

No 5. any right of the back-bond, for revocation must flow from some deed of the husband, either express or tacit, whereby his mind may be understood, and that it was his will to revoke, and cannot be collected from the deed of a third person, but by a deed done by himself, whereby it may be presumed that his mind was to revoke; likeas, in the contrary, by a posterior deed done *in anno* 1621, he declared that he persisted in that same mind, and had no intention to revoke, in so far as by his charter he disposed to her the lands of Huttonhal, and also the teinds thereof, in recompence of other lands renounced by her, at her husband's desire, and which he had sold, and wherein she was conjunct fiar, and which were far more worth than both the lands and teinds contained in the charter; which deed being *donatio remuneratoria et arriidagor*, cannot be subject to any revocation, but is irrevocable in law; and so the comprising, which is long posterior to this charter also, can give no place to this compriser, to quarrel this assignation or charter;—and the compriser *duplicing*, That this charter had only one word of the teinds in the narrative, and was neither mentioned in the *tenendas* nor *reddendo* of the charter, and was not *habilis modus* to give right to the teinds, the maker of the charter never being infest, so that the charter cannot make the assignation whereupon the pursuit is founded to subsist, specially against a compriser for causes of just debt, the comprises being clothed with seven years possession, and this assignation never being intimated, nor inhibition served thereon, but being a private act betwixt husband and wife, never made manifest, but remaining obscure and private; the LORDS found the tack ought to be delivered to the wife as assignee, having right thereto notwithstanding of the comprising, and compriser's allegiance and duply, which was repelled; for the LORDS found, that the compriser had not right to revoke, or to require by the back-bond, as the husband had, specially in respect of the charter, which albeit it was not a legal right, to give her security of the teinds, which the husband had not in heritable right, yet it was a declaration that he persisted in that same mind, and had no intention to revoke, and that it bore, "to be given to her in recompence of lands," renounced by her as said is, which the pursuer offered to prove she had done; and which reply, bearing *ut supra*, the Lords admitted to her probation.

Act. *Stuart & Mowat.*

Alt. *Nicolson & Craig.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 133. Durie, p. 594.

* * * Auchinleck's report of this case is No 357. p. 6151. *voce* HUSBAND and WIFE.

1635. *March 25.*

LD LAURISTON *against* LADY DUNIPACE.

No 6.

A PERSON granted to his wife an additional jointure out of certain lands. He afterwards granted a security for a debt equivalent to the worth of the lands,

and the creditor was infeft. Found, that the additional jointure was thereby revoked.

No 6.

Fol. Dic. v. 2. p. 133. Durie.

* * This case is No 346. p. 6132., *voce* HUSBAND AND WIFE.

1667. January 31.

HENDERSON *against* HENDERSON.

UMQUHILE Henderson grants a writ in favour of Allan Henderson, whereby he appoints the said Allan to be his heir, and donatar to all his lands and estate, and assigns him to the rights and evidences thereof; with power to enter by the superior: But in the narrative, it bears the ordinary narrative of a testament, and has a clause subjoined to all, in case of his return, he may alter and annul the same, there having nothing followed in his life. The said Allan pursues Henderson his apparent heir to fulfil the former writ, and to enter heir and resign in his favours, conform to the meaning thereof. The defender *alleged*, Absolvitor; *imo*, Because this writ is no disposition, but a testament or a donation *mortis causa*, in which no disposition of land can be valid; *2do*, Albeit this could be a disposition, yet it is not done *habili modo*, there being no disposition of the right of the land, or any obligation to infeft; neither can a person be constituted heir, but either by law or investiture, or at least by an obligation to grant investiture; *3tio*, This being *donatio mortis causa*, expressly revocable by the defunct at his return, it is ambulatory and conditional; *ita est*, he returned and granted commissions and factories, whereby his mind appeared to be changed.

No 7.

Although a party had, by only an informal deed, altered the order of succession, the intention being evident, his heirs were found obliged to implement it.

THE LORDS repelled all these allegeances, and sustained the summons, because though the writ was informal, yet they found the defunct's meaning was to alienate his right from his heirs to this pursuer, to take effect after his death; and albeit he returned, seeing he did no deed to annul or recal this right, this was effectual against his heir to complete the same.

1667. November 14.—HENDERSON insisted in the cause mentioned January 31. 1667, which was again fully debated above; and it was *alleged*, That the writ in question was a testament, or at least *donatio mortis causa*, or at least a conditional donation, to take effect only in case the disponent died before he returned, so that his simple returning, without any further, purified the condition, and made it null.

THE LORDS having considered the writ, found that albeit it was not formal, yet it had the essentials of a disposition and donation *inter vivos*, and that it was not null by the disponent's return, unless he had revoked it; for they found, that the words being that he nominated and constituted Henderson his heir and