

No. 11. make any executor he pleased : And craved a term to prove these qualifications. Answered, this was upon the matter a reduction of that decret reductive of the testament, and concluded repayment of the sums and goods intromitted with by the nearest of kin since they reduced the testament, and tended to make it revive, and yet the said decret is not so much as called for, nor in the field ; and though it aims to annul the deposition of the witnesses, yet they are nether called for nor produced : So this process of declarator is altogether wrong laid, seeing it should only be by way of reduction ; and even these reductions upon reprobaters are very rare and singular, and have taken small effect in Scotland, and may tend to discourage witnesses from telling the truth : And the words libelled are but *verba jactantia*, and they do not subsume that the parties accepted of the bribe offered, otherwise they cannot be said to be corrupted. Replied, though reprobaters be an extraordinary remedy, yet it cannot be called new, for all our lawyers mention them ; as Stair, Book 4. Tit. 43. and Lord Craigie in his Repertory, *voce* REPROBATERS ; and our decisions sustain their opinion, as is to be found in Dury, 26th June 1623, and 5th March 1624, Cochran, No. 212. p. 12099 ; 7th July 1632, Renton, No. 224. p. 6787 ; 30th July 1668, Lady Milton against Sir J. Whiteford, No. 216. p. 12104 ; and 14th July 1671, and 20th February 1672, *inter eosdem*, No. 217. p. 12105. marked both by Stair and Dirleton, with their judicious reasoning thereupon ; and Paterson against Johnston, No. 219. p. 12114. Duplied, pregnant qualifications a re required, and the idle story of offering him a lass with £.1000 is not to be regarded. The Lords found a declarator was not the formal way to bring in this trial and expiscation, and therefore found no process till a reduction were raised, and the production of the original depositions of the witnesses were satisfied ; before which they could not be forced to debate, and in case any of them died *medio tempore*, their heirs could not be called to the effect of any punishment to be inflicted on them who were not guilty of the prevarication ; but only for annulling the decret.

Fountainhall, v. 2. p. 67, 70, & 225.

1704. November 4.

MR. JOHN BUCHANAN and Others, *against* MR. THOMAS PATERSON.

No. 12.

A Wife's disposition to her husband reduced by the nearest of kin, on account of symptoms of an intention to revoke it.

Mr. Thomas Paterson being married to Janet Wright, the marriage dissolved within year and day ; but she made three several dispositions of the greatest part of her means, in favours of her husband, whereof the last was signed a few hours before her decease.

The defunct's nearest of kin, and Mr. John Buchanan, who was married to her sister, pursue a reduction of that disposition ; and there being a probation before answer, it did appear, that the disposition was framed by the defunct's order, and duly signed and delivered to the defender ; but, at the same time, the defunct de-

sired it might be re-delivered to her, which was done, and the disposition laid upon her pillow; and then she sent for Mr. John Buchanan, her brother-in-law; and, when he came, desired he might read that disposition, which she supposed had been taken off the pillow, and put in her pocket; but found there only two former dispositions, which she gave to Mr. John Buchanan, who telling her, that he found no disposition of a late date, she said, her husband had stole that disposition out of her pocket, which she said was a base trick, and she took hold of his night-gown, and said, she would not part with him till she got it. He again said, that it had been delivered to him, and was content the writer should read it, but was unwilling to put it in Mr. John Buchanan's hands: She did not acquiesce, but continued to exclaim; and being in a passion, fainted, and did not recover, but did very shortly expire.

It was alleged for the pursuer: That the disposition was null, in so far as it was conceived in favours of the defender; because the same being still in the defender's custody, and power, she thought fit to call for Mr. John Buchanan, her brother-in-law, that he might read the disposition to her, and that they might jointly consider the matter of it, to the effect it might stand or fall, as should be thought fit after reading; and the defender having unwarrantably possessed himself of the disposition, and kept it up more unwarrantably, when desired to restore it, and upbraided for stealing it from the defunct, he ought to reap no benefit by that disposition; for *quoad* him, it ought to be held as recalled, or the benefit thereof taken from him, *tanquam ab indigno*; and there is an express title in the civil law, *Si quis aliquem testari coegerit, vel prohibuerit*, which was reckoned a great crime, and in that case the succession or legacy, which would have fallen to the person guilty thereof, was confiscated: But, by the custom of nations, that of confiscation is altered, and the benefit of succession arises to those that would have succeeded *ab intestato*, in the one case, and to those that would have been heirs or legatars, in the other; and it is the same thing, whether a defunct be hindered or constrained to make a testament, or whether he be hindered or constrained to revoke a testament that is made, which in all probability this defunct intended; because the disposition did not only bear a power to revoke, but she expressly said, she believed there was a cleick in it, which was the reason that induced her to re-consider it.

