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; *2do*, The writ being now in the defender's hand, law presumes for the pursuer, unless the defender prove not delivery; *3tio*, The writ is good without delivery, because, *1mo*, It is a disposition by a father to his son; November 11, 1624, Children of Elderslie against His Heir, No. 14. p. 6344.; *2do*, 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. *1mo*, The disposition in favours of the pursuer was good without delivery, because of the granter's reserved liferent; *2do*, 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*; *3tio*, 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

assignation duly intimated, before the Rebellion. Patrick Steill assigned several bonds due to him by the deceased Robert Deans, merchant in Edinburgh, to Mr. John Cameron, in trust, who obtained decree of constitution and adjudication against the representatives of Robert Deans, and transferred the whole rights, with Steill's consent, to Mr. Walter, before the Rebellion, under back-bond to hold count to Steill for what he should recover. Mr. James Smith, as donatar of the escheat, pursued Mr. Walter for £.539 Scots recovered by him of Robert Dean's effects. No. 31.

The Lords found, That Mr. Walter, being creditor to the rebel before the Rebellion, and having obtained payment by virtue of the right from Cameron, whose assignation from the rebel was intimated before the Rebellion, he had right to retain in compensation of the sums due to himself *pro tanto*, and therefore preferred him to the donatar; albeit the translation from Cameron was not intimated to the representatives of Robert Deans before the decree of general declarator of the escheat; in respect the intimation of the assignation to Cameron effectually denuded Patrick Steill, and put the debtors *in mala fide* to pay him, who had only an action on the back-bond against Cameron to retrocess, with which the debtors were no manner of way concerned. Nor was there any necessity for Cameron's translation in favours of Mr. Stirling to have been intimated, in order to denude the first cedent, but only to secure against Cameron's uplifting or assigning *de novo*; for the assignation to Cameron (though in trust), being transferred with the cedent's consent, was equivalent to a discharge of the trust, and an effectual conveyance to Mr. Stirling of the effects assigned to operate retention, how soon they came into his hand, against the donatar.

Forbes, *p.* 641.

1714. *December* 8. JULIAN OSBURN *against* MR. HENRY OSBURN.

No. 32.
A discharge of a bond due to a wife, being signed by her husband and her, and put into the hands of the wife's brother, at whose instance execution was provided to pass against the husband, and by whose consent the wife's liferent was to be secured, and the

By contract of marriage betwixt Julian Osburn, with consent of Mr. Henry Osburn, her brother, on the one part, and James Stewart of Schawood, on the other, Julian is obliged to pay to her husband 3500 merks in name of tocher, and she is provided to the yearly annual-rent of the said tocher in liferent, and that how often the money shall happen to be uplifted, it shall be re-employed for her liferent use, with consent of her brother, at whose instance execution was to pass for implement of the contract.

The said Julian was creditor to Sir William Cunningham of Capringtoun in the sum of 3500 merks principal, which she did not by the contract assign, nor did the contract mention the same, but only obliged herself to pay the like sum *ut supra*.

Capringtoun, the debtor, being willing to pay the money, there was a discharge granted both by the husband and wife, and lodged in the hand of the said Mr. Henry Osburn, who received the money, and the husband being debtor to Mr. Henry