

afterwards contract, even legacies left *in articulo mortis*; and there is a faculty granted to the heirs of entail, whereby they are empowered “to contract or take on the sum of £40,000 for performing their honourable affairs.” Richard, the first heir of entail, did not enter, but contracted debts upon which he was charged to enter, and the estate adjudged. *Quær.* Could the adjudication be sustained to the extent of the faculty? It was objected to it, *1mo*, That, as the heir in this case was bound to certain conditions and prestations, he could not properly be charged to enter heir, unless he could be charged at the same time to perform the conditions of the entail, which is impossible. *2do*, It cannot be presumed to have been the will of the maker of the entail that any of the heirs should have this faculty of contracting £40,000, who did not enter and represent him. ANSWERED,—*1mo*, That the Act of Parliament 1621, allowing charges to enter at the instance of the creditors of the heir, speaks in general of heirs, and is not confined to heirs in fee-simple; that all heirs charged to enter, and not entering, are esteemed, *præsumptione juris et de jure*, to lie fraudfully out, and therefore are held, *fictione juris*, as if they were entered. *2do*, It cannot be thought that it was the intention of the maker of the entail that his apparent heir should be taken and laid in jail, possibly when he had a mind to enter, but before it was convenient for him to do it; and this would be the case if it were law that he could not be charged to enter heir *cum effectu*.

The Lords found that the adjudication was valid.—*Dissent. Preside.* Actor, Harry Hume.

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1743. November 23. GEDDIE against SOMERVILLE.

[Elch., No. 16, *Deathbed.*]

THE Lords found that a man might give to his wife, (or to any other,) a faculty to dispoise his heritage *etiam in articulo mortis*, and that the grant of such a faculty *in liege poustie* did not fall under the law of deathbed, though the faculty was exercised on deathbed. If the words had been “at any time during her life,” the decision would have been the same; but it is presumed the decision would have been different if the husband had, instead of the faculty, given the property of the subject to his wife, with a power to dispoise on deathbed, since that would be a power to frustrate her own heirs, contrary to the public law; whereas in the present case she had only a power to take the estate from the heirs of her husband, which he might grant *in liege poustie*.—Actor, William Grant.

The question, where the fee was, whether in the husband or wife, was here very learnedly debated.—See the papers.