No 53. humanity and parental affection, but even parental duty; for he that provideth not for his family is worse than an infidel.

A separate consideration may be added, peculiar to a bond of provision granted to children. With what countenance can it be pleaded, that such a bond, when moderate, is prejudicial to the heir? Upon any principle of humanity or justice it assuredly is not so. And indeed it must raise one's indignation to hear it coolly maintained, that the heir, who succeeds to all, suffers a prejudice by being burdened with moderate provisions to his brothers and sisters; when without such provisions they would be abandoned to all the bitterness of want.

A man on death-bed can grant an heritable bond of corroboration, and can, by a charge of horning, convert an heritable to a moveable debt. Every step of this kind is indirectly providing for his younger children. What justice, or what sense, can there be in prohibiting him to provide for them directly.

Upon this subject I must observe historically, that our law formerly, directed by the general bias of the nation, was out of all measure favourable to the heir; and through the same bias the law of death-bed was undoubtedly stretched too far. This not only accounts for our old decisions upon this head, but is also a reason for an alteration. Our manners and customs are changed: Commerce and manufactures employ those whose best occupation formerly was idleness, as they were frequently occupied in broils and civil dissentions: Our younger children have thus become the riches of our country, and, in opposition to the heir, ought now to be the favourites of law.

An argument was urged from the bad consequences of exposing persons on death-bed to undue solicitation. And indeed the argument is weighty with respect to the moveable estate, which, without limitation, can be aliened, not only upon death-bed, but even *in extremis*. But as for provisions to younger children, supposing them moderate, I cannot discover any bad consequence. No solicitation can be wrong which is confined to an end so rational. And if there be any excess in such provisions, it is subjected to the modification of the Court; which a settlement of moveables is not, however whimsical or irrational.

It was agreed on all hands that the provisions were moderate. Yet a great plurality voted against the provisions, influenced by practice and the course of decisions, without piercing deeper.

Sel. Dec. No 126. *p.* 178.

No 54. A father cannot, on death-bed, grant bonds of provision to younger children, to the prejudice of the heir.

1757. *November* 15.

Younger Children of Hugh Campbell, *against* His Eldest Son.

Hugh Campbell purchased the lands of Pencloe, of 600 merks yearly rent, from his brother Andrew, for 17,600 merks: He paid the price, and received a disposition; but no infeftment followed. This purchase exhausted all the fortune he had.

Six months after, Hugh being on death-bed, and seeing that he had no other fund for provisions to his younger children, cancelled the disposition, took an obligation from Andrew to sell the lands for behoof of Hugh and his heirs, and granted reasonable bonds of provision to his younger children, to be paid out of the price of the lands. No 54.

The tutors of the heir having quarrelled this transaction on the head of death-bed, the LORDS, abstracting from the circumstances of the case, ordered a hearing at the bar upon this general point, Whether a man could, upon death-bed, grant rational provisions to his younger children, so as to affect the land estate descending to the heir?

Pleaded for the heir; The words of the *Regiam Majestatem*, *lib.* 2. *cap.* 18. entituled, *De donationibus terrarum*, § 7. & 9. are, " Licet autem, generaliter, cuilibet liceat de terra sua rationabilem partem, pro voluntate sua, cuicunque voluerit, in vita sua donare; in extremis tamen agenti, hoc nulli hactenus est permissum.——Unde præsumeretur, quod si quis in infirmitate positus quasi ad mortem, terram suam distribuere cœperit; quod in sanitate facere noluit, hoc potius ex fervore animi, quam ex mentis deliberatione, eveniret." And the words of the laws of William the Lion, cap. 13. are, " Nullus post, in lecto ægritudinis suæ de qua moritur, alienare aliquas terras quas hæreditarie possidet, in comitatu vel in burgo; nec etiam aliquas terras quas acquisivit in sanitate sua; nec alicui dare aut vendere ab hærede suo, nisi forte ære alieno sit oneratus; propter quod, de necessitate, ipsum oporteat terras vendere vel impignorare; communiter enim dicitur, Quod necessitas non habet legem; ubi hæres ejus nec potest, nec vult, eum de suo debito relevare."

Originally it was the law of almost all nations, That not man, but God only could make an heir; and hence it was our most ancient law, That even in *liege poustie* a man could not dispose of his heritage. Afterwards, indeed, this came to be altered, and he was allowed to dispose in *liege poustie;* but still he was incapacitated to hurt his heir upon death-bed. The principles, therefore, on which the law of death-bed is founded are, the remains of the ancient favour to the heir, the supposed incapacity of a dying man to judge aright of settlements, and the danger of dying persons being teased in their last moments by those around them.

