

No 34.

ged and misbehaved himself to his father, that his father with difficulty was moved to provide any thing to him : And also, that the defender was content yet to supply and pay, what more price the judge should think expedient should be paid for the lands ; all which were rejected by the LORDS, and the reason sustained, seeing the party came not out to kirk and market after the alienation, without which had been done by him, the alienation was found could not be sustained ; neither was it respected, that the party was of sound judgment ; for they found, that the sickness of the body, albeit of never so long endurance, and albeit the judgment was whole, if the party continued unrecovered, and came not to public places, but died thereof, was a just cause to reduce the alienation, although made also for preceding just causes ; which the LORDS found not enough to sustain the same in prejudice of the heir, as said is ; but the reducer was ordained to repay to the defender, the just sums for which the alienation was made, and truly debursed.

Act. *Advocatus.*Alt. *Nicolson & Craig.*Clerk, *Hay.**Fol. Dic. v. I. p. 215. Durie, p. 766.*1637. July 1. LORD CRANSTON RIDDEL *against* RICHARDSON.

No 35.

Found, that a father on death-bed cannot make any provision in favour of his children, altho' unprovided, which might burden the heir with payment, and that the maxim was universal for all, as well children as strangers.

UMQUHILE SIR Robert Richardson of Pencaitland, having given a bond in favours of his second son, ' obliging him and his heirs to pay to the said second son, 8000 merks for his provision, and portion-natural, and for help of his living,' which bond being made by him, he then being sick of a palsy, whereof he lived a year and an half after the date of the said bond, which being desired to be reduced at the instance of the heir of the maker, viz. his eldest son, and at the instance of the Lord Cranston Riddel, to whom the said heir had sold the lands, whereto he succeeded by his father, and so as he whose lands might be distressed upon some pretext, through the said bond, upon this reason, that the said bond was null, being made by the defunct upon his death-bed, to the prejudice of his heirs. And the defender *alleging*, That this bond being granted by the father to his lawful bairn, who had no other benefit provided to him by his father, and who had no other thing to succeed to by his decease, neither moveable nor immoveable, but this bond, it ought not to be found under the compass of this reason, as a null deed, specially where the maker lived so long after the date thereof, and continued in this lent sickness, which sickness cannot be found, and was not of itself of the nature of *morbus santicus*, and which is not *impedimentum rebus agendis*, and which cannot be an impediment to hinder the father, to provide his children to their natural portions, according to his estate ; at least the quantity for which it may be sustained against the heir (there being no other moveables pertaining to the defunct the time of his decease) ought to be modified and determined by the LORDS ; for the which quantity so to be modified, the bond ought to be sustained, and ought not to be re-

duced *in toto*; for albeit persons on death-bed may not burden their heirs, yet the mind of the law is, that they cannot do such deeds as may take away the heritage from them, which ought to be understood to take it from them directly, and to give it to a stranger; but that they may not provide a *legitime* to their own bairns, they being then of sound judgment, albeit in sickness, and therewith to burden the heir, where the heritage is not thereby evicted, albeit it may be thereby something burdened for so just a cause, ought neither to be found the meaning of the law, nor maxim adduced in this reason; and it is against the law of God, of nature, and all reason; to find that the father, even on death-bed, may not do such a deed, as to provide his bairns, who were destitute of help, and that one should have all. THE LORDS repelled the allegiance, and sustained the reasons; for they found, that the father on death-bed, could not make any provision 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, and that the maxim was universal for all, concerning bairns alike as any other persons whosoever; and found, that no modification ought to be made.

Act. *Advocatus*.Alt. *Stuart*.Clerk, *Hay*.*Fol. Dic. v. I. p. 213. Durie, p. 847.*

1665. February 23.

JACK against POLLOCK and RUTHERFOORD.

MARION RUTHERFOORD married David Clerk, and had no contract of marriage with him, but he having acquired a little ruinous tenement, took it to her and him in conjunct-fee, and in the time of the plague, he provided her to the annualrent of 5000 merks. His heirs raise reduction of the provision, as being *in Tecto ægrutidinis*, after he had kept his house upon suspicion of the plague, of which he died. It was *alleged* for the said Marion, That keeping the house upon suspicion of the plague could not be as *in lecto ægrutidinis*, unless it were proven, that he was infected with the disease, before the provision was granted. *2dly*, Even in that case, defuncts are not hindered to give liferents to their wives, for which there is a natural obligation, according to Craig's opinion.

THE LORDS repelled the first allegiance, but found the second relevant, in so far as might extend to a competent provision to the wife, and therefore, having examined many witnesses *hinc inde*, upon the estate of the husband, and the tocher and frugality of the wife, and finding his means did consist in a tenement worth 500 merks by year, beside that inconsiderable tenement, wherein she was infest, they restricted her annualrent, which came to 300 merk, to L. 123, which was about the terce of the tenement, albeit terces of houses within burgh are not due.

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No 36.

Husbands *in lecto* are not hindered to give liferents to their wives, otherwise unprovided.