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

No 73. son to whom a disposition is offered in the foregoing terms, dares not refuse to accept, which would draw upon him his father's indignation. The bond was reduced as granted on death-bed. The Judges did not separate the two points; but it was the general opinion, that the son's consent, supposing it to have related to death-bed, could not bar him from challenging the death-bed deed.

Fol. Dic. v. 3. *p.* 173. *Sel. Dec. No* 232. *p.* 306.

*** The same case is reported in the Faculty Collection:

In 1748, Mark Pringle of Crichton, disponed those lands to John Pringle his son, and his heirs, reserving his own liferent, with full power to alter, sell, or burden.

The deed contained a clause, declaring that, by acceptance thereof, the disponee should be bound to pay all bonds of provision granted, or to be granted, and all debts and legacies which should be due by the disponer at his death.

Upon this disposition, a charter under the Great Seal was expede, and infeftment taken.

In 1754, Mark Pringle, in consideration of L. 2000 being paid to him, which his son had got in portion with his wife, renounced the reserved faculties, with respect to a part of the lands, of about L. 300 per annum.

In 1758, having married a second wife, he so far altered the deed 1748, as to settle the estate upon John and his heirs male; whom failing, upon his sons by the second marriage; and, in this last deed, he reserved the same powers as in the former.

Mark Pringle granted sundry deeds in exercise of these reserved powers, particularly, an heritable bond for L. 1000 Sterling, in favour of his youngest son, which was executed by notaries, within nine days of his death.

John Pringle insisted in a reduction of this deed, and *pleaded*, 1*mo*, That he never had accepted of the disposition 1748. He possesses part of the lands, in virtue of the onerous transaction in 1754. The rest of the estate he is entitled to take up by service as heir to his father. He cannot take it up in virtue of the disposition 1748, that deed being revoked; and he will not take it up in virtue of the disposition 1758; so that he is not affected by the reserved powers which it contains.

2*do*, Even the express consent of the heir will not support alienations on death-bed; 13th November 1728, Reids *contra* Campbell, No 104. p. 3327.; 4th December 1733, Inglis *contra* Hamilton, No 105. p. 3327.; and 15th December 1744, Irvine *contra* Irvines, No 49. p. 2304. Much less can they be supported upon an implied consent, inferred from the heir's acceptance of a disposition.

3*tio*, A reserved faculty to alter or burden *quandocunque*, must be exercised *habili modo*, that is, by a deed *inter vivos*, and in *liege poustie*, but cannot be

exercised on death-bed; 25th February 1663, Hepburn *contra* Hepburn, No 1. p. 3177.; also Dic. *v.* TESTAMENT; Craig, II. 1. 25. and Stair, III. 4. 14. and III. 8. 29. No 71.

Answered for the defenders to the *1st*; There are various circumstances tending to show that the pursuer accepted the disposition 1748; but it will not vary the case, though he should be at liberty to repudiate it. If he is so, it can only be in consequence of the disposition 1758, which contains the same powers and faculties: Indeed, it is a mistake to say that the disposition 1748 was *revoked* by the disposition 1758; on the contrary, the latter proceeds on the recital of the former, and the alteration made by it, in the order of succession, is an exercise of the powers thereby reserved.

To the *second*; The cases of Reids *contra* Campbell in 1728, and Irvine *contra* Irvines in 1744, do not at all apply. No more was there found, than that the heir was not barred from reducing death-bed deeds, by having accepted of a disposition in full of all he could demand at his father's death. In these cases, there was not so much as a renunciation of the benefit of the law of death-bed; but, though an antecedent renunciation of this kind is not sufficient to bar a challenge, as was found, in the other case quoted under this head, that of Inglis *contra* Hamilton in 1733, it cannot be thence inferred, that the pursuer is not bound by his acceptance of the deed 1748, which, being executed 12 years before the disponer's death, can never be looked upon as an artifice used to defeat the law of death-bed; the light in which obligations, extorted from the heir, have been justly considered.

To the *third*; Though no person can affect his *heir*, properly so called, by a deed upon death-bed, or even by a testamentary deed, as appears from the authorities which have been referred to; yet, he can burden his *disponee* by any deed, which is a proper declaration of his will, and is authorised by the terms of the disposition. The disponer has this power in the case of a disposition to a *stranger*; and the heir who accepts of a disposition is in the same case with a stranger, and is equally affected by every condition, which is an inherent quality of his right.

This doctrine is laid down by Lord Bankton, III. 4. 48. and it is supported by a variety of decisions stated in the Dictionary, *h. t.* *See* 22d June 1670, Douglas *contra* Douglas, No 6. p. 329.; and 8th February 1708, Bertram *contra* Weir, No 68. p. 3258. where the exercise of the faculty on death-bed was sustained on this ground, 'That the heir had accepted and bruiked by the disposition so qualified.'

The pursuer has referred to a decision, 25th February 1663, Hepburn *contra* Hepburn, where the contrary doctrine appears to have been adopted; but, to this is opposed the late decision in the case of Lord Forbes, No 71. p. 3277., where it was established by a judgment of the House of Lords, that reserved faculties may be properly exercised upon death-bed.

No 71. Nevertheless 'The Lords found, That the disposition in the year 1748, was not revoked by the disposition in the year 1758; but sustained the reasons of reduction of the bond for L. 1000 Sterling, as being granted on death-bed.'

Reporter, *Colston.* Act. *Lockhart, Miller, Advocatus.* Alt. *Montgomery, Sir D. Dalrymple.*
Fac. Col. No 6. p. 207.

*** This case was appealed:

January 29. 1767.—Ordered and Adjudged, That so much of the interlocutor of the 25th February 1765, as sustains the reasons of reduction of the heritable bond for L. 1000 Sterling, granted by Mark Pringle deceased, to Mark Pringle his youngest son, as being granted on death-bed; as also, of the first codicil in question, subjoined to the last will of the said deceased Mark Pringle, as being a deed of a testamentary nature, be, and the same is hereby reversed.

SECT X.

What circumstances infer Death-bed.

1608. *December* 3. Mr Nicol Gilbert, Supplicant.

No 72. Mr Nicol Gilbert being in great debt, and thereby forced to sell some of his lands; fearing that men should skar to deal with him, because the impotency of his gout held him bed-fast; by his supplication desired the Lords to direct him some of their number to visit him and try his estate; which being done, and they reporting, that albeit he was impotent, yet it was of a lingering infirmity, and that his memory and judgment was sufficient; they ordained that the alienations to be made by him should not be subject to reduction as upon death-bed.

Fol. Dic. v. 1. p. 217. Haddington, MS. v. 1. No 1494.

No 73.
Found, that a husband, 12 or 13 days before his decease, being sick of a fever and flux, and not

1622. *February* 1. Robertson *against* Fleming.

Umquhile —— Robertson gave infeftment of liferent to —— Fleming his spouse, of a tenement of land, by the space of 12 or 13 days before his decease, which right was craved to be reduced by Robertson's heirs, upon this reason, viz. as done in *lecto ægritudinis*, the husband being sick of a fever and