

No. 260.

against her father's general heirs, either male or line, or heirs-portioners, but with the burden of Margaret's provision of 5,000 merks.

Stair, v. 2. p. 550.

* * See Gosford's report of this case, No. 77. p. 15475. *voce* TAILZIE.

1679. December 11.

STARK *against* KINCAID.

No. 261.

A disposition of land sustained, though found among the disponent's writs at his death, without a clause dispensing with not-delivery, as it bore a clause reserving the disponent's life-ferent, and power to alter.

Robert Stark having adjudged two acres of land belonging to umquhile Robert Nasmith, pursues a reduction of a disposition granted of the same acres by Nasmith to Thomas Kincaid on this reason, that the said disposition is already proved to be amongst Nasmith's writs the time of his death, and therefore was never a delivered evident, and so null. The defender alleged absolutor, because the disposition bears "a reservation of the disponent's life-ferent, with power to alter during the disponent's life," and therefore without delivery, or a clause dispensing with the not-delivery, the writ is effectual, and equivalent, as if a dispensatory clause were inserted, especially seeing the defunct had no children. There was a practique produced for the like *in anno* 1668, Hadden against Shorswood, No. 256. p. 16997.

Stair, v. 2. p. 720.

* * Fountainhall reports this case :

Reduction of a disposition because undelivered. Answered, It bears a power to alter and renovate, which is in law equivalent to a clause dispensing with the not-delivery, as was found 19th June, 1628, Agnes Hadden and Mary Lauder against Shorswood, No. 256. p. 16997. The Lords found this reservation of a life-ferent, and to alter, had the force of a delivery; but likewise that it included a power to contract debts, and therefore found it was burdened with the debts contracted by him after the date of it; which last interlocutor was on the 23d December, 1679.

Fountainhall MS.

1680. January 6.

M'BRIDE *against* BRYSON.

No. 262.

A declaration under the hands of a defunct, that a disposition which he had

James M'Bride having adjudged a tenement in Edinburgh from the heirs of Mr. Andrew Bryson, pursues a reduction of a disposition by the said Mr. Andrew to Andrew Bryson his cousin-german, on this reason, that the disposition "reserves a power to the Bailie at any time in his life, *etiam in articulo mortis*, to dispoise this tenement, or to alienate or wadset the same;" and long thereafter there is a de-

claration signed by the said Mr. Andrew, bearing, a relation of the said reservation, and by virtue thereof, declaring "the disposition to be null and void, and ordaining his heirs of line to succeed as God and Nature hath ordained." The defender alleged that the reason is not relevant, because the declaration is not conform to the power reserved, being only "to alienate or wadset;" and if need be, it is offered to be proved, that after that declaration he continued in his first resolution, and did express the same; neither was this declaration ever delivered, but is suspect, and if true, was lying by the defunct. It was answered, That albeit such clauses in onerous contracts are strictly to be observed, yet this is a gratuitous disposition, and conditional, "failing heirs of his own body," and bearing "a power to alter on death-bed," so is of a testamentary nature, and therefore most favourable and amply to be extended according to the true intent, which is a power to alter; for the constitution of an annual-rent, or burdening with money, would be effectual, albeit not in the specific terms; and the words, "ordaining the heirs of line to succeed," is a dispositive word; but however, any alteration in whatever terms expressed, is sufficient.

The Lords found the power reserved, validly executed by the declaration produced, and therefore reduced the disposition, and found the declaration effectual, though not delivered, seeing the power to alter *in articulo mortis*, and in favours of the heirs of line, did necessarily import that there was no necessity to deliver the writ, making the alteration in the disponent's life.

Stair, v. 2. p. 731

No. 262.
formerly executed, containing a power to alter, was to be null, found effectual without delivery.

1683. *March.*

A. against B.

One having granted a disposition of some goods, without an onerous cause, containing warrandice from fact and deed, and dispensation with the not-delivery; and thereafter disposed some of the same goods to another; in a competition, it was alleged for the receiver of the first disposition, That the disponent could not take away his *jus quasitum* thereby.

Answered: The first disposition was never delivered, and the clause dispensing with the not-delivery, could not hinder the disponent to alter or innovate at his pleasure, though there was no such reserved faculty; all the use of a dispensing clause being only to hinder heirs or executors to quarrel the deed for want of delivery, which the disponent altered not before his death.

The Lords preferred the second disposition, in respect of the answer.

Harcarse, No. 134. p. 27.

No. 263.