lified revocation on death-bed hath been sustained as effectual in our law, 25th January 1677, Ker *contra* Kers, No 64. p. 3248.

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THE LORDS found, That the first tailzie was not annulled by the cancelling of Saltcoat's side-scription from the joining of the first and second sheets thereof; but was revocable, and revoked on death-bed, by the revocation on the back thereof; and found, that the quality in the revocation is not relevant to sustain the first tailzie, for supporting the second, and conveying thereby the right of succession in favour of Mrs Margaret Menzies; and therefore reduced both tailzies, and declared in favour of Mrs Baillie, one of the heirs of line.

Forbes, p. 226.

1740. *January* 16. JOHN M'KEAN *against* ELSPETH RUSSEL.

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JAMES M'KEAN being creditor to Sir Hary Innes in a bond for 2000 merks, payable to himself if in life, and, after his decease, to certain other persons, containing a power to James, at any time in his life, to uplift, receive, and discharge the same, without consent of the persons whose names were therein mentioned, did, on death-bed, exerce this faculty, and gave it away, not only from the heirs at law, but likewise from the substitutes.

In a reduction on the head of death-bed, it was *pleaded* for the heir at law, That the death-bed deed did evacuate the substitution, whereby there came to be place for him; and though with the same breath the subject is given away to strangers, the alienation could not be effectual against him, being done on death-bed.

THE LORDS repelled the reason of reduction.

Fol. Dic. v. 3. *p.* 172. *C. Home, No* 140. *p.* 240.

1755. *February* 11.

DAUGHTERS of WILLIAM LORD FORBES, and their HUSBANDS, *against* JAMES LORD FORBES.

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It was found by the Court of Session, that notwithstanding of a reserved faculty of making provisions to a certain extent to younger children, the defunct could not prejudice his heir, by provisions made on death-bed.

BY contract of marriage betwixt William Lord Forbes and Dorothy Dale his promised spouse, executed at London September 1720, he became bound to provide his land estate to the heirs male of the marriage; whom failing, to his other heirs male. And, as by this contract the Lord Forbes put himself and his heirs under a limitation not to alter the order of succession, nor even to contract debt in prejudice of the heir male of the marriage, it was thought reasonable to reserve a power for providing the younger children, which was done in the following words: 'That in case there shall be an heir male of the intended 'marriage, and one or more younger children, it shall be lawful for the said 'Lord Forbes, at any time in his life, *ac etiam in articulo mortis*, to make such

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But on appeal, this judgment was reversed, because the reserved power was in a contract of marriage, and so binding on the heir.

'provisions to the said younger child or children as he shall think fit; and therewith to affect and burden the foresaid lands and estate, provided the same do 'not in whole exceed the sum of L. 3000 Sterling, to be divided as Lord Forbes shall direct. And in case Lord Forbes shall die without making such provision, or shall not charge the estate with the whole sum of L. 3000 Sterling 'for that purpose, it shall then be lawful for the said Dorothy Dale surviving, 'to charge the estate with the said sum of L. 3000, or such part thereof as shall 'not be charged by the said Lord Forbes; to be proportioned among the 'younger children as she shall think fit.'

The marriage dissolved by the death of Lord Forbes in the year 1730, leaving a son and three daughters. While he was upon death-bed, though perfectly sound in his judgment, he executed a bond of provision to his three daughters for L. 2000 Sterling, payable at the first term after majority or marriage, with interest from his decease, 'Declaring, that in case of the decease of 'any of his daughters before the term of payment, her provision should return 'to his son and heir; whom failing, to the surviving daughters.' The son died under age, without being entered; by which the succession to the land estate, provided as aforesaid to heirs male, opened to James, the present Lord Forbes, his uncle.

