tor's death, she pursued Charles Aiton, in whose house he died, and who had got possession of the watch, for exhibition and delivery; and having referred the having of the watch to his oath, he deponed and acknowledged, "That he had the watch libelled at the Doctor's death, and that, in June 1736, when he was at Lochlomond attending the Doctor at the goat-whey, the Doctor delivered the watch to the deponent, and desired him to keep the same for the use of his son; and that, upon the deponent's refusing to take it, the Doctor pressed him to take it, telling him, he expected to die there, and it might be lost; whereupon the deponent carried the watch home, and had it ever since."

No 117. take away the effect of a prior *donatio mortis causa* constituted by writ.

As this quality was yielded to be extrinsic, especially in a landlord, in whose house the Doctor had died, it was for the deponent offered to be proved by witnesses, that the watch was delivered him in the way and manner deponed; and had the allegeance been, that it was simply gifted to him, the proof would have been admitted, the transmission of moveables by donation being probable by witnesses; but as by the allegeance as laid in his oath, it was no more than a legacy to him, the LORDS "found, that the defunct's letter did constitute a *donatio mortis causa* in favour of the pursuer, and that a proof by witnesses was not competent in this case to take away the effect of a donation constituted by writ, and create a new legacy of the same."

Fol. Dic. v. 4. p. 158. *Kilkerran,* (PROOF.) *No* 5. *p.* 442.

*** Clerk Home's report of this case is No 25. p. 8072, *voce* LEGACY.

1744. *November* 23.
MARION WILSON *against* CHILDREN of WILLIAM PURDIE.

No 118. Proof by witnesses to supply a clause omitted in a deed *ex dolo* of the grantee.

ANDREW PURDIE, merchant in Mossplat, died intestate, leaving three children by his wife Marion Wilson, William, Anna, and Jean. Anna was married while her father was alive, and got a provision of 2000 merks in full of her bairns' part of gear, whereby the relict and the other two children were entitled to the free effects which wholly consisted in moveables. By a minute of agreement in February 1732, it appears, that there was a meeting of all the the parties concerned in the succession, where it was agreed, by the intervention of friends and communers, that the daughter Jean should have 2000 merks, the same sum which her elder sister had got; that Marion Wilson, the relict, should have a liferent of L. 5 Sterling yearly, and a faculty to dispose of 1000 merks of the subject by testament; and that the remainder of the effects should belong to William the son, and he be the sole intromitter. This minute of agreement was so far fulfilled, that Jean Purdie got 2000 merks at her marriage; and as Marion Wilson continued to carry on the business of a retailer in her husband's shop, her son, William, who had set up as a merchant

No 118.

in Glasgow, sent her from time to time merchant-goods, to the extent of L. 5 yearly. Matters continued upon this footing till March 1737, when an assignment was executed by Marion Wilson in favour of her son William Purdie, of all she had right to by her husband's death, with power to him to intromit with the same, "provided that he, by acceptation thereof, become bound to pay her the yearly sum of L. 5 Sterling during her life, at the terms therein-mentioned." The deed proceeds upon the narrative of love and favour, and certain other onerous considerations; but makes no mention of the former agreement.

After William Purdie's death, Marion Wilson called his children as defenders in a reduction of this assignment, upon the head of fraud and circumvention, condescending upon the following fact, that the faculty to dispose of the 1000 merks, contained in the minute of agreement 1732, was agreed to be reserved to her, though, by the artifice of her son, it was left out of the assignment. The fact was proved by the two instrumentary witnesses; and, at advising the proof, a doubt occurred, whether it was competent to prove the said fact by witnesses, when the effect of it was to cut down a formal deed?

It was *urged* for the defenders, That though every extraneous circumstance relevant to reduce a transaction may be proved by witnesses, to the effect of annulling a written document, because such proof impinges not upon the faith of the writ; yet that no circumstance contradictory to any clause in the writ can be proved by witnesses, which would be giving more credit to oral evidence than to writing. The pursuer does not assert, that she was induced by fraud and circumvention to discharge her faculty; her allegeance is only, that she understood the faculty was reserved to her in the assignment, and that she subscribed it upon her son's faith that it was so reserved. Now, this allegation is in direct contradiction to the writ, which sets forth, that she conveyed to her son the whole interest she had in her deceased husband's moveables, reserving only an annuity of L. 5 Sterling for life.

Answered for the pursuer, That had the faculty been discharged by an express clause in the deed, it would not have been competent to prove by witnesses, that it was agreed upon to be reserved; but an allegation that an article agreed upon was left out of the deed, either by over-sight or by artifice, is not contradicting any clause in the deed, and therefore may be proved by witnesses.

"Found the reason of reduction of the assignment, granted by the pursuer to William Purdie, relevant and proved, and therefore reduced and decerned."

Rem. Dec. v. 2. *No* 58. *p.* 88.