As such is the precise rule of the common law, laid down in the *Regiam Majestatem*, and of the statute law, laid down in the law of William the Lion, and as that rule has not been altered by any subsequent statute, it is not in the power of the Court of Session to infringe upon it. The Court is to apply the law, not to make the law. The Court of Session has not pretorian powers. The pretor was a magistrate as well as a judge, who derived his power immediately from the people, and succeeded the consuls in their judicative power; as they again succeeded the kings in that part of their regal office. This account of the origin of the office, gives the reason why the pretor not only acted the part of magistrate and judge, but of lawgiver, giving out laws under the name

No 54. of *edicts*, according to which he administered justice. The judicial part he committed, in ordinary cases, to certain judges under him, called *judices pedanii*, who were judges, and nothing more; and therefore had not the power of executing their own sentences, which were executed by the magistrate who named them. These were the proper judges known to the Romans; and that part of the trial which was carried on before them, was only, in their language, called *judicium*. This was the power of the Roman pretor. On the other hand, the Judges of the Court of Session are not magistrates, but judges, having a delegated power from the chief magistrate of the country; and who himself, by our constitution, hath not the power of suspending or dispensing with the laws, much less of abrogating them. And even the sentences pronounced by them they cannot execute; but, like the sentences of those judges just mentioned among the Romans, they are executed in the name of the king, or chief magistrate, from whom the Court derives its authority. And although, like those judges, the Court does not judge under the restraint of a *formula* in every particular case, yet it has a general *formula*, namely, the law of the country, from which it cannot in any case depart. Even the Roman pretor, great as his power was, did not take upon him directly to abrogate the established laws; but, on the contrary, treated them with the greatest caution and respect, rather eluding, and breaking the force of them, by circuits and devices, than directly repealing them; nor can any example be given, where the pretor went so directly in opposition to the established law, as it is proposed the Court of Session should do in this case.

Answered for the Younger Children; The words of the two laws bar only gratuitous alienations to the prejudice of the heir, but not rational deeds to his prejudice. The chapter of the *Regiam Majestatem* founded upon, is entituled expressly, *De donationibus terrarum;* but then a law founded on utility, and which promotes the common interest, may be extended beyond the words, to fulfil the purpose of the legislature; and the judgment may fall to be pronounced in equity, and not in strict law. In this view, the present question is, Whether the law of death-bed ought to be so far extended by a Court of Equity, as to annul a bond of provision granted by a man upon death-bed?

When the principles of equity are applied, they will be found to vary with the merits of the bonds. That the law of death-bed ought to be extended against bonds merely gratuitous, seems obvious; for a law prohibiting alienation upon death-bed, so far as prejudicial to the heir, could never intend to lay the estate open to be swallowed up by a gratuitous bond; and indeed, were this permitted, the law of death-bed would avail very little. A bond merely voluntary, or gratuitous, granted on death-bed, will not be presumed, in terms of the law, to be done deliberately, or by good advice: It will be presumed to be either the effect of undue influence upon a man in trouble of mind, or of an unjust purpose, to defraud the heir; and, in either view, it ought to be annulled.

A bond granted on a rational consideration, is in a very different situation. It admits not of either of the two presumptions now mentioned. Its rationality, which is a just motive for granting it, excludes them both. There can lie no presumption, that it was elicited by undue influence, and as little that it was done to defraud the heir. There is not the slightest foundation in the spirit of the law of death-bed, more than in the words, to cut down such a deed. No 54.

Thus a bond of provision, which is immoderate, and beyond the circumstances of the granter, ought to be cut down; because it either has been elicited by undue influence, or must have been intended to the heir's prejudice. But a moderate bond of provision cannot admit of either of these presumptions: It has a most rational motive; not only humanity and parental affection, but even parental duty; for he that provideth not for his family, is worse than an infidel.

This doctrine takes off the force of the argument drawn from the danger of mens doing irrational deeds when they are incapable of judging for themselves. The authority of the Court is asked to support rational, and not irrational bonds of provision.

It takes off too the force of the argument drawn from the danger of dying persons being teased to execute settlements. It will require little teasing, to get a man to grant rational bonds of provision to his children; and it cannot be called undue influence, to ask a man to do what he ought to do.

It takes off too the force of the argument, that the Court have no power to support such bonds, even though they thought it right to do it. The Court of Session is either a court of strict law, or a court of equity. If it is the former, it cannot cut down rational bonds of provision; because, not being gratuitous alienations of land, they are not within the strict letter of the law of death-bed: If it is the latter, it would appear to be the province of the Court, to beat down bonds of provision when they are exorbitant, and contrary to equity, but to support them when they are moderate, and according to it.

'THE LORDS found, That the father could not grant the provisions in question to his younger children upon death bed.'

For Heir, *Burnett, Advocatus, Ferguson.* Alt. *Jo. Dalrymple, Miller, Lockhart.*

J. D. *Fol. Dic. v.* 3. *p.* 171. *Fac. Col. No* 55. *p.* 88.

*** This seems to be the same case with Logan against Campbell, No 53. *supra.*

1759. *June* 19. JOHN BOGLE of Hutcheson, *against* DAVID BOGLE.

No 55.
The Lords found, that the law of death-bed extended to tacks; and, at the instance of the heir, reduced

JOHN BOGLE was proprietor of the two merk lands of Hutcheson; which, in in his contract of marriage, he provided to himself, and the heirs of the marriage; whom failing, to his own heirs whatsoever. Of that marriage he had three sons; William, Thomas, and David.

Upon the marriage of William the eldest son, John the father disponed to him the one half, *pro indiviso*, of the foresaid tenement. The father and son