No 176. the tutor *intus habuit*, being debtor in greater sums to the pupil than this. The pursuer *answered*, 1*mo*, The allegeance is no way relevant upon such presumptions to take away the right standing in the defender's person; 2*do*, The defence is not liquid, and so can make no compensation, albeit his son were expressly assignee as he is not.

"The Lords found the defence relevant, unless the pursuer would condescend and instruct that the assignation was granted to him otherwise than by his father's means."

Fol. Dic. v. 2. *p.* 148. *Stair, v.* 1. *p.* 82.

1667. *November* 20. Trotters *against* Lundy.

No 177.
A person who purchased a right, took the assignation in name of his daughter, which was acted upon. He afterwards discharged the debt, which was found unwarrantable.

The Children of George Trotter in Fogorig being confirmed executors to their sister Isobel Trotter, pursued James Lundy, cautioner in a bond for James Trotter of the east end of Fogo, for the sum therein contained. It was *alleged*, That the said James being heir to his grandfather, Alexander Trotter, in the east end of Fogo, and the said George, son to the said Alexander, and executor to him, they did transact together that the moveables belonging to the said George, as executor, should remain with the heir; and the said James, and the defender as cautioner, did, for the cause foresaid, grant the said bond blank in the creditor's name, wherein the said George filled up the name of John Trotter in Chester, his brother, and procured for him an assignation for the said Isobel his daughter; and that thereafter, upon a submission betwixt the said George and Alexander Trotter, son to the said James, granter and principal debtor in the said bond, the arbiters ordained the said George to give back to the said Alexander the said bond and assignation, with a discharge thereof; and therefore the said Isobel being *in familia paterna*, and the said bond and assignation being taken and procured, as said is, by the said George the father, in favour of the daughter, who hath no visible estate or means to acquire any such right, he was still master of the same; and it being ordained to be discharged, (as said is) the said debt is extinct. It was *answered*, That the bond being filled up, and registered in the name of the said John Trotter, and the same being assigned, and the assignation in favour of the said Isobel intimated, and after her decease, her executors having confirmed the said debt, all before the said submission, her father could not, by the submission, or any other deed of his, evacuate the said right established in the person of the said Isobel and her executors; and as to the practique betwixt Monimusk and Pittarro, * whereupon the defenders allege, it doth not quadrate to the bond in question, it being never delivered, but deposited in the uncle's hand, mother brother to the child; and in the same case it was found, that the father could not retract a real right made in favour of his child and heir; and here there is *eadem ratio*.

* In Division VIII. of this Title.

THE LORDS found, that the father being master of a bond or right whereupon nothing followed, being granted by himself, may throw it in the fire, and consequently discharge it; but the said right being made public, and completed by the delivery, and which is equivalent, by some public deed, by infeftment if it be heritable; or by assignation intimated or confirmed testament, if it be moveable, he could not thereafter retreat or prejudge the same; and repelled the defence in respect of the answer. No 177.

Reporter, *Lord Hackerton.* Clerk, *Hay.*

Fol. Dic. v. 2. *p.* 148. *Dirleton, No* 106. *p.* 44.

*** Stair reports this case:

GEORGE TROTTER and James Lundy his cautioner, having granted a bond of L. 636 to John Trotter, and the same being assigned to Isobel Trotter, and confirmed by her executors, they pursue Lundy, who *alleged* absolvitor, because he offered him to prove, that the bond was granted blank in the creditor's name to James Trotter, father to the said Isobel, who filled up the name of John Trotter (his brother) therein, and took an assignation thereto in favour of Isobel, who was then in his family, having no means of her own, and therefore it is in the same case as if it were a bond of provision granted by the father to the daughter or taken in her name, which may always be discharged by the father at his pleasure; and true it is, that the father submitted the same, and was decerned to discharge the same, which is equivalent to a discharge. It was *replied*, Albeit bonds of provision to children be alterable by their fathers, before any thing follow, yet if they be delivered to the children, or which is more, if they be registered, they become the children's proper right, and cannot be recalled; *ita est*, this bond though it had been blank *ab origine*, it was filled up in John Trotter's name, and filled up before the submission; yea Isobel was dead, and the sum confirmed in her testament, so that her father could not discharge it *proprio nomine*, or as his administrator. It occurred further to the Lords, that albeit the bond was registered, the assignation granted to the daughter was not registered, so that if that assignation remained still in the father's power, the case would be alike as if it were a bond of provision taken originally in the daughter's name; yet this not being pleaded by the parties, and that the assignation was intimated, and that it was not constant that the assignation remained in the father's hands,

"THE LORDS repelled the defence, in respect of the reply."

Stair, v. 1. *p.* 487.