

1769. *March 10.*MARION RUSSEL *against* JAMES RUSSEL of Astiesteel.

No 36.

A bond of provision to a person, and his heirs and assignees, payable at the grantor's death, falls by predecease of the grantee.

WILLIAM RUSSEL, late of Astiesteel, granted a bond of provision in favour of David, his second son, his *heirs, executors, and assignees*, payable at the first term after the death of the granter.

David Russel having predeceased his father, an action was brought by his sister Marion, for payment of the bond.

Pleaded for the pursuer; Though, in the general case, legacies and donations *mortis causa* expire *morte donatarii*, the donor being presumed to prefer his own heirs to those of the donee, yet the presumption may be taken off by any clear indication of a different intention; and a clearer indication can scarce be, than what occurs here, where the bond is expressly taken to heirs and assignees. Thus it was found in the case of a legacy, July 16. 1760, Inglis *contra* Millar, *voce* LEGACY. And the present question concerning a donation *mortis causa*, must be determined by the same rule. Nor can it be objected, that the bond never was *in bonis* of David, and therefore cannot be taken up by his Representatives; for the pursuer takes, not as representative of David, but as conditional institute, designed and pointed out under the denomination of his heir or executor.

Answered for the defender; The arguments drawn from legacies cannot apply to the present case, to a bond of provision by a father to his child. Bonds of provision are granted in implement of the natural obligation; and, as soon as that ceaseth by the death of the child, they are understood to fall; so it was decided in the case, Bell *contra* Davidson, January 14. 1730, No 12. p. 6342. and in a still later case, November 17. 1757, Gordon *contra* Ross, No 13. p. 6343. even with regard to a bond of provision granted by a grandfather.

This general rule of law may no doubt be excluded, if, by fixing a *certain* term of payment, or by any other means, the father's intention clearly appear, that the bond of provision shall be good, notwithstanding the predecease of the child. But the bare adjection of heirs and assignees will not have the effect. That clause is, for most part, inserted in bonds of provision, that, in the event of the existence of the implied condition, the bond may descend to heirs or assignees; but it would be hard, if, after the death of the father, the extraneous heirs of the children were allowed to claim bonds, which, upon their predecease, he had omitted to cancel. Legacies have no certain destination, and, when bequeathed to heirs and assignees, may be sustained even in their favour; but the stronger presumption, which obtains in the case of bonds of provision, is not removed without some clear and explicit indication of the donor's will.

“ THE LORDS sustained the defence, and assolizied.”

Aft. Macqueen.

Alt. Lockhart.

Reporter, Pitfour.

G. F.

Fac. Col. No 97. p. 177.