

No 33.  
 clinique was  
 for furnishing  
 made to his  
 father. They  
 refused to  
 sustain the  
 bond for  
 these, except  
 it were alled-  
 ged, that the  
 defunct was  
 heir or exe-  
 cutor to his  
 father, where-  
 by law would  
 have obliged  
 him to pay  
 the sums.

said parties having compted, finding it to amount to this sum, he then made and subscribed this bond ;—the LORDS found this allegiance relevant, to sustain the bond, albeit it was made on death-bed, the forefaid real furnishing being proven to have been really made, equivalent to the said sum, and which the LORDS found probable by witnesses, the furnisher also giving his oath upon the truth of the furnishing after probation. And it being also *alleged* for the other bond, containing other 500 merks, that the creditor had recovered this bond, for satisfaction of the like sums owing before to him, and particularly which he had furnished to the defunct's father, which then the defunct took on him by his bond to pay ;—the LORDS found this allegiance relevant for so many of the sums, as the defender should prove furnished to the defunct's self, but repelled that part of the allegiance, anent the furnishing made to the defunct's father, for the which they would not sustain the bond, except it were alleged that the defunct was heir or executor to his father, whereby in law he would have been liable to pay sums addebted by his father to this defender.

Clerk, *Gibson*.

*Fol. Dic. v. 1. p. 214. Durie, p. 645.*

1635. July 30.

RICHARDSON and the LORD CRANSTON RIDDEL *against* SINCLAIR.

No 34.  
 A sale of  
 lands, though  
 for a reason-  
 able price,  
 was reduced  
*ex capite lecti*.

UMQUHILE Sir Robert Richardson, father to the pursuer, having disponed his lands of Pencaitland to John Sinclair, heritably and irredeemably, for the sum of four score and five thousand merks, whereof 30,000 merks were appointed to be paid to the said Sir Robert's eldest daughter, and 32 or 33,000 merks were appointed for payment of debts owing to his creditors, and the rest was divided among the rest of his bairns, viz. 7000 merks to his second son, other 7000 to his second daughter, and the rest, viz. about 10,000 merks to his eldest son ; and the said John Sinclair, being thereupon infest, holding of the superior, the said Sir Robert thereafter, about the space of one year or thereby dies ; before whose decease, the said John intents an action of declarator against the said umquhile Sir Robert in his lifetime, and against the said pursuer, his son and apparent heir, to hear it found and declared, that the undoubted heritable right and property of the said lands pertains to him, by virtue of the said alienation ; after execution of the which summons, and citation of the said parties, the said Sir Robert died before any further process was deduced in that action ; after whose decease, the said Sir Robert his son, dispones his right of the lands to my Lord Cranston Riddel, and his right to reduce John Sinclair's securities ; and the said Sir Robert being served and retoured general heir to his father, the said Lord Cranston Riddel pursues for reduction of the said contract and disposition made by the father to the said John Sinclair, upon this reason, as done *in lecto ægritudinis* to the heir's prejudice ; in which action, the retour being quar-

