1670. *June* 18. DOUGLAS of LUMBSDEAN *against* the LADY and her SON.

THE deceased Douglas of Lumbsdean granted disposition of his whole estate in favours of his son of the first marriage, with reservation, in the body of the said disposition, of his own liferent, and of a power and faculty of burdening the same with 4000 merks, any time in his lifetime. When he comes to die, his second lady, with her solicitations, and her brother, Mr. Lylle, procures of the Laird, (just two days before he dies,) a bond for 1000 merks, to herself in liferent, and to her son (who was of the second marriage) in fee, and this conform to the power reserved to him in the disposition made to his son of the first marriage. Of this bond, the son of the first marriage, as heir to his father, raises reduction upon thir reasons; 1*mo*, That this bond can never be respected such a right as may affect the estate disponed to him, but the same must be reduced; because the said bond was never a delivered evident in the maker's lifetime, but found in his charter-kist undelivered after his decease, and so intromitted with by thir defenders, and so is a null writ. 2*do*, *Esto* it had been a delivered evident, (as it was not,) the same must be reduced *ex capite lecti*, since the same was granted by the defunct but two days before his decease, after which he never came to kirk or market; and so can never be sustained in prejudice of the heir. 3*tio*, The said bond must be reduced, because it bears only to have been granted for love and favour; seeing it is offered to be proven, that this defender is most competently provided in a jointure, and the son provided to more land than the son of the first marriage is. 4*to*, The bond must be reduced, because the granter had no power to grant the same, in regard all that was reserved to him in the disposition, was a power to affect the land with 4000 merks at any time in his lifetime; but so it is, it is offered to be proven, that before the granting of this bond now craved to be reduced, he had contracted debts above the value of 8000 merks, whereon they condescended; and so the power reserved him was expired, and he more than exceeded the same.

To thir reasons it was ANSWERED, 1*mo*, that the not delivery of it in the granter's lifetime can never be a ground whereon the same can be reduced, because the same was granted to the defunct's own wife, who was in *familia*; and to his son, an infant of two years old, who was also *in familia*, in which case no delivery was requisite. 2*do*, It can never be reduced upon the account that it was done upon death-bed, for thir three reasons; 1*mo*, Because by the reservation, he had a power at any time in his lifetime *indefinitè* to burden the lands with that sum; which must be understood as well *in articulo mortis*, as *in liege poustie*. 2*do*, None have interest to pursue reduction of writs alleged granted upon death-bed, but he who is, or may be heir to the granter; but so it is, this pursuer, the son of the first marriage, can never be heir to his father, granter of this bond craved to be reduced; because it is offered to be proven that he was got in an adulterous conjunction, and notwithstanding he may be thought to have been legitimated by his father's subsequent marrying of that woman on whom he got him, yet the 20th act of Parliament 1600, excludes such clearly from reaping any benefit by the parents, especially where there are lawful issue of another marriage. Neither can it be imagined that the act excludes the adulterous brood from succession *ab intestato* only, and not from taking dispositions from their said parents in their lifetimes; for that were *in fraudem legis facere, et legis mentem circumvenire*. 3*tio*, This bond

can never be reputed to have been done on death-bed, because the defenders offer them to prove that the maker, after the making of the same, rose, put on his clothes, sat at table, went down stairs, walked in the fields, in the same manner as he was wont to do, and did other acts of sanity; which must be equipollent to going to kirk and market. To the third reason, answers, if the pursuer think the defender more competently provided than himself, he is content to change with him. To the fourth, answers, that the defunct having disponed to this pursuer, after the contracting of the debts condescended on in the reason, his liferent of the lands disponed, (which was reserved to him in the disposition,) it is offered to be proven that he gave bond to his father, obliging him to relieve him of all debts contracted by him preceding the date of that bond, so that these debts can never be obtruded by this pursuer as the implement of that power reserved in the disposition; and if there be any debts contracted since, the defender offers to purge them.

To thir answers it was REPLIED,—1*mo*, That their being in *familia* said well to supply the not delivery of the bond, if they had not been competently provided *aliunde*, but says nothing where that is. To the second, replies 1*mo*, that the power reserved him of burdening these lands at any time in his lifetime, must not be taken captiously, *(nam verba non debent captari,)* but *civiliter et secundum terminos juris:* whereby it must be presumed that all he intended, was to keep a power of burdening these lands in his *liege poustie*, conform to the common law of the kingdom; whereas if he had meaned that his power should have reached to death-bed, he would have made it special, by reserving power *etiam in ipso articulo mortis*. 2*do*, Where it is said that a reduction *ex capite lecti* is a benefit only competent to the heir, and solely introduced in favours of heirs, that in its large extent is false; for the Lords have found creditors to have interest to quarrel writs done on death-bed, if they redound to their prejudice, though they be not heirs; and so this pursuer, *esto* he were not that person that could be heir to his father, yet this disposition gives him sufficient interest to quarrel any deeds which may any way impede his disposition from being made effectual in whole or in part, *ex capite lecti*. But 3*tio*, *Nullo modo constat* that he was procreated in the manner alleged in the answer: neither is it probable that his father and mother would have been suffered to cohabit thirty years together as man and wife, (as they did,) if any such thing had been true, considering the strictness of the late times. 4*to*, As to the deeds of sanity condescended on, *nullo modo relevant*, except Sir George Lockhart say he went to kirk and market, as he most contentiously reasoned in my Lord Balmerino's cause. To the third replies, the offer of excambion *non relevat* except they could make the pursuer as young as the defender is. To the fourth, denies there is any such bond of relief. The Lords found the allegeance on the bond of relief relevant, and assigned a day for proving it.

Act. Sinclar and Spottiswood. *Alt.* Lockhart.

Advocates' MS. No. 23, folio 74.