional donation, to take effect only in case the disponer died before he returned, so that his simple returning, without any further, purified the condition, and made it null.

The Lords having considered the writ, found that albeit it was not formal, yet it had the essentials of a disposition and donation *inter vivos*, and that it was not null by the disponer's return, unless he had revocked it; for they found, that the words being that he nominated and constituted Henderson his heir and

No 7. successor, and donatar irrevocably to certain tenements in particular, with power to him (in case the disponer returned not) to enter by the superior, and enter to possession, and transferring all right he had in that case; which words constituting him donatar, they found were dispositive words and effectual, and the adding of heir and successor could not evacuate the same; and found the condition of his not returning was not annexed to the dispositive words, but to the executive clause of entering by the superior, and taking possession, which was cleared by the posterior reservation to recal it after his return.

It was further offered to be proved, That the disponer not only returned but recalled the disposition, in so far as he had it in his own hands and power after his return. It was *answered*, That it was no way relevant, unless the delivery of it *hoc intuitu* were proved; for he might have had it in his hands upon many other accounts. It was *answered*, That the very having of the writ did presume that it was delivered, unless the other party would offer them to prove that it came in his hands *alio nomine*.

Which the Lords found relevant.

Thereafter it was *alleged*, That as the disponer's having of it presumed revocation, so the acquirers having of it hereafter presumed a passing from that revocation, and a reviving of the right, and now it is in the acquirers' hands. As to this point the parties did not debate; but it occurred to the Lords, that the disponer's having might be sufficient to infer delivery, but would not infer that the acquirer's having thereafter would presume passing from the revocation, because the clause reserving to the disponer a power to recal, made the naked recovery of the writ sufficient to him, and did annul it; but it was more dubious what was requisite to revive it, whether naked having or express delivery *hoc intuitu*, or if something were not requisite in writ; and therefore, before answer to that point,

The Lords ordained the pursuers, who now had the writ, to condescend and prove how they got it. See Testament.

Fol. Dic. v. 2. p. 134. Stair, v. 1. p. 432. & 484.

*** Dirleton reports this case:

1667. *November* 14.—Quia facti species (quæ sequitur) dubia et perplexa, et de ea disceptatio in apicibus juris est, eam et argumenta ultro citroque adducta ex jure civili, juris istius idiomate Latine visum est subjicere. Sequitur species facti.

Ninianus Henderson nauta et incola villæ, quæ vulgo nuncupatur Salinæ Præstonianæ, peregre profecturus; nec immemor periculorum, quibus nautæ et navigantes obnoxii sunt; de rebus suis et patrimonio (quod exile fatis erat) in prædiis urbanis, et quibusdam tenementis in villa ista sitis, disponere statuit: quod fecit chirographo seu instrumento, sed adeo informi et styli ancipitis et dubii, ut acerrimæ disputationi ansam præbuerit, utrum testamenti et donationis

