

be lesed, such transaction must be set aside, in so far as he is prejudged. Thus, if a minor should *adire hæreditatem damnosam*, and pay the creditors thereon, there could be no doubt, if he could show that he was hurt thereby, but that he would be restored against the same, however just the creditors' debts, to whom the payments were made: so, in the present case, however just the claim of aliment; if the minor had a good defence, which would liberate him from payment, he ought to be restored against any security therefore, which cut off his objection to it.

The Lords sustained the reason of reduction upon minority and lesion; reserving to Provost Davidson to insist against the heir or executor for the aliment, as accords.

*No. 79. page 127.*

[See Davidson against Watson, 16 Nov. 1739; and Swinton's Appeals, page 41.]

1738. February 10. Competition betwixt ROBERT CLELAND, Kirk-treasurer of Edinburgh, and Captain WILLIAM CRAWFURD.

THOMAS FISHER disposed certain houses in Edinburgh, under the reservation of his own and his wife's liferent, to Johnston, kirk-treasurer in Edinburgh, and his successors in office, for behoof of the poor in fee. After the dispositive clause this deed assigned the maills and duties of the tenements, in the following words: "And that, after the first term of Martinmas or Whitsunday next after my decease and the decease of my spouse, and the longest liver of us two allenary: surrogating and substituting them in my full right and place of the premises, under the provisions above and after mentioned allenary, and no otherwise, for now and ever; with full power to them to possess the said houses, uplift and discharge the maills and duties thereof, after the decease of me and my said spouse, and the longest liver of us two, as said is, and to do all other things that I might have done before the granting thereof."

Fisher having died without any known heirs, his relict obtained a gift of *ultimus hæres*, which she conveyed to Mr. David Crawford, her second husband: and, in April, 1736, she died. Whereupon a tripartite question arose, concerning the half-year's rent of the tenements which fell due at the Whitsunday thereafter, between the executors of the relict, the donator to the *ultimus hæres* of the husband, and the kirk-treasurer fiar of the subjects. The interest of the relict's executors was put an end to by a reference; but the claims of the other two being litigated.

It was ARGUED for the kirk-treasurer, that if the disposition had contained no assignation to the maills and duties, the right of fee behoved to carry all the rents not falling under the liferents. Nor could the restriction in the grant vary the question; for, if that was to have any influence, it behoved to lie in this, that, in so far as the donor has not granted the said subjects, they are still in him and his heirs, by an implied reservation: or, *2do*, in this, that Fisher's will appears, by the clause, to prefer some body else. As to the first of these, it is true, there is a difference between a constituted and a reserved liferenter;

for, in the one case, the donor retains every thing he has not given away; but, in the other, the liferenter takes nothing, but by the force of the grant: which does not meet the present question; seeing Fisher was totally divested of the fee *per verba de præsentis*, retaining the liferent and nothing more; therefore, whatever would fall under the liferent, would be his. But, even supposing he had survived his wife, and died in April 1736, the Whitsunday term would not have fallen under even his reserved liferent; because, as he retained no hold of the property, (which is the case here, after the determination of the liferent,) the right of fee falls to be extended to all its lawful consequences, unless the intention of the donor appears to the contrary. With regard to which, it is plain, he preferred the disponee to himself in these subjects; of course, to all his heirs, and the King amongst the rest, claiming in the character of *ultimus hæres*. *2dly*, If it does not appear that the donor preferred some other person, the subject in question must fall to the disponee, as a consequence of his right of property. The exclusion, if there is any, will operate in favours of the person preferred; but, if none can appear, and show that he has the benefit of the exclusion, it vanishes, and the fee stands absolute.

ARGUED for the donator,—That the deed in favours of the kirk-treasurer, being gratuitous, ought to be strictly interpreted, so as nothing should be found to pertain to him, but what he can show is conveyed in express and apt words. *2do*, In the construction of legal deeds, what ought chiefly to be considered, is the will and intention of the parties; and, if that come out to be clear, it must be obeyed, though possibly not expressed in the most proper words. These considerations premised, it follows, from the nature of the thing, that, when one alienates any subject belonging to him, the property must remain with himself in so far as it is not given away; therefore every restriction or limitation upon the fee in the disponee's person, is tantamount to a reservation of that very fee in the disponer. In this view, if one shall dispone his estate, under this limitation, that the disponee shall have no right to the maills and duties but from and after a certain term; it will be a mistake to imagine that the fee is here absolutely given away from the date of the disposition: the fee, in this supposed case, is limited and qualified in the person of the purchaser, until the term come at which he has right to the rents; and then, and not till then, it becomes absolute. In the mean time, the fee so far remains with the disponer, as to entitle him to the most useful exercise of property, which is the rents and profits of the subject.

To apply this to the case in hand, Fisher dispones the fee of the tenements in question, reserving his own and his wife's liferent; but with this express limitation, that the kirk-treasurer should have no right to the maills and duties, but frae the first term of Whitsunday or Martinmass allenary next after his decease, &c. Here there is reserved to the disponer, not only his liferent-property of the subjects in question; but, further, the property after his death, in so far as to entitle him to uplift the maills and duties in controversy.

The Lords found that the half year's rent, falling due after the liferenter's death, at Whitsunday 1736, did not fall under Thomas Fisher's disposition; but the same fell under the gift of *ultimus hæres*; and therefore preferred Captain Crawford thereto.