

A bond granted on a rational consideration, is in a very different situation. It admits not of either of the two presumptions now mentioned. Its rationality, which is a just motive for granting it, excludes them both. There can lie no presumption, that it was elicited by undue influence, and as little that it was done to defraud the heir. There is not the slightest foundation in the spirit of the law of death-bed, more than in the words, to cut down such a deed.

Thus a bond of provision, which is immoderate, and beyond the circumstances of the granter, ought to be cut down; because it either has been elicited by undue influence, or must have been intended to the heir's prejudice. But a moderate bond of provision cannot admit of either of these presumptions: It has a most rational motive; not only humanity and parental affection, but even parental duty; for he that provideth not for his family, is worse than an infidel.

This doctrine takes off the force of the argument drawn from the danger of mens doing irrational deeds when they are incapable of judging for themselves. The authority of the Court is asked to support rational, and not irrational bonds of provision.

It takes off too the force of the argument drawn from the danger of dying personseing teased to execute settlements. It will require little teasing, to get a man to grant rational bonds of provision to his children; and it cannot be called undue influence, to ask a man to do what he ought to do.

It takes off too the force of the argument, that the Court have no power to support such bonds, even though they thought it right to do it. The Court of Session is either a court of strict law, or a court of equity. If it is the former, it cannot cut down rational bonds of provision; because, not being gratuitous alienations of land, they are not within the strict letter of the law of death-bed: If it is the latter, it would appear to be the province of the Court, to beat down bonds of provision when they are exorbitant, and contrary to equity, but to support them when they are moderate, and according to it.

THE LORDS found, That the father could not grant the provisions in question to his younger children upon death bed.'

For Heir, *Burnett, Advocatus, Ferguson.*

Alt. *Jo. Dalrymple, Miller, Lockhart.*

J. D.

Fol. Dic. v. 3. p. 171. Fac. Col. No 55. p. 88.

* * This seems to be the same case with Logan against Campbell, No 53. *supra.*

1759. June 19. JOHN BOGLE of Hutcheson, against DAVID BOGLE.

JOHN BOGLE was proprietor of the two merk lands of Hutcheson; which, in his contract of marriage, he provided to himself, and the heirs of the marriage; whom failing, to his own heirs whatsoever. Of that marriage he had three sons; William, Thomas, and David.

Upon the marriage of William the eldest son, John the father disposed to him the one half, *pro indiviso*, of the foresaid tenement. The father and son

No 55.
The Lords found, that the law of death-bed extended to tacks; and, at the instance of the heir, reduced

No 55.
a tack of 38
years endurance,
granted for an under-
rent, by a
father on
death-bed to
a younger
son.

afterwards possessed each a half of the lands, in a kind of run-rig, for many years, till William let his half to John Reid; and soon after died, leaving a son, John, and several other children.

When old John was in the 74th year of his age, and after contracting the disease of which he died, a tack was executed between him and his youngest son David; whereby he let, for the space of 38 years, the half of the lands which had remained in his natural possession, to David, and the heirs of his body; whom failing, to his other son Thomas, and his heirs and assignees; reserving to himself and his wife the liferent of the dwelling-house and yard. On the other part, David and Thomas were taken bound to pay to their father and his heirs, L. 100 Scots of yearly rent, together with the public burdens effeiring to the half of the lands of Hutcheson.

John, the granter of the tack, died within fourteen days after its date; and was succeeded in the property of the said half of the lands contained in the tack, by John his grandson, then a minor; who, upon his coming of age, brought a reduction against his uncle David, of the said tack, on the head of death-bed; and the circumstances of the granter at the time were clearly proved as above mentioned.

Pleaded by the defender; That it is only alienations of heritable subjects which are reducible *ex capite lecti*, and where the heir can qualify lesion from such deeds; whereas tacks, such as this, being onerous, and acts of ordinary administration, may be lawfully and effectually executed at any time of the granter's life, while he retains a sound judgment.