relled, as being done after advocation, and after the judge was discharged to proceed; this allegiance was repelled, in respect that the judge was, by the letters of advocation, only discharged to proceed, ay and while John Sinclair was warned to the day of the service; and the pursuer offered to prove, that he was lawfully warned and cited before the day of the service, to compare to the service, in respect whereof, that being proven (as it was admitted by the LORDS to probation) the retour was sustained. And it being further *alleged*, That this right made to the Lord Granston Riddel, was null, and could not be sustained to produce this pursuit, but the party ought to be assoilzied therefrom; because, by act of Parliament, it is declared, that it is not lawful to the LORDS of Session to buy pleas or actions, or rights pleadable; and this action was of this nature, in respect of the nature of this process, and that the defender had intented his declarator before the right was made to the Lord Granston Riddel. This allegiance was also repelled, for the said declarator being only execute, but never called in judgment, nor other process deduced thereon, it was found, that the buying of the right libelled by the Lord Granston Riddel, was not of a litigious right, which came under the compass of that act of Parliament; also, the LORDS found, that the certification of the act of Parliament being express, that such buyers of pleas should be deprived of their offices, it ought not to be extended further, as to the tinsel of the plea, but left to the defender to pursue for depriving of the pursuer: But the act of Parliament declares, that it shall not be lawful to buy any plea, *ergo* it would appear that if it be not lawful to buy, therefore that such writs are not lawful, and consequently, that such unlawful writs are null, and cannot produce action, but it was repelled *ut supra*. Also, the LORDS found the reason of reduction relevant, although it was *alleged*, that the said alienation could not be quarrelled as done *in lecto ægritudinis*, seeing the maker thereof was not affected with any such sickness as might be called *lectus ægritudinis*, and which was an impediment *rebus agendis*, and which is called, in law, *morbis sonticus*, for his disease was lent sickness, which kept him continually in one estate, by the space of two year together before his decease, viz. a palsy in the one arm and leg; likeas, this alienation was made a year or thereby before his death, at the time whereof, and continually thereafter, he had sound and perfect judgment, and did all his affairs as any other healthful provident man used to do; and, as he himself used, before his sickness, both in directing of his business, guiding of his rents, subscribing of his writs, and in his diets, at bed and board; likeas, this alienation being made for the causes within written, of satisfying of his creditors, and of his eldest daughter, which were done, contracted, and perfected, before ever he contracted any sickness, and when he was in full and entire health, and the rest of the sums appointed to his bairns unprovided, which was a lawful act to do, so long before his death, his eldest son being also provided to the rest of the sum of the price, and whose provision the father could not enlarge, in respect the price would extend to no more; and also, that the eldest son had so estran-

No 34.

ged and misbehaved himself to his father, that his father with difficulty was moved to provide any thing to him : And also, that the defender was content yet to supply and pay, what more price the judge should think expedient should be paid for the lands ; all which were rejected by the LORDS, and the reason sustained, seeing the party came not out to kirk and market after the alienation, without which had been done by him, the alienation was found could not be sustained ; neither was it respected, that the party was of sound judgment ; for they found, that the sickness of the body, albeit of never so long endurance, and albeit the judgment was whole, if the party continued unrecovered, and came not to public places, but died thereof, was a just cause to reduce the alienation, although made also for preceding just causes ; which the LORDS found not enough to sustain the same in prejudice of the heir, as said is ; but the reducer was ordained to repay to the defender, the just sums for which the alienation was made, and truly debursed.

Act. *Advocatus.*Alt. *Nicolson & Craig.*Clerk, *Hay.**Fol. Dic. v. I. p. 215. Durie, p. 766.*1637. July 1. LORD CRANSTON RIDDEL *against* RICHARDSON.

No 35.

Found, that a father on death-bed cannot make any provision in favour of his children, altho' unprovided, which might burden the heir with payment, and that the maxim was universal for all, as well children as strangers.

UMQUHILE SIR Robert Richardson of Pencaitland, having given a bond in favours of his second son, ' obliging him and his heirs to pay to the said second son, 8000 merks for his provision, and portion-natural, and for help of his living,' which bond being made by him, he then being sick of a palsy, whereof he lived a year and an half after the date of the said bond, which being desired to be reduced at the instance of the heir of the maker, viz. his eldest son, and at the instance of the Lord Cranston Riddel, to whom the said heir had sold the lands, whereto he succeeded by his father, and so as he whose lands might be distressed upon some pretext, through the said bond, upon this reason, that the said bond was null, being made by the defunct upon his death-bed, to the prejudice of his heirs. And the defender *alleging*, That this bond being granted by the father to his lawful bairn, who had no other benefit provided to him by his father, and who had no other thing to succeed to by his decease, neither moveable nor immoveable, but this bond, it ought not to be found under the compass of this reason, as a null deed, specially where the maker lived so long after the date thereof, and continued in this lent sickness, which sickness cannot be found, and was not of itself of the nature of *morbus santicus*, and which is not *impedimentum rebus agendis*, and which cannot be an impediment to hinder the father, to provide his children to their natural portions, according to his estate ; at least the quantity for which it may be sustained against the heir (there being no other moveables pertaining to the defunct the time of his decease) ought to be modified and determined by the LORDS ; for the which quantity so to be modified, the bond ought to be sustained, and ought not to be re-