No 60. was promising to make over herself and her effects to her husband; and, if that is not onerous, nothing surely can be so; neither is it a clear point, that such a promise may be resiled from; but if it could, it brings the party obliged at least under a natural obligation to perform; and which, of itself, it is thought, is a sufficient onerous cause. Neither is it true that the bill was granted *intuitu matrimonii*; on the contrary, from the whole circumstances of the case, it appears to have been intended to take place in the event no marriage followed; for in case the defender had implemented his promise, the bill would have fallen back to himself *jure mariti*. In a word, the true cause of granting it was, to induce the pursuer to accept of the proposal; and as she did accordingly accept of Calder's proposal, it can never be said that the bill was either granted *sine causa*, or that it is in the case of *causa data non secuta*.

THE LORDS sustained the defence, and assoilzied.

But, upon a reclaiming petition and answers, "THE LORDS repelled the defence, and found the defenders, conjunctly and severally, liable to the pursuer for the L. 100 Sterling." *See* PROOF.

*C. Home, No* 193. *p.* 325.

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1753. *February* 7.

Sir MICHAEL STEWART of Blackhall *against* EARL of DUNDONALD.

No 61.
A bond obliging the granter to pay 100 guineas when the granter or his descendants should succeed to a certain Earldom, found void and null.

IN the year 1698, William Cochran of Kilmaronnock granted bond to John Stewart younger of Blackhall, of the following tenor: "I Mr William Cochran of Kilmaronnock, for an certain sum of money paid and delivered to me by Mr John Stewart younger of Blackhall, be thir presents, bind and oblige me, my heirs and successors whatsomever, to content, pay, and deliver, to the said Mr John Stewart, his heirs, executors, and assignees, the sum of 100 guineas in gold, and that immediately, so soon as I, or the heirs descending of my body, shall succeed to the dignities and estate of the Earldom of Dundonald, but longer delay, fraud, or guile."

This sum being claimed from the heir of the obliger, now become Earl of Dundonald, certain defences were made, and the cause being reported, the following objections to the bond were suggested by one of the judges, That the subject matter of the claim was a *sponsio ludicra*, which, however innocent and equal in the present case, is a sort of gaming which ought not to be encouraged, being an inlet to very bad practices; and therefore, that no process ought to be sustained upon the bond, as being *contra bonos mores*. To this it was *answered*, That a disposition by a remote heir of his hope of succession for a certain sum was sustained, though objected to as *pactum de hæreditate viventis*, Fountainhall, 29th July 1708, Rag *contra* Brown, No 37. p. 9492. And a party having taken a gold piece, under condition to pay a greater sum if

No 61.

he should marry; the LORDS, upon the condition happening, sustained process for the greater sum, Dirleton, 9th February 1676, No 52. p. 9505. Hence bargains like the present are not unlawful; and if purchasing the hope of succession from a remote heir be lawful, it cannot be unlawful to give him a sum, to receive a greater sum when he shall succeed. It is true, that if an heir pinched for money makes an unequal bargain, equity will relieve him. And if the bargain be very unequal, it will be reduced upon extortion, or fraud and circumvention, as in the case of Lord Mordaunt, *voce* USURY. But, in the present case, there is no evidence of inequality; and the parties were in such a situation as to remove all suspicion of advantage being taken by the one against the other. Accordingly, it is a rule of the English law, "That these hazardous bargains with heirs or others, are not always set aside in a court of equity, for they may be fair; and it is only upon the circumstance of fraud, or being extremely unreasonable, that they can be overthrown."

"THE LORDS found the bond in question void and null, reserving to the consideration of the Court, whether the pursuer was entitled to a repetition of the money paid, upon proving the extent thereof."

This interlocutor was obtained by the President's casting vote, and the danger of encouraging such bargains moved the plurality. The judgment can only stand upon the following footing, That it is not necessary for commerce, nor the convenience of society, to sustain action upon such *sponsiones ludicræ*. They ought to be left upon private faith, and neither be supported by an action, nor cut down, unless attended with the circumstances of fraud or extortion; in which case a party will be relieved even after performance.

*Fol. Dic. v.* 4. *p.* 34. *Sel. Dec. No* 39 *p.* 44.

*** This case is reported in the Faculty Collection:

IN the year 1698, Mr William Cochran of Kilmaronock granted a bond to Mr John Stewart, the purster's father, in the following words, viz. 'I Mr William Cochran of Kilmaronock, for a certain sum of money, payed and delivered to me, by Mr John Stewart, younger of Blackhall, by thir presents, bind oblige me, &c. to content, pay, and deliver to the said Mr John Stewart and his heirs, &c. the sum of a hundred guineas in gold, and that immediately, and so soon as I, or the heirs descending of my body, shall succeed to the dignities and estate of the earldom of Dundonald.' This bond was written by Laurence Crawfurd of Jordanhill, and witnessed by Sir James Smollet of Bonhill, and John Brisbane, jun. of Bishopton. At that time the estate of Dundonald stood settled upon John Lord Cochran and his heirs-male; whom failing, to his brother Mr William Cochran, the granter of the bond, and John had then two sons alive.

The pursuer, in right of his father, brought his action upon this bond, alleging, that the condition of it had been purified in the 1725, when the succes-

No 61. sion to the estate and dignities of Dundonald opened to the defender's father, who was the son of Kilmaronock.

The defender offered sundry special defences; but when the case was reported to the Lords, it occurred to them, that the first question was, whether action could lie upon such a bond?

