quently was effectual to those who might succeed to him, either by will or *ab intestato*. No 154.

Pleaded for the defender, A provision made for a younger child is intended for the subsistence of such child after the death of his father; and, therefore, if the child die before his father, the provision is voided *ob non causam*; and this more especially, if such provision be constituted in a deed of a testamentary nature; it is then a legacy, or at least *mortis causa donatio*; and, according to a known maxim in law, must become void, by the predecease of the legatee or donatar. Alexander could never have claimed under this deed, which the father retained in his own possession, which he could have revoked at pleasure, and in effect did revoke; for it cannot be supposed that he intended that the provision in favour of his deceased son, Alexander, should still remain in force, when, by the deed 1742, he restricted the provision formerly granted to his daughters, and revoked all prior testaments made in their favour. Alexander then was not creditor in the bond 1730; and if he was not creditor in it, his executors cannot be received to claim under his right.

"THE LORDS found that the pursuers have no claim on the provision to Alexander, in respect he died before the father."

Reporter, *Elchies*. Act. *J. Ferguson, A. Lockhart*. Alt. *R. Craigie, & R. Dundas*. Clerk, *Gibson*.

D. *Fol. Dic. v.* 4. *p.* 185. *Fac. Col. No* 40. *p.* 61.

1767. *January* 21. HELEN BINNING *against* JAMES BINNING.

No 155.
Where children predecease their father, the provisions made for them, in the father's settlement, go to grandchildren, though the heirs of the children be not mentioned.

IN 1733, James Binning executed a deed of settlement of his affairs, giving certain liferent-provisions to his wife, and portions to his younger children. He nominated his wife, Helen Glendinning, sole executrix, with the burden of his debts, and aliment of the younger children; and then, with consent of James Binning, his eldest son, he binds and obliges himself, his heirs, &c. to content and pay to Patrick and Margaret Binnings, his younger children, 500 merks Scots each, at the first term after their mother's death; and, failing either of the said children by death, before majority, the portion was to divide equally between the eldest son and surviving child. Then follows a clause dispensing with the not delivery, and declaring that the same should be as sufficient to the wife and younger children, as if a separate disposition, or bonds of provision, had been delivered to them respectively.

Soon after executing this deed, Patrick Binning, the second son, married; but there was no contract of marriage, or settlement, entered into by him on that occasion. Patrick did not long survive his marriage, having died many years before his father or mother, leaving one daughter, Helen, who, upon her

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father's death, was carried to her grandfather's house, where she resided during his life.

During the lifetime of Helen Glendinning, the grandmother, the younger children had no claim for their respective portions, as the funds were liferented by her; but, upon her death in 1762, Helen Binning, the daughter of Patrick, brought an action against her uncle James, her father's elder brother, concluding for payment of the sum of 500 merks, as the portion settled by her grandfather upon her father, Patrick. THE LORD ORDINARY sustained the defence, and assoilzied. Helen reclaimed to the whole Lords.

Pleaded for James, the defender, That Helen's father, in whose right she claims, having died before his mother, who liferented the subjects, his heirs were not entitled to the sums provided to him, agreeably to the maxim of the Roman law, that *dies incertus pro conditione habetur*. And, *secondly*, That as the deed was of a testamentary nature, the legacy became void by Patrick's predeceasing his father, agreeably to the other rule in the Roman law, *quod morte legatarii perit legatum;* and, in support of this, sundry authorities from the Roman law were quoted; and the decision, Bell against Mason, in February 1749, No 6. p. 6332. observed in the Remarkable Decisions referred to; and also Edgar against Edgar, July 1665, No 1. p. 6325.; Belsches against Belsches, 22d February 1677, No 2. p. 6327.

Answered for Helen, Her claim was favourable, being that of an only child for a father's portion, who had got no part of his father's effects, and the defences insisted upon did not apply. The first, founded upon the maxim of the Roman law, *dies incertus pro conditione habetur*, can have no effect in this question, as the term of payment, though suspended to a future day, could not render the obligation conditional, unless it was uncertain whether the day of payment should ever exist, which could not be maintained in the present case, unless it was alleged to be uncertain whether Helen Glendinning should die or not; and if the defender's plea was good, every obligation, however pure when the term of payment was suspended, would resolve into a conditional obligation, Campbell of Calder against Ruth Pollock, 2d December 1717, No 11. p. 6342.; Kelso against M'Cubby, 25th November 1686, No 4. p. 6330.

