

available ; which was said to be the case of Inglis *contra* Hamilton, 4th December 1733, No 106. p. 3827.

No 112.

But, upon advising bill and answers, it was *argued*, That the contract did not even imply a renunciation of the law of death-bed, as it only discharges the father of any obligation he might be under to his son by his mother's contract of marriage, or otherways ; and renounces all claims that might arise from any obligation of the father's at his death, but by no means bars the son from succeeding to his father in any estate which he should happen not otherwise to dispose of, and consequently, the son must be entitled, upon any legal ground, to quarrel every deed whereby he is debarred from that succession ; and *separatim*, that even the most express antecedent consent of the son could not have conferred on the father a power of disposal of his heritage on death-bed ; for, that though an onerous cause on the part of the father may support his death-bed deed, as where he is previously obliged to dispo, yet no clause, however onerous, can be pleaded in support of the son's renunciation of the law of death-bed, as such renunciation is a *non obstante* to the law of the land.

THE LORDS altered their former interlocutor, and sustained the reasons of reduction. See No 49. p. 2304.

*Fol. Dic. v. 3. p. 170. Kilkerran, (DEATH-BED.) No 4. p. 152.*

1745. July 19. JANET PATERSON *against* AGNES SPREUL.

JOHN PATERSON died of a decay April 1731, leaving issue, two children, a daughter of a first marriage and a daughter of a second. Being upon death-bed he executed a settlement of his whole heritable and moveable estate, to his wife Margaret Spreul in liferent, and his two daughters equally in fee. And he further provides, in case of the decease of his youngest daughter before majority or marriage, that her mother should have an adjudication upon a certain estate named in the deed, at her own disposal.

The younger daughter having died soon after the father, the elder, who became heir in the whole, brought a reduction of her father's settlement, so far as concerned the alienation of the adjudication, being an heritable subject, in favour of the relict. The defence made for the relict was, that the deceased having settled upon his heirs all his moveables, of which he had the disposal even upon death-bed, the heir who is a benefiter by this disposition cannot quarrel the alienation of the heritable subject, which amounts not to the value of the moveables.

This defence, it was *answered*, resolves into a proposition which hitherto has not got the sanction of practice ; to wit, that, to the extent of the moveables left to the heir, a man upon death-bed may alien any part of his heritage. This seems not consistent with the maxim, that the law denies liberty to dispose of heritage upon death-bed. Such a deed is null and void, and can infer no war-

No 113.

In a deed upon death-bed, a man having settled his moveables upon his heir, an adjudication, conveyed to his wife in the same deed, was supported against a reduction upon the head of death-bed, the moveables being of greater value than the adjudication.

No-113.

randice. If so, there is nothing to bar the pursuer from setting aside this deed altogether, so far as regards the heritable subjects, as being *ultra vires*, leaving it to subsist so far as the granter had power.

When this cause was advised, Arniston and Elchies were absent. The President was clear, that the heir could not challenge the disposition being *super tota materia* in her favour. He observed, that the law of death-bed was of old a salutary regulation, when popery and superstition reigned in Scotland; but these having happily lost their influence, that it was rational rather to abridge than to extend this law, being contrary to the great law of nature, *uti quisque legasset de re sua, ita jus esto*. And it carried by a plurality to pronounce the following interlocutor:

‘ Find, That there being moveable subjects, which the defunct was at liberty to have disposed of as he pleased, conveyed by the disposition to the heir, and that these moveables exceed in value the adjudication conveyed to the relict, the disposition is not in prejudice of the heir; and therefore, that she cannot challenge the same upon the head of death-bed.’

This judgment might be right, had not the heir been also next of kin. But to bar a challenge of death-bed, it certainly would not be sufficient to say, that the heir being also next of kin is in possession of the moveable estate, as well as of that which is heritable. Now this, in effect, is the present case. It cannot be thought that the heirs were any way benefited by being disponees to the moveables, when they would have succeeded to the moveables though no disposition had been granted.

*Fol. Dic. c. 3. p. 171. Rem. Dec. v. 2. No 73. p. 114.*

\*.\* Kilkerran reports the same case.

JOHN PATERSON merchant in Glasgow was twice married, and of each marriage had an only daughter. In the year 1731, while on death-bed, he executed a settlement of the estate, heritable and moveable, upon his two daughters, Janet of the first, and Margaret of the second marriage, with the burthen of the liferent of his wife Margaret Spruel; and further provided, in case of his daughter Margaret's decease before her majority or marriage, that her mother, Agnes Spruel should have the portion she brought at her own disposal, which was the sum of L. 1000 Scots secured upon her father's estate of Blahairn by adjudication.

