

reservation in the father's own favours in the assignation which he made to his son; for that was to reserve a power contrary to law, and this case is yet so much stronger than the present, as the heir held the estate on that very title in which the reserved faculty was contained, whereas here the defender does not hold the estate upon the title of the contract of marriage, but as heir of investiture; and as so the law stands in general, the question is, what speciality there is in this case to distinguish it from the common rules of law, and I know none, unless it can be shown, from the circumstances in this case, the heir was not prejudged by the deathbed deed; for if it can be shown that he was not, I own the reduction does not lie, for I know it has been found, that where the heir was not prejudged by the disposition on deathbed, as it contained a great moveable estate to which he had not right but by the disposition, he was not prejudged by the disposition, and therefore could not quarrel the disposition.

“It may be perhaps said, that here the heir is, in place of being prejudged, benefited by the tailyie, whereby Lord Forbes tied up himself. But I am not yet convinced that the heir was not rather prejudged than benefited, as no man will be understood to make a tailyie for the benefit of his heir, but rather to restrain him.—But, *2dly*, what is that to the defender, who does not take the estate by this tailyie? If it be said—*2do*, No prejudice, because the lady had a power to grant the provisions, if Lord Forbes did not, or did it not effectually, *Ergo* the heir not prejudged by its being done on deathbed.

“ANSWER,—That no more can be inferred from this, but that there was a strong intention the provisions should be effectual; and if the lady can yet do it, she may, but it will not support an illegal exercise of the faculty which still is prejudicial, as many accidents may have happened, by which the lady would not have it in her power; she might have died before her husband, and now by the deeds that have passed between the defender and her, I doubt if it be now in her power. *2dly*, The lady has already declared her opinion, by her contract with the defender.”

1755. *February 19.* JOHN DAVIDSON and SPOUSE, and ANNE DAVIDSON, their daughter, *against* Mrs. MARY and HENRIETTA NAIRNS.

1748. *April 12.*—Mr. John Murray, son to Lord Edward Murray, executed a testament, whereby he named Mary, Louisa, and Henrietta Nairns his executors and universal legatees.

Of the same date, Mr. Murray, for love and favour, disposed to the above persons his house in the Canongate, reserving his own liferent, and power to alter.

Miss Louisa Nairn having soon after been married, Mr. Murray revoked the disposition *quoad* her.

1748. *September 7.*—Of this date, Mr. Murray, upon a revival of his testament, and of his resolution to burden the same with certain legacies, bequeathed to the pursuer, Mrs. Davidson, certain pieces of furniture, and to the pursuer Mr. Davidson, some other articles, after which is subjoined this clause:—“All

these particulars, I legatee and bequeath to the persons above named, free of all debts, my funeral charges, and all other burdens whatsoever, with which debts I hereby of new burden my said executors and universal legatees."

1748. *September 28.*—Of this date, Mr. Murray executed a new deed, wherein, upon a recital of his testament of the 12th of April, and his disposition of his house in favours of Mary, Henrietta, and Louisa Nairns, both deeds being with the burden of his just and lawful debts, that should be resting by him at the time of his decease, and of his funeral charges, and reserving to him at any time in his lifetime *et in articulo mortis*, to alter and innovate these deeds, and to burden and affect the same with such legacies as he should appoint, and reciting the foresaid other deed, dated 7th September, 1748, and that he had burdened the said Mary, Louisa, and Henrietta Nairns with the legacies therein contained; and which deed last mentioned, he hereby not only homologates and confirms, but of new burdens the said other deeds granted to the Misses Nairns therewith, and with an annuity contained in his testament, to his servant, in manner therein mentioned; and subsuming that being desirous that John Davidson of Whitehouse, should be at the expense and outlay of his funeral charges, to be performed in manner directed by the deed; and that he might see his hail just and lawful debts, after specified, honestly paid, and that the residue of the subjects after assigned, remaining after payment of the said debts and funeral charges, should belong to Anne Davidson, his daughter; therefore he assigns and transfers to the said John Davidson the particular debts therein specially after insert, and thereto is subjoined the following clause;—And that with the burden of my said funeral charges, and the debts due by me to the persons following: to Joseph Stead, my servant, L.20 Sterling; and after mentioning eight other persons, and the debts due to them severally, he adds, "with the sum of forty shillings Sterling, or thereby, due by me to sundry persons, with the payment of which these presents are specially burdened; and the residue, after payment of the said debts, I assign and dispose to the said John Davidson, for the use and behoof of his said daughter, and which I leave as a legacy to her, excepting always from the foresaid burden the foresaid legacy left to the foresaid Joseph Stead, my servant, and any debt that shall happen to cast up as due by the said deceased Lord Edward Murray, my father; with the payment of both which debts, and of this and the other deed, granted by me to my friends of the date the        day of September instant, I hereby specially burden the foresaid two deeds granted by me in favours of the said Mary, Louisa, and Henrietta Nairns, of my house in the Canongate and other effects."

