1709. *July* 28. Murray *agains* ——

No 351.
Decree informal, but materially just.

James Short, son to the Provost of Stirling, marries Anna Murray, daughter to Polemais; and *stante matrimonio* in 1672, dispones to her the liferent of a great lodging in Stirling, and of 22 acres adjacent to that town; and, failing of bairns of the marriage, dispones the property and fee of 10,000 merks, heritably secured by infeftment on the estate of Tullibarden. In 1674, he, by a new right, dispones the said sum of 10,000 merks to Mary Scot his mother, and expressly revokes the former disposition he had made of it to his wife, in so far as concerned the fee, reserving her liferent of the same. Mary Scot dispones the said 10,000 merks to my Lord Saline's daughters, her own grandchildren, whereon they pursue a reduction of James Short's disposition to Anna Murray, his wife, against Polemais, to whom she had assigned it, on this ground, that it was a donation *inter virum et uxorem*, in so far as it exceeded a competent liferent, and absorbed the fee, and so was revocable, and *de facto* revoked by the posterior disposition made in favours of his mother; and the Lords, in 1678, did accordingly reduce it. Alexander and William Murrays having right by progress to Anna Murray their cousin's disposition, do raise a reduction of that decreet reductive, and founded on sundry nullities, such as, that the grand decerniture had no warrant by particular interlocutors after the because; the first being only the words of the clerk in stile, and the last are the words of the judge, which are collected by the extractors, and put all together in the great interlocutor; likeas, no avisandum was made with the probation. *Answered*, They opponed the decreet, which was *res judicata*, and could not after 30 years silence be now called in question. Likeas, these things being really done, it is no matter whether they be inserted in the decreet, if they appear from the minutes. The Lords thought it an useless and unnecessary work to loose and open a decreet, where there was nothing, in material justice, to say against it, when it is turned into a libel; and therefore, without opning it, they allowed the pursuers to object what they relevantly could against the said revocation. In which debate, the Murrays *alleged*, That it was no donation, for there being no contract of marriage, this provision came in place thereof; neither was it exorbitant, seeing it was both affected with debt and her mother's liferent; and she being a gentlewoman of a good family, and he a burgess, it was but a competent provision failing of bairns, which case happened. Likeas, the revocation was on death-bed, and so *tempore inhabile*, and was not in favours of his nearest heir, but of his mother, and to the heir's prejudice, when he could not wrong him. *Answered*, All this was fully tried and examined by the Lords in 1678, and very deliberately then reduced; for she having married without her father's consent, he got not one farthing of tocher with her, and the liferent of the house and acres, joined with the liferent of the said 10,000 merks was more than a competent provision; far less

should he have given her the fee of the said sum, which was *excessus notabilis*, and was so found by the Lords, 27th June 1677, and 22d June 1678, Birnies *contra* Murrays, No 341. p. 6124. and No 58. p. 3242. where all now alleged is there founded on and repelled. THE LORDS, by plurality, thought it incongruous to loose a decreet *in foro* on nullities, where the allegeances against it (*esto* it were open) are irrelevant; and, therefore, finding it was *bene judicatum* in 1678, and what is now said, shewed no material injustice then committed, therefore, they sustained the decreet, and assoilzied from Murray's reduction. In this case, conveyances of fees to wives by husbands were thought unfavourable, and instances remembered of the Duke of Lauderdale and the Lord Whtelaw.

Fol. Dic. v. 2. p. 206. Fountainhall, v. 2. p. 520.

No 351.

1744. *December* 19. CHRISTIES *against* CHRISTIE.

No 352.
A defender being found liable by an interlocutor which was laid open on a reclaiming bill, and thereafter a new topic insisted on as relevant to subject him, whereupon he was assoilzied without reviewing the former interlocutor, the decree was opened to the effect of reviewing it, and determining how far it ought to be adhered to or altered.

GEORGE CHRISTIE, tenant in Kinglassie, purchased the lands of Auchmuir, and took the rights to himself in liferent, and to George and William his two sons equally in fee. After which he acquired the feu-duties of the lands of Kynninmound, which he took to himself in liferent, and to William in fee; and on this, in virtue of powers reserved, he disponed the lands of Auchmuir to his son George; but this deed, which was written by William, wanted witnesses.

Upon George the father's death, and the observation of the defect, a declaration was obtained from William, that he should never quarrel his father's settlement; but this wanted the writer's name and designation.

The matter came to a plea between George the son's daughters, and their uncle William, in which it was referred to his oath, if he had not signed the declaration, to which he deponed *affirmative*; and also, if he had not promised never to quarrel his father's disposition; to which he deponed, "He knew his father's intention, that his brother should succeed to the whole lands, which he promised to implement; but he was also assured their father intended there should be mutual tailzies betwixt them, failing heirs-male of their bodies; and that he made the said promise only on condition of the said intended tailzie."

THE LORDS found the promise proved, and the quality extrinsic; but this being opened on a petition, the matter was never determined, and the cause taken up on another point, in which the defender prevailed, and was assoilzied; and of this decreet *in foro* a reduction was brought on this ground, that the interlocutor by which the defender was found liable, stood yet unreversed; and the pursuers having only failed prevailing on another topic, he ought not to have been assoilzied.

"THE LORDS, 6th November 1744, upon report of the Lord Tinwald, in respect it appeared from the extract of the decreet under reduction, that by in-