

disponer's death; but here, no right to any thing is transmitted, but only a commission given to trustees for exercising a faculty reserved to the granter, which did not divest of any right, but was revocable as other commissions, and became extinct when not executed in his lifetime.

No 5.

THE LORDS found, That the contract of marriage of Walter Dundas elder, with his Lady, contains no obligation, express or implied, to provide the estate of Dundas in favours of heirs-male of that marriage; and, that old George, by virtue of the faculty reserved in the tailzie 1669, had full power to divert and alter the succession, or suspend and discharge the reversion in favours of Ralph, and the heirs-male of his body; and found, that the said George, elder, his discharging of Ralph's liferent, and suspending the force and effect of the reversion reserved to him by the tailzie, until he or his heirs-male should procure the consent of the friends therein mentioned, with power to these friends to discharge the said reversion, and their discharging accordingly, doth resolve into a perpetual suspension or extinction of the reversion; and that the friends or their heirs could never thereafter concur in the redemption, nor Ralph redeem without their concurrence; and, that the heirs-male descending of him are excluded by the said suspension and discharge, as effectually as he was; and found, that Ralph and his heirs-male, are excluded from the lands whereof Walter, elder, had the fee before the tailzie 1669, in the same way as from the rest of the estate, in respect of the foresaid faculty reserved to George and Walter, and longest liver in the said tailzie; and that George the survivor exercised the said faculty by the second deed, and that the discharge by nine of the eleven friends, being the plurality, is sufficient. See SUCCESSION.

*Forbes, p. 31, 59.*

1712. July 4. RENNY and ROBERTSON *against* MILLAR.

HELEN MATHIESON being proprietor of some tenements and acres about Stirling, and having no children alive, she makes a disposition of her whole estate, both heritable and moveable, to James Millar writer in Edinburgh, her sister's son, in 1688, with a power to alter in case of urgent and absolute necessity. Some months before her death, in 1690, she was prevailed with to make a second disposition to one Renny, another nephew of her's, on a narrative that Millar had disobliged her by debauching her servant woman, and had straitened her in her living and credit, by inhibiting and arresting her effects; therefore she revoked his disposition, and gave a new one to David Millar, his brother, and Renny, betwixt them. Of this disposition James raised a reduction on these reasons, that it was elicited from the woman when old and infirm, and given *a non habente potestatem*, she having no power to alter, except in the case of extreme poverty allenary; and he offered to prove she was so far from that con-

No 6.

A woman made a disposition to her nephew, with power to alter in case of absolute and urgent necessity. She afterwards made a disposition in favour of another person, on a narrative that her nephew had disobliged her, though

No 6.  
it was not al-  
leged that  
she was in  
any necessity.  
The Lords  
reduced the  
first disposi-  
tion.

dition, that she lived plentifully to her dying day ; and the narrative of his arresting and inhibiting could not be the cause of it ; for it is posterior to the second disposition some days, and was done with no other design but to prevent her being cheated and imposed on, and so proceeds on a false narrative. And the LORDS having allowed a conjunct probation as to the points of fact alleged *hinc inde*, and the same being advised, it was *alleged* against the *first* right to Millar, that though it was in the terms of a disposition, yet it was really no more upon the matter but a destination of succession, a *donatio mortis causa*, and a tailzie without any onerous cause, but mere love and favour ; and it is known by the principles of our law such deeds are ambulatory and revocable ; as Sir Thomas Hope in his Minor Practics, c. 26. observes, that bonds of tailzie *sine ulla causa* but affection, are alterable and revocable at pleasure. It is true, our decisions have deborded from this doctrine in the case of mutual tailzies, or where there is *causa onerosa* expressed, or where the posterior gratuitous deed can be quarrelled on the act of Parliament 1621 ; and the Roman law repudiates all *pacta de hereditate viventis*. Now that Millar's disposition is such, appears from its narrative, that she thought him fittest to succeed her ; by which it is evident she designed only to name a successor ; and *l. 34. D. de reg. jur.* says *semper in stipulationibus et ceteris contractibus id sequimur quod actum est ; 2do*, All these lucrative deeds are lost by ingratitude and misbehaviour ; and his inhibiting and arresting to prevent their cheating her can be neither cloak nor excuse, for he should have gone to herself, and convinced her there was no necessity to alter, and not by the rugged way of legal diligence ; and though it be after the disposition, yet he had threatened her long before. And *esto* he has proven that she lived plentifully to the last, yet no thanks to him, for he did what in him lay to bring her to indigency, and law considers the attempt, whether it succeed or not ; and it discovered an ungrate mind against his benefactor to bring her to straits and disrepute. And the *tit. C. de revoc. donat.* gives us many cases beside ingratitude, as *supervenientia liberorum, &c. ; 3tio*, The restriction of her faculty to alter only in the case of absolute necessity, foisted in by a cunning agent, can never palliate or support his disposition. What if this trial had been taken in her own lifetime, behoved she to have led a long and dubious probation of her mean circumstances before she could alter ? *nullo modo* : Law, justice, and equity left that in her own discretionary power ; and her declaration was sufficient to set her at liberty from these ensnaring fetters.—*Answered*, Millar's disposition has nothing of the nature of a *donatio mortis causa*, nor a testamentary deed, but is a plain *actus inter vivos*, proceeding on the impulsive cause of his many good services done her ; and she had put it out of her power to alter, save only in the case of absolute necessity, which never existed ; and the Lords in 1678, in the case of Mary Mauld with Carnegie of Phineven\*, though she herself raised a reduction of her deed, containing that quality, yet the Lords refused to reduce Phineven's disposition, un-

\* Examine General List of Names.

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 adharebit*, 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 infestment, were beyond all example hard; for by the clause of warrandice in my right I am so far a creditor to the disponent, that she could not thereafter, by any gratuitous deed, dispoise 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 prejudice 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.*

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

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; *imo*, Because Isobel

No 6.

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 dispoise?