

No 44.

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 assignments 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*.

It is true, in the mutual relief betwixt the granter's heir and executor, it is competent for the heir to say, this debt cannot burden my heritage till the executry be exhausted, and it must, *primo loco*, affect the moveables; but *quoad* the creditor, both heir and executor, were equally liable to him.—THE LORDS considered such a bond would not subsist against an inhibitor, unless there had been a previous specific obligation to grant it, but that was not competent to the heir, where it was supported by a clear bond for onerous causes, and granted *in liege poustie*; and therefore preferred Hay, the annualrenter. There was likewise a nullity objected against Darling's adjudication, that it did not bear the executions of the special charge to have been produced; but they being now in the clerk's hands, the LORDS did not much regard this nullity; neither was it needful, seeing the preference stood on the first point.

No 45.

*Fountainhall, v. 2. p. 482...*

1721. July. SIR JAMES FOWLIS of Colington: *against* HIS SISTERS.

THE now deceased Sir James Fowlis of Colington, upon death-bed, granted to each of his two daughters, Elizabeth and Mary, bonds for the sum of 4000 merks, as their provision and portion natural; of which bonds the now Sir James Fowlis of Colington, son to the defunct, intented reduction upon the head of death-bed; and it was *pleaded* for him, That the law of death-bed extends to all deeds whereby the heritage can be evicted, 7th January 1624, *Schaw contra Gray*, No 32. p. 3208; and 1st July 1637, *Riddel contra Richardson*, No 35. p. 3212; where the LORDS repelled the allegiance, and sustained the reason of death-bed; for they found that a father could make no provision on death-bed in favours of his bairns, albeit unprovided, which might burden the heir with payment thereof; and that he could do nothing, but in so far as he might do in his own part, in-law belonging to him, in so far as concerned his moveables: Which is a decision directly in the case.

No 46.

Bonds of provision on death-bed not sustained.

The defenders *answered*; That the provision of children being *debitum natura*, bonds of provision granted in satisfaction of that debt, ought to be sustained, in so far as they are suitable to the condition of the children, and of the father's estate. The rule is, Wherever there is a preceding debt, a party on death-bed may grant a bond, or anailzie land: And the law has made distinction, whether the debt had its rise from any antecedent civil, or natural cause; both being equally binding upon the heir, who, by our law, would be obliged to aliment the younger children, as well as to pay debts contracted by bond or otherwise, to extraneous persons in *liege poustie*: And here the father, by granting the bonds of provision, has in effect done no more but regulated the fund of the aliment; which, when exorbitant, is subject to rectification of the judge, but if moderate, with respect to the circumstances of the estate and rank of the family, there can be no reason for the heir to reclaim, or allege that such pro-