

[M. 3281.]

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 FORBES  
 r.  
 FORBES.

Mrs. JEAN FORBES, wife of Captain Dundas, and ELIZABETH FORBES, wife of Dr. John Gregory, and both Daughters of the late Lord Forbes - - - - -	}	<i>Appellants ;</i>
JAMES, LORD FORBES - - - - -		<i>Respondent.</i>

House of Lords, 29th January 1756.

DEATHBED.—An antenuptial contract of marriage, in the shape of an entail, contained a reserved faculty and power to grant provisions to younger children on deathbed, and to affect the estate therewith. Held, reversing the judgment of the Court of Session, that bonds of provision granted on deathbed were not reducible on deathbed, they having been executed in exercise of the reserved faculty.

LORD WILLIAM FORBES, the appellants' father, in contemplation of his marriage with Dorothy Dale, entered into an antenuptial contract of marriage, by which, in consideration of £10,000 of tocher, the lady's father agreed to give with his daughter, he thereby bound and obliged himself to infest and seize him, the said Lord Forbes, and the said Dorothy Dale, and the longest liver of them, in liferent, for her liferent use allenary, and the heirs male to be procreated betwixt them in fee, whom failing, to the said Lord Forbes his other heirs male whatsoever; whom failing, to the heirs female to be procreated betwixt them, with several remainders over in the whole lands and Lordship of Forbes.

There was this reservation or exception in favour of burdening; "in case there be an heir male of the marriage, and one or more younger children, it shall and may be lawful for the said Lord Forbes, at any time in his lifetime, *et etiam in articulo mortis*, to make such provisions for his said younger child or children as he may think fit; and therewith to affect and burden the foresaid lands and estate, providing the same do not exceed in whole the sum of £3000 sterling, and to divide and proportion among the said younger children as the said Lord Forbes shall direct and appoint. And the heir male succeeding to the said estate shall be holden and obliged, and by acceptance hereof, they are held and obliged to pay the said sum of £3000, or such part thereof, in such way and manner, and to such persons as the said Lord Forbes shall direct

“ and appoint, and, in case the said Lord Forbes shall die  
 “ without making any provisions for such younger child or  
 “ children, or shall not charge the estate with the whole  
 “ sum of £3000 for that purpose, then, and in either of these  
 “ cases, it shall and may be lawful for the said Dorothy  
 “ Dale, if she survive the said Lord Forbes, to charge the  
 “ said estate with the said sum of £3000, or any such part  
 “ thereof as shall not be charged by the said Lord Forbes.”

FORBES, &c.  
 v.  
 FORBES.

Of this marriage there was issue, Francis a son, and three daughters, Mary, Jean, and Elizabeth.

Of this date, Lord Forbes executed, in terms of the above June 17, 1730.  
 contract of marriage, bonds of provision to each of his daughters; to Jean, £666. 13s. 4d. ; and to Elizabeth £500 sterling, to Mary £833. 6s. 8d. Any daughter deceasing before the term of payment, it was provided, that their provision was to return to Francis, whom failing, to accresce to his surviving daughters.

Lord Forbes died nine days after executing these bonds.

Lady Forbes being entirely unacquainted with her affairs, ignorant of the marriage contract rights, and while in affliction for loss of her husband, was induced by the relatives of the family, who represented that the estate was exhausted with debt, to execute a bond of restriction of her liferent July 2. 1730.  
 provisions, restricting the same to the liferent of the free rents and profits of the heritable estate, after deducting the interest payable on the heritable debts. After the death of her son, she also entered into a similar deed with Oct. 27, 1735.  
 his uncle, who succeeded. Both deeds were granted on condition of their not challenging the deeds of provision in favour of her daughters, on the head of deathbed.

On being advised, that the bonds were not reducible on the head of deathbed, the daughters brought action for payment, with interest since they became payable. The defence stated was, that these bonds of provision were granted on deathbed. It was answered, that being executed in implement of a power reserved in an antenuptial contract of marriage, the plea of deathbed could not strike against them.

The Lord Ordinary found “ it proved that the deed was Dec. 10, 1754.  
 “ granted on deathbed.” On reclaiming petition, the Court pronounced this interlocutor: “ The Lords having advised Feb. 12, 1755.  
 “ the above debate, sustain the defence of deathbed, relevant to assoilzie the defender from the claims of annual-  
 “ rents made by the pursuers upon their bond of provision  
 “ previous to their respective majorities, and remit to the

FORBES, &C.

v.