It was answered: The disposition was fairly made by her own direction, and signed outwith the presence of her husband, and was delivered to him, which the parties by mistake thought necessary to validate the deed, not adverting that it was revocable, and of a testamentary nature; and the defunct did never express the least intention to revoke the deed; but having, in the former dispositions, left a legacy to Mr. John Buchanan, which was increased in the last, she sent for him only to let him know the regard she had testified to him, though they had not been formerly on good terms: Neither did the defender simply refuse to suffer the disposition to be read; but, being sensible of Mr. John Buchanan's unkindness, he was unwilling it should come in his hands; but he offered to send for the

No. 12. writer, or any other person, to read it; and the defunct signified no intention to recal it, otherwise she could have done it by a posterior writ; and, though she had died before that writ had been concluded, yet, if she had but so much as ordered the framing of it, the pursuers might have insisted upon the civil law to annul it: But she did no such thing; only, by reason of her indisposition, she was easily offended, which can have no legal effect in this case.

“The Lords found it relevant to annul the disposition, in so far as it was conceived in favours of the defender, and proven, that the defender did unwarrantably abstract the disposition from the defunct, and kept it up, and refused to exhibit it, that it might be read and re-considered, and cancelled or revoked, as she should think fit.”

Dalrymple, No. 50. p. 63.

* * * Fountainhall reports this case :

1703. *November 26.*—Janet Wright being married to the Laird of Kairsey, and having no children by him, she got a right to a great part of his means, both personal and real, and then marries Mr. Thomas Paterson, late Minister at Borthwick; and falling into a consumption, she signed two several dispositions and conveyances of her means, partly in favour of her second husband, and partly of her mother and sisters; and the day whereon she died, resolving on some alteration, she subscribed a third disposition; and, finding herself weak, she sent for her mother and other friends, and particularly for Mr John Buchanan, who was married to one of her sisters; and when they were come, she told them she had made a new disposition; and putting her hand in her pocket, with a design to give it them, and missing it, she expostulated with Mr. Paterson her husband, for taking it from her, and desired him to produce it; and he replying, that he could not trust it in Mr. Buchanan's hand, who was his unfriend, who might keep it up, or cancel it; but he would send for George Robertson, who wrote it, and he might read it over to them; but she persisted still to have her disposition re-delivered to her, and bade Mr. Buchanan, and others present, either take it from him, or send for a party of the town-guard to cause him restore it. During this conflict and confusion the wife expires, and Mr. Paterson keeps the disposition; whereupon Mr. Robert Wright, her brother, with his sisters, and Mr. Buchanan, as husband to one of them, for his interest, raise a reduction against Mr. Paterson of that last disposition, on these reasons, *1mo*, That it was signed but some few hours before her death, and so, being *in lecto*, can never transmit the heritage to the prejudice of her heirs; *2do*, As it was elicited by importunity, so it was never delivered, but clandestinely stolen from her; *3tio*, It reserved an express faculty to innovate or alter, which she did effectually by seeking it back from her husband, and, upon his refusal, desired those present to take it from him, which was equivalent to an actual revocation; and craved that the women present about her, at the time of her death, might be examined on the above-mentioned circumstances.