In the year 1753, an action was brought against the present Lord Forbes by two of his brother's daughters, only now surviving, for payment of the abovementioned L. 2000, contained in the bond of provision granted to them by their father. The bond was objected to, as granted upon death-bed; and as the defender had taken up the succession, and subjected himself to the debts upon the faith of a transaction made with the mother, which would have made matters pretty easy could she have bound her daughters, there was no avoiding listening to the objection with some degree of favour. It was understood that this claim of L. 2000, with interest from the 1730, would, with the other debts, do more than exhaust the estate; and to this natural, perhaps honest prepossession, more than to the point of law, I ascribe the interlocutor sustaining the defence of death-bed, and assoilzing the defender.

I have chosen, however, to mark the decision, in order to set forth what occurred to me upon the point of law; which may be useful in other cases, where the influence of favour is less.

In the *first* place I urge, Why ought not a provision to children be effectual though on death-bed, when a provision to a wife in the same circumstances is effectual? Can the heir qualify any just or legal prejudice by a deed, to grant which his predecessor is bound in conscience and by the law of nature? *2do*, A man on death-bed may adjudge for payment of moveable debts due to him; or he may take an heritable bond; both of which are prejudicial to the legitim. Strange that he can hurt the younger children on death-bed; and yet be barred from doing them common justice! Further, he may on death-bed charge

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for payment of an heritable bond, which is indirectly providing for his younger children; strange that he cannot do this directly!

So far in general. I now apply myself more particularly to the circumstances of this case. If a man, wanting to get free of the restraint of death-bed, shall take his heir bound before hand to ratify any deed that he shall grant even upon death-bed; such a transaction, which has no other intendment but to evade the law of deathbed, ought not to be countenanced. For the same reason, if a man dispone his estate to his heir *alioqui successurus*, reserving power to alter *in articulo mortis*, such a deed will not be more effectual than the former.

A deed done to benefit the heir is in a very different case; as for example, where a proprietor of a land-estate makes a regular entail, limiting himself not to alter the order of succession, not to alienate, and not to contract debt above a certain sum. In this case, the heir who is benefited by the deed cannot quarrel the contracting of debt within the extent mentioned, even supposing more or less of the debt to have been contracted upon death-bed. This proceeds from the very nature of the law of death-bed. It is the privilege of the heir, that the predecessor cannot hurt him by any deed done on death-bed. But in the case supposed, the heir is not hurt. The entail is certainly not a prejudice to the heir: On the contrary, it is greatly beneficial to him. And if so, no deed done in terms of the entail, and in pursuance thereof, can be qualified to be prejudicial to the heir. It will be observed, that I lay no weight upon the circumstance of reserving power to contract debt upon death-bed. Such a clause is in itself good for nothing; because no man merely by his own will can free himself from limitations imposed upon him by law. The argument proceeds, not upon a declaration of will, but upon the nature of the deed; which, upon the whole, taking in all circumstances, is beneficial to the heir.

The case supposed approaches near to the real case. William Lord Forbes, limited himself by an entail in favour of the issue-male of the marriage, not to alter the order of succession, nor to contract debt above the sum of L. 3000. This deed was extremely beneficial to the heir-male of the marriage, who therefore could not quarrel the provisions made to his sisters within the L. 3000, though granted upon death-bed. It is true, the same limitations were not extended in favour of the present Lord Forbes. But then it will scarce be maintained that these provisions, effectual against the immediate heir, can be challenged after his death by the next heir.

To illustrate this argument, let us suppose William Lord Forbes had left L. 10,000 of a moveable estate, this estate would have descended wholly to the heir; because the daughters were cut out of their legitim by the bond of provision, whether they were willing to accept of it or not; according to the decision that a legitim may be excluded in a contract of marriage. This shews the palpable injustice of the objection of death-bed. The heir takes the advantage of this bond of provision, when it is his interest to bar the younger

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children from their legitim; and yet this bond is not good against him, if he find it his interest to reduce it as upon death-bed. This would be unjust and iniquitous. If the bond be good for the heir, it ought to be good against him.