This deed contains a farther clause in the following terms: "Providing always, if the said John Davidson shall not recover and make effectual so much of the subjects hereby assigned and disposed, as will satisfy and pay my said funeral charges, and debts wherewith the same is burdened, then the said John Davidson shall be only accountable to my said creditors for what he shall actually receive and make effectual, and the said John Davidson is not bound to do diligence, nor for omissions." The deed contains a reservation of Mr. Murray's liferent, a power to alter at any time, *et etiam in lecto*, and a dispensation with the delivery.

This deed contains also the following clause, viz. "And lastly, I hereby alter, innovate, and recall the said other deed granted by me to the foresaid Mary, Louisa, and Henrietta Nairns, in so far as concerns and extends to the sums

of money above assigned, and subjects provided and granted to my other friends therein named, by my other deed, dated the said 7th September instant, in so far as the same are contrary and repugnant to this present deed, with which and the said last deed, the two first deeds and settlements, in favours of the said Mary, Louisa, and Henrietta Nairns, are hereby expressly burdened."

On Mr. Murray's death, the legatees named in the deed of 7th September, 1748, received their legacies. The pursuer, Mr. Davidson, also in virtue of the special assignation in his favour, recovered debts to the amount of L.248, 15s. On the other hand, the funeral expenses and debts with which Mr. Davidson was burdened, amounted to L.200, leaving in his hands a balance of only L.48, 15s.

In this situation, being pursued by several creditors of the deceased, to the extent of L.200 and upwards, he claimed relief in the present action from the Misses Nairn, as executors decerned and confirmed to the defunct, and also as having accepted the gratuitous disposition of the dwelling-house, subject to an unlimited power of altering, reserved by the defunct. In defence, it was pleaded that heritage can neither be conveyed nor burdened by a testament, and that both the deeds of the 7th and of the 28th of September were testaments, and could not have the effect of burdening the house, previously disposed to the defenders.

The Lord Ordinary found, "that there is no action of relief competent to the pursuer, for such debts as do not of their own nature affect the heritable subject, disposed by the defunct to the defenders."

*February 19, 1755.*—This interlocutor however was altered by the Court, who found Mr. Davidson entitled by the deed of the 28th of September, to relief against the disponees to the house, and remitted to the Ordinary to proceed accordingly.

The following are Lord KILKERRAN's remarks on the case :—

"As I take it there is no inconsistency in a conveyance of lands and a testament being in one deed, where the disposition of lands is conceived in the proper words of a deed *inter vivos*; so the Lords found 9th July, 1733, *Douglas contra Allan*.

"In another case in 1735, *Brand contra Brand*, the Lords reduced a disposition of an heritable subject as being in a testament; the principal intention of the deed being a testament, and that the disposition of the heritable subject was granted for the better enabling the executor to pay the debts.

"An heir cannot be burdened by a testament, because a testament and death-bed are equipollent. But where heritage is disposed to a stranger, the donee may be burdened with debts in a testament, for the following reasons :—

"*1st*, That such a burdening clause, though in its nature not testamentary, is not void by being found in the same paper with the testament.

"*2dly*, A testament, considering it in the strictest sense, is a habile deed for burdening such a donee with debts, because the testament is full evidence of the will of the disponer, which is sufficient to burden the donee ultimately with the debts."