1741. *January* 9.

ANNA HAMILTON and her HUSBAND *against* CLAUD, &c. HAMILTONS.

No 25.
A father settled his estate on his son, obliging him to pay his father's debts, and settle a certain sum on younger children, particularly a specific sum on a daughter; afterwards the father, by a testament, varied the proportions mentioned in his son's obligation. This found ineffectual.

HAMILTON of Westburn granted an heritable bond for 5,000 merks to his only daughter Anna Hamilton, alterable at pleasure, and in which she was infeft; thereafter he disponed his estate of Westburn, &c. to Gabriel Hamilton his eldest son, reserving to himself only the liferent of the half thereof; but, of the same date with the disposition, he took a bond from his son, wherein he obliged him to relieve his father of his debts, conform to a list, and likewise to pay the younger children L. 1,000 Sterling, by the proportions and divisions therein mentioned, viz. to Anna 6,000 merks, and to each of the younger children the sum therein specified, in full contentation and satisfaction of all former provisions made by his father to them, and all executry, portion-natural, *legitim*, or others, provided that the half of the portion of the child deceasing before the term of payment, should return to the granter, and the other half be divided amongst the surviving children. Some years thereafter he made a testament, whereby he varied the proportion due to Anna by her brother's bond, leaving her only the liferent of 2000 merks, and the fee thereof to such of her children as should attain the age of majority, or be married. Upon Westburn's death, Anna brought a process against her brother Gabriel for the 6000 merks contained in the bond to her, who being uncertain whether he should pay the L. 1000 Sterling, conform to the proportions in his own bond, or according to his father's testament, raised a multiple-poinding, whereupon there ensued a competition betwixt Anna and the younger children.

For Anna, it was *pleaded*, That bonds of provision granted by a father to his children, and not delivered by him, nor registered, may be cancelled, or otherwise altered by him at his pleasure, because he himself is the debtor and granter, and the obligation upon him is not completed but by delivery to the creditor, or to some other in the creditor's name; but where the obligation is taken from a third party directly to the children, or any other person in their name, the obligation is complete, inducing a debt upon the granter, and a ground of credit to the party in whose favour the bond is conceived, which cannot be resolved by any other person but the creditor, unless it contains a provision or condition *in græmio*, that it shall be alterable at pleasure, which is an usual clause when any such thing is intended, and must surely have occurred in the present case, if the father had not resolved, that the disposition in favours of the eldest son, and his bond to the younger children, which was part of the same transaction, should, to the extent of the provisions, have been the ultimate settlement of his means and estate. This bond, therefore, put into the father's hands, without any condition or quality that it should be in his power to alter the same, as to the extent of the children's provisions, must be considered in his hands as custodier for his children, and in the same case, as if he

No 25. had taken a bond in the name of any third party, and caused the person assign the same in favour of the children, but which bond and assignation the father still retained; as was determined 20th November 1667, Isobel Trotter against Trotter, *voce* Provision to Heirs and Children.

For Claud, and the younger sons of Westburn, it was *observed*, That, by the law of nature and right and reason, there is lodged in the father a power of division of his effects amongst his children, according to what he thinks each of them deserves; and a father is never presumed either to have restricted, or entirely passed from his power, too often necessary to keep children in their duty. In the next place, the younger children were no parties-contractors to this obligation; and therefore they can plead no *jus quæsitum* in virtue of the obligation which was granted by the son at the desire of the father. It cannot be *alleged*, That the son intended it as a gift to his younger brothers and sisters; it is rather to be considered as a price given by the son to the father for the estate then disponed to him; so that the bond is truly the father's effects, and there is no ground to believe he ever intended to depart from his *patria potestas*, so far as to give up his power of dividing his younger children's provisions as he should afterwards judge most proper, or that he designed to make their condition better, or tie up his hands with respect to them, more than if he had kept his whole estate to himself, and executed a bond of provision in their favours, without delivering it to them, or any for their behoof. Besides it is plain, from the whole transaction, that the provisions were always considered as granted by the father; for, *1mo*, The term of payment is the first term after his decease. *2do*, There is a clause expressly declaring, that the same should be in full satisfaction of all former provisions made by the father. *3tio*, As the father thought he might incline to give provisions to his younger children during his own life, he takes the son obliged to pay the provisions, either in whole or in part, at any term he should think proper to demand it; and although there is no power of alteration reserved in the obligation, yet, as it falls to be considered as a bond of provision granted by the father, a power of alteration is virtually implied therein. *See* 6th July 1717, Ross against Bayn, *voce* Presumption; December 19th 1739, Russel against Gordon, *voce* Pactum Illicitum.

Answered for Anna, That when parties contract, if there be any article in favours of a third party, *est jus quæsitum tertio*, which cannot be recalled by both contractors; but the third party may compel either of them to exhibit the contract, and thereupon the party obliged may be compelled to perform; and whatever might be the father's after-inclinations in this case, he could never have compelled the son to give him a bond in any other terms than what he had already given him at the time of settling his estate. By the conception of the bond, the half of the portion of the deceasing was to accresce to the eldest son debtor in the bond; the father could not have compelled the son to discharge the benefit of this clause; and if he could not alter the bond with regard to his eldest son, the granter, it is not easy to discover upon what ground

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. No 25.

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.

No 26.
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.

THOMAS TELFER, eldest son of Thomas Telfer of Townhead, granted bond to William Telfer his brother, (with, and under the condition after mentioned allenarly,) 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-