

David Thoirs, as treater and communer for and in name and behalf of Cragievar, who accordingly accepts thereof; and this assignation made to Craigievar is intimated to Mercer, the debtor in that bond, I think a day before Cockburne could get his assignation intimated to Cragievar. This being the matter of fact; when Cockburne pursues for his sum, Cragievar ALLEGES he must have compensation, in so far as he was become creditor to Mercer, by Sir George Gordon's assignation to him, before Cockburne's intimation; and so being both debtor and creditor *vicissim, confusione tollitur obligatio*.

To this it was ANSWERED,—That they could not be heard to plead compensation on that head unless they would say that Cragievar knew of this assignation made to him by Haddow, and accepted of the same before Cockburne intimated his assignation, seeing it was only a northland, done of collusion and set purpose, to elude Cockburne's assignation; *et non amo nimium diligentes*; it was done without any onerous cause on Cragievar's part, and Haddow laid so small weight on this conveyance, that at the same time he, in his own name, and for payment of his debt, caused arrest the sum due by Cragievar, which by the course of nature was inconsistent and incompatible with his former assignation, whereby he was denuded of the right to that sum.

REPLIED,—That they needed not say that Cragievar knew of that assignation or accepted thereof before Cockburne's intimation, because of the law, *Si procurator rem mihi emerit ex mandato meo, eique sit tradita meo nomine, dominium mihi, id est, proprietas acquiritur etiam ignoranti*; *l. 13 D. de acquir. rerum dominio*; *l. 34 p. 1, D. de acquir. vel amitt. possess. par. 5 Instit. per quas personas cuique acquiritur*; so that all the law required was, that he give a commission for doing such a business or acquiring such a thing; which the mandatary accordingly acting, *mandanti ignoranti res illa acquiritur*. *Vide Dumnum, in commentario ad regulam 3 Juris Canonici*; *Perezium ad Tit. C. de donation. quæ sub modo et condit. numero 8vo*.

The Lords *referente Domino Craigie*, ordained Cragievar the alleged *mandator*, and Mr. David Thoirs the alleged *mandatarius*, to be examined before answer, whether Cragievar gave any commission to Mr. David Thoirs to treat with Haddow for that bond of Mercer's, and if Mr. Thoirs accepted the assignation in Cragievar's name, and for him intimated it to Bailie Mercer. Which if they grant, then I imagine the Lords will sustain the assignation made to Cragievar, though he was ignorant of it, because it was accepted by Mr. David Thoirs, who had a commission from him to that effect.

*Advocates' MS. No. 320, folio 128.*

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1672. February 9. The LAIRD of BALNAMOON *against* JOHN MACINTOSH.

THIS Macintosh having married his daughter on one Weymes, by the contract of marriage he is obliged to pay 2000 merks in name of tocher, to which 2000 merks Weymes is obliged to lay 3000 merks of his own monies; and which 5000 merks is provided to him and her and the longest liver of them two, in conjunct fee, and to the heirs of the marriage to be procreated betwixt them. Weymes being

debtor to Carnegy of Balnamoon, and having no other way to pay him, he assigns him to that obligation in the contract of marriage, whereby Macintosh, his goodfather, is obliged to pay him 2000 merks; Balnamoon, charging for the sum, Macintosh suspends on this reason, that he was not liable to pay it *simpliciter*, but to pay it under this quality, that it should be employed first for the use of his daughter, and then for the children of the marriage; in respect of which destination he cannot pay it to this assignee.

To which it was ANSWERED,—That the charge at the assignee's instance, must be found orderly proceeded, notwithstanding of the reason; because any destination of the tocher contained in the contract of marriage, takes not away the husband's dominion therein, in so far as the wife is dead, and so her liferent thereof can never exist; and for the children they can lay no claim in it, because it is provided to the heirs of the marriage, and how long the father lives they cannot be heirs.

REPLIED,—By heirs must be understood bairns.

DUPLIED,—However heirs might be interpreted bairns in a man's second contract of marriage, yet it can never but be properly taken for heirs served and retoured in the first, as this was. *Item*, The father is doubtless fiar of the sum; and so may dispose and assign it at his pleasure, because the termination of the fee is on his heirs.

The Lords found the letters orderly proceeded, reserving action to Macintosh against the charger's cedent, to see the contract of marriage fulfilled to his grandchildren. This seems pretty hard, and is direct contrary to that decision in Dury, at the 20th November, 1623, *Goodman of Kinblathmont*. *Vide infra* November 1677, *Barbara Grant* against *Janet Cuthbert*, No. 647, § 4.

It were to be wished that some of the Lords' number, and the lawyers, did meet, and take to their consideration the import of all the clauses used in contracts of marriage, by explaining the ambiguity of the said clauses, and by setting down a certain rule whereby they may be equally and alike understood in all time coming. *Vide infra*, No. 351, [*Lundy* against *Lundy*, 26th June, 1672] *in fine*; and 396, [*June*, 1673;] and 430, [*Lauder* against *Alisone*, November 1673. *Advocates' MS. No. 321, folio 129.*

1672. February 9. Anent The TOWN OF EDINBURGH'S CHARTER in 1636.

ABOUT this time I had occasion to see the town of Edinburgh their great charter, granted to them by King Charles in 1636, with the seasine taken thereon in 1637. It is a new gift to the town of their burgh, mills, common moor, port and harbour of Leith and Newhaven, superiority of Leith, dock-money, anchorage-money, golden pennies, &c.; office of sheriff-ship and justiciary of peace, within their town and liberties, &c. with a ratification of all their former infestments. As for the badges of honour and sovereignty (so to speak) conferred on the Provost and other Magistrates of the city, *viz.* the sword, sceptre, and red robes, these are by the grant of King James the VI. by his charter under the great seal in 1621, and that on the parallel of the Lord Mayor of London.