No 239. delivery; and the minute of the sasine taken fortifies its having been originally delivered;—and the father having exhausted his faculty by granting that heritable bond to Robert, there was a *jus plene quæsitum* to him, which the father could not take away by a discharge elicited from him three years posterior; and though creditors may question deeds done by parents to children *in familia*, yet his heir may not; and provisions perfected by infeftment to children are no more revocable, and now Sir Robert has several years ago infeft himself on the precept contained in the bond given him by his father; To the *third*, John being heir to his father *præceptione hæreditatis*, the obligement of warrandice was heritable, being of a faculty to burden the lands by infeftment, that warrandice did only affect the heir; neither was Sir Robert executor, but *confusione tollitur*. The Lords repelled the first reason of reduction, on the maxim *Non præsumitur gravare hæredem*; and as to the second, found Sir Robert behoved to prove this bond was a delivered evident, either to himself or some other for his behoof, prior to the discharge; and that delivery *ab initio* is not presumed in this circumstantiate case; and that so long as Walter the father kept it in his own hands, he might revoke, alter, or discharge it; and that there was a great difference betwixt bonds granted to children that were minors and *in familia*, and writs to other extraneous persons. And as to the third reason, the Lords found the eldest son was here creditor by the warrandice; and that Sir Robert, as succeeding to his father's whole executry, was liable in the obligement to warrant the discharge, and consequently could not insist for the 10,000 merks, for that was to quarrel his father's subsequent discharge.

Fol. Dic. v. 2. p. 155. Fountainhall, v. 2. p. 121.

1707. *June* 26.

Mr Robert Sinclair, Writer in Edinburgh, *against* Mr George Purves of Yewford, and John Purves his Grandson.

No 240.
One executed an assignation in favour of his daughter, with warrandice from fact and deed, reserving his liferent. He deposited it in a third party's hand, to remain while he should have use for it, as security of his liferent.

Mr George Purves of Yewford, who is blind, having assigned to the deceast Jean Purves his only daughter, and the heirs of her body, a bond of 4000 merks, granted to him by William Purves, his only son, with the reservation of his own liferent, and the burden of L. 48 payable to his Lady during her lifetime, in case she survived him, with warrandice from fact and deed, and a declaration that the said assignation is by and attour what the assignee got in her contract of marriage, and a clause mentioning, that the bond and assignation were deposited in the hands of Mr Thomas Wood, minister in Dunbar, to remain there during Mr George's lifetime, or while he should have use for the said bond, for security of his reserved liferent, to be delivered after his decease to the said Jean Purves, to be disposed of by her and her foresaids at their pleasure, and that the same being then in the custody of the said Mr

No 240.
It was found a delivered evident, irrevockable, and a second assignation reduced.

Thomas Wood, should be sufficient as if it had been a delivered evident in George Purves's lifetime; in corroboration and fortification of which assignation, the said William Purves, debtor in the bond, subscribes consenter thereto: Sometime thereafter, George Purves granted a second assignation of the said bond to John Purves, William's son, whereby he revoked the assignation in favours of his daughter, and thereupon pursued an exhibition and delivery of the bond and first assignation, against Mr Thomas Wood, wherein Mr Robert Sinclair, son and heir to Jean Purves, compeared, and craved that the bond and first assignation might be exhibited and delivered to him, and repeated a reduction of the second assignation, and a declarator of his own right to the bond.

Alleged for Mr George and John Purveses; That Mr George ought to have redelivery of the bond and assignation, for these reasons; 1*mo*, The assignation to Jean Purves was revocable at any time before her acceptation thereof, and much more now after her decease without accepting. For, as Perezius in Cod. Lib. 8. Tit. 54. N. 23. & 24. Tit. 55. N. 7. observes, by the Roman law a donation is altogether imperfect, and but a destination, before it is accepted; and this consonant to our practice, February 1. 1672, Cockburn *contra* Craigivar, No 173. p. 11493. So in consignations for redemption of wadsets or annualrents, though made expressly for the behoof of the creditor, the consigner may, at any time before the creditor's acceptance thereof, resile from the order, and uplift the consigned money. And the contract of depositation being only betwixt the deponent and depositar, the former is to be obeyed at any time before the person for whose behoof it was entered into declare his acceptance; especially in this case, where something was to be performed by the assignee, viz. the payment of the annualrent to the cedent during his lifetime, and L. 48 to his relict; for the nature of such a right is fitly compared by lawyers, to a man holding out the end of a rope to another in favours of whom he designs to bind himself, who (if he draw back before that other take hold on it) is under no tie. 2*do*, The assignation being gratuitous, it ought to be largely interpreted in favour of the cedent, who had competently provided his daughter in her contract of marriage; and by the last words of the depositation, the bond was not to be understood a delivered evident to the daughter, unless it had been left in the custody of the depositar at the cedent's death; besides, for what other end did not he deliver the assignation to his daughter herself, who was a widow, than that he might revoke it in his lifetime.

