

## D E A T H - B E D.

## S E C T. I.

Reduction *capite lecti*, to whom Competent.

1663. February 25.

HEPBURN against HEPBURN.

**T**HE estate of Humby being provided to heirs whatsoever, umquhile Thomas Hepburn of Humby, in his contract of marriage with Elizabeth Johnston, provides the said estate to the heirs-male, and provides 25,000 merks for the daughters; there is a clause of the contract, bearing, that it should be leisome to the said Thomas, at any time during his life, to alter the said provision, or to dispoñe thereof according to his pleasure; thereafter, upon death-bed, he dispoñed the whole estate in favours of his daughter of the marriage, being his only child. Adam Hepburn his brother, as heir-male, intents reduction of that disposition, as being done in *lecto ægritudinis*. It was *alleged* for the defender, *primo, minor non tenetur placitare de hæreditate paterna*. The defender is minor, and now the question of reduction is upon her father's heritage. It was *answered*, that the maxim holds not, where the question is of the disposition made to the minor, whether valid or not, but where the question is not upon the minor's right, but upon the father's right; which right of the father's, or predecessor's, the minor is not holden to dispute.

'THE LORDS repelled this defence in respect of the reply.' *2dly*, It was *alleged* absolutor, because the pursuer having only a personal provision in his favours, conceived in the contract of marriage, and there being, as yet, no infestment to heirs-male, the maxim that no deed upon death-bed can be prejudicial to heirs, can be extended to none but such as are special heirs, and not to those who are by destination heirs, which is less than if a charter had been granted to the heir-male, which, according to Craig's opinion, is but as *nudum pactum*, and an incomplete right, and could not compel the heirs of line to re-

**No 1.**  
The law of death-bed protects every sort of heir, male or of tailzie, as well as heirs of line; those who are heirs in personal rights, as well as those who succeed to infestments.

No 1. sign. The pursuer *answered*, that the maxim is general, and there is no distinction by law or custom, whatsoever the heirs be ; so that a person having a right to heritable bonds, bearing clause of infestment, whereupon no infestment had followed, could do nothing upon death-bed in prejudice of the heirs, who would have succeeded unto those bonds ; as to Craig's opinion of a charter, it is against law, and the common opinion now received, that a charter, or any provision in writ, is effectual against the granter and his heirs, to compel them to complete the same.

' THE LORDS repelled this defence.' 3dly, It was *alleged* absolutor, because the maxim can be only understood of the heir of line, as nearest of blood, so that nothing can be effectually done in their prejudice ; but here the disposition is but in prejudice of an heir-male, and in favours of an heir of line, in respect of whom the heir male is but a stranger ; which is the more clear, because this maxim being very ancient, was produced before there was any heir male or of tailzie ; and because the reason of the law is founded upon the natural obligation parents and predecessors have of providing their successors, and so can do them no prejudice, especially when they are weak and on death-bed. The pursuer *answered*, as before, that the maxim is general, and there is no distinction introduced by law or custom of heirs-male ; and albeit the law had introduced such heirs since this common law, yet in so far as it makes them heirs, it gives them the privilege of heirs, to which the reason of the law doth well quadrate, which is not that natural obligation, but this presumption of law, that persons on death-bed are facile, and weaker in their capacities than at other times, and therefore the law disables them at that time to alter the settlement of their estates, as they were in their health, and so allows of no deed in prejudice of any heir of whatsoever kind, although in favours of another.

' THE LORDS repelled this defence.' 4thly, It was *alleged*, that the defunct, having himself constitute this interest of the heir-male, had reserved this power to himself, to alter it during his life, can signify nothing, unless it empower him to do it on death-bed, because, without any such reversion, he might have altered the tailzie, during his *liege poustie*. The pursuer *answered*, *Pactum privatorum non derogat jure communi* ; therefore this being a special part of our common law, anterior to either act of Parliament, or practice, no private provision or reversion can capacitate any person to do that which the law declares void ; especially being upon a reason of weakness and infirmity, which is presumed in persons on death-bed, *præsumptione juris et de jure*, admitting no contrary probation, for it will not be admitted, to prove that the disponent was in perfect soundness of mind, and therefore, if any person should reserve a power to disponent, though he were not *compos mentis*, the reservation would signify nothing, so here neither is the ordinary word adjected, *etiam in articulo mortis*, or on death-bed, and so cannot be extended to that case, and can reach only to what is done lawfully, *legitimo tempore et modo* ; and there is far less inconvenience that a cause should be superfluous, which is very ordinary, than that it should

extend to take away common law; neither is the provision adjected as an express condition upon which the tailzie was made, and no otherwise.

' THE LORDS repelled also this defence, in respect of the reply, and so having advised all the defences and disputes in the afternoon, albeit the parties had agreed before hand, and the heir of line's portion doubled; yet the LORDS were generally clear in the decisions above written, as relevant in themselves.'

*Fol. Dic. v. I. p. 211. Stair, v. I. p. 186.*

No 1.

1672. July 24.

PORTERFIELD against CANT.

ELIZABETH CANT having taken certain bonds to herself, and failing of her by decease, to the children of John Porterfield her son; and Mr Walter Cant having been tutor to Margaret Porterfield, only bairn of the said John Porterfield, the said Margaret pursues Catharine Cant as executrix to the said Mr Walter, to deliver the bonds, or the sums therein contained. The defender *alleged* absolvitor, because the pursuer being only substitute in the bond to Elizabeth Cant her good-dame, the said Elizabeth who was fiar, and might dispone, did assign the saids bonds to Sir Patrick Drummond, for the behoof of John Porterfield her son, father to this pursuer, whose debts the tutor paid, which ought to be allowed in the sums contained in these bonds. It was *answered*, That that assignation was *in lecto agritudinis*, whereupon the pursuer hath intended reduction, and repeats the same by way of reply. It was *replied*, That *posito* the assignation had been on death-bed, it is not reducible on that head; because there is a provision in the bonds, that it should be leisome to the grandmother to assign and dispone the sums at her pleasure, without consent of the substitutes; and so having disposed in favours of her own son the pursuer's father, who was her heir of line, and this pursuer as substitute, being but heir of provision, she might lawfully do the same. It was *duplicated*, That the privilege of heirs is not to be prejudged by their predecessors' deeds on death-bed, which doth extend generally to all heirs, so that a deed done in prejudice of an heir-male or of tailzie, in favours of an heir of line, though nearer of blood, is reducible; because the ground of the law is, that parties after contracting of the sickness whereof they died, become weak, and therefore are not allowed to alter the succession of their heritage, as it was established before they became sick; and the provision of the bonds reserving a power to dispone, can only be understood to be *legitimo modo*, in the way allowed by law, and cannot warrant a deed done on death-bed.

Which the LORDS found relevant, and sustained the reduction by way of reply.

*Fol. Dic. v. I. p. 211. Stair, v. 2. p. 109.*

No 2.

The law of death-bed takes place in favour of all sorts of heirs, whether the destination be by infestment or only in a personal deed.