

1649. June 29. RODGER *against* JAMES BINNING.

IN the suspension pursued by Rodger against James Binning, the reason was libelled, that, before payment, the said James should subscribe assignation against the cautioner his heirs, contained in the first bond, according to his promise; as also, according to a clause in the second bond, tying him to deliver both the bonds to the suspender the time of payment-making; which importeth assignation, or else the re-delivery was not much profitable. But the charger denied the same, being referred to his oath; for that, to free the poor minors, bairns to the deceased cautioner, was according to conscience. He discussed, first, the principal, and, if Rodger had not intervened by his posterior bond, he would have laid in ward his principal debtor, whom he had then in hands. Likeas, the Lords found that the foresaid words of the bond did not import assignation, and yet was profitable *ut constaret de relato, sicut de referenti*; and the said James, being paid, should keep neither of the bonds.

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1649. June 29. NEILSONE *against* CRANSTOUNE.

IN the suspension at the instance of Neilsonne against Cranstoune, for a cure in chirurgery, decret having been given by the commissaries of Edinburgh beyond the injunctions; the reasons, in effect, were to have modification. The Lords were loth to meddle in it, in respect of the pursuer his oath taken *in supplementum*; yet desired them to hear chirurgeons thereanent, and to report.

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1649. June 30. HERIOT, LADY POWRIE, *against* JAMES GRAHAME of MONORGUNE.

IN the action of mails and duties pursued by Heriot, Lady Powrie, *first*, against Mr James Grahame of Monorgune, alleged heritor of Lawlethime,—it was excepted upon an infetment from the Laird of Fentrie his brother, who had disposition from the Laird of Powrie, her husband, and was infet therein: neither could the pursuer her prior infetment be respected; because, proceeding on a bond from her husband, *stante matrimonio*, for love and favour, which is *donatio inter virum et uxorem*, prohibited in the law *ne mutuo amore se spolient*; —*FF. et C. de Donat. inter Vir. et Uxorem*;—and so revokable, and was *de facto* revoked, in so far as the said Laird of Powrie did alienate those same lands to the said Laird of Fentrie. Whereunto it was replied, That there could be no tacit revocation understood here, to her prejudice; since her husband had given to her the said lands, under reversion to him and his heirs-male, for ten merks, which he never did redeem; and farther, that the defender, knowing of this, at least the Laird of Fentrie, author to him, did take infetment of the lands of Powrie in warrandice. Whereunto it was duplied, That, in respect of that reversion for a small sum, it was much more revokable, and ought to be revoked

in favours of the singular successor ; who, if he came back upon his warrandice-lands, might be repelled by the heritor thereof, who had bought them sinsyne from the Laird of Powrie and herself ; they being truly her conjunct fee lands, and she consenting legally to the alienation. And it may be, that this pretended right of Laulathime, and other lands, did move her to the alienation of her conjunct fee, provided by contract of marriage ; but she did not consider that the same was not *remuneratorie*, neither could be ; the same being long anterior to the alienation of her conjunct fee, and so could not be *intuitu matrimonii*, which is the case sustainable in law. Neither does here militate the distinction *quod maritus non sit pauperior factus, nec uxor locupletior*, which has place by the laws *in minutis tantum et fructibus consumptis*. The Lords found little in it : but, pitying the poor lady, reserved it to be heard *in præsentia*, to the effect some composition might be had by way of arbitrament, since her husband had debauched all, and left nothing to her.

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1649. June 30. MR WILLIAM RIG *against* The EARL of SEAFORTH and ———
WEDDERBURNE, Relict of Thomas Montcur.

IN the action pursued by Mr William Rig against the Earl of Seaforth and ——— Wedderburne, relict of Thomas Montcur, for her interest, it was excepted, against his title of assignation to the Earl his bond, That it was blank even till his death, alleged granter thereof ; and but subscribed on death-bed, *et omnium bonorum*. It was answered, That was *jus tertii*, and neither heir nor creditor did quarrel the same : neither could they or she either ; in respect one Hunter being, as it were, *proxeneta* for getting the said Montcur granter thereof, money to borrow, did deliver the said bond to the pursuer, and promised to bring him an assignation thereto, containing more sums, for some other things that were between them. To the which it was duplied, by way of information, That this Hunter (after bankrupt) might have been debtor to the pursuer, and, in satisfaction, given this blank assignation to him ; which, perhaps, for eschewing of horning or other inconvenient of law, the said Thomas Montcur might have laid by him. Whereupon, for clearing the said Mr William his part, the preceding Lords had taken his oath ; and those who sat now did renew the same.

It was farther excepted, That the said Mr William could not have filled the blank assignation with his own name, to the prejudice of the said relict, to whom the sum was provided in liferent ; and that the said assignation never being intimated before the said Montcur his death, could neither prejudge executor, creditor, nor relict. It was replied, That the bond, being delivered long before the death and assignation promised, the same needed no intimation, except there were another assignee contesting for priority ; and, if the granter subscribed the same *etiam in extremis agens*, it must be thought, as concerning the relict, to be *revocatio donationis inter virum et uxorem, quæ non nisi morte confirmatur, cum et hic mariti voluntas usque ad mortem sit ambulatoria*. And if a bond and assignation be subscribed by the granter, it may be taken, of purpose *et consulto consilio*,