

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.

when he was in his *liege poustie*, and not in *lecto ægritudinis*, unless it had been so expressed.

Fol. Dic. v. 1. p. 215. Gosford, MS. No 64. p. 23.

* * * The like was found in the case Douglas against Douglas, *voce ADULTERY*, No 6. p. 329.

1676. December 9.

KER against KER.

No 64.
A deed not delivered till the party be *in lecto* is reducible.

JANET KER as heir to John Ker her grand-sire, pursues reduction of a disposition granted by the said John in favours of Ninian Ker, son to Patrick Ker his second son, of a tenement in Rothsay, on this reason, that albeit the disposition bear date several years before the disponent's death, yet it was no delivered evident, till the disponent was on death-bed, and doth not contain a clause to be valid, though not delivered during the disponent's life, or *liege poustie*. This reason being found relevant, and admitted to probation, there were only two witnesses which knew any thing, the one Gilchrist a notary, who depones, that two or three days before the defunct's death, he delivered to him this disposition, and desired him to draw two disposition of the same tenor of the equal halves of the tenement, the one in favours of Patrick Ker his son, father to Ninian, the other in favours of Janet Ker, daughter to his eldest son deceased: And for that effect he subscribed two blanks, which were filled up after the defunct's death, and delivered to John Kelburn by his order; which two dispositions are also produced. John Kelburn depones, that John Ker delivered to him the disposition to Ninian seven years before his death, and that three days before his death he called for the same, which Kelburn having put in a chest of the defunct's, some days before, took it out thereof, and brought it to the defunct, who delivered it to Gilchrist the notary, to frame other two dispositions by it. There is also produced an act in a process of exhibition before the Bailie of Rothsay, bearing, that Kelburn being pursued to exhibit the disposition to Ninian, did depone that he had received it from John Ker, for the behoof of Ninian his oye. At the advising of this cause, it was *alleged*, that the reason was sufficiently proven, two witnesses concurring, that Ninian's disposition was in the disponent's hands on death-bed, and one of them only deponing, that it was delivered to him of before. It was *answered, imo*, That this being a disposition in favours of an oye, it is valid without delivery, the good-sire's custody being the oye's custody. *2do*, That this writ was only delivered on deathbed, is not proven, because Kelburn one of the two witnesses depones it was delivered to him before. The pursuer further *alleged*; that suppose it were proven that the disposition was delivered to Kelburn in *liege poustie*, yet Kelburne did not depone in this process, on what terms it was delivered to him; and therefore *quod est verisimilius præsumitur*, that John Ker gave him