

No 60.

THE LORDS found, That Muirhouse's signing the inventories, and judicially producing them by a procurator, doth sufficiently infer his acceptance of the tutory; and found, that he cannot have the benefit of the qualities in the nomination from the act of Parliament 1696, unless the testament was made in *liege poustie*.

*Fol. Dic. v. 1. p. 215. Forbes, MS. p. 18.*

## SECT. IX.

## Reserved Faculties whether reducible upon Death-bed.

1662. June 28. Dame MARGARET HAY *against* GEORGE SEATON of Barnes,

No 61.

A man disposed his estate to his heir with a reserved faculty to burden it with a certain sum. The burden was sustained against the heir, though the faculty was exercised upon death-bed.

UMQUHLE Sir John Seaton of Barnes, having provided George Seaton his son, by his contract of marriage, to his lands of Barnes, some differences rose amongst them, upon fulfilling of some conditions in the contract: For settling thereof, there was a minute extended by a decret of the Judges, in *anno* 1658, by which the said Dame Margaret Hay, second wife to the said Sir John, was provided to L. 100 Sterling in liferent; and it was provided, that Sir John might burden the estate with 10,000 merks to any person he pleased, to which George his son did consent, and obliged himself to be a principal disponent. Sir John assigned that clause, and destinated that provision, for Henry Seaton his son in fee, and for the said Dame Margaret Hay in liferent; whereupon she obtained decret before the Lords, the last session. George suspends the decret, and raises reduction, on this reason, that the foresaid clause gave only power to Sir John to burden the estate with 10,000 merks, in which case George was to consent and dispone, which can only be understood of a valid, legal, and effectual burden thereof; but this assignation is no such burden, because it is done in *lecto ægritudinis*, and so cannot prejudge George, who is heir, at least apparent heir, to his father. The charger *answered*, That the reason was no way relevant, *1st*, because this provision was in favours of the defunct's wife and children, and so is not a voluntary deed, but an implement of the natural obligation of providing these. *2dly*, This provision, as to the substance of it, is made in the minute, and extended contract, in the father's health; and there is nothing done on death-bed but the designation of the person, which is nothing else than if a parent should, in his lifetime, give out sums payable to his bairns, leaving their names blank, and should on death-bed fill up their names. The suspender *answered*, That he opposed the clause, not bearing *de presenti* a burden of the land, but a power to his father to burden; neither hav-

ing any mention of death-bed, or in *articulo mortis*, or at any time during his life; and though the deed, on death-bed, be in favours of wife and children, it hath never been sustained by the Lords in no time, though some have thought it the most favourable case.

THE LORDS sustained the provision, and repelled the reason of reduction, assoilzied therefrom, and found the letters orderly proceeded.

*Fol. Dic. v. 1. p. 215. Stair, v. 1. p. 116.*

No 61.

1663. February 25. HEPBURN against HEPBURN.

IN a destination of succession, in favour of heirs-male, there was a clause bearing, 'that it should be liesom to the said Thomas, at any time during his life, to alter the same.' This was found not to validate an alteration upon death-bed, though in favour of the heir of line.

*Fol. Dic. v. 1. p. 215.*

No 62.

\*\*\* See The particulars of this case Sect. 1. b. t. No 1. p. 3177.

1668. December 16. MARGARET BRYSON against ANDREW BRYSON.

MARGARET BRYSON being the only child procreate of the marriage betwixt Andrew Bryson and Elisabeth Elphinston, being infest in an annualrent out of the lands of Craighton, effeiring to the principal sum of 7000 merks, did thereupon pursue a pointing of the ground against Mr. Andrew Bryson her brother, who had right to the saids lands from John Johnston, to whom the said Andrew's eldest son had disposed the saids lands, being infest therein by his father before the said Margaret was infest in the annualrent foresaid. It was *alleged* for the defender, That he had a reduction on the pursuer's infestment as being granted *in lecto*. To which it being *replied*, That the reduction could only be sustained at the instance of the heir; whereas the right of fee, granted by Andrew Bryson to his eldest son, did only make him represent his father *passive* as successor *titulo lucrativo*, but gave him no active title to pursue this reduction *ex capite lecti*, nor none having right from him. *2do*, The pursuer's infestment depended upon a contract of marriage; and the said Andrew Bryson having burdened his fee of the said lands, disposed to his eldest son, with a power and liberty to affect the same at any time before his decease, the pursuer's infestment could never be quarrelled *ex capite lecti*.—THE LORDS assoilzied from the reduction, and sustained the infestment, notwithstanding that it was alleged, that that power to burden, at any time before his decease, behaved to be interpreted

No 63.

A father disposed his estate to his eldest son, reserving power, at any time during his life, to alter. This power he exercised on death-bed, which was found good against the disponee, who was heir, as he had accepted and bruiked by the disposition, containing this power to burden at any time during life which includes also death-bed.