

No. 43.  
to provide the children in a certain sum, having granted a bond of provision on death-bed to one of them, for a sum something less than the due proportion, but making no mention of the contract of marriage, the Lords repelled the defence of death-bed, and sustained the bond of provision.

*ex capite lecti*, his father having died shortly after granting it.—*Answered*, *imo*, There is a natural obligation on parents and brothers to provide their children and sisters: This is sufficient to support the bond, it being moderate and alimentary, though on death-bed; *2do*, This has an anterior onerous cause, viz. her mother's contract of marriage, where 20,000 merks are provided to the heirs and bairns of the marriage, whereof these are only three; and so 5000 merks are less than the proportion of that sum.—*Replied*, Whatever might have been pleaded, if this bond of provision had expressly related to the contract of marriage; yet here is a simple and absolute bond without mentioning the contract; and the bond being null as *in lecto, quod nullum est nullos sortitare effectus*, and cannot be supported by a cause to which it noways relates; *2do*, The contract of marriage is fully implemented, seeing the bairns of the same marriage gets it, he being the son and heir thereof; and it is alike if any of them enjoy the provision; seeing parents, by their power of division and distribution, may give it to any of the bairns procreate of that marriage, he not going out of that line, nor taking in bairns of another bed.—*Duplied*, When a deed on death-bed can be ascribed to a cause, *ab ante*, preceding his sickness, there law sustains the deed, though it does not expressly mention it; and it is all one as if there were a pursuit intended upon the obligation of the contract, to give her a share of the 20,000 merks, as a bairn's part of gear, being a child of the marriage; and so, without multiplying processes, may be admitted by way of reply, *ad finiendas lites*; *2do*, Though he be the eldest son of the marriage; yet his succession is not by virtue of the contract as heir of provision, but as heir of line.—*Triplied*, Law requires things to be done *habili modo*; but here the defunct *non fecit quod potuit*, in making the bond relate to the contract and its obligation, *et fecit quod non potuit*, by granting a simple bond *tempore inhabile* when on death-bed.—THE LORDS remembered, that they had lately sustained Carnegie of Kinfaun's obligation as a sufficient exercise of his faculty and reserved power, though it bore no express relation thereto; and therefore they, in this case, repelled the reason of death-bed, and sustained the bond of provision, in respect of the antecedent obligation in the contract-matrimonial, though not mentioned therein. See FACULTY.

*Fol. Dic. v. 1. p. 214. Fountainball, v. 2. p. 344.*

\* \* The same case is reported by Forbes, Sect. 2d, *b. t.* No 12. p. 3193.

1707. July 22.

JANET COWIE and MR DAVID HARDIE, her Husband, for his Interest, *against* WILLIAM BROWN of Seabegs, JANET COWIE, and Others.

No 44.

A person's moveables, notwithstanding

JOHN COWIE of Bothkenner having granted, for love and favour, to William Brown of Seabegs, Janet Cowie, and others, *respective*, a discharge and some

assignments of some moveable debts due to him ; Janet Cowie, as one of the five heirs portioners of the said John Cowie, her brother, and as creditor to him in 500 merks, raised reduction of the foresaid gratuitous deeds *ex capite lecti*, with a conclusion of declarator, That notwithstanding thereof, the granter's moveable goods and gear are liable to be affected, both for payment of the debt due by him to the pursuer, and for the pursuer's relief of the other moveable debts to which she might be obnoxious as heir.

*Answered* for the defenders, *1mo*, The pursuer, as creditor, cannot be heard to reduce, except upon the act of Parliament 1621, about deeds *in fraudem creditorum*, which cannot take place here where the defunct was solvent ; *2do*, Neither can she reduce, as heir, the rights quarrelled ; because they relate only to moveables, and none of them burdening or affecting the heritage, and the old statute in the Majesty forbids only the disposing of heritage without consent of the heir ; which, by the rule of *inclusio unius, &c.* argues, that men are at liberty, even upon death-bed, to do what they please with their moveables, except children be wronged of their legitim, or a relict of her share, which is not the case.

