No 6.

less she made her necessity appear otherwise, than by her own assertion. And as to the lawless excessive liberties taken in traducing his good name, they are neither true, proven, nor pertinent; for *quod hoc ad edictum prætoris?* And their inserting his debauchery is none of her's, for *cogitatio in mente retenta nihil operatur*, and the insinuations are false; and *calumniare audacter aliquid adhærebit*, but offered to so great and noble a judicatory, contrary to all rules of decency, merits a reprimand; for respect of persons can never change the principles of right or wrong. And upon such empty pretences to reduce my disposition, completed by infeftment, were beyond all example hard; for by the clause of warrandice in my right I am so far a creditor to the disponer, that she could not thereafter, by any gratuitous deed, dispone the same in favour of another, in prejudice of my prior right, as has been often decided, and particularly Alexander *contra* Lundies, No 64. p. 940. and Hays *contra* Hay, No 66. p. 942.; and she was upon death-bed when she made the second right; and my using diligence can never prejudge me, for *nemo videtur dolo facere qui jure suo utitur.*—*Answered*, As to the death-bed, no such thing proven; and *esto* it were, none can quarrel it but the heir, which you are not, David being the elder brother.——THE LORDS, by plurality, found the first disposition revocable, and revoked by the second; and therefore reducing it, preferred the second.

*Fol. Dic. v. 1. p. 290. Fountainhall, v. 2. p. 749.*

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1737. *June.* ELIZABETH BORTHWICK *against* TRADES MAIDEN HOSPITAL.

No 7.
Found that a reserved power in a wife to burden, with consent of her husband, any time during her life, could not be exercised after the husband's death. Does an unlimited faculty to burden imply a power to dispone?

ISOBEL HALYBURTON, with consent of Samuel Nimmo her husband, *anno* 1713, granted a disposition of a tenement in Edinburgh to the said Hospital, under condition, That, by acceptation thereof, the managers should be obliged to pay certain sums to particular persons, at the first term after her and her husband's decease; 'reserving her own liferent, and a power to burden the 'same, with her husband's consent, with what other sums she should think fit, 'to any other persons, by a writ under her hand, at any time in her lifetime.' After the date of this deed, the husband died, and Isobel being dissatisfied with the legacies she had left, raised a reduction thereof; but it would seem she had then no intention to alter the deed to the Hospital; for, in the year 1719, she granted a bond to it, reciting the mortification, and that she had raised a reduction for annulling the burdens thereon, but she had no design to hurt the Hospital; therefore she obliges herself, that in case she prevailed in that process, she should pay to the managers 1200 merks; but, if she did not, then they were to make use of the disposition or not, as they should think fit.

*Anno* 1723, she executed a new disposition of the same subject in favour of Elizabeth Borthwick, who, in virtue thereof, having raised an action of mails and duties against the possessors, a competition ensued betwixt her and the Hospital, in which the pursuer craved to be preferred; 1*mo*, Because Isobel

No 7. Halyburton, in the first disposition, reserved a power to burden the tenement with such sums as she should think fit, which implied a power to alter at pleasure, even without any onerous cause; 2*do*, That she was preferable upon her disposition, in regard she was first infeft.

To which it was *answered* for the Hospital; Though the disposition in their favour reserves a power to the granter to burden with what sums she pleased, yet that power could not be imposed but during the joint lives of the granter and her husband; the meaning of the deed being, that she was to have that power any time in her life, with her husband's consent; therefore it could only be exerced during their joint lives; 2*do*, Granting she might have exerced the faculty to burden after the husband's decease, still it does not follow she had a power to dispone, seeing it is certain no fee can be disponed, but either where the property is in the disponer, or an express faculty to dispone the same. Besides, there is this difference betwixt these two powers, viz. that in the case of a burden, the grantee hath an option to keep the fee, if he pleases; but it does not follow, that, because one has a power to burden, so as to render the fee useless, that therefore he can give away the same; *e. g.* an apparent heir may grant a bond, on which his predecessor's estate may be adjudged, and rendered useless to the next heir; yet, if he dispone, such disposition will be good for nothing, because he had no fee in him. Again, an heir of entail, who is prohibited to sell, but left at liberty to contract debt, may exhaust the estate by such contraction; and yet, if he sell, his disposition can be of no avail; therefore the disposition in favour of the pursuer, though with the first infeftment, can have no effect. In the next place, supposing, for argument's sake, Isobel Halyburton had a power to alienate, yet the same is plainly passed from, by the bond which she granted to the Hospital, as it truly imports a transaction, that in the one case the Hospital was to have the money, and, in the other, the event that happened, to be allowed the use of her right; so that to suppose, after such an act of homologation, that she had a power to dispone, is to argue contrary to the design or intention of the bond.

