1751. *February.* CRAWFURD *against* JOHNSTON and Others.

No 52.
A father cannot on death-bed, vary a nomination of curators made in *liege poustie.*

FOUND, That as a father cannot name curators to his children on death-bed, so neither can he on death-bed vary a nomination, which he had made in *liege poustie*, by a new nomination, only a part of those formerly named; though he might have thrown the former nomination into the fire.

Fol. Dic. v. 3. *p.* 171. *Kilkerran*, (DEATH-BED.) *No* 7. *p.* 154.

1757. *February* 25.
AGNES LOGAN and her CHILDREN *against* ANDREW CAMPBELL.

No 53.
Found, that provisions to younger children, even moderate and rational, were challengeable by the heir if granted on death bed.

PROVISIONS to younger children extremely moderate and rational, being granted on death-bed, the tutors to the heir thought it their duty, much against their inclination, to challenge the same. According to the late practice of the Court of Session, with respect to younger children unprovided, of modifying such aliment as to afford some stock out of the savings, it was made appear, that the heir was really at no loss by the provisions granted to the younger children in this case. The case was so clamant that it produced a hearing in presence. Humanity and equity pleaded for the provisions. But the current of decisions lay the other way. Without gathering all that was said on either side, it will give more satisfaction to follow out one train of reasoning. The argument for the heir was very simple, that he cannot be hurt by any deed done by his predecessor on death-bed. The argument for the younger children, in the best light I can put it, is what follows:

To draw the attention of the reader, I must premise that this point is of greater consequence than one at first is apt to imagine. So averse are men to think of death, that an ultimate settlement of their affairs is generally postponed from time to time without end. Daily instances accordingly of children left unprovided, or provided no sooner than on death-bed. The greater the fortune, the greater chance for such event; persons in opulent circumstances having generally a peculiar aversion to death.

The law of death-bed, as set forth in the statutes of King William, cap. 13. goes no further than to prohibit gratuitous alienations of land on death-bed. And this is made more plain in Reg. Mag. L. 2. cap. 18. § 7. &c. There it is laid down, that in *liege poustie* a man may gift a reasonable or moderate portion of land to whom he pleaseth. But that he cannot do this on death-bed; for, says the law, 'Where a man in deadly sickness maketh an alienation, which in 'health he did not think of; the same is presumed to be done through trouble 'of mind, and not deliberately, nor by good advice.'

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So strictly has this law been interpreted, that even in more recent times the doubt was stirred, whether the law of death-bed strikes against the alienation of an heritable bond which is not completed by infeftment. It was *urged*, That our ancient law-books talk of *terræ et tenementa* only. The plurality, however, moved by the reason of the law just now mentioned, were of opinion that this case falls under the law of death-bed; 16th January 1581, Dickson, No 27. p. 3205.

Admitting, then, that the prohibition to alien on death-bed extends to all heritable subjects as well as land, it is clear that there are no words in the law which prohibit a man on death-bed to contract debt, whether onerous or gratuitous; for alienating a man's property, and contracting debt upon it, are very different acts. The power of borrowing money upon death-bed was never disputed. And whatever objection may lie against a gratuitous bond granted in that situation, the objection plainly does not arise from the words of the law. This observation demands peculiar attention, because great weight will be laid on it.

A law founded on utility, and which promotes the common interest, may no doubt be extended beyond the words, to fulfil the purpose of the legislature. And, therefore, whether the law of death-bed ought to be so far extended by a court of equity as to annul bonds of provision to children, is the precise question that remains to be discussed.

That the law of death-bed ought to be extended against bonds merely gratuitous, seems pretty obvious. For a law, prohibiting alienation upon death-bed, as far as prejudicial to the heir, could never intend to lay the estate open to be swallowed up by gratuitous bonds. And indeed, were this permitted, the law of death-bed would avail very little. A bond, merely voluntary or gratuitous, granted on death-bed, will be presumed, in terms of the law, not to have been done deliberately or by good advice. It will be presumed to be either the effect of undue influence upon a man in trouble of mind, or of an unjust purpose to defraud the heir; and in either view it ought to be annulled.

A bond granted upon a rational consideration is in a very different condition. It admits not of either of the two presumptions now mentioned. Its rationality, which is a just motive for granting, excludes both. There can lie no presumption that it was elicited by undue influence; and as little that it was done to defraud the heir. I give for an example, a bond for 10, 20, or 30 pounds, given in remuneration to an old servant who has done faithful duty to his master, in peace and war, in health and sickness, for many years. I cannot find the slightest foundation in the spirit of the law of death-bed, more than in the words, to cut down this deed.

And this leads directly to the case in hand. 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

No 53. humanity and parental affection, but even parental duty; for he that provideth not for his family is worse than an infidel.

A separate consideration may be added, peculiar to a bond of provision granted to children. With what countenance can it be pleaded, that such a bond, when moderate, is prejudicial to the heir? Upon any principle of humanity or justice it assuredly is not so. And indeed it must raise one's indignation to hear it coolly maintained, that the heir, who succeeds to all, suffers a prejudice by being burdened with moderate provisions to his brothers and sisters; when without such provisions they would be abandoned to all the bitterness of want.

A man on death-bed can grant an heritable bond of corroboration, and can, by a charge of horning, convert an heritable to a moveable debt. Every step of this kind is indirectly providing for his younger children. What justice, or what sense, can there be in prohibiting him to provide for them directly.

Upon this subject I must observe historically, that our law formerly, directed by the general bias of the nation, was out of all measure favourable to the heir; and through the same bias the law of death-bed was undoubtedly stretched too far. This not only accounts for our old decisions upon this head, but is also a reason for an alteration. Our manners and customs are changed: Commerce and manufactures employ those whose best occupation formerly was idleness, as they were frequently occupied in broils and civil dissentions: Our younger children have thus become the riches of our country, and, in opposition to the heir, ought now to be the favourites of law.

An argument was urged from the bad consequences of exposing persons on death-bed to undue solicitation. And indeed the argument is weighty with respect to the moveable estate, which, without limitation, can be aliened, not only upon death-bed, but even *in extremis*. But as for provisions to younger children, supposing them moderate, I cannot discover any bad consequence. No solicitation can be wrong which is confined to an end so rational. And if there be any excess in such provisions, it is subjected to the modification of the Court; which a settlement of moveables is not, however whimsical or irrational.

It was agreed on all hands that the provisions were moderate. Yet a great plurality voted against the provisions, influenced by practice and the course of decisions, without piercing deeper.

Sel. Dec. No 126. *p.* 178.

No 54. A father cannot, on death-bed, grant bonds of provision to younger children, to the prejudice of the heir.

1757. *November* 15.

Younger Children of Hugh Campbell, *against* His Eldest Son.

Hugh Campbell purchased the lands of Pencloe, of 600 merks yearly rent, from his brother Andrew, for 17,600 merks: He paid the price, and received a disposition; but no infeftment followed. This purchase exhausted all the fortune he had.