*Replied* for the pursuer ; The defunct could not, by any gratuitous deeds on death-bed, which are of a testamentary nature, prejudice the heir, or any of his own lawful creditors ; for, *1mo*, The moveables of the defunct ought to be burdened and affected with his moveable debt, and he could not dispose of his moveables, except in so far as they were free ; it being a maxim in law, That *bona non sunt nisi debitibus deductis*, and so decided, Lady Colvil *contra* Lord Colvil, *vace* SUCCESSION. The pursuer needs not recour to the act of Parliament 1621, she being founded in the common law, whereby legacies can only be of the defunct's free moveables, and if more be legated, they suffer a proportionable abatement. It is not a good defence against all gifts on death-bed, that *debita excedunt bona*, which evinceth that debts are not thereby to be prejudiced : So the LORDS found, that a special legatar could not pursue the debtor, till the executor was called, lest the debts should exhaust even the special legacy, Forrester *contra* Clerk, No 36. p. 2194. ; *2do*, The pursuer has right as heir to crave it may be declared, that no deed on death-bed can directly or indirectly burden or affect the heritage ; and if the persons who have considerable moveable debts were allowed to exhaust their executry by gratuitous deeds, it were easy to evacuate the law of death-bed by exposing the heritage to be swallowed up by the moveable debts.

*Duplied* for the defender ; The cited decisions are not to the purpose ; for though legacies be affected with the burden of debts ; deeds *inter vivos*, though granted on death-bed, are not ; *2do*, Though the heir is to be relieved by the executor of testamentary deeds, that relief is not to be extended to deeds *inter vivos*, though made on death-bed ; for how can the executor's obligation to relieve the heir, which commeneeth but after the defunct's decease, operate *retro*, to reduce an assignation or discharge granted by the defunct to third par-

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ing of gratuitous rights thereof made on death-bed, found liable both to the payment of a debt due by him to his heir, and for the heir's relief of the defunct's other moveable debts, and these rights found reducible *ex capite lecti*, in so far as prejudicial to the heir *qua talis*, or as creditor.

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ties. True, bonds granted upon death-bed are reducible when they come to affect heritage ; because thereby the law is directly eluded : But here the heir is left only under debts contracted by her predecessor in *liege poustie*, by the withdrawing some moveable subjects from her relief, which is a different case.

THE LORDS found the defunct's moveables, notwithstanding of the discharge and assignations on death-bed, liable both to the payment of the debt due by him to the pursuer, and for the pursuer's relief of other moveable debts, to which she might be obnoxious as heir ; and found the foresaid deeds reducible *ex capite lecti*, in so far as the same prejudice the pursuer as heir or creditor.

*Forbes, p. 187.*

1709. *January 18.*

MR ROBERT DARLING, Minister at Eues Kirk, *against* MR JOHN HAY, SON  
TO MR JOHN HAY, Parson of Peebles.

No 45.

An heritable bond being granted on death-bed, in corroboration of a prior bond for the same sum, which prior one carried no obligation to grant further security, the Lords, in a competition betwixt an adjudger and this infester, considered, that though such a bond would not subsist against an inhibitor, unless there had been a previous obligation to grant it ; yet that such privilege was not competent to the heir or his creditor ; and therefore preferred the annual renter.

IN a competition for the rents of a tenement in Linlithgow, belonging to the deceased Humphrey Welsh, betwixt Mr Robert Darling, who had adjudged the same from the heritable apparent heir, and Mr John Hay, who stood infest upon an heritable bond granted to him by Mr Welsh on death-bed, corroborating a former personal bond granted in *liege poustie* ; Mr Darling having repeated a reduction of the said heritable bond *ex capite lecti*, the LORDS repelled the reason of reduction, in respect of the antecedent onerous cause ; albeit it was *alleged* for Mr Darling, That the anterior personal bond was no obligation upon the debtor to grant an heritable bond of corroboration, whereby the heir was cut off from getting relief of that debt out of the executry ; and persons on death-bed could not prejudice their heirs.

*Fol. Dic. v. 1. p. 214. Forbes, p. 300.*

\* \* \* Fountainhall reports the same case :

MR JOHN HAY, and Mr Robert Darling competing for the rents of some lands belonging to Humphrey Welsh, their debtor ;—Hay is infest on an heritable bond. Darling is an adjudger, who objects against Hay's right that it is null, being granted when he was *in lecto et agens in extremis*, and therefore signed by two notaries mentioning his sickness, and he died shortly after ; and as the heir might quarrel it, so can his creditors, as was found Balmerino *contra* Lady Couper, *voce* PROOF.—*Answered*, Ought to be repelled, because] the heritable bond, though granted on death-bed, yet depended on an antecedent onerous cause, being only a corroboration of a prior bond for the same individual sum ; and though a creditor who had inhibited could reduce it, yet the heir can never be allowed to do so, because it depended on an onerous cause *ab ante*.