In the next place, I consider this case in a different view. If, in a marriage contract, a certain sum is provided for the younger children, this provision must in all events be good against the heir. But then there is is an apparent inconvenience in such a settlement, by making the children independent of their parents. This inconvenience is remedied by converting the burden into a faculty. Therefore when such a thing is done in a contract of marriage, it must, from the situation of the parties, be considered as done merely in this view, and not to afford any advantage to the heir. With regard to him it ought still to be considered as a burden, and consequently that he cannot object to the modification, though upon death-bed. And the great anxiety shewn to make the whole or part of this sum effectual to the children in all events, confirms this construction; a faculty being given to the mother to modify the provisions, in case it should be neglected by the father. What then is the consequence of finding that a faculty in this case cannot be exercised on death-bed? Plainly this, to oblige parties in their contracts of marriage to make direct provisions for their children, notwithstanding the inconvenience of making them independent—hurtful to parents and children, without producing any good to the heir.

I add, that this construction of a faculty to provide younger children is not a novelty in our practice, witness the following decision. 'A father having 'disponed his estate to his eldest son in his contract of marriage, reserving to 'himself a power to burden the estase with a certain sum for provisions to his 'younger children; this very clause was found to produce action to the young-'er children against their brother, though the father died without exercising the 'faculty; 15th February 1673, Graham *contra* Morphey, *voce* Faculty.' This decision is evidently founded upon the above principle. With regard to the heir the provision is considered as a burden, to which he must be subjected, though the father should make no deed in consequence. But with regard to younger children, it is only considered as a faculty so far as to give the father power, within the sum mentioned, to give them more or less at his pleasure.

3tio, What in my apprehension cuts down entirely in this case the heir's privilege of death-bed, is the faculty bestowed upon the relict to burden the estate with L. 3000 for the younger children, in case the father should neglect to exercise the faculty. Hence it appears to me extremely clear, that the heir cannot qualify any prejudice by the bond of provision for L. 2000, executed by the father on death-bed. On the contrary, it was directly beneficial to the heir, by depriving the mother of her faculty of burdening the estate to the extent of L. 3000.

This judgment was accordingly reversed in the House of Lords.

Fol. Dic. v. 3. p. 172. Sel. Dec. No 83. p. 108.

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** The same case is reported in the Faculty Collection.

By marriage-articles, dated 3d September 1720. entered into betwixt William Lord Forbes and Dorothy Dale, father and mother to the pursuers; William Lord Forbes settled his estate in favour of himself, and the said Dorothy Dale, and longest liver, in liferent; and of the heir-male of the marriage in fee; whom failing, in favour of his other heirs-male whatsoever, under prohibitive and irritant clauses, against contracting of debt, or altering the order of succession; and the articles contain the power and faculty following:

'That in case there be an heir-male of the said intended marriage, and one 'or more younger children, that then, and in that case, it shall and may be 'lawful to and for the said Lord Forbes, at any time in his life, *ac etiam in articulo mortis*, to make such provisions for his said younger child, or children, 'as he shall think fit; and therewith to affect and burden the foresaid lands 'and estate, providing the same do not exceed, in whole, the sum of L. 3000 'Sterling, to be divided and proportioned amongst the said younger child, or children, 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, as he shall then have, or shall not charge the estate with the 'whole sum of L. 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 L. 3000; or such 'part thereof, as shall not be charged by the said Lord Forbes, to be paid to 'such younger child, or children, and in such proportions as she shall think fit.'

There was issue of this marriage, one son, Francis, and three daughters, Mary, Jean Maria, and Elizabeth; and, in June 1730, Lord Forbes, when on death-bed, granted a bond of provision in favour of his daughters; whereby he obliged himself, his heirs and successors, to pay certain sums of money to them, amounting, in whole, to the sum of L. 2000, at their respective marriages or majorities, with annualrent, from the first term of Whitsunday or Martinmas after his decease. The bond provides, That, in case of the decease of any of the daughters, their share shall return to his son Francis; and, in case of his decease, he substituted the daughters to each other.

