

Humbie's case, No 1. p. 3177. ; and had Sir Robert intended the clause to be more comprehensive, the words *etiam in articulo mortis* would have been adjected.

No 65.

Duplied ; Though rights in favours of apparent heirs, with a clause to burden at any time in the disponent's life, would not be extended to give him such a faculty on death-bed ; yet a greater latitude must be allowed here to the granter of a new tailzie in favour of a remote relation ; *2do*, Such was the defunct's *enixa voluntas* to have his debt paid, that he charged the defender to satisfy the same, under the pain of God's curse and displeasure.

Triplied ; That imprecation could extend no further than the power reserved, viz. to satisfy deeds in *hege poustie*.

THE LORDS having considered the circumstances in this case, they decerned the defender to pay the debt.

Harcarse, (LECTUS ÆGRITUDINIS.) No 655. p. 182.

* * The following is a sequel of the same case :

1687. February 3.

HEPBURN of Keith *against* The OLD LADY KEITH and JEAN COCKBURN,
Pilton's Daughter.

THE deceased Sir Robert Hepburn of Keith left his estate to Congalton's son, with the burden of all debts and obligations he should adject at any time in his life ; and on death-bed he ordains him, by a writ under his hand, to marry the said Jean Cockburn, otherwise to lose the estate ; and neglects to provide it to another in this event ; *ergo* it would be caduciary, and so belong to the King as last heir. He being required to marry by way of instrument, and having refused, a declarator of his amitting the estate is raised.—*Alleged, 1mo*, Reserved faculties to burden, or adject qualities or conditions to tailzies or estates, must be understood *in terminis habilibus juris* ; *ergo* they should not be exercised *in lecto*, no more than a man can validly reserve a power to himself to dispo-
 ne, though he should be furious or an idiot ; nor can a clause in the King's charter give any such power on death-bed ; *2do*, All adjected clauses restricting *libertatem matrimonii*, and imposing a penalty in case of contravention, are reprobate as unlawful conditions, *cum matrimonia debeant esse libera* ; and this case is clearly so stated, *Capitul. 29. extra. de sponsal.*—*Answered*, If I convey to you my estate, I can do it with what qualities I please. This being advised on the 17th of February, the LORDS assoilzied from Hepburn of Keith's reduction, and repelled the reason of death-bed ; and found that Sir Robert Hepburn of Keith might *etiam in lecto* burden his disposition with what qualities and conditions of marriage he pleased.

Then the LORDS, on a bill, allowed him to be further heard on their declarator of his having lost the estate, and its being caduciary, and fallen to the King. He likewise craved to be heard on the personal objections against the woman offered, as being once furious ; and to instruct that the last paper signed by Sir

No 66.

Found, that a party *etiam in lecto*, might exercise a reserved faculty of burdening his estate with what qualities or conditions he pleased.

No 66. Robert, ordaining his heir to marry the said Jean, was elicited, and contrary to his former intentions. *Quæritur*, If the offering to marry her now will preserve the estate to him, seeing he has so contumaciously refused it all along? And they whisper there is a donatar already named by the King for that estate.

January 25. 1688.—THE LORDS found the quality of his marrying the said Jean, adjected by Sir Robert to his disposition, affected it, though it was on death-bed, and that he behoved either to fulfil it or lose the estate; and the LORDS gave him eight days longer to deliberate, and declare if he would marry or not; else they would proceed. And in case he refused, Blair Drummond had a gift ready from the King of the *ultimus hæres*, because Sir Robert had not provided to whom it should go on his refusal; and so there would be a caducity. But he redeemed this process, and obtained a discharge, by a composition of L. 10,000 Scots to the gentlewoman.

Fol. Dis. v. 1. p. 116. Fountainball, v. 1. p. 445. & 494.

* * Harcarse reports the same case :

SIR ROBERT HEPBURN of Keith, having disposed his lands to his nephew young Congleton, reserving power to alter and burden at any time in his lifetime, and dispensing with the not delivery, and requesting the receiver of the disposition to perform all his deeds and orders, as he would escape the wrath of God. In pursuance of this power, Sir Robert, by writs under his hand, left 14,000 merks to his Lady, who had a jointure of 6000 merks a-year, and he ordained Congaleton his heir to marry her niece, Pilton's daughter: Of these two deeds reduction was raised, *imo, Ex capite lecti*; *2do*, upon this ground, That they were never delivered.

Alleged for the defender, *imo*, The reserved power to alter and burden at any time in his life, includes *etiam articulum mortis* in new tailzies, which the heir must either accept with the quality or repudiate, he not being *alioqui successurus*; especially considering the imprecation adjected to the not performance; *2do*, The dispensation with delivery in the disposition, imports the like dispensation in favours of deeds done by virtue of the reserved power, which are to be repute a part of the disposition.

Answered; Such provisions would then destroy the law of death-bed.

THE LORDS found, That the clause and reservation in this new tailzie did empower Sir Robert to do deeds on death-bed, which cannot be quarrelled by the heir; and that the delivery thereof was not necessary. Here the heir was in-fest in Sir Robert's lifetime, and had homologated and used the right; but the question was about the import of the word *lifetime*.

Harcarse, (LECTUS ÆGRITUDINIS.) No 657. p. 183.