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pone away, with consent of his wife. Found he could not dispone gratuitously in prejudice of the liferent.

'that he should happen to borrow from any person or persons, or with any bond 'of provision to his children, or to dispone the same to any person he should 'think fit, without consent of his said spouse, or heirs procreate, or to be pro-'create betwixt them, as freely as if no such provision had been made in their 'favours.'

Of this marriage there was one daughter, who, after her father's decease, produced an absolute disposition from him of the foresaid tenement in her favours, and upon it craved to be preferred to her mother's liferent-right, *alleging*, That though the husband had provided her in such a right, yet by the conception thereof he had retained to himself a faculty of disponing the liferent-lands to any person he pleased; and that accordingly he had exercèd that faculty by the conveyance made in her favour.

It was *answered* for the relict, 1*mo*, That by the reserved faculty no more was intended, than that the husband should have a power to dispone for onerous causes, as appeared from the words of the clause, *viz. of burdening the houses with sums of money borrowed, or provisions to children:* Therefore since he had restricted himself from burdening, except for payment of borrowed money or provisions to children, he could not be said to have retained the absolute power of disponing, according to the principle, *cui minus non licet, nec plus licet.* 2*do*, By the husband's reserving a power to dispone *without consent of the heir*, it appears, that he had it not in view to reserve a power of disponing, except in such cases where the consent of the heir was necessary, which never could be to a disposition in her own favour.

The Lords found, That the husband could not, in virtue of the reservation contained in his right, dispone the lands gratuitously in favour of the daughter the fiar, in prejudice of the liferenter; and therefore preferred the relict.

For the Relict, *Gardenstone*. Alt. *Ja. Ferguson, sen.* Clerk, *M'Kenzie*.

Fol. Dic. v. 3. *p.* 131. *Edgar, p.* 128.

1746. *June* 3. Beatsons *against* Beatson of Glasmonth.

No 63.
A person, whose eldest son was out of the kingdom, disponed his estate to his second son, and his heirs, burdened with provisions to his younger children, and redeemable by his eldest son.

James Beatson of Suther-Glasmonth had several children, of whom the eldest son, William Beatson, doctor of medicine, went abroad after the rebellion in 1715, on account, as was supposed, of some part of his behaviour at that time; and during his absence, James Beatson disponed his estate to Robert, his second son, and the heirs-male of his body, and so successively to three others, his younger sons; under this provision, 'That on which soever of his said sons the fee of 'the said lands, &c. should fall and terminate, by the existing of an heir-male 'lawfully to be procreate of either of their bodies, according to the respective 'order of their primogeniture, such one of them should, by his acceptance there-'of, be bound and obliged, likeas he bound and obliged him, and his heirs-male,

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for a *rose-noble*. His heir returned, and was permitted to take possession, on his apparency, without redeeming. Dying without issue, a son of the second son succeeded. Found, that the provisions to younger children were a burden on the lands.

'to make good and thankful payment and satisfaction to each one of his other 'three brethren, and to [four *nominatim*] the disponer's daughters and his sisters 'of the sum of 1000 merks Scots money, extending in hail to the sum of '7000 merks money foresaid; which 1000 merks provided to every one of the 'said seven children, should only be payable to such of them, whether son or 'daughter, as should not be otherwise provided by the disponer out of his move-'able fortune in his own lifetime, and no otherwise.' And these provisions were made payable the first term after his decease, with interest during not payment to such as should then be majors, and to the others at their majority or marriage; the estate being redeemable from the disponee by himself at any time of his life, and after his decease by any person named by a writ under his hand, for a Rose-noble, without necessity of registrating the said writ, which was dispensed with.

The disposition contained a clause of warrandice by the disponer and his heirs to the said Robert Beatson, and the heirs-male of his body; which failing, as in the substitution, 'under the reservations, provisions, qualification and redemp-'tions above exprest, and no otherwise.'

