1687. *November* 17. DAVIDSON *against* DAVIDSON.

No 67.
A father took an estate to himself in liferent, and his eldest son in fee, with a reserved faculty to innovate in *articulo mortis*. A death-bed deed in favour of his second son was reduced.

THE case of James Davidson against Mr Alexander his brother was debated. Mr Alexander Davidson, advocate at Aberdeen, their father, in 1675, acquires the lands of Newton to himself in liferent, and his eldest son, Mr Alexander, in fee, reserving always to himself an express faculty to alter the said fee, and to dispone it *etiam in lecto*. Afterwards, being disobliged by his eldest son, he revokes his fee on death-bed, and turns it to a liferent, and dispones the fee to James the second son. Mr Alexander, after his father's death, raises a reduction of the second disposition, 1*mo*, because his wife had married him in contemplation of this estate, and brought a considerable fortune with her; 2*do*, He could not exerce the reserved faculty, *nisi modo habili et tempore legitimo*, in his *liege poustie*, else that cardinal law of death-bed shall be supplanted by such reservations, which has hitherto preserved our estates sacred and entire against wives, children, and churchmen, and makes us die in quiet. 3*tio*, The clause *etiam in articulo mortis* takes only effect where the disposition containing that clause is made to an assumed heir, and a stranger who is not *alioqui successurus*, and so must take his right with all the qualities annexed; but an eldest son may enter *aliunde*, and so it ought not to be exerced against him *in lecto*; else this were to exheredate him *absque elogio*. 4*to*, A reservation to grant deeds on death-bed, must be construed of rational considerate deeds, and not where it is evident he has proceeded by passion, solicitation, and suggestion, *aut delinimentis novercalibus*, or that it is *factum inofficiosum contra pietatem*; and they cited these decisions in Stair, 25th February 1663, Hepburn, No 1. p. 3177.; 24th July 1672, Porterfield, No 2. p. 3179.; and 7th June 1676, Yeoman, *voce* FACULTY; and Craig *de feudis*, page 130. *Answered* to the reasons of reduction, That the law of death-bed is very fundamental, but yet it has its exceptions, where the deed depends on an anterior cause, viz. a reserved faculty in *liege poustie* to alter *etiam in articulo mortis*; which certainly may be exercised at any time when he is *mentis compos*; else this were to abridge the parental power, and stir up their children against them; and that this was clearly decided *supra*, 3d February 1687, Hepburn, No 66. p. 3253.; and the like was found 28th of June 1662, Hay, No 61. p. 3246.; and 23d June 1670, Douglas, No 6. p. 329. observed by Stair; and, in a narrower point, the Lords found a father might alter his eldest son's fee, given him in his contract of marriage, which dissolved within year and day, and bestow it on his second son, Burleigh, *voce* HUSBAND AND WIFE. 2*do*, Death-bed may be as well dispensed with by a clause, as the not delivery of a writ is dispensible with by a like clause; the one being as great a nullity as the other: And faculties need not be exerced *in forma specifica*; as Stair observes, b. 2. t. 3. § 54. and Hop-Pringle, *voce* FACULTY: And we have not the nicety of the Roman exheredations, who behoved either to institute or disinherit, under the pain of nullity of the testament; but, with us, a father may dispone

No 67. to any son, *sine quærela inofficiosi*, even as by the Roman law he could give the patronage of a slave to any child he pleased: And here Mr Alexander could not succeed to this estate as heir, because his father was never fiar, and so the inquest could not retour nor answer that head of the brieve, *quod pater obiit ultimo vestitus et sasitus ut de feodo*. 3*tio*, The decisions cited meet not; for, in Humby's case, the faculty wanted the clause *in articulo mortis*, and only bore at any time in his life; and in the rest, the heir could repudiate that right, and enter by another title, which Mr Alexander the pursuer cannot do here: And Craig is speaking of succession to Crowns, and not of private men's successions; being in answer to Doleman, or Jesuit Parson's book against King James's succeeding to the Crown of England. 4*to*, It was not here an entailed estate, but all purchased by old Mr Alexander's virtue and industry; and the eldest son had proven ungrateful, whereof the father was best judge, and should not be put to prove it; and Christ, in the parable of the labourers, has determined this case, 'May I not do with my own as I please; I will give to the last born as 'much as to thee.' 5*to*, He had homologated this disposition, by pursuing on it since his father had exerced the faculty, and possessing the lands by virtue of it; and he is not totally exheredated; for his father has given him 18 chalders of victual and the liferent; and his wife's portion was but inconsiderable.

The Lords having, on the 24th of November, advised this cause, they found that the father in this case (for they would not generally decide it *in tota latitudine*) could not, by virtue of his reserved faculty, alter and retract his eldest son's fee on death-bed, nor dispone it then to the prejudice of his apparent heir; and therefore reduced the second son's disposition. The President was not clear in this, but the plurality carried it; for they thought, that if these reserved faculties were once allowed to be exerced *in lecto*, (which clause was first introduced and advised by Sir Thomas Nicolson advocate) the good law of death-bed should be evacuated, and that this was *fraudem legi facere*, and so every one hereafter would reserve that power; and though it seemed to restrict parents power, yet such a faculty was rather a snare and prejudice to parents, than a favour, and was not to be desired: And though one, in moveables, should reserve such a power, yet on death-bed he would not be allowed either to wrong his relict's part or bairn's legitim, and even so here by the analogy of law; for no man can reserve to himself, that he shall have then solidity of judgment; without which he ought not have power; and in Keith's case he was a stranger, and had no other way to bruik the estate, but by the disposition bearing that burden. Yet here Mr Davidson could not be heir, his father not being fiar.