Upon that point, *pleaded* for the defender, That this was *pactum de hæreditate viventis*, and *contra bonos mores*; and, as a precedent in point, was mentioned the case of Abercrombie against Peterborough, 13th July 1745, *voce* USURY, where the Lords restricted the pursuer's demand to the sum advanced, with interest from the time of the advancements. The like judgment was given in two similar cases in England, viz. Berny *versus* Pit, (Vernon, vol. II. fol. 14.) and Wiseman *versus* Beeche, (Vernon, vol. II. fol. 121.)

*Replied* for the pursuer, That the bond in question is properly a contract *do ut des*, and is of a similar nature with bills of bottomry and insurances, which are favourites of the law. That, 1*mo*, The bargain had all the appearances of being a fair one; for, although the sum paid cannot now be proved, yet, at the date of the bond, Kilmaronock's chance of succession was so distant and uncertain, that a very small sum advanced was equal to 100 guineas to be returned on that event. Besides, Kilmaronock was no extravagant young heir, seeking to borrow money at any rate. Both he and Mr Stewart were equally above all suspicion of imposing, or of being imposed upon; and the witnesses were gentlemen, who would not have set their name to any thing usurious or unfair. The case of Dr Abercrombie was entirely different; for there advantage was taken of Lord Mordaunt's circumstances, to extort from him a bond, by which four times the sum received was to be paid back, if he, a young man, should outlive his grandfather, a man of 80 years of age. This was plainly an usurious and deceitful loan, and such as would have fallen under the *Senatusconsultum Macedonianum*.

In the *next* place, the condition of the bargain was no way unlawful, or *contra bonos mores*. The maxims and reasons of the civil law concerning *pacta de hæreditate viventis*, are by modern laws exploded. The *Majoratus* in Spain, *les institutions contractuelles* in France, entails in England, and tailzies in Scotland, are no other than *pacta de hæreditate viventis*. Purchases of liferents, annuities upon lives, are daily bargains. In such annuities one may insert the name of a father, nay, of the King himself. Yet, in none of all these cases doth the law suppose a *votum desiderandæ et captandæ mortis alienæ*. The law is above such suspicions. Lord Stair, l. 3. tit. 8. § 28. says, 'All pactions and contracts, in 'relation to the heritage of persons living, are valid and ordinary in contracts 'of marriage,' &c. See the case of Aikenhead against Bothwell, No 36. p. 9491.; see also No 52. p. 9505.

*Triplied* for the defender; That as to the fairness of the bargain, it does not enter the case, seeing the sum advanced does not appear; and though it did, no injustice is done if the pursuer get repetition to that extent. It was not upon

that footing, or upon the circumstances of the parties, that the judgment was founded in Abercrombie's case, but entirely upon the natural turpitude of such bargains, and upon the danger of admitting them in any shape. Insurances, bills of bottomry, annuities on lives, purchases of liferent, tailzies, and other settlements, are introduced in favour of commerce, or for the convenience of mankind, by regulating successions. But no argument of convenience or expediency can be brought to support wagers of this kind, which generally import a *turpe votum* upon one side, a desire to take an undue advantage upon the other, and, at best, folly and rashness upon both. No 61.

" THE LORDS found the bond in question void and null, reserving to the consideration of the Court, whether the pursuer should have repaid to him the money paid for the same, upon proving the extent thereof.'

Act. *H. Home, W. Stewart.* Alt. *Ferguson.* Reporter, *Lord Elchies.* Clerk, *Kirkpatrick.*
*S.* *Fac. Col. No* 61. *p.* 93.

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1760. *August* 8.

SIR WILLIAM MAXWELL of Monrieth *against* MR CHARLES MURRAY.

No 62.
A minor bought rings worth L.40, promising to pay 150 guineas for them at his marriage or death. This obligation he ratified when major. Found valid.

SIR WILLIAM MAXWELL of Monrieth, in his minority, granted bond to Charles Murray of Stanhope, acknowledging the receipt ' of a large diamond ring, with ' a fine picture ring, in value upwards of L. 40 Sterling, and obliging himself to ' pay to the said Charles Murray for these rings, 150 guineas at the first term ' after his marriage or death,' which of these terms should first happen, with the ' interest after the term of payment;' and, three years after he became major he granted a formal ratification of the same.

Sir William, in the year 1760, brought a reduction of this bond, upon the following grounds; 1*mo*, That it was a *sponsio ludicræ*, and in effect a game-debt; 2*do*, That the bargain was usurious, an exorbitant advantage being taken of him under colour of the uncertainty of the terms of payment; and therefore, that it ought not in equity to be sustained for more than the value as estimated by the parties, viz. L. 40 and interest. *Answered* to the *first*, That this is obviously a commercial bargain, and by no means a *sponsio ludicræ*. Here is a *merx et pretium* both ascertained. The quantity of the price is indeed made to depend upon future events, but no lawyer says that this is an objection to any bargain. Even bargains of pure chance are indulged in commercial dealings, witness a *jactus retis* mentioned by all the Roman lawyers. Upon that foundation stand policies of insurance, bottomry contracts, the *pecunia trajectitia*, and a thousand others which daily occur in commerce. To the *second* it was *answered*, That this case must be distinguished from extortion, where a young heir, or any man pinched for want of money, must have it at any rate, and where the lender, taking advantage of the borrower's necessity, imposes upon him hard and rigorous conditions. This is not the present case. Sir William was under