*Replied* for the pursuer; It is a rule in the interpreting donations, that they ought to be constructed in the most favourable way for the donor; and, on the other hand, in the strictest way against the donatar; of consequence, the reserving clause here ought to be interpreted in such a way as not to exclude the disponer from the exercise of the reserved faculties while alive, by the husband's predeceasing her. It is true, instances may be given, where a power granted to two cannot be exerced by one after the death of the other; but the case is quite different where a proprietor reserves a power over his own estate during his life, to be used with the consent necessary by law; there the consent will not be understood to be a limitation upon the reserved power, but the expressing what *inerat de jure; e. g.* If a minor dispone, with a power to alter at any time of his life, with consent of his curators, the construction would be, that while the curatory subsisted, their consent should be necessary; but it

No 7.

could never be interpreted, that, after the curatory ceased, their consent should be requisite; just so, the reserved power in the present question must import a designation of the form in which it was to be exerced, but not a limitation.

With respect to the *second* point it was observed, There was no foundation in the clause for restricting Isobel Halyburton's power, or limiting it so as to leave a residue to the Hospital; and, the reservation not being confined to onerous debts, no reason could be assigned for excluding even gratuitous deeds; so that, if she had burdened the tenement in favour of the pursuer, with a sum exceeding the value, an adjudication might have been led in satisfaction thereof, which would have indirectly evacuated the first right: Hence it follows, that she had a power to grant the second disposition; for, as such a reservation must be largely interpreted, if the exercise of it goes no farther than what was intended, there is no necessity that it should be exercised in the precise terms thereof; *e. g.* If a father dispone his estate with a power to burden, if he grant a personal bond, which is properly no burden in terms of such reservation, yet it has always been held, that the creditor may adjudge the faculty, and make his personal bond a real one; because the law considers the reserved faculty as the donor's estate; therefore, as Isobel Halyburton could have burdened the tenement to whatever extent she judged proper, and thereby excluded the first right; of consequence, no more was vested in the Hospital than she pleased, it depending on her will, whether they were to have a right or not; and as she has declared her intention that they should have none by the disposition in favour of the pursuer, it cannot be said she acted beyond her powers.

There is no similitude betwixt the case of an heir of entail and the present question, because limitations, upon heirs of entail, in favour of their own heirs, are contrary to the nature of property; and so fall to be interpreted in the strictest manner; but, a reservation in favour of a donor is the natural effect of property, that he reserve it as far as he pleases, and grant away no more than he thinks fit. Neither can the instance of an apparent heir granting a bond, upon which adjudication may follow, have any influence in the present argument; seeing such an adjudication will not convey the estate of the granter more than his disposition, unless he is charged to enter heir in special; and it is because the law has considered this special charge as equal to a special service, that it has made such adjudication equal to a disposition; but this has nothing to do with the present argument, which is allenarly whether a donor, who has reserved a power to evacuate his gift by burdening it, can do the same thing, and disappoint his donation directly, by a disposition.

As to the argument drawn from the bond 1719, it is admitted the same is an homologation of the mortification; consequently the granter, or any claiming under her, are precluded from quarrelling thereof, upon the account that it was not granted by her deliberate and voluntary consent; but then, it is not so obvious, how the approbation of a revocable deed can make it irrevocable; for

No 7. that would be not to homologate, but to alter the deed; and, as it contains no discharge of any of the reservations in favour of the donor, they behoved to remain with her after the homologation.

The Lords preferred the Hospital.

*C. Home, No 62. p. 108.*

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## SECT. III.

### Faculties when effectually Exercised.—Effect on Heirs.—Effect on Singular Successors.—Competition of Creditors claiming under Reserved Faculties.

No 8.
An heiress infeft her son upon resignation, reserving to herself a faculty to dispone an yearly annualrent out of the land to her daughters. She executed a charter in favour of her daughters, containing precept of sasine, but neither delivered it nor infeft them. The Lords found the subscribing the charter to be a sufficient exercise of the faculty.

1624. *June* 29. Hamilton of Silvertonhill *against* His Sisters.

Francis Hamilton of Silvertonhill younger, being infeft in the lands of Provand in fee, upon his mother's resignation, who was heretrix thereof, with special provision contained in his infeftment, that it should be lawful to his mother to dispone in her own lifetime an annualrent of 800 merks yearly out of the said lands to her daughters, for the help of their marriages, redeemable upon 8000 merks; whereupon she having made and subscribed a charter to them, after the said fee granted to her said son, but no sasine being taken thereupon while she lived; after her decease the daughters pursue the said Francis, whose fee was affected with the said provision, to give them a precept, whereby they might take sasine, conform to the foresaid charter made by their mother in their favour. This action was sustained against the said Francis, and he was ordained to grant and subscribe a precept of sasine in their favour; albeit it was *alleged* by him, That the provisions foresaid, contained in his fee, reserved a liberty to his mother to provide the said daughters; which liberty not being used in her lifetime, nor the deed perfected by her, which she might have perfected, if it had been her intention to have made a complete and profitable security to them, which she hath not done, and so hath not clad her with that liberty which she had; for a charter, whereupon no sasine followed in her lifetime, it is not a valuable right; specially seeing she lived by the space of nine years after the date of the charter, during the which space no sasine was taken, but the charter remained beside herself; whereas, if she had intended valuably to have secured the pursuers, she would have delivered the charter, and given sasine to them while she lived; which not being done, the action becomes extinct, and the defender cannot be compelled to fulfil the