the £.17 10s. Sterling, which assertion Dumbreck ought not to have acquiesced in without Caldwell's concurrence and assent thereto.

No. 29.

Fountainhall, v. 2. p. 600.

1712. *June* 24.

MARTHA WRIGHT, and DAVID KINLOCH of Conland, her Husband, *against* JOHN WRIGHT, Merchant in Edinburgh.

No. 30.
A trustee who buys a right which may compete with the right wherein he is trustee, cannot thereby prejudice the trust.

The deceased John Wright, Bute-pursevant, January 28, 1707, did (under the reservation of his own liferent, and of his whole household-plenishing, and a liferent of 200 merks yearly in favour of Lillias Sanderson, his wife) dispone his whole estate, heritable and moveable, to Alexander Wright, his only child, and the heirs of his body, which failing, to Laurence and Martha Wrights, his brother and sister, and John Wright, merchant in Edinburgh, his brother-in-law, equally among them, and their heirs. Which disposition bore the said John Wright to be named tutor to the disponer's son, the institute, and that the writs were instantly delivered to him, in name of the son and the other substitutes. On the same day, Lillias Sanderson procured from her husband another disposition of all his moveables to their son, and, failing of him, in favours of herself, over and above the 200 merks of liferent. Which disposition was perfected by an instrument of possession, of the date thereof, in favours of the wife; and thereafter transferred by her to John Wright, one of the substitutes in the other disposition, for payment of the liferent provided to her in that other disposition. The disponer's son, and Laurence Wright, another of the substitutes, having died, Martha Wright, as heir served to them, raised a reduction of the disposition in favours of Lillias Sanderson, the wife, upon these reasons, viz. Either it was prior or posterior to the pursuer's disposition; if prior, it was *donatio inter virum et uxorum, quæ solum morte confirmatur*, and was revoked by the subsequent disposition; if posterior, it was *a non habente potestatem*, the disponer being *ab ante* denuded by the other disposition, containing warrandice from fact and deed.

Answered for John Wright: The pursuer ought to be positive in the fact whereupon she founds her reason of reduction; for a pursuer is not, as a defender, privileged to propone contrary allegeances; and how can the Judge determine any thing certainly, while the pursuer is at an uncertainty how to insist? *2do*, The defender answers the pursuer's *dilemma*, by proposing another, that is, If the disposition in favours of the wife was granted before the other, it is not revocable, being a reasonable provision to a wife, no otherwise provided; if posterior, (which is more probable), it ought to subsist, in respect it doth not appear that the first disposition was a delivered evident, and it bears no clause dispensing with not delivery.

Replied for the pursuer: The disposition in favours of the pursuer, and the other substitutes, bears to have been instantly delivered to the defender, as tutor

No. 30.

to the son, in name of him and of the pursuer, and other substitutes; and the presumption of law stands *pro veritate instrumenti*, till the contrary be made appear; 2*do*, The writ being now in the defender's hand, law presumes for the pursuer, unless the defender prove not delivery; 3*tio*, The writ is good without delivery, because, 1*mo*, It is a disposition by a father to his son; November 11, 1624, Children of Elderslie against His Heir, No. 14. p. 6344.; 2*do*, The disponer having an interest by his reserved liferent, his possession was the son's and substitute's possession; Stair, Instit. p. 66. (68.); which is conform to the civil law, whereby the property of *legata* and *hæreditates* were transmitted without delivery; particularly in the case of a reservation of a disponer's liferent; L. 28. C. De Donationibus.

Duplied for the defender: Had the first disposition been delivered, it is not very probable that the granter would have altered it the same day. It doth not import that the disposition bears, that it was delivered to the defender in name of the persons concerned; for what is in the body of a writ cannot prove actual delivery thereof, but only that it was designed to be delivered. A clause of delivery, relating to other writs than that wherein it is inserted, will indeed bind those other writs upon the receiver of the disposition; but no clause in any writ can prove delivery of that individual writ. Nay, it hath been found, that a disposition, though judicially ratified, being in the granter's hand, is not presumed to have been delivered.

The Lords preferred the pursuer, the heir substituted to the relict; and therefore reduced the relict's disposition. The Lords seemed to go upon the reasons following, which occurred to their Lordships at advising, viz. 1*mo*, The disposition in favours of the pursuer was good without delivery, because of the granter's reserved liferent; 2*do*, The wife's disposition, though followed with an instrument of possession, could not vest any title of property or possession in her *stante matrimonio*, but did immediately return to the husband *jure mariti*; 3*tio*, The transaction made by John Wright, the defender, with Lillias Sanderson, did accrue to the son and his substitutes, because the defender being not only tutor to the disponer's son, but also trustee for his substitutes, for whose joint use and behoof the disposition bears to have been delivered to him, any benefit or advantage that could arise from such a transaction ought to be communicated to the substitutes.

Forbes, p. 602.

1712. *December* 5.

MR. JAMES SMITH of Whitehill, *against* MR. WALTER STIRLING, Writer in Edinburgh.

No. 31.
Discharge of a trust.

Mr. James Smith obtained a gift of Patrick Steill's escheat. Mr. Walter Stirling was assigned to 6000 merks owing by Steill to Thomas Deans, Esquire, and the