Answered for Mr Robert Sinclair; The assignation is a plain irrevocable conveyance put out of the granter's hand for the behoof of himself, his daughter and her heirs, according to their respective interests of fee and liferent; and whatever legal presumption there might be of an implied trust and power of revocation in favour of a father granting a writ to his child *in familia*, and depositing the same in the hands of a third party; yet a writ granted to a child forisfamiliate and her heirs, and deposited simply in a third party's hands, must

No 240. be understood for the behoof of that child to whom the bond was expressly to be delivered after the father's death, to be disposed of by her and her foresaids at their pleasure; nor is it of any import, that the daughter had not accepted, for this is not the case of an offer, but a plain conveyance of a right in favour of a third party, out of the hands of the granter, which needs no formal acceptance by the assignee. And there is no burden prestable by the assignee, but only a burden upon the annualrent, of a bond bearing annualrent for the father and his wife's lifetime. Again, which puts the matter out of doubt, the assignation bears warrandice from fact and deed, which is not consistent with a power to alter; and William the debtor in the bond, and father to the second assignee, subscribes consenter to the first assignation.

The Lords found, That the assignation granted by Yewford to his daughter, containing warrandice from fact and deed, is a delivered evident, and not revocable by his granting a posterior assignation, and sustained the first assignation as to the fee of the sums thereby assigned, and reduced the second assignation, and remitted to the Ordinary to proceed and determine in the exhibition.

Fol. Dic. v. 2. p. 156. Forbes, p. 174.

*** Fountainhall reports this case:

Mr George Purves elder of Yewford, having disponed the fee of his estate to William, his eldest son, he takes a bond from him for 4000 merks, for the use of his other children; and his daughter Jean being married to George Sinclair, brother to Longformachus, he assigns this bond to her, and to Mr Robert Sinclair, her son, reserving his own lifetime, and burdening them with the payment of L. 48 Sterling yearly to his wife, in case she survive him; and, by an express clause in the assignation, he depositates and consigns it into the hands of the said Thomas Wood, there to remain all the days of the said Mr George the cedent's lifetime, except when he had use for it, for getting payment of his annualrent, and immediately after his death, to be delivered to the said Jean Purves, his daughter, to be used and disposed by her and her foresaids at their pleasure; and the same being in the said Mr Thomas Wood's custody, at the said Mr George Purves's decease, shall be sustained, to be as valid and sufficient, as if the same had been a delivered evident to the said daughter in his own lifetime; and in farther corroboration and fortification of the said assignation, William Purves, the son and debtor in the bond assigned, subscribed his voluntary assent and consent thereto. Jean the assignee dying, the father makes a second assignation to John Purves, his grandchild by William the debtor, of the said 4000 merks bond; and the said John raising a reduction of the first assignation made to Jean and Mr Robert Sinclair, her son, the said Sinclair pursues also an exhibition of the assignation against Mr Wood the depositary, who having produced the same, the competition arises betwixt