Margaret having died soon after her father, Janet, daughter of the first marriage, brought a reduction, on the head of death-bed, of the faculty given to the wife to dispose of a sum which stood secured by adjudication.

In this reduction, THE LORDS found, ‘ That there being moveable subjects, which the defunct was at liberty to have disposed of, far above the adjudication in question, conveyed by the disposition to the heir; the disposition was

‘ not in prejudice of the heir, and therefore she could not quarrel the same on the head of death-bed.’

No 113.

And this notwithstanding it was argued, that though this judgement might be just, had the reason of reduction only been, that the faculty to dispose of the heritable subject was given in a testament, yet the case was different, where the reason of reduction was death-bed: For, as by the law of death-bed, the defunct is presumed *non sanæ mentis* so far as concerns the disposal of heritable subjects; the question was not, Whether, by the disposition, as comprehending both heritage and moveables, the heir was prejudiced? but, Whether the disposition, so far as it conveyed a faculty to dispose of heritage, was not void, as granted by a person who, *præsumptione juris*, was incapable *quoad* that subject? Which the Lords had no regard to, as an improper conception of the law of death-bed; which though it may proceed on the presumption of incapacity, only restrains deeds in prejudice of the heir, who therefore cannot take by a deed, and, at the same time, reprobate a part of the same deed.

*Kilkerran, (DEATH-BED.) No 5. p. 153.*

\* \* \* D. Falconer also reports the same case..

JOHN PATERSON merchant in Glasgow, by a deed on death-bed, disposed his whole effects, heritable and moveable, to Janet his daughter, and thereby gave to Margaret Spruel his wife 1000 merks, being her tocher, which she conveyed to her brother and sister.

As the tocher had been secured by an adjudication, it was *alleged* it could not be conveyed on death-bed; but THE LORDS found that it was not the precise sum received in tocher and heritably secured that was given, but generally 1000 merks: However, they determined also this other question, How far a conveyance of the adjudication might be effectual in this case, being alleged to be *legatum rei alienæ*, which the executor, who was also heir, was obliged to make good.

*Pleaded* for the heir; That on death-bed a man cannot dispose of heritables, and she is not obliged to make this good out of the moveable succession, which she might have taken up at law, without using the disposition; besides, this burthen is not charged on the moveables, but an heritable subject is disposed, with regard to which, the presumption is, that the testator was incapable of judging.

*Pleaded* for the defenders, claimers of the legacy; that when a person leaves a thing which he cannot dispose of, his executor must make it good, especially when he is not ignorant of his own want of property or power; here he was master of his moveables, which he could have wholly disposed of, and yet left them to this pursuer, who cannot divide the deed, and say part of it is to her prejudice, when the whole is so much to her advantage.

No 113.

THE LORDS, 20th June, found, 'That there being moveable subjects, which the defunct was at liberty to have disposed of as he pleased, far above the value of the adjudication referred to in the debate, as conveyed in the disposition to the heir, that the disposition was not in prejudice of the heir, and that therefore she could not quarrel the same on the head of death-bed.'

*Pleaded* in a reclaiming bill, That this interpretation would elude the law annulling deeds on death-bed, which infer no warrandice, and therefore are not to be made good; and there is no difference betwixt the case of a person burthening his heir by a deed on death-bed, to whom he lets his moveables fall *ab intestato*, as being also his next of kin, and this, where they are disposed; since it is in the power of an executor next of kin to neglect the disposition in his favours, and take up the effects *ab intestato*.

*Answered*, There is a manifest difference betwixt these cases, as the executor named, could not, by neglecting the disposition and setting up another title, free himself of the burthens therein L. 29. t. 4. D. *Si quis omissa causa testati*: And the burden on death-bed is at worst *legatum rei alienæ*; which though ignorantly done, behoved to be made good to a wife L. 10. Cod. *de legatis*, 2d December 1674, Cranston against Brown, *voce* QUOAD POTUIT NON FECIT.

THE LORDS adhered.

Act. *H. Home & Wallace.* Alt. *A. Hamilton & W. Grant.* Clerk, *Gibson.*

*D. Falconer, v. 1. p. 123.*

## S E C T. XV.

## How the Sixty Days are to be computed.

1793. December 10.

Sir JOHN OGILVIE, and Others *against* CATHARINE MERCER, and Others.

No 114.

A deed reduced as made on death-bed, where the granted survived its execution fifty-nine days and three hours.

ROBERT MERCER, on 22d February 1791, at eight o'clock in the evening, executed a deed of entail of his lands of Lethindy, in favour of Catharine Mercer his niece, and various substitutes. He died on the 22d April thereafter, betwixt ten and eleven o'clock at night.

Mr Mercer, when he executed the entail, had contracted the disease of which he died, and he did not afterwards go either to kirk or market.