FORBES.

“ Lord Ordinary who pronounced the act to proceed accordingly.”

Against this interlocutor, the present appeal was brought.

*Pleaded for the Appellants* :—1st, The law of deathbed was never held sufficient to reduce deeds which the granter was bound to execute by an antecedent obligation. To provide for children is both a natural and civil duty; and therefore deeds executed for that purpose ought to be supported against the objection of deathbed as far as possible. In the present case, the power reserved to William Lord Forbes of burdening the estate with £3000 to the younger children was an onerous stipulation, and an obligation undertaken on his part for a most valuable consideration—the marriage and the marriage portion advanced by Lady Forbes’s father. And though William Lord Forbes reserved the power or faculty of burdening the successor in this estate with £3000, yet this faculty had only been exercised by him to the extent of £2000 sterling, which is within the power reserved. And it would be extremely rigorous and unjust to object the law of deathbed to such a case. 2d, The principal sums provided by these bonds to the appellants not being liable to the objection of deathbed, the interest due thereon must be computed from the times at which the father directed these sums to be paid. And as the respondent has taken the estate of Forbes by service, as heir in special of William Lord Forbes, while the appellants had the natural right to succeed, as heirs of line, to the estate, the presumption of law is, that he takes, by virtue of the limitation in the marriage contract, in which the power of charging the lands for provisions to the appellants to the extent of £3000 is specially reserved; the respondent, therefore, cannot take the estate under that settlement without being burdened with all its conditions and provisions. 3d, Their mother might by any agreement do as she pleased with her own, but she could not by any agreement, and from a mistaken apprehension that their bonds were reducible on the head of deathbed, agree to restrict the annual-rents on her daughters’ provisions, so as to deprive them of the right to interest payable from the terms from which it is made payable.

*Pleaded by the Respondent* :—1st, The law of deathbed has always been extended, by the law of Scotland, to bonds of provision, and for this very just reason, that bonds affect the heir, and the estate to which he is called to succeed.

And it makes no difference in this rule, that the granter had reserved power, in a previous deed executed in good health, to dispose of or charge the estate on deathbed; because, if this were allowed, every man might have it in his power, by so doing, to annul the law of deathbed altogether. The bonds of provision, therefore, executed in virtue of the power reserved, were null and void, on the ground of deathbed, and good neither for principal nor for interest. *2d* and *3d*, But even assuming them good as to principal, it did not follow that interest was chargeable from Lord Forbes' death; because Lady Forbes had disposed of that question by the agreement, and she was bound, as liferenter, in any event, to keep the heir free of such charge.

1758.

WILSON, &c.  
v.

BURNTON, &c.

After hearing counsel, it was

Ordered and adjudged, that the bond of provision in question having been granted in execution of a faculty reserved in the contract of marriage, the exception of deathbed did not lie either against the principal sum of £2000, or the annualrents or interests thereof: and it is therefore ordered, that so much of the said interlocutors as are complained of (sustaining the defence of deathbed to the extent of the annualrents) be reversed, and that the defence of deathbed be repelled; and it is further ordered, that the cause be remitted to the Court of Session in Scotland, to proceed therein accordingly.

For Appellants, *Ro. Dundas, C. Yorke*.

For Respondent, *W. Murray, Al. Forrester*.

NOTE.—*Vide* Kames, p. 109; also Kilkerran. The Lord Chancellor, Hardwicke, according to the note on his papers, written by himself, sustained the deathbed deed, because it was executed in virtue of a reserved faculty.

[Mor. 4549.]

JOHN WILSON, Collector of His Majesty's Customs at Stockton, in the County of Durham; and RICHARD SWANSTON, Solicitor of Customs, His Attorney. -	}	<i>Appellants;</i>
ROBERT BURNTON, and JAMES CHALMERS, both Merchants in Edinburgh, -		
	}	<i>Respondents.</i>

House of Lords, 20th Feb. 1758.

FOREIGN DECREE.—Effect of foreign decree in seeking its execution in the Courts of this country.

The Court of King's Bench in England, in a suit brought