William Lord Forbes died a few days after executing of this bond of provision; and, some years thereafter, his said son Francis, and Mary his eldest daughter, also died; and James Forbes, brother to William Lord Forbes, succeeded to the honours and estate of Forbes.

Jean Maria, and Elizabeth, and their husbands, brought a process against James Lord Forbes, for payment of the principal sum due to them by their father's bond of provision, and for the annualrents thereof, from Martinmas 1730, being the first term after his death.

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The defender *pleaded*, by way of defence, against payment of the annualrents which had become due betwixt the term of Martinmas 1730 and their respective marriages, That the bond could not be effectual against him, the heir; because granted by William Lord Forbes when on death-bed: but he did not plead this defence against payment of the principal sum and annualrents since the respective marriages of the pursuers; because the pursuer's mother, the Lady Dowager of Forbes, had discharged the defender of claims much greater than the said principal sum and annualrents from her daughters' marriages; which claims were to revive, if the defender made any objection against payment of the said principal sum and annualrents.

Answered for the pursuer: 1*st*, That the law of death-bed does not strike against deeds done in implement of prior obligations; and there can be no obligation stronger on a man, than that of providing for his children: nor is this obligation merely moral, it is also legal; for it has frequently been found by this Court, That the heir is obliged to aliment the daughters, or other children of the deceased, who are not in a capacity to support themselves; and these decisions are founded on this principle, That there was a legal obligation upon the father to provide for, or aliment his children, after his death; which, upon his failure, becomes effectual against his representative.

2*dly*, Whatever may be the case, in general, with respect to provisions granted by a father on death-bed to his younger children, yet the law of death-bed cannot affect the provisions pursued for; because, 1*mo*, by the marriage-articles above mentioned, Lord Forbes reserved a power to himself, at any time in his life, *et etiam in articulo mortis*, to burden his heir with an sum in favour of his younger children, not exceeding L. 3000; and the granting the bond of provision pursued on, was an exercise of that power or faculty. The sum of L. 3000 is to be considered as set apart for the younger children at the time of the marriage: but, as it was improper to make them independent on their father, special provisions were not made for them in the event of their being one, two, or more; but the provision was conceived in the form of a power or faculty granted to the father, of giving them provisions to the extent of L. 3000; which faculty might lawfully be exercised at any time.

2*do*, It has frequently been decided by this Court, That when one settles his estate upon a stranger, under certain conditions and faculties to be exercised on death-bed, the stranger cannot plead the law of death-bed against the exercising of these faculties; because such was the condition of the grant under which the stranger takes. And, in the present case, the defender may be considered as a stranger; for when William Lord Forbes entered into the marriage-articles, he enjoyed the estate of Forbes without any limitations, and might have settled it on whomsoever he pleased, and might have given it to his daughters, his heirs of line, preferably to the defender; but he settled the estate on the heirs-male, under the express condition of his having a power to burden it to a certain extent, *etiam in articulo mortis:* under this condition it comes to the de-

fender; and therefore he must either take it under the condition, or repudiate it altogether.

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3tio, Even where one dispones his estate to him who is *alioque successurus*, under certain reserved powers and faculties, to be exercised by the disponer at any time, *etiam in articulo mortis*, the heir will be subjected to the burdens imposed by the disponer on death-bed, in virtue of the reserved powers, if it appears, as it plainly does in the present case, that the disposition was not made, and the powers reserved in order to elude the law of death-bed; and this must undoubtedly obtain, if the heir accepts of the disposition, and possess by virtue of it, as has frequently been decided; particularly, Hay against Seton, No 61. p. 3246.; Douglas against Douglas, No 6. p. 329.; Bertram against Weir, No 68. p. 3258. And although the defender has made up his titles to the estate by a service as heir-male, and not by the procuratory contained in the contract of marriage, yet he must be presumed to have taken it by virtue of the settlement contained in the said marriage-contract; for, as William Lord Forbes had full power to make the tailzie with the prohibitory and irritant clauses contained in the said marriage-contract, the defender was not at liberty to repudiate that settlement, and to take the estate upon the former investitures in favour of the heir-male; as was decided in the case Turnbull against Kinnier, *voce* TAILZIE; and in the case of Lord Strathnaver against the Duke of Douglas, 2d February 1728, *voce* TAILZIE.

