delivered for the defender's use, and so kept by John Kelburn. It was *replied*, that it was offered to be proven that it was in the father's chest and custody the time of his decease, during which time he did call for the said disposition, which was brought to him, and did order a writer to draw up two new dispositions, one in favours of the defender's father, Patrick Ker, and the other in favour of the suspender, for the equal half of the said tenement and lands, which was a clear evidence that he was still master of the first disposition; and as to these dispositions being truly made and subscribed on death-bed, they could not prejudge the pursuer who was heir. THE LORDS ordained the said John Kelburn, and the writer, and witnesses of the new disposition to be examined, and finding that Kelburn did prevaricate in his deposition, and did not make a direct answer if the first disposition was truly delivered to him for the behoof of the defender, but that he keeped the same in his custody until the disponer called for it upon deathbed, and delivered it to him, after which he ordered the two new dispositions to be drawn, and subscribed them, and that he immediately delivered the same back to him; as likeways finding by the depositions of the writer and witnesses, that the two new dispositions were filled up after they were subscribed and left by the father; they did thereupon long debate the said case before decision, and at last found, that the first disposition, being a clear right in favour of his grandchild, by a second, which would have given him an undoubted right, if it had not been recalled; yet the said disposition, bearing an absolute right of the whole lands, without so much as reserving the goodfather's own liferent; and being put in the hands of Kelburn only upon that reason, if he himself had retained it till his death, and had then delivered it, it would have been *ipso jure* null;—that therefore in law it ought to be presumed, that it was only delivered to be kept until such time as he might deliberate whether to alter the same or not; which he having done by two new dispositions, taking away from his apparent heir only the half of the lands, she being a woman who might marry a stranger, and giving the other half to his second son, and the defender, his oye, that it might remain with the name; therefore they decerned that the first could not be looked upon as a delivered evident for the oye Ninian, who had only recovered it after the goodsir's decease, from Kelburn; and so having exercised his power to alter, albeit upon death-bed, that the said two new dispositions should take effect, and the estate divide accordingly, albeit made upon death-bed, which was hard.

Gosford, MS. No 946. p. 624.

No 64.

1685. *December.* BROWN *against* CONGLETOUN.

No 65.
A person having tailzied his estate to a stranger,

GEORGE COCKBURN of Pilton as principal, and Sir Robert Hepburn of Keith as cautioner, having granted bond to Thomas Brown, stationer in Edinburgh, for 2000 merks; and he having pursued Robert Congletoun, for payment, as

No 65.
with this provision, that the disponee should be bound to pay all his debts contracted, or to be contracted, and that should be due at his decease, but without the clause *etiam in articulo mortis*; and having thereafter granted a bond upon death-bed; the Lords found, that the disponee was burdened with the said quality in the disposition, and therefore that he could not reduce the bond as granted on death-bed.

he who had accepted of a disposition from Sir Robert of his estate, with the burden of all debts contracted by Sir Robert in his lifetime, and due at his decease, which he obliged the said Robert Congletoun to pay, as he would eschew the wrath of God.—*Alleged* for the defender; That the bond was null, as being granted by Sir Robert when he was upon death-bed; and so cannot oblige the defender, who is heir to him, at least universal successor, by the foresaid disposition; and upon that ground had raised reduction, which he repeated.—*Answered*; That the defender could not quarrel the bond as being granted upon death-bed; because he had accepted of a disposition, with the burden of all his debts contracted in his lifetime, and due at his decease; which must comprehend debts contracted upon death-bed, as well as *in liege poustie*, as was decided 22d June 1670, Douglas of Lumsden *contra* Douglas, No 6. p. 329. where it was not found relevant to reduce a bond granted on death-bed, by a party who had disponed his estate, reserving a power to himself to burden it in any time during his life, though it did not bear *etiam in articulo mortis*; much more in this case, seeing the disposition did not only bear the foresaid reservation, but an imprecation obliging the defender to pay the debt, as he would eschew the wrath of God, which did evince Sir Robert's *enixa voluntas*, that all his debts contracted, or to be contracted by him, should be paid.—*Replied*; That these words in the disposition, that the defender, by the acceptation thereof, should be obliged to pay all debts contracted by the said Sir Robert in his life time, or due at his decease, can only be understood *in terminis juris*, as to such debts that Sir Robert contracted in his *liege poustie*, when he was capable to contract debt, and not of debts contracted on death-bed; especially seeing it does not bear a reservation to contract debts *etiam in articulo mortis*.——The Lords found, That Congletoun, as heir of tailzie, is burdened by the quality of the disposition, made by Sir Robert Hepburn to him, for payment of debts contracted, or to be contracted by Sir Robert, at any time in his life time; and that Congletoun had not the benefit of reduction of the foresaid bond, as being contracted on death-bed.

Fol. Dic. v. 1. p. 215. Sir P. Home, MS. v. 2. No 749.

*** Harcarse reports the same case:

In a pursuit at the instance of Robert Brown, against young Congletoun, as heir of tailzie to Sir Robert Hepburn of Keith, for payment of 2000 merks Sir Robert stood cautioner for Pilton;

Alleged for the defender; The bond was signed by Sir Robert on death-bed, when he could not prejudge his heir.

Answered; The tailzie contains a quality, that the defender should satisfy all Sir Robert's debts contracted, or to be contracted at any time of his life.

Replied; Any time in a man's life imports only *liege poustie*, as was found in

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 disponer'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; 2*do*, 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 *liege 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.

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.

THE deceased Sir Robert Hepburn of Keith left his estate to Congalton's son, with the burden of all debts and obligements 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*, 1*mo*, 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 dispone, though he should be furious or an idiot; nor can a clause in the King's charter give any such power on death-bed; 2*do*, 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