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, disponded 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

father, with the burden of the provisions he should nominate and appoint for his bairns, yet that must be understood *civiliter et in terminis habilibus*, that the provisions be made in the granter's *liege poustie*, and not on death-bed; seeing the clause does not bear that he shall be liable, though they be granted at any time in his life, *etiam in articulo mortis*; and if it were otherwise, that excellent fundamental law of death-bed should be overturned, which is the great barrier and security of our estates, and is founded on the best of reasons; 1*mo*, To free us from the importunity of churchmen, wives, and other friends and relations at that time; 2*do*, To teach us to provide our younger children in *liege poustie*, when our executry is not sufficient to serve them. Yea, Sir John Nisbet of Dirleton, and many of our lawyers, doubted if a power given by the King, in his charter under the Great Seal, to dispone or contract debt on death-bed, would be a legal warrant to sustain such deeds; and if so, then *multo minus* should a faculty reserved by a party himself, in a private writ, impower him to dispense with and subvert that useful and necessary law of death-bed; seeing *pactis privatorum nequit derogari juri publico*; and no man can provide *ne leges in suo testamento locum habeant*; and in a famous case, decided in November 1687, Davidson *contra* Davidson, No 67. p. 3255. the Lords found such a faculty to alter *etiam in lecto*, did not impower the father to dispone the lands to his second son when he was on death-bed, and resolved to keep that law sacred and inviolable; and much more ought the Lords to keep this rule, when the power does not mention these words, that they may exercise it *etiam in lecto et ipso mortis articulo*, which is the present case. *See* Stair, 25th February 1663, Hepburn, No 1. p. 3177. *Duplied* That the providing of younger children is favourable, and depends on an antecedent natural obligation, and has been so decided, 28th June 1662, Hay, No 61. p. 3246. where such a faculty having been exerced on death-bed, and quarrelled on that head, the Lords sustained the bond, and assoilzied from the reason of *lectus ægritudinis*: And any small insinuation has been laid hold on to infer the heir's consent, as Dirleton observes, Haliburton, *voce* Homologation, and Stewart's case there cited, that signing as witness imports consent; though now of late, in Dallas's case, *voce* Homologation, the Lords have receded from that practique. *See* Dirleton, *tit.* *Reduction ex capite lecti*; Stair, 24th July 1672, Porterfield, No 2. p. 3179.; and lately Erskine's pursuit against Erskine her brother, 4th January 1705, *voce* Homologation——The Lords, in arguing the case, thought, if this bond of provision was either prior or of the same date with his right and disposition, that it ought to exclude the reason of death-bed; but the disposition being amissing, and yet not much controverted by Stanebyres, but they might be of one date, therefore the Lords proceeded on that supposition, and thought his bruiking by that right, which bore the quality and reservation of any provisions made or to be made to his younger children, was a tacit and implicit acknowledgement of the bond, and secluded him from proponing death-bed, or reducing it on that head; though it would not supply other nullities, as

No 68.

No 68.

if it wanted writer's name and witnesses, or had been extorted by force or fear; and when an overture was moved in the Parliament 1672, to allow heritors to burden their estates with three or four years rent, on death-bed, for providing younger children, the motion was rejected, as tending to destroy the ancient families of the nation. Some proposed to try what condition Stanebyres's estate was in at the time of his decease, and what debts and burdens affected the same, that it might appear whether this bond of provision was rational and moderate, or excessive and exorbitant; but the Lords decided *ut supra*, and repelled the reason of death-bed in this case *me referente*.

Fol. Dic. v. 1. *p.* 216. *Fountainhall, v.* 2. *p.* 324.

*** Forbes reports the same case:

IN the action at the instance of Alexander Bertram of Nisbet, as assignee to a bond of provision of 8000 merks granted by the deceased James Weir of Stonebyres, to Mary Weir his daughter, against William Weir, now of Stonebyres, as having accepted from the granter his father, a disposition of his estate, with the burden of provisions made, or to be made, in favours of the younger children, and possessed 24 years by virtue thereof; which bond is of the same date, or prior to the disposition;

Alleged for the defender; Absolvitor; because the bond was granted by his father *in lecto ægritudinis*, and he had raised reduction on that head which he repeated. And his acceptance of the disposition with the general burden of provisions to younger children, could only be civilly understood to make him liable for such provisions as were granted in *liege poustie*, which the father could lawfully make, since he is not expressly burdened with any granted *in lecto* or *in articulo mortis*, which are as illegal as obligements extorted, or wanting writer's name and witnesses.

