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be affected,  
was found to  
imply a pro-  
hibition to  
alter the  
course of suc-  
cession.

He afterwards disposed these lands gratuitously to the Earl of Crawford and Hugh Crawford; a reduction of this disposition, as granted in contravention of the above prohibitory clause, being brought by his heir after his death,

It was *pleaded* for the Earl and Hugh Crawford; That the favour of property being great, and the interpretation of restraints upon property being limited to the very words of the restraint; and it having by many decisions been found, that a prohibition to alter the course of succession, or do any other deed whereby the lands might be affected, did not imply a prohibition to sell, it ought here to be found, *vice versa*, that a prohibition to sell, or do any other deed whereby the lands might be affected, did not imply a prohibition to alter the course of succession; since those decisions proceeded on this ground, that the disponent had not been by express words prohibited to sell; the present decision ought to go on this ground, that the disponent was not by express words prohibited to alter the course of succession.

‘THE LORDS reduced the disposition to the defenders.’

Act. *Elliot, Williamson, & And. Pringle.* Alt. *J. Dalrymple, Brown, & Lockhart.*  
*J. D.* Fol. *Dic. v. 3. p. 214.* Fac. *Col. No 205. p. 303.*

1758. February 14. JAMES MACNEIL *against* MARGARET LIVINGSTON.

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Additional  
liferent-pro-  
vision to a  
wife is not  
excluded by a  
disposition to  
the husband,  
his heirs, and  
assignees,  
with a pro-  
hibition to  
contract debt.

JAMES BURNS proprietor of the estate of Clarkston, in the year 1699, granted a disposition of that estate to his son Richard Burns, his heirs and assignees, heritably and irredeemably, &c. reserving his own liferent, a power to burden with 4000 merks, and containing this express provision and condition, ‘That Richard the disponent shall have no power, during the life of his father, to contract and ontake debts upon the lands of Clarkston.’

Of the same date with this disposition, Richard Burns, with consent of his father, entered into a contract of marriage with Margaret Livingston the defender; whereby, for 1000 merks of tocher advanced by her, James the father obliged himself to pay to Richard and her a certain annuity during his life; and both father and son bound themselves to infest her, in case she survived her husband, in a liferent of one half of the lands of Clarkston; upon which she was accordingly infest, but no infestment followed in the person of Richard upon the disposition.

Notwithstanding the provision above mentioned, Richard Burns contracted sundry debts, upon which many diligences issued against him.

In 1718, Alexander Livingston of Parkhall, the defender’s father, granted a bond to her for the sum of 4000 merks, with a provision, that it should not fall under her husband’s *jus mariti*.

With this fund, the defender employed trustees to purchase in most of her husband's debts; who accordingly took assignations thereto for her behoof, in the years 1720 and 1721; and the narratives of these conveyances bear, that they had been purchased with her money.

In April 1721, Richard Burns, who appears to have been a facile man, and having no hopes of issue, granted an obligation to his three brothers, which proceeds upon the narrative, 'That James his father had disposed to him the estate of Clarkston, and that it was communed upon, that he should grant the following obligation; therefore he binds and obliges him, that in case he should happen to have no heirs of his own body, then he should not make nor grant any voluntary fraudulent right or alienation of the lands of Clarkston in favour of any person whatever, in defraud and prejudice of his said brothers, anent their right of succession to the said lands.'

In 1731, Richard Burns executed a deed in favour of his wife, the defender, proceeding on this narrative, 'That she had been a most dutiful and affectionate wife, and had sympathized with him in many straits and difficulties, and had advanced to different creditors of his the sum of 2500 merks, out of the sums left her by her father; therefore he obliges him, and his heirs, to repay the same; and further obliges himself to infeft her in liferent of the remaining half of the lands of Clarkston, to take place after the death of his father and mother.' This deed also contains a disposition in her favour to his whole moveables.

In 1733, Richard Burns died without issue, his father and mother being still alive. Upon their decease, Margaret Livingston, in virtue of her contract of marriage, and the deed 1731, entered into the possession of the liferent of the lands of Clarkston.

In 1751, these deeds by Richard Burns, in favour of Margaret Livingston, were brought under challenge at the instance of the heirs of Richard Burns; and, *imo*, it was *objected* to the additional jointure of the half of the lands of Clarkston, That it was gratuitous and unreasonable, and contrary to the express proviso in the deed 1699, by which Richard Burns was barred from contracting debts upon the lands of Clarkston during his father's life, and also contrary to the obligation above recited, which Richard had come under to his brothers in 1721; and therefore, as a voluntary gratuitous deed, must be held fraudulent, and be reduced, as counteracting the engagements which Richard had come under to his father and brothers.

*Answered* for the defender; By the deed 1699, the lands are conveyed to Richard Burns, and his heirs and assignees irredeemably, &c.; there is no return to his father's heirs, nor any series of heirs whatever, pointed out, in favour of whom he should be limited; and therefore the import of such disposition is, that he had the full property of the lands, and could dispose of the estate at pleasure; and of consequence could contract debt, or grant a reason-

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able liferent to his wife for her subsistence ; which in this case is very moderate, the estate in all being only L. 23 Sterling yearly. And, *2do*, It is not competent to the pursuers, who claim as heirs of line to Richard, to challenge any of his deeds, seeing they represent him, and are liable to fulfil them. *3tio*, The obligation in favour of the brothers can have no effect, as it excludes only voluntary fraudulent alienations, in defraud of their right of succession, which this liferent provision, allowing the property to descend to them, can never be reckoned.