Replied for the defender: That although it be the duty of every man to provide for his children, yet he ought to do so *debito tempore*, and not when he is *moribundus*; for the law of death-bed strikes against every deed done by a person when on death-bed to the prejudice of his heir, without distinguishing whether the deed be gratuitous, rational, or onerous. 'Craig, lib. 1. dieg. 12. '§ 36. Sunt etiam qui ratione temporis in feudum concedere non possunt; veluti, si quis in lecto ægritudinis sit constitutus; quo tempore neque alienare 'res hæreditarias, neque immobiles, neque obligare se, aut contrahendo, aut 'debitum agnoscendo potest, unde hæreditas, aut ejus pars successori decedat.' After a person comes to be on death-bed, *civiliter pro mortuo habetur*, as Dirleton observes, p. 186, so far as concerns his power of burdening his heritage; and therefore he cannot burden it with provisions to his younger children: and it has uniformly been so decided by this Court as often as the question has occurred; particularly, Lord Cranston Riddell against Richardson, No 35. p. 3212.; Fowlis of Collington against Fowlis, No 46. p. 3223.; and Strachan's Creditors against Elizabeth Strachan, No 50. p. 3227. Were it otherwise, no heir could be safe where his predecessor had younger children or daughters, about him at the time of his sickness, who could easily elicite from him, when *moribundus*, such provisions as they thought proper; and to deliver dying persons from such solicitations, was one great design of the law of death-bed.

And as in general one cannot on death-bed burden his heir with provisions to his younger children; so the bond pursued on cannot be supported by the pow-

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er or faculty reserved to the pursuer's father in his contract of marriage; for that the defender cannot be considered as a stranger who could only take under the disposition, and therefore could not object to the conditions of the deed; for the investitures stood in favour of heirs-male; and the defender was the heir of the investiture. And it is certain, that one cannot, by any deed in favour of his heir, create a power to himself to alienate or burden his heritage on death-bed; for it is a rule in law and reason, *Nemo potest cavere ne leges in testamento suo locum habeant:* and the Court has uniformly decided agreeably to this rule; particularly, Hepburn of Humbie against Helen Hepburn, No 1. p. 3177.; January 1734, George Ballantyne against William Ballantyne.* In the cases mentioned for the pursuers, the heirs had homologated the settlements made by their predecessors reserving the power to dispone and burden on death-bed; but in the present case, the defender never homologated the settlement made by the pursuer's father, having made up his titles by service as heir of the investitures, and not upon the procuratory contained in the contract of marriage. And although, notwithstanding thereof, he may be bound by the prohibitive and irritant clauses which the late Lord Forbes had power to impose, yet he cannot be bound by any of the conditions which are reprobated by law.

'The Lords sustained the defence of death-bed relevant to assoilzie the defender from the claim of annualrents made by the pursuers upon their bond of provision previous to their respective majorities or marriages.'

Act. *Advocatus, And. Pringle, Ja. Dundas,* et *Bruce.*
Alt. *Ferguson, Lockhart, Burnet,* et *Grant.* Clerk, *Kirkpatrick.*

Fac. Col. No 136. *p.* 203.

*** This case was appealed:

The House of Lords 'Declared, That the bond of provision in question 'having been granted in execution of a faculty reserved in the contract of marriage, the exception of death-bed did not lie either against the principal sum of 'L. 2000, or the annualrents or interest thereof; and it is therefore Ordered, 'That so much of the said interlocutors as are complained of (sustaining the 'defence of death-bed to the extent of the annualrents) be reversed, and that 'the defence of death-bed be repelled; and it is further Ordered, That the 'cause be remitted to the Court of Session in Scotland to proceed therein accordingly.'

* See Appendix.