Answered for Mr. Paterson to the *first*: He did not, *hoc loco*, insist for the heritable estate, but only for the moveable bonds and debts, which the reason of death-bed did not strike against. To the *second*, The writ being now in his hands, lawful delivery must be presumed, and not that he got it by any vitious contrectation; and by our law it cannot be taken from him, save only *scripto vel juramento*; yet, in fortification, he offers to prove, by the writer and witnesses, that they saw it delivered fairly. To the *third*, The disposition being once completed in writ, though she had a power to alter, yet that must be understood to be done *habili modo* by a revocation, likewise in writ, seeing *unumquodque eodem modo dissolvitur quo colligatur*, L. 35. D. De reg. jur. even as a nuncupative testament might be recalled and irritated by a subsequent contrary testification of their pleasure, by word of mouth allenary; so here, *è contrario*, writ was requisite to take away writ, and which she might have caused Mr. John Buchanan do, by drawing six lines of a revocation; but she never designed any such thing: And as to the women witnesses, they are not receivable in law, except *in puerperio*, where men are not admitted; and sundry of them expected legacies. The Lords thought, in this case, though she had not reserved a faculty to her, yet the very nature of the right implied a power, it being *donatio inter virum et uxorem*, which requires less explicit revocations than other deeds, and could not be said here *morte confirmari*, where she had craved it back, and was refused; so there was here a double power of revoking, one given by the law, and the other conventional by the writ, and that this affair could not be understood without a previous trial; and therefore, before answer, they ordained the prior disposition to be produced, and probation to be led by either party on their several allegiances as to the delivery, and her requiring it back again, and to what end; if only to read it in the audience of her friends, or with a design to alter it; and allowed women, and all others present in the room, to be examined; for the Lords have taken expiscations of the manner how some have come by papers, without always referring it to oath or writ, as appears 22d January, 1669, The Daughters of Crichton of Crawfordston against Brown, *voce* WRIT.

1704. November 4.—In the action mentioned 26th November, 1703, Wrights and Buchanan against Paterson, being a reduction of a disposition made on death-bed, the Lords, on advising the probation, thought this right being of a testamentary nature, and bearing a power to alter, it did not require delivery; and being a donation by a wife to her husband, it was revocable; and it coming into her husband's custody, it was contended, that her seeking it back again, and his refusing it, was a revocation upon the matter, though it did not appear *quo animo* she craved it back, whether only to read, or to cancel it, or to review and reconsider it; for a testament may be revoked either by a contrary writ, or by cancelling, inducing, or lacerating it; and Mr. Paterson refusing to return it back to her, did thereby impede and stop the exercise of that faculty and power she had reserved of altering, and so fell under the compass of that title in the common

No. 12. law, *Si quis aliquem testari prohibuerit*, which was founded on the twelve tables, *Uti paterfamilias legasset rei sue, ita jus esto*. Answered, Her calling for it was not to destroy it, but only to have it read before her friends; and Mr. Paterson's refusing it was not simple and absolute, but only that it might not fall into Mr. John Buchanan's hands. Yet the Lords finding, by the testimonies of the witnesses, that the defunct complained it had some cleck in it, and was stolen from her by a trick, they thought he had forfeited his right *ut indignus*, conform to that title in the common law, for refusing to give it back to review and reconsider it, that she might be fully satisfied anent it; and by plurality found the last disposition null *quoad* him, and that he could reap no benefit by it, but prejudice of what might be said for the other legacies therein.

The next question was, If the two former dispositions she had made, subsisted, or fell in consequence with this last? If it had been sustained as valid, there is no doubt but it would have been a formal innovation and revocation of all preceding rights; but being declared null, the debate arose whether they stood in force; the hearing whereof was continued to another day, that the lawyers might be prepared thereon.

Fountainhall, v. 2. p. 193. § 237.

1710. July 15. MONCRIEFF against MONYPENNY.

No. 13.

A testament reducible upon this ground, that the witnesses did not see the testator sign his name and surname without assistance, but only his name and the half of his surname, he being assisted by the writer's leading his hand to finish the other half.

George Moncrieff of Sauchop, finding himself very weak in November 1707, gives order to one Watson to draw his testament, and within a quarter of an hour after subscribing it he dies, without any children: In it he nominates his wife, Catharine Monypenny, Pitmillie's sister, his sole executor, with the burden of some legacies; his moveables being of a great value, near to £.2,000 Sterling, in ships, tickets, &c. Isobel Moncrieff, his sister-german, and Brown her husband, raise a reduction of this testament on sundry grounds, that it was not read to him, and he was then insensible, and his judgment decayed. The Lords allowed a conjunct probation to either party, to prove the way and manner in which it was subscribed, and what condition he was in at the time; and the instrumentary witnesses, with several others, being examined, the Lords advised the probation this day; and it being alleged, *1mo*, 'I hat *non constat* it was read to him, and he behoved to be in a great confusion, being so near death; it was answered, That the witnesses deponed it was read in his presence; neither is their not hearing it read to him relevant, seeing it might be done ere they were called in. And as to the solidity of his judgment, his disease not being a fever, which is sometimes accompanied with a delirium, but a consumption, it is known that such keep their judgment and senses to the very last. *2do*, Alleged, by the 5th act of Parliament 1681 witness are required to see the party subscribe, but here none of the witnesses but one declare their seeing him sign the whole, because he did it in his