mortis causa, an inter vivos, jure censeri debeat: Ejus clausulas et tenorem breviter perstringam: Cum esset cœlebs, nec liberos, nec fratres haberet, sed sororem unicam, eam præteriit nulla de ea mentione facta: et præfatus de profectione sua et de morte; quod haud ignarus esset ea nihil esse certius; nec minus hora et tempore quo esset obeunda nihil esse incertius; ideo amore et gratia ductus, quo prosequitur Allanum Henderson Niniani patrui sui filium, nominat (ipsa verba) et constituit dictum Allanum hæredes executores et assignatos suos ejus hæredes et successores et donatarios in rem suam irrevocabiliter, in et ad sua tenementa domos et terras arabiles jacentes in villa dicta; et ad omnes alias terras hæreditates et bona quæ in posterum ad sese pertinere contigerint; cum plena potestate dicto Allano suisque prædictis, si ipsum mori nec in patriam redire contigerit, intrare et confirmationem obtinere a domino directo et superiore, in et ad dictas terras et tenementa, iisque frui et possidere; transferendo in dictum Allanum ejusque prædictos, omne jus suum tam proprietatis quam possessionis; et excludendo agnatos et necessarios suos, et proximos cognatos quoscunque; cum cessione omnium instrumentorum et evidentiarum dicta tenementa et terras concernentium: Reservando tamen (ipsissima verba, quæ notanda) sibi ipsi tantummodo, post suum in patriam reditum, revocare, rescindere, irritare, et annullare præsentes literas tanquam nunquam fuissent; et dictis terris aliisque uti et pro arbitrio et libitu suo de iis disponere; cum clausula registrationis. Ninianus et profectione redux in patriam, diem obiit. Ex eo instrumento egit ad implementum prædictus Allanus, adversus sororem et hæredem dicti Niniani. Excipiebat soror, et pro ea advocati arguebant, eam non teneri, sed absolvendam his argumentis; testamentis, legatis, et mortis causa donationibus, res mobiles tantum disponuntur, nec eæ omnes sed quæ executoribus relictæ et liberis cedunt; libata et subducta ea parte mobilium, quæ jure hæreditatis hæredi, moribus nostris, relinquitur: Nec satis esse aliquem tum velle tum posse de rebus suis disponere, nisi accedat modus habilis; forma enim in civilibus et concessionibus dat esse rei; cum igitur tenore instrumenti perpenso; in comperto sit, testamentum, saltem ei affinem donationem mortis causa esse; sequitur eo testamento de prædiis suis frustra nec modo habili disposuisse, et donationem inanem et inefficacem esse: Quod autem instrumentum et donatio in eo contenta, testamenti et donationis mortis causa jure censeri debeat, facile evinci, tum ex præfatione et verbis narrativis, tum ex clausula dispotiva, nec non et ex clausula et verbis executionis: Ex præfatione liquet, donationem concessam non tantum contemplatione verum etiam commemoratione mortis, et verbis in testamentis et ejusmodi donationibus testamentariis solennibus; nec non ex ipsis concessionis verbis constare, donatorem voluisse testari vel mortis causa donare; nominat siquidem dictum Allanum ejusque prædictos, suos hæredes et successores; nominare autem et constituere hæredes et successores sunt verba penitus testamentaria; et in donationibus inter vivos nec apta nec usurpata: Accedit, quod cum definitio donationis mortis causa sit, Cum aliquis vult se

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No 7. magis quam donatarium, eumque potius quam hæredem rem suam habere; eam disponentis voluntatem fuisse certum est ex clausula executiva, et potestate dictis bonis et terris fruendi post mortem suam; aliis cognatis et proximioribus submotis et exclusis: Cum donatio aliqua conceditur metu et intuitu periculi imminentis, eo cessante, et donante incolumi et superstite, cessat et evanescit donatio; donatio autem, de qua agitur, facta est metu periculi ex navigatione periculosa, imo sub conditione si disponentem mori contigerit; cum igitur in patriam redierit, nec conditio exstiterit, consequens est donationem inanem et irritam esse. Dato donationem inter vivos, et puram esse ab omni conditione suspensiva; extra omnem quæstionis aleam est, eam factam sub conditione resolutiva; siquidem potestate concessa ex donatione, terris aliisque donatis fruendi et possidendi, si donantem sine reditu in patriam mori contigerit; a contrario sensu sequitur, sin in patriam incolumis redeat, rebus donatis nec frui nec possidere licere; sed donationem nullam, existente conditione sub qua resolvitur donatio ista: Et si supponatur inter vivos nec sub conditione suspensa nec resoluta; sine dubio a donatore revocari potuit; et revocata est post reditum; et probaturos recipiebant rei, instrumentum donationis penes donantem repertem fuisse: Instrumentum autem penes debitorem aut concedentem repertem, censetur liberatum aut revocatum.

Quod nunc sit penes actorem, non sequi, ei rursus a donante traditum, et iterata traditione donationem reviviscere; nisi doceatur quando et quommodo ad eum pervenerit; fieri enim potest ut tempore mortis penes donatem fuerit, et actoris dolo substractum.

