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the respondent could only take it subject to the debts and deeds of his grandfather. These exceeded the value of the grandfather's separate estate; and, consequently, there could be no relief left to the heir except out of that fund; but as that belonged to the respondent in his own right, the heir, without representing his father, cannot be liable to communicate any share of it to his father's creditors. He, therefore, cannot take any benefit from this general service. All that the respondent took, as heir of the marriage, was the barony of Moncrieff; but as the general service will not apply to or carry that estate; and as this is only taken up by him, not as representing his father, but by serving heir in special to his grandfather, he was entitled to have the general service reduced, as expede to his hurt and prejudice in minority.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutor complained of be affirmed.

For Appellants, *F. Norton, Al. Wedderburn.*
For Respondent, *C. Yorke, Thos. Miller.*

*Note.*—The first branch of this case is reported in Morison, p. 12,871, and Fac. Coll. ii. p. 361; the latter branch not. In this appeal the whole case was taken to the House of Lords.

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[Fac. Coll. iv. p. 207; M. 3287; Brown's Supplt. "Tait," p. 444.]

Mrs. PRINGLE and ROBERT ANDREWS and MARK PRINGLE, - - - - - } *Appellants;*
JOHN PRINGLE of Crichton, - - - *Respondent.*

House of Lords, 29*th January* 1767.

DEATHBED—FACULTY TO BURDEN—TESTAMENT.—A party disponed his whole estate to his heir-at-law, under a reserved power or faculty to burden at any time during his life, with provisions to younger children. By a codicil bearing no date, but executed ten months before his death, he altered this disposition so as to diminish the fund for the heir; and granted also an heritable bond of provision for £1000, in terms of his reserved power to burden, nine days before his death: Held that these deeds were reducible on the head of deathbed; but reversed in the House of Lords.

The late Mark Pringle was twice married. By his first

wife the respondent was his eldest son, and heir-at-law to the estate of Crichton. By his second wife he had three sons, the appellants—Mrs. Pringle, the other appellant, being their mother.

1748. During his life he conveyed his estate of Crichton, together with all his moveable means and estate, in favour of himself in liferent, and his eldest son, his heirs and assignees whatsoever, in fee, under burden of certain provisions to his daughters, &c. And "reserving always to me myself "alone, *at any time in my lifetime*, without consent of the "said John Pringle and his foresaids, to burden and affect "the said lands and others by heritable bonds or otherwise, "with such debts, gifts, and provisions as I shall think fit."

Of this date, 1758, he executed a will, and thereafter a codicil in 1760, altering this disposition in two respects, and conveying personal funds, which affected the heir materially, by diminishing the fund out of which the debts due by him were payable. He also, in virtue of his reserved powers, granted an heritable bond of provision to Mark Pringle his other son. Nine days thereafter he died. And the codicil having no date, the present reduction was raised by John Pringle of Crichton, to set aside not only the heritable bond of provision on deathbed, but also the above codicil, as a deed which, having no date, must be presumed in law to have been executed on deathbed, on the ground that the testator could not on deathbed dispose of his personal estate to the prejudice of his heir-at-law, and so deprive him of that fund against which he had a right of relief, if called on to pay executry debts. In defence, the appellant stated that the codicil was executed ten months before the time of his death, and was not reducible on the head of deathbed. That the heritable bond was executed in virtue of a reserved power and faculty to burden, "at any time in his life," and to such deeds the law of deathbed did not apply; and, finally, that the pursuer had accepted of the settlement, which inferred his consent to all its clauses, and consequently barred the reduction.

May 25, 1761.

The Court of Session "sustained the reasons of reduction "of the bond for £1000 sterling, as being granted on death-"bed, and also of the codicil in question, as being a deed "of a testamentary nature, and decern." *

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* Lord Kames, one of the judges, says, Dec. p. 306:—"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

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Forbes *v.* Forbes, *ante.*

Against this interlocutor an appeal was taken to the House of Lords.

*Pleaded for the Appellants.*—There is no foundation in law for setting aside the heritable bond in question, given for a moderate and reasonable provision; because, being granted in virtue of a reserved power or faculty to burden, at any time during life, the law of deathbed did not apply. The respondent, therefore, cannot challenge the exercise of this faculty, otherwise there could be no use of such reserved power, as it might on all occasions be defeated, and younger children deprived thereby of their provisions. Besides, the heir-at-law here, taking the estate under a particular disposition or singular title, granted in his favour, must take it under the burden in the conditions of that settlement; and the obligation falling under the faculty reserved and exercised must be binding on him, and so cannot challenge his own obligation; and, by accepting and taking under that disposition, there is an implicit consent to the deed. At all events, there is no foundation for setting aside the codicil, on the ground of its being of a testamentary nature, because that is the very ground upon which such a deed, which conveys no land or real estate, is unexceptionable. A testamentary deed conveying moveables is not subject to the law of deathbed. And there is no ground whatever for supposing that it will affect the heir in the indirect way alluded to, by creating a diminution of the fund out of which the testator's debts fall to be paid.

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when one is on deathbed? 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 construed as to create a power in the granter, either to alien or burden his estate on deathbed; 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 deathbed 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 as 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 deathbed is at an end. For an eldest 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 deathbed. 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 deathbed, could not bar him from challenging the deathbed deed."

*Pleaded for the Respondent.*—The power and faculty reserved by the settlement in the present case, cannot give validity to deeds which are incontestibly void by the common law, in competition with the heir-at-law. The respondent, notwithstanding the disposition, is entitled to take the estate as heir-at-law, without regard to the deed, which he never accepted of. It is further established by many precedents, that such reserved faculties cannot take off the objection of deathbed competent to the heir-at-law; though strangers, whose only title is in virtue of such special settlements, are bound by these reserved faculties. That Forbes' case was different from the present, for it was a case of marriage contract, in which the reserved power was to burden even on deathbed. This power was contained in a marriage contract, which preferred the heir male to the granter's own daughters, who were the nearest heirs of line, and who could otherwise have taken the estate. The heir male succeeded as a stranger, and therefore it was justly found that deathbed did not apply. The faculty, therefore, in this case can have no effect, unless executed by the granter at least sixty days before his death.

After hearing counsel, the Lord Chancellor (Camden) said:—

"The bond of provision in favour of the children, I consider established against the *eldest son* (heir-at-law), being executed pursuant to a power reserved in deed of disposition 1748, and codicil 1758. This disposition is accepted by the eldest son, on the faith of which, he received the whole he had to receive before infeftment; and having done so, there was an implied consent on his part to the deed, such as precluded him, as heir-at-law, from reducing the heritable bond of provision on deathbed."

It was ordered and adjudged, that so much of the interlocutor of the 28th February 1765, as sustains the reasons of reduction of the heritable bond for £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.

For the Appellant, *J. Montgomery, F. Norton.*
For the Respondent, *C. Yorke, Al. Wedderburn,*