

No 38. petent against him if he had entered heir ; so that it was just that either he should enter, or the disposition of the lands be affected.

*Gosford, MS. No 845. p. 535.*

No 39.

Bonds granted on death-bed, although they do affect only the dead's part, yet are preferable to legacies left in the ordinary way ; for the defunct is *in legitima potestate* as to affecting his part, and granting of bonds to that effect.

1676. December 14. MITCHEL against LITTLEJOHNS.

UMQUHILE Thomas Littlejohn, by his first contract of marriage, provided his whole conquest, during the marriage, to the bairns of the marriage ; shortly before his death, he granted a bond of provision to the bairns in satisfaction of their portions natural, and what they could crave of him ; and having married Catherine Mitchel, he provided her, by her contract, to 720 merks yearly ; and, by a posterior bond, he obliged himself, his heirs, executors, and assignees, to pay her 600 merks yearly in case the marriage dissolved within year and day. Which the LORDS sustained, notwithstanding of the prior clause of conquest, in so far as might extend to the third of the moveables. The said Thomas did also grant a legacy to Andrew Littlejohn, his brother, for several gratuities, containing an obligation upon his heirs, executors, and assignees, to pay the same, with condition that he accepted the tutory of his bairns. The account being remitted to an auditor, he did report, that the bairns provision exceeded the two parts, and therefore they craved to be preferred to the relict and the legatar ; because, albeit their bond was due on death-bed, yet there is no law nor custom restricting the power of persons on death-bed as to dead's part, but they may grant legacies or bonds as *inter vivos*, betwixt which there is this difference, that those who get bonds on death-bed are creditors ; and albeit their bonds be not effectual against the heir's bairns, or wife's part, against whom neither the obligations nor declarations of defuncts are valid, yet they are fully valid against the executor *quoad* dead's part, and so they are not legatars but creditors ; so that the provision to the wife and bairns being not by way of legacy, but by way of credit and bond *inter vivos*, they are both preferable to the legacy, although it proceed upon rational motives, being no civil debt ; and though it bear an obligation upon the heirs and executors to pay the legacy.

THE LORDS found, that a bond granted by a defunct on death-bed, not by way of legacy, but obliging heirs and executors, was preferable to his legacy.

*Fol. Dic. v. 1. p. 213. Stair, v. 2. p. 479.*

\* \* Dirleton reports the same case :

THE LORDS found, That bonds granted on death-bed, albeit they are legacies, as to that effect, that they affect only the dead's part, yet they are preferable to other legacies left in the ordinary ways of legacies ; and that the defunct was *in*

*legitima potestate* as to the affecting of his part, and granting of bonds to that effect.

No 39.

Reporter, *Justice-Clerk.*Clerk, *Gibson.**Dirleton, No 402. p. 198.*

1678. July 29.

HERIOT *against* LYON, &c.

No 40.

IN a reduction at George Heriot's instance against Hary Lyon, &c. of their bonds, as given *in lecto*, alleged they were but the renewing of old bonds, or else granted for counts of work wrought.—THE LORDS sustained them; but declared they would consider the counts if exorbitant, since it is not like the defunct *in lecto* did it; and also take their oath in supplement on the truth of the work.

*Fol. Dic. v. 1. p. 214. Fountainball. MS.*

1683. February 27.

EARL OF LEVEN *against* MONTGOMERY.

No 41.

THE Countess of Leven, with consent of her curators, having entered into a contract of marriage with Mr Francis Montgomery, wherein she provided him in liferent to the barony of Inchleslie, in case there should be no children of the marriage, or in case the children should decease before Mr Francis, that was declared to be in satisfaction of his courtesy of the whole estate: As also, by the said contract, it is provided, that in case he should have children surviving himself, he was to have the liferent of the whole estate, only he was to pay the current annualrent of the debt; and, by the contract, the Lady, with consent of Mr Francis, was empowered to burden the estate with 10,000 merks, for providing her house with plenishing; and Mr Francis was obliged, after the decease of the Viscount of Kenmore, to apply 50,000 merks, which was his portion, for payment of the debts; and in case the marriage should dissolve without children, the Lady and her heirs were obliged to refund the said 50,000 merks to Mr Francis after her decease, according to the terms of the said contract. The Lady, with consent of Mr Francis, granted bond to Lauchlan Leslie for 10,000 merks. The Lady, upon death-bed, ratifies the foresaid contract of marriage upon oath, and also the foresaid bond for 10,000 merks, which she had granted upon death-bed; she also, upon death-bed, grants a discharge to Lauchlan Leslie her chamberlain of his intromissions with the by-gone rents of the lands, and at the same time dispones her half of the moveables, which were in common betwixt her and Mr Francis, and delivered to him all her jewels, and particularly a jewel which was gifted by the King of Sweden to General Leslie her grandfather as a token, and which her grandfather did legate to the family, with a

The Lords refused to sustain a deed on death-bed, disposing on moveables, *in quantum* prejudicial to the heir's relief of moveable debts.