

of law he could alter it with respect to the younger children, especially by a deed on death-bed, in form of a testament; as our custom extends the law of death-bed to relicts or bairns, for their legitim and portion natural; and this bond being taken in lieu thereof, reserving no power of alteration, cannot validly be altered by a testament executed by a father within a few days of his death.

THE LORDS found, that in respect there was no power contained in the son's obligation to the father to alter, that he could not alter or vary the proportions settled by that obligation; and therefore preferred Anna to the 6000 merks, &c.; but found the same to be in full satisfaction of any former bond of provision granted by the father to her, and of what else she could claim by and through her father's decease.

*Fol. Dic. v. 3. p. 203. C. Home, No 160. p. 272.*

\* \* \* See This case by Kilkerran, *voce* PRESUMPTION.

1744. November 20. JOHN JAMIESON *against* THOMAS TELFER.

THOMAS TELFER, eldest son of Thomas Telfer of Townhead, granted bond to William Telfer his brother, (with, and under the condition after mentioned allenary,) narrating, that their father being old and infirm, and not inclining to make any settlement of his effects himself, had commanded him to grant it, 'in full of all provision, executry, bairns part of gear, legitim or portion natural, provision, claim or demand, which he (William) could any way pretend to through the decease of his father or mother, and that he had discharged his brother Thomas thereof;' and therefore obliging himself to pay to William 2500 merks, at the first term after the decease of the longest liver of their father and mother; and the condition is in these words, 'Providing always, that in case my said father hath made or granted, or may hereafter make or grant any deed, whereby my succession to him in his estate real or personal may be disappointed, or rendered precarious or caduciary, that then and in that case, these presents are to become void and null to all intents and purposes.'

William, who was a travelling merchant, died in England, and John Jamieson linen-draper in Cirencester, a creditor of his, being left his executor, pursued Thomas on the bond, who *pleaded*, That it being payable after the deaths of their father and mother, became void by William's predecease. Bonds of provision given to children, payable at the father's death, become void by the predecease of the child; and the Lords have found such bonds payable at the child's certain age, become void if it do not attain to it, 12th February 1677, Belchies against Belchies, *voce* IMPLIED CONDITION; and they found a bond given to a grandchild, bearing to be for its aliment, payable after the death of the granter, fell by the child's predecease, — January 1730, Bell against Da-

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A bond granted by an elder brother to another at the father's desire, in full of all claims by the father or mother's death, resolvable by the father's doing any deed to disappoint the granter of the succession, was found due, though the creditor predeceased the father.

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vidson, *voce* IMPLIED CONDITION ; and this case is similar to the present, which is for a provision. A similar case also occurs in the civil law, *l. 79. § 1. ff. de conditionibus et demonstrationibus*, where a legacy left after the death of the heir, is said to become void by the predecease of the legatar. The condition annexed is a further evidence that the validity of the bond behoved to depend on the prior death of the father ; for it was in his power at any time of his life, to disappoint his son Thomas of his succession, in which case it was to be void.

*2do*, The bond is null, as returning *in non causam* ; the cause thereof was William's interest in his parent's succession, in which, he dying before them, could have no interest. If it had been granted by any third person, it would have been void ; for they could not in lieu of their obligation have got any benefit of a succession that never opened to him ; and it makes no difference, that it is granted by his elder brother ; for he thereby purchased his right ; and yet if there were any younger children, the benefit would wholly accrue to them ; the case is not the same as if a father had granted a bond of provision, (though there the condition of survivancy would be implied) for Thomas grants it, with a plain view to the interest he was to have in the succession.

The discharge granted by William is an argument for annulling the bond ; for by his death it becomes ineffectual, and could not hinder the other children, if any were, from claiming the whole executry.

*Pleaded* for the pursuer, This was a transaction between the father and his sons, and was a bargain of hazard ; the sum was in lieu of William's right to the executry, which might encrease ; and it were absurd to imagine he was to be excluded therefrom, whatever it might amount to, and yet not get the stipulated price, unless he survived his parents. Portions are frequently given in contracts of marriage, in satisfaction of all claims by the death of the bride's father ; and it would rear up many a process, if they could be repeated, or payment denied upon his surviving her. It is not pretended that the father did any deed to the prejudice of his son's succession ; and a deed voidable on a condition which never exists, remains valid.

Suppose the bond to have been granted by a third person, who could have taken no benefit by the succession, it would have been good as a bargain of hazard ; but the case is different ; for here Thomas is to take his father's personal and real estate, without diminution ; and the bargain was made with a view of the circumstances as they stood at the time, when there were neither hopes nor fears of more children, and was most onerous, not only as it was a purchase of his brother's right, but as it was in effect the purchasing a security that his father should do no deed to his prejudice, it being a transaction amongst them all.

THE LORDS found, that the bond was a valid subsisting bond, notwithstanding William Telfer's predeceasing his father and mother ; and repelled the defences against the said bond.

Reporter, Lord Elchies. Act. Ch. Arskine, Alt. A. Macdowal. Clerk, Forbes.

D. Falconer, v. 1. p. 8.