*2do*, It was *objected*, That the debts purchased by the defender's trustees could not be kept up as a burden against the estate, as their onerosity is not proved ; that is, they are not shewn to have been purchased by the wife's money, and must be presumed to have been acquired by the husband's means and estate. The narratives of deeds *inter conjunctos* bearing onerous causes, are not held probative ; the original creditors, in these debts, when making the conveyances, as they had no interest in the matter, would not be attentive or solicitous about what was put into the narrative. And no acknowledgement of the husband in these deeds will defeat the presumption of law, that the wife was possessed of no funds separate from the husband's, with which to make these purchases ; especially as it can be proved, that the 4000 merks left her by her father, exclusive of the *jus mariti*, was laid out for other purposes.

*Answered*, As the fact is established, that separate funds were left to the defender by her father, the presumption lies on her side, when supported by the narrative of the deeds, in which it is inconceivable, that so many different people should have joined in a falsehood.

*3dly*, It was *objected* to the obligation granted for 2500 merks to the defender, in consideration of the other debts which she had paid for her husband, That there is no evidence what these debts were, or indeed that any such ever existed, other than the narrative of the obligation itself, which can never be held as evidence.

*Answered*, The documents of these transactions were all destroyed many years ago in the house of one of the trustees, which was burnt ; but it is clear, from the whole circumstances of the case, and particularly from the number of diligences produced against Richard Burns for very trifling sums, that he had a number of debts, and was greatly straitened. On the other hand, it is also clear, that the defender was possessed of separate funds ; and therefore the natural presumption is, that these debts were cleared by her ; and the pursuers ought not to be allowed to avail themselves of having delayed their challenge so long till the proper evidence is lost.

THE LORDS found, That Margaret Livingston had right to the liferent of the whole lands of Clarkston ; and to the bond of 2500 merks granted by Richard Burns to her, and the other debts conveyed to her trustees by the creditors, in as far only as the 4000 merks in the bond of provision by the father to her,

excluding the *jus mariti* of the husband, and annualrents thereof, were sufficient to acquire the same, and no more; unless she would shew, that she had other funds, exclusive also of the *jus mariti*. But in respect that John Burns, the brother and apparent heir of Richard, in the conveyance of his debt, acknowledges there was a separate fund from the 4000 merks, sustained the whole debt so conveyed by him.—See PRESUMPTION.

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Act. *Wal. Stuart.*Alt. *Ferguson.**Fol. Dic. v. 3. p. 215. Fac. Col. No 99. p. 175.*

## S E C T. III.

## Simple Destination.

1705. *January 25.* ROBERT DALGARDNO *against* ROBERT DURHAM.

HUGH WATT of Foulshiells having only one daughter, and no sons, she is first married to Hamilton of Boighead, by whom she had a son called Thomas; then to David Bruce, by whom she had a daughter called Jean, married to Adolphus Durham; then she married James Dalgardno in Leith, by whom she had a son called Robert. Hugh Watt, her father, in the settlement of his lands of Foulshiells, disposes them to Thomas Hamilton, his daughter's son of the first marriage, and the heirs of his body; which failing, to Robert Dalgardno, his grand-child by the third marriage, (passing by Jean Bruce, his grand-child by his daughter's second marriage;) which failing, then to the said Hugh Watt's own nearest heirs and assignees. Thomas Hamilton, the first institute, disposes these lands of Foulshiells to the said Jean Bruce, his sister-uterine, in liferent, and to Robert Durham her son in fee, on this narrative, That David Bruce, father to the said Jean, had tailzied his lands to him, therefore in remuneration he made the said disposition. Robert Dalgardno, the substitute, finding himself frustrated by this conveyance of Hamilton's to Durham, and his substitution and right of succession thereby evacuated, and the tailzie made by Watt, his grand-father, disappointed and broke, he raises a reduction and declarator of Hamilton's disposition, on this reason, that, by the whole tract of Hugh Watt's disposition to Hamilton, it was evidently his will and purpose, that failing of heirs of Hamilton's body, (which case has now existed), the lands should next fall and descend to Dalgardno, his other grand-child; and, though there was no express irritant clause or prohibition to invert the tailzie, or alter

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A person dis-  
posed his es-  
tate to one  
grand-son and  
the heirs of  
his body;  
whom failing,  
to another  
grand-son and  
the heirs of  
his body;  
whom failing,  
to the grant-  
er's nearest  
heirs and as-  
signees. A  
disposition by  
the grand-son  
institute in  
favour of his  
sister-uterine,  
upon the nar-  
rative, that  
her father had  
tailzied his  
lands to him,  
was sustain-  
ed; the insti-  
tute being  
found a simple  
fiar, and the  
substitution  
no bar to dis-  
pone even  
gratuitously.