1736. *July* 14.

The CREDITORS of Sir PATRICK STRACHAN of Glenkindy *against* CHARLES BALDWIN, Esquire.

No 50.
A person on death-bed executed a marriage contract, granting an annuity out of his estate to his wife. Having died insolvent, his creditors in right of the heir, challenged the deed *capite lecti*. Found that the annuity was ineffectual, in so far as it could affect the fee of the estate.

SIR PATKICK STRACHAN, on death-bed, executed a marriage-contract, whereby he granted an annuity of L. 100 Sterling per annum, out of his estate, in which he was infeft, to Elizabeth Auldgood his wife, with whom he had been married for several years; and, on the other hand, the Lady therein disponed to him a small estate she had in England, renouncing likewise in his favours, her parapharnalia, jewels, &c. It was further *provided*, That, in case she happened to succeed to any friend in an estate of a hundred pounds a year, the jointure was to go to her own children; and on this contract she was infeft.

Upon Sir Patrick's death, the Lady married Mr Baldwin, who, during the marriage, commenced a process of poinding the ground, for recovering her annuity; which he insisted in after her death, as having right to the bygones *jure mariti*.

But Sir Patrick's creditors, who adjudged the estate from his apparent heir, brought a reduction of the Lady's provision, as granted on death bed; against whom it was *pleaded* for Mr Baldwin, 1*mo*, That, as the heir could have no title to insist in the objection of death-bed, seeing he would have been excluded by the debts, which exhausted the estate (although the annuity had not been granted); therefore it was not competent to the Creditors, who came in his right, to plead it. 2*do*, Supposing they had a title, yet, as the provision was in favours of a wife, it could not be said to be in prejudice of the heir; seeing it was both onerous and rational, founded not only on the antecedent obligation which lay upon the husband to provide for her, but likewise upon the onerous prestations on her part, which are, *per se*, a sufficient defence against death-bed; as it has been found, That an heritable bond of corroboration of a moveable debt is not reduceable *ex capite lecti*, 18th January 1709, Darling against Hay, No 45. p. 3222. Nay, the marriage itself was an onerous cause for granting the annuity; in consequence whereof it follows, that a jointure given after marriage is not reckoned a donation, but onerous, and therefore not revokeable; or, abstracting from the onerosity of the deed, the natural obligation upon a husband to provide a wife is sufficient to support the annuity. It is true, provisions to children fall under the law; but there is a great difference betwixt the two cases; for, with regard to the first, there is both an antecedent natural obligation and onerous cause, *scil.* The marriage for supporting the provision to a wife; whereas, it is doubtful if there is any natural obligation to provide children; and, for certain, there is no antecedent onerous cause.

But, 3*tio*, A jointure, in such a case as this, where the husband was infeft, and consequently the wife entitled by law to a terce, can never get the name of a deed in prejudice of the heir, if the provision did not exceed a *rationabilis*

No 50. *tertia;* for it is no prejudice to the heir to change the form of the wife's jointure, from that of a terce to a voluntary provision; on the contrary, this annuity might have proved an advantage to Sir Patrick's heir, since it was only to subsist until she succeeded to L. 100 a-year, of which she had then a prospect, by the death of a near relation. And, in questions where a jointure has been quarrelled, as granted without suitable powers, if there might been a terce competent to the wife, the voluntary provision has been sustained to the extent of a *rationabilis tertia;* as in the case betwixt Mrs Borthwick, widow of Hartside, and Borthwick of Crookston. *See* HUSBAND and WIFE.

*Replied* for the Creditors; It is an established point, That a man on death-bed can do no deed whatsoever to the prejudice of his heir; and, as it would have been competent to him to reduce the liferent, it is equally so to the creditors, who have denuded him by their diligence. Nor does it make any alteration, whether the estate is exhausted by other debts or not; seeing every deed, by which it is burdened or alienated, is certainly prejudicial to the heir, who is entitled to his predecessor's estate free of that burden, and to detain it upon paying or transacting the debts contracted in *liege poustie;* so that the donee, by the death-bed deed, is not concerned, whether the reversion that falls to the heir be more or less.

In the *second* place, As Sir Patrick knew he was *oberatus*, and that his estate was not sufficient to answer his debts, it was directly *in fraudem creditorum* for him to give such an exorbitant provision out of his estate, which does not exceed 3000 merks a-year; so that, *esto* it had been granted in *liege poustie*, it was reducible upon the act 1621; for this is not like the case where a contract is entered into before marriage, which is supported by the marriage following upon the faith of it, and where the Lady is presumed ignorant of her future spouse's circumstances. But here this simulate contract is entered into several years after the marriage, when the Lady cannot be supposed ignorant of her husband's situation; and, in so far was *particeps fraudis* in taking any security from him beyond what the law gave her a right to; but there is no occasion here to enter upon such an argument, as this reason of reduction is so plainly founded in law, and which admits of no exception upon account of the rationality of the deed; in so much, that bonds of provision by a father to his children, which are as rational as any provision to a wife, if not more so, as the law secures her in a terce, are reducible *ex capite lecti;* so it was decided July 1721, Sir James Fowlis, No 46. p. 3223.

Neither does the onerosity of a deed exeem it from this objection; for what is more onerous than a sale? Yet it is void when executed on death-bed: *Nemo potest hæreditatem vendere in lecto ægritudinis*, says the law of Majesty; agreeable to which, it was adjudged July 1635, Richardson, No 34. p. 3210. As to the decision in the case of Darling, the *ratio decidendi* there was, That the heir had no prejudice by the deed; how far this was a good reason, the pur-

suers have no occasion at present to enquire, or to enter upon these general topics, as there was here no onerous cause for granting the provision; for the conveyance of the English estate, by the Lady to Sir Patrick, was no more than à *color quæsitus* to make the appearance of onerosity, as it does not appear that she had any right to it herself. No 50.

As to the *third* observation, That the liferent ought to be sustained, at least to the extent of a terce, it falls to be observed, that there is a very wide difference between these two rights, a terce being no more than a right to the fruits; whereas an infeftment of annuity affects the fee. And, although the Lady might have insisted upon her terce, either against the tenants or intromitters with the rents, as may the defender her assignee; yet he cannot, in virtue of the terce, affect the fee of the estate, for rents which she ought to have uplifted during her own lifetime. Nor is there any ground to support the annuity as a security for the terce, as if the heir and creditors had no harm by it; seeing their prejudice is manifest, if a right to the rents is turned into a burden upon the property, and the relict gets liberty to ly still and allow the rents to be run away with, which she had a title to uplift, and thereafter to come and be ranked on the fee to the exclusion of creditors. But it is plain, a person on death-bed has no power to make such a transmutation of right to the prejudice of his heir or creditors.

And, with regard to the clause declaring, That the jointure should cease in case she succeeded to L. 100 Sterling a-year, it is *answered*, That, if one in such circumstances cannot make the plainest bargains for his heir, much less can he make bargains of chance. Besides, even in that event, the Lady was only to give down her liferent to her own children, but still it was kept up against the creditors; so that that clause does not appear to concern the present question.

THE LORDS sustained the reason of reduction, in so far as the annuity could affect the fee of the estate.

*C. Home, No 30. p. 58.*

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1747. *December* 17. LESLIE *against* LESLIES. No 51.

IT is laid down in our law-books, That bonds of provision to younger children are reducible upon the head of death-bed, however rational and moderate: And so it was here adjudged; the bonds of provision were reduced *ex capite lecti*, and the defence, that they were rational and moderate, repelled.

*Fol. Dic. v. 3. p. 171. Kilkerran,* (DEATH-BED.) *No 6. p. 154.*