Pro actore replicabatur, instrumentum dispositionis et donationis, inter vivos jure censendum; et actionem ex eo efficacem esse; mentem donantis fuisse donationem concedere irrevocabilem si peregre mori contigisset; sin rediisset revocabilem; hoc casu potestatem revocandi retinuisse, sed ea haud usum; nec enim instrumentum aut scriptum exstare quo testatus sit donationem revocari: menti exprimendæ verba haud defuisse satis apta, et dispositioni inter vivos idonea; donasse *sc*: irrevocabiliter et jus suum omne tam possessionis quam proprietatis transtulisse, cum potestate fruendi et possidendi: et cessio evidentiarum, et registrationis clausula sunt naturæ penitus heterogeneæ et a testamentis alienæ. Si donator revocatione facta peregre decessisset revocationem actori minime obfuturam; si actor superstite donatore mortuus fuisset donationem haud inanem, sed hæredibus actoris efficacem fore: Ea argumenta concludere donationem, testamenti naturam haud sapere; cum in testamentis ambulatoria sit voluntas et præmoriente donatario aut legatario evanescunt legata et donationes; haud diffiteri donationem istam quibusdam clausulis, donationi mortis causa affinem videri: Sed quod de Hermophrodito jure cautum est, haud inepte et hic accommodari, et quod prævalet inspiciendum.

Ad argumenta pro reo respondebatur: Ad primum, haud incongruum esse mentis et valetudinis compotem, et in legitima potestate constitutum, uno et

eodem instrumento, de rebus suis tam mobilibus quam immobilibus disponere posse; si quis enim peregre profecturus testamentum condat, et executores instituat, et eodem testamento de terris suis disponat per verba formalia et idonea, addito mandato de resignatione facienda, et sasinæ præcepto: Sasina et resignatione secuta, eo casu, si dicas nec testamentum nec dispositionem valere, absurdum erit quæ seorsim licitæ sunt rerum suarum donationes, illicitas fieri, quod simul uno instrumento celebratæ sunt; si dicas testamentum tantum valere, ratio reddi non potest, cur testamentum et mobilium donatio magis valeat, quam dispositio et rerum immobilium donatio, cum in hac non minus concurrant potestas et voluntas, et modus et conceptio, idonea et solennis: Superest igitur utrumque valere. Præterea respondetur, falsum esse quod asseritur, donationibus mortis causa de terris et rebus immobilibus disponere haud licere; cum nihil frequentius sit contractibus et donationibus, quibus, proximioribus exclusis, hæredes alii (et ut loqui solemus) taliæ et provisionis instituuntur. No 7.

Accedit, quod donator actorem donatarium constituerit; et verbum istud proprium sit donationis inter vivos; nec officit quod etiam hæredem et successorem nominarit, cum utile per inutile non vitietur. Ad secundum respondetur; dato, donationem esse mortis causa, non sequitur invalidam esse; superius enim dictum est in contractibus et obligationibus de successione talliata, de rebus immobilibus et prædiis nos quotidie disponere: eas autem donationes; esse mortis causa patet ex prædicta difinitione mortis causa donationis; et quod omnes de successione contractus, mortis contemplatione et plerumque non sine mortis commemoratione fiant, et effectum post mortem sortiantur, et in iis ambulatoria sit voluntas, nisi accedat paetum de non revocando. Ad tertium respondetur, falsam esse propositionem; nec enim cessante causa impulsiva cessat effectus; nec qui periculo imminente mortalitatis admonitus, testamentum condidit; si periculum effugerit aut eluctatus fuerit, eo minus in voluntate eadem perseverasse censebitur; et testatus discedit nisi revocasse constiterit. Ad quartum respondetur, Dispositionem reditu eveniente, haud nullam aut irritam esse, sed revocabilem, id ex eo demonstrari, quod sibi soli et tantummodo reservarit, si domum redirit, potestatem revocandi; si enim inanis et caduca fieret donatio, in casu reditus, quorsum ista potestas et sibi soli reservata, revocandi donationem, quoad omnes, ipso conditionis eventu extinctam et revocatam. Ad quintum et sextum respondetur, et negatur, instrumentum post donatoris reditum penes eum esse; et penitus supervacuum disceptare an penes eum fuerit, cum nunc penes actorem sit, et sibi a donatore traditum, nec necesse est docere quomodo et quando ad se pervenerit.

Senatus interlocutus est, Donationem istam testamenti naturam haud sapere, sed validam et efficacem esse: Sed si constiterit et probatum fuerit, penes donantem instrumentum post ejus reditum fuisse, tunc revocatum et irritum esse.

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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 dipsone, 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.