Answered for the pursuer; The law of deathbed was introduced to preserve the succession to the right heirs; and to this day takes place in the smallest as well as the greatest heritage. It strikes against not only direct alienations, but every device or measure calculated for creating an incumbrance on the heritage prejudicial to the heir. It is admitted, that the proprietor of an estate must, for public utility, retain the administration of it *usque ad supremum vitæ habitum*; but this tack was not a necessary or common act of administration, but a device to create a burden on the heir in favour of the granter's younger children. For, *1mo*, It is granted for a rent below the true value of the ground. *2do*, It is of an uncommon endurance. *3tio*, It comprehends the mansion-house and yard of this ancient though inconsiderable family. *4to*, By the intermixed possession of the lands, the heir cannot let or sell his remaining half to advantage, while the other half is under this lease. And, *5to*, The substitution of one son after another is uncommon, and carries the appearance of a deed of provision by the father for the benefit of his two younger sons. The reduction of such a tack on the head of deathbed is therefore not an extension of that law, but agreeable to the reason and intendment of it, and to the analogy of many decisions; particularly, December 1733, Chrystisons *contra* Kerr, No 49. p. 3226; and 15th November 1757, Children of Hugh Campbell, No 54. p. 3232.

Replied for the defender, *1mo*, The tack is granted for an adequate rent, as it is equal to what Reid paid for the other half of the lands, or very little short of it. *2do*, Experience hath proved the inconveniency, both to master and tenant, of limiting tacks to a short period of time; and the utmost length the objection to this tack's endurance could go, would be to restrict it to such a shorter period as might be thought proper. *3tio*, There is properly no mansion-house on either half of the lands, but only an onstead for each farm; and the pursuer may, if he pleases, have his choice of the two. *4to*, The two halves of the lands have been always possessed as separate farms: so the inconveniency is not greater than formerly; and could not be remedied by this reduction, as both lie run-rig with other grounds. And, *5to*, The substitution of Thomas, the granter's other son, cannot affect this tack, more than if it had been granted in such terms to perfect strangers. Nor does the decision, *Chrystisons contra Kerr*, which is a single one, apply to this case; as there the tack was given on deathbed of the whole of the granter's estate for three nineteen years, which was considered as a species of alienation.

'THE LORDS reduced the tack; and decerned.'

Act. *Miller*.

Alt. *Jo. Dalrymple, Lockhart*.

Clerk, *Pringle*.

Fol. Dic. v. 3. p. 171. Fac. Col. No 187. p. 334.

1797. December 5.

MARGARET and AMELIA MURRAY, *against* The TRUSTEES of MARGARET BORTHWICK.

JOHN SCHAW died on the 1st September 1770, leaving a widow, Margaret Borthwick, and two daughters, Janet, married to William Murray, and Margaret, the wife of Dr James Feild.

In 1769, John Schaw had executed a trust-settlement, by which he left his wife L. 2000, and the liferent of the greatest part of the remainder of his property. He also left L. 1500 to his grand-children by each of his daughters, payable at his wife's death.

These legacies were qualified by the following clause: 'Reserving always full power to the said Margaret Borthwick, my spouse, at any time of her life, after my decease, by a writing under her hand, to revoke and alter the provisions hereby conceived in favour of my said grandchildren, or otherwise to divide and proportion the same amongst them, in the same manner, and as freely in all respects as I could have done myself, if in life.'

The deed further provided, that 'upon the decease of the said Margaret Borthwick, my spouse, I do hereby appoint the whole free residue of my estate, real and personal, which shall then remain, after payment and satisfaction of my debts, funeral-charges and expenses, and after deduction of the aforesaid L. 2000 Sterling provided to my said spouse, in case she shall have disposed thereof by a writing under her hand; as also after payment of any

No 55.

No 56.
Bonds secluding executors fall under the law of deathbed.