dispose of the conquest, but for onerous causes; yet others thought, that he might dispose thereof, without fraud, and for rational causes and considerations; as in the case in question, upon the considerations above mentioned, in favours of a dutiful wife; and it was so found by the major part; albeit others thought indeed, that the husband, notwithstanding of the foresaid clauses, might provide a second wife, and his children by her, out of the conquest during the first marriage, if he had no other estate, and the provisions be competent; but that, in the case in question, the deed foresaid was a donation, which the children of the first marriage, being creditors by the said clause of conquest, might question. No 11.

But the LORDS found, That if the said deed was on death-bed, the defunct having not only granted an heritable right, but having obliged himself, his heirs and executors, to pay the said sum, his executry and deads-part would be liable to the said obligement; even as to moveables acquired during the first marriage, which may appear not to be without difficulty; seeing, as to the conquest, during the first marriage, there could be no deads-part, the same being provided to the children of the first marriage, as said is.

Though the heir of the marriage may renounce to be general heir, and may take a course to establish the conquest, either in his own, or in the person of an assignee to his behoof, and so not be liable to the defunct's obligement without an onerous cause; yet it is to be considered, whether, if they should be served heirs of the marriage, they would be liable to the same, seeing all heirs represent the defunct *suo ordine*, and are *eadem persona?* Or if they be liable only to the defunct's deeds and obligements for onerous causes?

Item, If such provisions be not in favours of the heirs of the marriage, but only of bairns; whether the bairns will be liable to the defunct's debts? And if all the bairns will be liable to the same, as heirs of provision?

It is thought, If infeftment follow in favours of the father and the bairns of the marriage, they must be heirs of provision to him; and, that all the bairns (if it be not otherwise provided) will be heirs of provision.

But these points did not fall under debate. *In presentia.*

Act. *Cuningham.* Alt. *Dalrymple.* Clerk, *Hamilton.*

Dirleton, No 359. *p.* 174.

1708. *July* 19.

KATHARINE EDMONSTOUN, and Mr STEPHEN OLIPHER, her Husband *against* JAMES EDMONSTOUN.

No 12.
A bond of provision, granted to a child by her father on death-bed, who, by his

JAMES EDMONSTOUN having granted a bond of provision to his younger children, and the portions of the deceasing to accresce to the survivors; Katharine Edmonstoun, one of these children, with the concourse of Mr Stephen Olipher

No 12.
contract of marriage with her mother, was bound to provide the children of the marriage to the fee of a certain sum, was sustained, as being, in effect, but a division of the sum and implement of the contract.

her husband, pursued James Edmonstoun, her eldest brother, as heir to his father, for payment of her own provision of 5000 merks, and a proportion of her younger brother's, falling to her through his decease.

Alleged for the defender; Absolvitor; because the bond of provision was granted on death-bed, and he had raised reduction *ex eo capite*, which he repeated by way of defence.

Replied for the pursuer; That the father was bound, by his contract of marriage, to employ 20,000 merks in favours of himself and his future spouse, in conjunct-fee and liferent; and of the heirs and bairns, one or more, to be procreated betwixt them in fee: And the bond of provision was nothing in effect but a division, which the father has always the power of even *in articulo mortis*.

Duplied for the defender; *Utcunque* the death-bed deed, had it related to the obligement in the contract as its antecedent onerous cause, might have subsisted; yet, not having any relation thereto, but being in the terms of a separate provision, and made on death-bed, it cannot stand in prejudice of the heir. Nor is it enough for the pursuer to restrict the import of it to what might fall to her share of the 20,000 merks by her mother's contract of marriage; because, the death-bed deed being null in law, can have no effect at all, by the rule *quod nullum est*, &c. Besides, there was no faculty of division of the 20,000 merks reserved to the defunct, nor did he exerce any such faculty; on the contrary, *hoc non voluit*, but only that the death-bed bond of provision should be binding, *quod facere non potuit*.

The Lords sustained the bond, and repelled the defence of death-bed; in respect of the anterior onerous cause by the contract of marriage.

Fol. Dic. v. 1. *p.* 211. *Forbes, p.* 126.

No 13.
A person was bound, in his contract of marriage, to provide the conquest to the heirs of the marriage. This found to hinder him from disposing of his moveable estate on death-bed.

1722. *February.* Robert Maxwell *against* Neilson of Barncailly.

The deceased Robert Neilson of Barncailly, in his contract of marriage with Elisabeth Stewart, having provided the conquest to the heirs of the marriage, granted a legacy upon death-bed of 500 merks to Robert Maxwell.

Death-bed being *objected*, it was *answered* for the legatar, The law of death-bed extends not to moveable subjects, which any proprietor may freely dispose of upon death-bed, unless in so far as he is restricted by the wife and children; the law has thought it proper, only to tie up people absolutely as to their heritable subjects, that they cannot alienate these upon death-bed, leaving moveables more free, as generally of less consequence: And the law of death-bed does not consider the heir *simply*, if he be prejudged, but if he be prejudged in an heritable subject; and therefore the moveables will be liable for this legacy,