the two assignees, and if Mr George, the grandfather, was so denuded by the first assignation, that he had no power to revoke it, nor grant a second. It was *alleged* for John, the second assignee, that Sinclair and Jean Purves, his mother, had no right to this bond, because the assignation was never a delivered evident; and *esto*, that the depositation of it in Mr Thomas Wood's hands, were equivalent to a delivery, yet it being a mere gratuitous deed, and she competently provided in a tocher before this delivery to a third party, can never be effectual in law, till it was accepted or ratihabited by the party for whose behoof it was, which cannot be subsumed; and so the granter of the assignation might call for it when he pleased, and alter it to any other, as he has done, seeing it was not to be given up to his daughter till after his own death; and these words in the end of the clause, the same being in Mr Thomas Wood's hands, the time of old Yewford's decease, imply a clear power he had to call for the assignation, if he pleased, for *ablativi absolute positi faciunt conditionem*; and the law is clear, where a donation is made *sub conditione vel modo*, and the donatar dies before acceptation, the donant and depositator can revoke the same; as Perezius determines, ad lib. 8. C. tit. 54. et 55. sub modo et conditione vel certo tempore, that ante acceptationem licet donanti voluntatem suam mutare, imo licet notarius stipulatus fuerit pro donatario absente, unless he had a special mandate from him; and this is likewise our law, as appears by the decision, 1st February 1672, Sir James Cockburn *contra* Forbes and Gordon, No 173. p. 11493.; where delivery to Mr David Thoirs, as *negotiorum gestor*, was not sufficient without actual acceptance, and *Grotius de jure belli ac pacis* is of the same opinion. *Answered* for Mr Robert Sinclair, the first assignee, That his right, without a violent stretch, can never be taken from him, for it is a certain principle in law, that a writ put in a third parties hand for my behoof, becomes my evident, and here there is an express clause, dispensing with the not delivery, and not the least mention of any reserved power to revoke and alter, which two words would have done, if it had been intended, and no faculty or power to call for it, but allenarly for getting payments of his annualrents, which are only reserved to him; and whatever power of revocation a parent might plead, *quoad* bonds to children *in familia*, yet that cannot take place here, where she was married, elocate, and forisfamiliate; and though she had got her tocher, yet her father giving her brother a free estate, he might very well burden him with such a moderate sum as 4000 merks; and her non-acceptance signifies nothing, for as she died shortly after, so that takes place only in offers, and where there is a *factum præstandum* on the other side, which is not here, for the L. 48 of yearly annuity to his wife was not to commence, nor exist, till his death; so that the transmission of a right to a third party requires no formal acceptation by the assignee, but can be done both *absenti et ignoranti*, only they may repudiate it when it comes to their knowledge, if they be not pleased with it; but who can believe that Jean Purves would reject this gift of 4000 merks from her father? *Replied*, If they will interpret

No 240.

No 240. the clause so strictly and judicially, because it does not expressly mention a power to alter, then by the same rule, John, the second assignee, may as justly contend, that the clause allowing him to call for th. assignation is not taxative, wanting these exclusive particles (only or allenarly); so the expressing of that single case, does not exclude his power to call for it on other occasions, or to dispose of it to another as he saw cause. The Lords thought the clause very ill drawn; but found as it stood it gave no right to alter, change or revoke; and therefore though they were both gratuitous, yet preferred the first assignation, and found it not revocable.

In this cause the lawyers urged the case in l 3. § 3 & l. 5. § 1. D. De condict. caus. dat. that though nothing was more favourable in the common law than liberty, yet one sold under this express condition, *ut intra certum tempus manumittatur*, yet upon intimation, before existing of the time of his resiling and repenting, the manumission may be stopt and interrupted; but the Lords decided *ut supra.*

Fountainhall, v. 2. *p.* 374.

1738. *November.* Irvine *against* Agnes Irvine, and her Husband.

No 241.

A deed found after the granter's decease in the hands of his ordinary doer was considered as a deed never delivered.

Fol. Dic. v. 4. *p.* 125. *Kilkerran,* (Presumption.) *No* 1. *p.* 425.

1741. *January* 9. Hamilton *against* Hamilton.

No 242.
Right taken in name of children from a third party, if alterable by the father.

Where a father had disponed his estate to his son, and taken from the son an obligation to pay certain sums to his several chidren in full contentation of all former provision or portion natural, without reserving to himself any power to alter or vary the proportions settled by that obligation, it was found that the father could not alter nor vary the said proportions.

For though bonds of provision granted by the father, and still retained by him, may be cancelled, or varied at pleasure, yet, where a father takes a bond from a third party in his child's name, the delivery of that bond to the father is a delivery for the behoof of the creditor, upon the common principle, that a bond out of the hand of the granter is presumed a delivered evident, and may be recovered by the creditor out of the hands of any third party.

Fol. Dic. v. 4. *p.* 125. *Kilkerran,* (Presumption.) *No* 3. *p.* 426.

*** C. Home's report of this case is No 25. p. 4137., *voce* Faculty.