

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-

No 46.

visions were to his prejudice. And this is Lord Stair's opinion, l. 3. t. 4. § 29. ; and a similar case to this was determined 23d February 1665, Jack *contra* Pollock, No 36. p. 3213. And as to the decision Riddel *contra* Richardson, it is *answered*, That the course of our law at that time was to allow no aliment to younger children, however necessitous, from the heir ; which is otherwise now, according to the citation from Lord Stair, mentioned before. ' And now,' says that author, ' since the Lords have frequently decerned aliment for bairns against the father's heirs, having competent estates ; it is like the Lords will allow all provisions on death-bed, in so far as they may be competent aliments.'

*Replied* for the pursuer ; A father is bound to aliment his children till their majority, that they are capable to provide for themselves ; deeds on death-bed will be sustained so far as that obligation of aliment reaches ; and this is all Lord Stair says : But here the bonds craved to be reduced are not alimentary bonds ; they are bonds which the father was not under any antecedent obligation to grant, and therefore cannot stand against the force of a reduction upon the head of death-bed.

' THE LORDS found the bonds reducible upon the head of death-bed.'

*Fol. Dic. v. 1. p. 213. Rem. Dec. v. 1. No 27. p. 59.*

1725. *January 12.*

WILLIAM M'KAY, and ELSPETH his Wife, *against* THOMAS ROBERTSON.

No 47.

A bond secluding executors cannot be disposed of upon death-bed.

THOMAS ROBERTSON, merchant in Inverness, became debtor in a bond for 3000 merks, to William M'Wirrich and his heirs, *secluding executors*. John M'Wirrich, only son to the said William, made up a title to the bond, by serving heir in general to his father ; and thereupon charged Robertson the debtor, who suspended. Thereafter upon death-bed, he conveyed this bond, by a testamentary deed, in favours of his mother, and William M'Kay her husband, the present pursuers ; who being confirmed executors to the defunct, *insisted* against the debtor Robertson for discussing the suspension.—It was *objected*, ' That the pursuers had no sufficient active title by their confirmation as executors, the bond charged on being heritable, secluding executors : ' To enforce which it was *pleaded*, *in*, That formerly all bonds bearing annualrent were heritable, whether in the person of the original creditor or his heirs ; and could only be transmitted by a service. The 32d act, Parl. 1661, declares all bonds bearing annualrent moveable, except in these cases following, *viz.* ' That they bear an express obligement to infest, or that they be conceived in favours of heirs and assignees, secluding executors ; in either of which cases, ordains the sums to be heritable, and to pertain to the heir.' Here there is a general alteration of our ancient law with respect to bonds bearing annualrent, with an exception