1758. *August.*
JANET BUCHANAN *against* ALEXANDER BUCHANAN of Auchmar.

No 72.
A reserved faculty of burdening an estate, contained in a disposition by a father to a son, found capable of being exercised gratuitously and on death-bed.

By contract of marriage, dated in 1696, between William Buchanan, with consent of his father John Buchanan of Auchmar, and Jean Buchanan; John the father disponed to William his son, and the heirs-male to be procreated of that marriage, whom failing to the heirs-male of William by any other marriage, the lands of Auchmar.

Of this marriage there were born three sons and three daughters, viz. John, Alexander, Bernard, Janet, Katharine, and Helen.

The said William Buchanan did, in 1735, in implement of the marriage-contract, dispone to his eldest son John, and the heirs-male of his body; whom failing, to his second son Alexander, &c. his estate of Auchmar, yielding about 2000 merks of yearly rent; but under sundry conditions and reservations; particularly that John, by his acceptation thereof, should be bound to pay the granter's debts, conform to a list to be signed by him; 'And by and attour the 'said list of debts, reserving full power and liberty to me to burden and affect 'the lands, &c. above disponed, to the extent of L. 100 Sterling, and to 'grant security therefor, heritable or moveable, in favour of such person or 'persons as I shall think fit.' An annuity of 600 merks was likewise thereby reserved to the father; and John was also taken bound to pay the younger children 5000 merks.

William Buchanan afterwards divided the 5000 merks among his younger children, which was accordingly paid to them. John the eldest son entered to possession of the estate, under the title of that disposition, and held the same till his death, which happened in the 1744; when Alexander the second son succeeded, and entered to possess upon the same title. William the father was yet alive: In December 1746 he assigned to his daughter Janet his moveables, and arrears of his annuity; and in January 1747 he granted a deed in her favour, proceeding on a recital of the reserved faculty of burdening the estate with L. 100, contained in the foresaid disposition, and, in exercise thereof, obliging himself and his son Alexander to pay that sum to her, over and above her former provisions; *proviso*, That Janet should pay the one half of the L. 100 to her sisters Katharine and Helen.

William Buchanan died within thirty days of the time of granting this last deed, and had before contracted the illness of which he died.

Janet brought a process against her brother Alexander for payment of her provisions, particularly of the said L. 100 Sterling.

Objected by the defender; 1*mo*, The reserved faculty gave no power to the father to burden the estate gratuitously. The disposition bore to be in implement of his marriage-contract, by which the estate was already provided to the heir of the marriage; and a disposition with a reserved power to burden gra-

No 72. tuitously could not have been implement of that provision. Neither was the faculty intended for enabling his father to bestow such a sum on any of his younger children, as they were provided for in separate clauses of the deed. The true intention of the reservation was only to enable the father to contract a further sum of L. 100 of debt, if necessary, over and above those debts which he had already contracted, and which the son was bound to pay for him.

2*do*, Supposing the faculty might have been gratuitously exercised, yet it could not be done by the father upon death-bed. For although a man disponing his estate to a stranger, and reserving to himself such a faculty, may exercise it at any time; yet where the disponee is son and heir, as in this case, to whom he is under an antecedent obligation to give his estate, the son notwithstanding the disposition, will still be understood to be heir, and as such have the privilege of reducing any deed made to his prejudice upon death-bed; more especially as here the clause does not bear expressly, that the faculty might be exercised *etiam in articulo mortis*.

Answered for the pursuer; 1*mo*, The disposition was more than sufficient implement of the contract, though with a reserved power of burdening gratuitously to the extent of L. 100; for notwithstanding the contract, the father might have contracted debts to any extent, or spent every shilling of the estate; whereas, by this deed, he put it out of his power to do so, and also gave the son possession in his own time, reserving only a small annuity. These considerations made it reasonable for him to be allowed the power of giving this L. 100 to whom he pleased. Neither is it competent for the defender to object to it, when both he and his brother accepted of the disposition, under that condition, and possessed upon it. Nor can the meaning of the clause be doubted to imply a power of burdening gratuitously, seeing it stands quite distinct in the deed, both from the clause subjecting the son in the father's debts, and from the clause of provision to children; and bears to be by and attour the aforesaid list of debts; and also in favour of such person or persons as he should think fit.

2*do*, The objection on the head of death-bed admits, that if the disposition had been to a stranger, or even to an heir, but such to whom the disponer was under no antecedent obligation to give his estate, and the heir had accepted the disposition, the faculty might have been exercised at any time; because a disponee has not the privilege of an heir; and an heir, accepting of a disposition, is in no other case than a common disponee. Now, the prior obligation, in this case, on the father, can make no distinction, because he was only thereby bound not to disappoint gratuitously the succession of his son, but might have spent the whole estate. If, therefore, he passes from that power, and even denudes of the possession long before his death, but under certain qualities and conditions; and the son accepts of his disposition, and possesses upon it; surely the latter must be thereby held to give up his right *qua* heir, and to betake himself to his disposition, with all its burdens and qualities. It matters not

that the clause does not bear the words *etiam in articulo mortis*, seeing the clause runs in general terms, without limiting the time for exercising the faculty, and a disponee cannot challenge on the head of death-bed. No 72.

'THE LORDS found, That in virtue of the faculty reserved to William Buchanan, in the disposition granted by him to his son, he could gratuitously, and on death-bed, burden the said lands with the sum of L. 100 Sterling; and that he properly exerced the same in favour of the pursuer by the bond and assignation granted to her.'

Act. *Burnet.* Alt. *Montgomery.* Reporter, *Woodhall.*

D. R. *Fol. Dic. v. 3. p. 172.* *Fac. Col. No 134. p. 247.*

1765. *February* 28.

PRINGLE of Crichton *against* MARK his Brother.

No 73.
An heir had consented, by acceptance, to a deed, of which he afterwards brought a reduction on the head of death-bed. The Court reduced; but this judgement was reversed on appeal.

MARK PRINGLE of Crichton settled his estate upon John Pringle his eldest son, and the heirs-male of his body; whom failing, to his younger sons *seriatim*, *&c.*; reserving the granter's liferent, with full power to him at any time in his lifetime, to burden the lands with such debts, gifts, and provisions as he shall think fit; to sell or dispone the lands in whole or in part; and to revoke, alter, and innovate these presents at pleasure. This settlement was accepted of by John Pringle the son, who was legally infeft.

Mark Pringle in *liege poustie* made competent provisions for his younger children, excepting his youngest son, to whom he gave an heritable bond upon the estate for L. 1000 Sterling. This bond being executed upon death-bed, John Pringle the heir brought a reduction of it upon that head. The defence was, That the pursuer had accepted of the settlement, which inferred his consent to every clause, and which of course barred his reduction.

This was a nice case. And the first doubt that occurred was, whether a reserved power to burden at any time in the granter's lifetime includes the time when one is on death-bed. The words strictly taken include this time; but it is far from being clear that the parties intended to include it. It was observed, that the natural import of such a disposition to an eldest son is only to save a service, and cannot be so constructed as to create a power in the granter either to alien or burden his estate upon death-bed; a power that no wise man would chuse to have, considering the arts it lays him open to in his last moments. And if his death-bed deed be left unsupported by the heir's consent, his privilege to reduce is undisputable; for his acceptance of the deed as disponee, does not cancel his character of heir.

In the next place, supposing the heir had consented in express terms, the question is, Whether such consent can bar the reduction? The doubt is, that if such consent be binding, the law of death-bed is at an end. For an eldest