In Irvine of Drum's case, the like point falls to be debated, but with this difference, that Drum's faculty and power is given him in the King's charter under the Great Seal, which he had exerced in favours of his children of the second marriage, against his eldest son; and though *pactis privatorum non derogatur juri publico, et nemo potest pacisci, ne leges in suo testamento locum habeant;* yet

there is more to say where the King gives and allows the power, than when it is only reserved by the party. No 67.

Mutual bills having been given in against this interlocutor, and the same being advised 3d December, the LORDS ordained the eldest brother, pursuer, to prove that his father was *in lecto* at the time of exercing the said faculty, by signing the second disposition; and also, before answer, to prove that he was imposed on, and himself kept from having access to him, and what composure of spirit he was then in; and also allowed the second brother to prove what acts of disobligement or ingratitude the eldest had committed against his father, which might provoke him to put this estate by him; by which last tour, the President brought this case to the principles of equity and justice, and somewhat rectified and corrected the harshness of the first interlocutor.

Fol. Dic. v. 1. *p.* 216. *Fountainhall, v.* 1. *p.* 478.

*** Harcarse reports the same case:

MR ALEXANDER DAVIDSON having acquired some lands to himself in liferent, and his eldest son in fee, reserving power to himself to alter and innovate at any time in his life, *etiam in articulo mortis;* and having, by virtue of the reserved faculty, made a new disposition in favour of his second son, the eldest raised reduction thereof *ex capite lecti.*

Alleged for the defender; That the pursuer had no interest to reduce, because he could not succeed as heir to the father in these lands, who was not fiar, but had only a personal faculty to dispone. 2*dly*, The pursuer being infeft as fiar upon the right wherein the faculty was reserved to his father, he cannot repudiate the exercise thereof. 3*dly*, It is usual for a person infeft from the King to reserve power to name his heir *in lecto.*

Answered; Though the fee was originally taken to the pursuer, the father had it in effect by the reserved faculty; and though the pursuer could not properly succeed by a special service to his father, who died not seized in the fee, yet he may come to have right to the lands by a declarator, and the extraordinary remedy of reduction. 2*dly*, The pursuer being infeft when he was a child, and never having homologated the faculty therein reserved, cannot be hindered to quarrel the same. 3*dly*, Such provisions in the King's charters have not been questioned, and are granted *periculo petentis;* and if reservations of that nature were effectual, every body would make them, and so elide the excellent law of death-bed. 4*thly*, Though such a reservation might take place against a right made to one who is not *alioqui successurus*, it can have no effect against apparent heirs, either in new or old feus; because apparent heirs may enter by law, passing by the qualified deed, unless they have homologated the same, whereas others cannot have access but by acknowledging the qualified right, and so must either take it *cum onere*, or repudiate it.

No 67.

Replied for the defender; The faculty to dispone is most ample; and in the cases of Douglas, No 6. p. 329. and of Keith, No 66. p. 3253. the clause at any time in the disponer's life, without the words *etiam in articulo mortis*, was found to extend to death-bed. 2*dly*, The pursuer has homologated the qualified right, by using it as the title of his reduction in his own name.

Duplied; The practiques of Lumisdane and Keith do not meet this case, seeing there the qualified disposition was not granted to an apparent heir; and, in Humbie's case, a reserved power to dispone at any time during life was not extended to support a deed on death-bed, in favours of the disponer's own daughter and heir of line, in prejudice of a former tailzie to his brother, (No 1. p. 3177.) 2*dly*, The pursuer's using the right, in order to quarrel the reservation therein, and its effect, cannot import homologation.

The Lords, before the question was well understood, reduced the second disposition, and repelled the defence of homologation as it was qualified. But thereafter the interlocutor was stopped, and the act made for trying if the second disposition was in *liege poustie* or *in lecto*, and if the disponer was *sanæ mentis* at the granting thereof. And the second brother apprehending that the father would be found to have been not *satis compos mentis*, the matter was settled by a friendly transaction; and the second interlocutor, reducing the second disposition, bore to be of consent of parties, that it might not be a preparative. *See* this decision observed by Dirleton in his Doubts, page 150.

Harcarse, No 659. p. 184.

No 68.

A man disponed his estate to his son, with the burden of provisions to his younger children, granted or to be granted. He granted a bond of provision to one of his daughters on death-bed. The Lords found this bond not reducible *ex capite lecti*, by the heir who had accepted the disposition.

1706. *February* 8. Bertram of Nisbet *against* Weir (or Veir) of Stanebyres.

James Weir, late of Stanebyres, gives a bond of provision to his daughter, Mary Weir, for 3000 merks. She, and Gilbert Kennedy, younger of Auchtifardel, her husband, assign it to Bertram, and he pursues Stanebyres on the passive titles for payment. *Alleged*, The bond was granted when his father had contracted the sickness whereof he died; and though he lived several months after, yet he never went to kirk nor market; and repeated a reduction he had raised of it upon that head. *Answered*, You can never quarrel this deed, neither *ex capite lecti* nor on any other ground, because you have consented thereto, and accepted the right with the burden of it, in so far as your father, of the date of this bond, disponed to you his estate, with the express burden of all provisions, either already granted or to be granted by him in favour of his younger children, by which you bruik and possess the estate to this day, without ever revoking or repudiating the same, or ascribing your possession to any other title; so you must have it, with the condition, quality, and burden of this bond annexed thereto; neither can you separate them; and, by accepting the disposition, you have as much homologated and acknowledged this bond, as if you had granted it yourself. *Replied*, Though he has accepted a disposition from his