

1677. *January 16.* STEWART of Ardvorlich *against* RIDDOCH.

No 74.

A party disposed his estate to his son, in his son's contract of marriage, which he kept in his own custody. Being a mutual evident, no presumption of extinction took place.

DAVID RIDDOCH, by contract of marriage betwixt his son Alexander and Janet Ballentyne, did dispoise to the said Alexander his estate; and thereafter did dispoise the same to his second son David Riddoch, for payment and with the burden of all his debts, who did thereafter dispoise the same to Stewart of Ardvorlich for a just price.

The said Stewart of Ardvorlich pursued a reduction of the disposition, contained in the said Alexander his contract of marriage, upon that reason, That the said contract of marriage was not delivered to the said Alexander, at the least there being but only one double subscribed, the same was given back to David Riddoch the father, and was lying by him the time of his decease; and it was evident, that it was never intended that any other use should be made of the said contract, but only in order to get a marriage to the said Alexander, as being provided to the said estate, in so far as the said disposition in favours of the said Alexander was without the burden of the dispoiser's debts, which were very great, and did not so much as reserve his liferent. Whereunto it was *answered*, That the contract was a mutual evident, subscribed by both parties, and that marriage had followed upon the same, and therefore it could not be taken away up the pretence of not delivery.

THE LORDS found, That though the contract had been beside the father the time of his decease, it was not to be considered as *instrumentum penes debitorem*, being a mutual evident: But thereafter it was *replied*, That the pursuer offered to prove, that not only the said contract was lying by the dispoiser, the time of his decease, but an assignation blank of the said contract, which, being in the dispoiser's hands, was in effect a retrocession or discharge of the disposition contained in the contract; which reply the LORDS found relevant. *In presentia*.

This reply was found also probable *prout de jure*. See PROOF.

*Fol. Dic. v. 2. p. 137. Dirleton, No 428. p. 212.*

1686. *January 12.* LIERMONT *against* GORDON.

No 75.

The presumption of *instrumentum penes debitorem*, found not to take place relative to real rights.

THE debate between Liermont of Balcomy and Mr William Gordon, advocate, brother to Lesmore, was advised. Lesmore had an apprising on Balcomy; when he pursues for mails and duties, Balcomy raises a declarator that it was in trust, and enforced it from this, that the said apprising, with the charter and sasine, were lying beside the debtor in his charter-chest, and so was in the case of *instrumentum apud debitorem repertum*, which presumes liberation. *Answered*, Whatever presumption of being retired this may infer against personal rights, and principal evidents, yet it had no force in real rights, because they might all be got at the register, and extracted by the debtor, and so the finding them beside him could enforce no transaction nor delivery. THE LORDS