

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 obligation 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. F. 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.

equally as if they were not provided to the heirs of the marriage; or being provided to the heirs of the marriage, as if the legacy had been granted in *liege poustie*, by way of disposition *inter vivos*. And thus it was determined, Mitchell *contra* Children of Littlejohn, 16th June 1676. No II. p. 3190.

No 13.

*Repleit* for Barncailly, heir of the marriage, That the law of death-bed takes place against every deed done upon death-bed, to the prejudice of the heir; and that indifferently, whoever be the heir, whether of line, tailzie, or provision; and whatever be the deed, whether an alienation of subjects in themselves heritable or moveable.

'THE LORDS found, That the clause of conquest in the contract of marriage, did hinder the father to dispose on his moveable estate upon death-bed.'

*Fol. Dic. v. I. p. 212. Rem. Dec. v. I. No 32. p. 64.*

1738. December 16.

CAMPBELLS *against* CAMPBELLS.

No 14.

ONE having become bound in his contract of marriage to provide a certain sum, and also the conquest during the marriage, to himself and spouse in conjunct-fee, and to the children to be procreate of the marriage in fee, did purchase an estate during the marriage, taking the rights thereof to himself, his heirs and assignees, and upon death-bed did execute a deed, settling both heritable and moveable estate upon his eldest son, with the burden of certain provisions, in favour of the younger children; in a reduction of this settlement, at the instance of the younger children, upon the head of death-bed, the LORDS were unanimous, that seeing there was no actual settlement of the conquest in terms of this obligation, to constitute the children heirs of provision, they had not the privilege of death-bed; that they were constituted creditors by this obligation, and in whatever way a service in general as heir of provision or conquest may have crept into our practice, it is, strictly speaking, inept; such a thing, while the father is alive, cannot be, and if he died without implementing, the obligation is purified in favour of the children, and they have a direct action against their father's representatives to make over the conquest in their favour. See APPENDIX.

*Fol. Dic. v. I. p. 211.*