Replied for the pursuer; The bond of provision taking place against the defender by virtue of his own right qualified therewith, is not reducible *ex capite lecti*; especially considering, that, as it was in the defender's power to accept or repudiate the disposition; so moderate provisions to children are very favourable, and slender grounds of homologation have been sustained to infer the heir's consent, June 28, 1662, Dame Margaret Hay *contra* Seton of Barns, No 61. p. 3246.; and July 1666, Halyburton *contra* Halyburton, *voce* HOMOLOGATION; and the words, *etiam in articulo mortis*, are but sometimes adjected *in majorem cautelam*.

Duplied for the defender; That all the favour of, and necessity for younger childrens provisions, could not move the Parliament 1672, to allow heritors to burden their estates on death-bed with three or four years rent for that effect, as tending to subvert the ancient families of the nation. There is also a difference betwixt a father disponing to his apparent heir, with the burden of debts

No 68.

to be contracted on death-bed, and his disponing to a stranger, with such a burden, viz. that though the reserved faculty to burden might be effectual against a stranger, who could ascribe his possession to no other title, it cannot be effectual against the heir, who can repudiate the disposition and enter by a service; seeing *nemo cavere potest, ne leges in suo testamento habeant locum.* And the acceptance of the disposition with possession by virtue thereof, can be no homologation of the bond; because homologation is never extended to what the party did not know at that time, Tailfer *contra* Maxton, *voce* HOMOLOGATION. Neither doth homologation of an article in a writ, homologate others of a different nature, Primrose *contra* Dun, IBIDEM. Nor takes it place where the deed is ascribable to other causes, Barns *contra* Young, IBIDEM; and *ita est*, That the defender's acceptance of the disposition is ascribable to a design of possessing the estate with the legal burdens made in *liege poustie.* Which method he could hardly omit; seeing he could not serve heir to his father who died not last vest and seased. For the defender, when an infant, was infeft upon the disposition by his father before his death; and he could not reduce an infeftment in favours of himself, who was *alioqui successurus.*

THE LORDS found the defender's accepting and bruiking by, after his majority, a disposition with the burden and reservation of provisions made, or to be made, to the younger children, was a homologation of the bond pursued for, and excluded the reason of death-bed: Though it would not hinder the defender to found upon the nullities of wanting writer's name and witnesses, or other reasons of reduction, such as force or fear; and therefore decerned against him, as liable to pay.

Forbes, p. 93.

1705. *December* 13.

GILBERT LIVINGSTON *against* MARGARET MENZIES, and the HEIRS of LINE of SALTCOATS.

No 69.
A person made a tailzie in favour of some others, failing heirs of his own body, but bearing this reserved faculty, 'that it should be lawful to him *at any time during his lifetime*, to alter the said tailzie,' which *de facto*, he so far did, as to make a new tailzie on death-bed. The Lords

GILBERT LIVINGSTON serves himself nearest heir-male of George Livingston, last Laird of Saltcoats, who deceased in October 1704, and pursues a reduction of a bond of tailzie, made by the said George in favour of the said Margaret Menzies, his sister's daughter, as done *in lecto ægritudinis*; at least the substitutions, material clauses, and some marginal notes, being added a few days only before his death. *Alleged*, You have no title, right, nor interest to pursue this action, as heir-male, because the estate of Saltcoats, for many generations, was provided to heirs whatsomever; and this was never altered till George, in his contract of marriage with Beinston's daughter, in anno 1655, with consent of three of his curators, (being then minor), provided the estate to the heirs-male of the marriage; and failing of them, to his other heirs, passing by his daughters of that marriage; and upon which tailzie, Gilbert now founds his right;