James Beatson, of the same date, executed a deed, naming his eldest son, the doctor, and two other persons, for the behoof of him and his heirs whatsoever, to be the persons entitled to redeem the estate; and having made this settlement, died during his son's absence; whereupon Robert took possession; and on his brother's return, accounted to him for the rents, who disponed to him for his patrimony a tenement in Kinghorn; but made up no titles to any other part of his estate, possessing all his life on his apparency, and totally neglecting the disposition and power of redemption.

Dr Beatson died without heirs of his body, and Robert having predeceased him, the estate was entered upon by James his son; who was pursued by David one of his uncles, and his four aunts, for their provisions, on the passive titles, and in a declarator, that his grand-father had made the estate liable, and he could not avoid the burden, by neglecting the disposition, and possessing as heir of line, *tit. ff. Si quis omissa causa;* though the pursuers, as they pleaded, had no need of founding on this constitution, for the heirs of line were bound to warrant the disposition, *under the reservations, provisions, &c.* and if the defender possest as heir of line, he was liable in this warrandice.

Pleaded for the defender, He is not liable, because the provisions were not laid upon the Doctor, in case of his redeeming the estate: He did not indeed use the form of a redemption, because the disposition was wholly neglected, and never took effect, but possest on his apparency, and the defender succeeds as apparent heir after him; and neither of them are bound by the obligation of warrandice laid upon the heirs of line, which is only in favour of the disponee, not of the children. Had the Doctor redeemed, it could not have been said the defender possest *ab intestato omissa causa testamenti;* and it is the same case when the disposition, which appears to have been solely intended as a cover to

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preserve the estate, was repudiated, whereby the order of redemption became unnecessary; or if it can be still looked upon as valid, which the defender might have taken up, and upon that account ought to be made liable, then the Doctor, who never redeemed, was *mala fide* possessor of the rents, which he must account for to Robert's representatives; and the pursuers are his executors, and as such liable, and have got more by that succession than will answer their present claim.

For the pursuers, The Doctor was liable, for he could only have redeemed under the burden of the provisions; but whether he was or not, these burdens are laid on the estate in the persons of any of the other sons.

He can never be considered as *mala fide* possessor, so as to make him accountable for the rents, when Robert delivered up to him the possession, accounting for his intromissions; and he had it in his power to redeem when he pleased.

For the defender, If the Doctor was liable, then his executors are bound to relieve the estate in the person of his heir, for this was plainly a moveable debt.

Observed on the Bench, That the Doctor would have been liable, for he might have not redeemed till after the portions were paid; but he was not liable on the passive titles, as the disponer had not bound himself; and his possessions without titles made up, which might have been only for a term, ought not to subject him, when no decreet was taken against him in his life.

THE LORDS, 28th November 1747, "found that the lands of Suther-Glasmonth, and others contained in the disposition granted by the deceased James Beatson to his second son Robert, were affectable at the instance of the pursuers, for payment of their provisions contained in the said disposition; and repelled the defence founded on the pursuers, their being executors to the deceased William Beatson."

On bill and answers,

They adhered to their former interlocutor as to the principal sums provided to the pursuers by the disposition libelled on, but found the annualrents thereof acclaimable only from and after the decease of Dr William Beatson.

Reporter, *Murkle*. Act. *Ferguson* et *A. Murray*. Alt. *R. Craigie* et *H. Home*. Clerk, *Gibson*.

Fol. Dic. v. 3. *p.* 131. *D. Falconer, v.* 1. *No* 250. *p.* 334.

1757. *August* 11. DR GREGORY *against* HELEN BURNET.

No 64.
A person was bound to renounce a life-rent secured on land, on obtaining a

AN inhibition was executed against Dr Gregory, upon an obligation granted by him in favour of Helen Burnet, his brother's relict, by which he was bound to infeft her in his third of the lands of Blairtoun and Hopshill, for security of her annuity of 600 merks; but under a condition, That if he should happen