As to the *second* defence, That this 500 merks was of the nature of a legacy in favours of Patrick, and fell by his predeceasing his father; the defender seems to misapprehend the nature of the deed; for, althongh the first part of it has the appearance of being testamentary, yet the latter part of it, which concerns the provisions to the younger children, is of the nature of a bond of provision in favour of those younger children; and, as it contains a clause dispensing with the delivery, it must have the same force as if a bond of provision had been executed and delivered to Patrick. The governing rule, in succession, is the intention of the deceased person, either expressed or presumed. And this principle has been justly established by the laws of all nations; and it must be presumed, that a father intended the provision made to a son, to extend to

grandchildren, as no principle can be conceived, which would lead a father to provide for his son, and yet leave his grandchildren destitute; and this differences the case of childrens' claims for their fathers' provisions, from all the other cases resorted to by the defender, L. 102. D. De Cond. Demonstrat; Magistrates of Montrose against Robertson, 21st November 1738, No 50. p. 6398. No 155.

"THE LORDS altered the Lord Ordinary's interlocutor, and found the defender liable.

For Helen, *Henry Dundas.* For James, *Archibald Cockburn.* Clerk, ——.

A. E. *Fol. Dic. v.* 4. *p.* 185. *Fac. Col. No* 51. *p.* 90.

1769. *March* 10. RUSSEL *against* RUSSEL.

No 156.

A FATHER having granted a bond of provision, in favour of a second son, his heirs, executors, and assignees, payable at the first term after the death of the granter, the grantee predeceased his father. In an action, at the instance of a sister of the grantee, for payment of the bond, it was *pleaded*, That in donations *mortis causa*, the general rule, *quod morte donatarii perit donatio*, may be set aside by a clear indication of a different intention in the donor, which occurs strongly here. *Answered*, Bonds of provision to children are granted in implement of the natural obligation; and as soon as that ceases, by the death of the child, the provision falls. The adjection of heirs and assignees, which is customary in all bonds of provision, is not sufficient to entitle the extraneous heir of children, after the death of a father, to claim bonds, which, upon their predecease, he had omitted to cancel. THE LORDS found the bond not due.

Fol. Dic. v. 4. *p.* 186. *Fac. Col.*

*** This case is No 36. p. 6372. *voce* IMPLIED CONDITION.

SECT. XX.

Conditional, and Implied, Provisions to Children.

1672. *June* 21.

ANNA CARSTAIRS and JOHN RAMSAY, her Husband, *against* JOHN CERSTAIRS, her Father, and SIR JOHN, his Tutor dative.

No 157.
Provisions in favour of daughters, failing heirs-male of the

JOHN CARSTAIRS, the father, being obliged by contract of marriage, *in anno* 1649, in case there should be but one daughter procreated of the marriage betwixt him and Isobel Ainsly, to pay to her the sum of L. 20000 after her at-

No 157.
marriage, are not due till the marriage be dissolved by death of the husband or wife, although payable at a certain age.

taining the age of 16 years, the said Anna did intent action against her father and his Tutor-dative, for payment of the said sum, she being now past the age of 20 years, and married. It was *alleged* for the defenders, That the contract of marriage could furnish no such action, because the provision in favours of one daughter, was only in case of failure of heirs-male of the marriage, which condition did not yet exist, seeing both the father and mother were alive, and might have heirs-male. It was *replied*, That the father being furious, and a Tutor-dative given to him, and the mother not having cohabited with him these many years, and being past 50 years of age, by reason whereof it was impossible there should be any heirs-male of the marriage, the condition of failing of heirs was purified, and the condition ought to be satisfied.

THE LORDS did sustain the defences, notwithstanding of the reply, and found that such conditional provisions in contracts of marriage in favours of daughters, failing of heirs-male, could only be interpreted where the marriage is dissolved by the death of one of the parties contractors, at least; and some were of opinion, that the condition could not be fulfilled but by the death of the husband, to whom only an heir of the marriage could be served. But as to this case, they did all agree, where both parties were alive, that it could never be the meaning of the parties that the father should be distressed, because of age or sickness, as equivalent to the dissolution of the marriage by death, which is not the meaning of the clauses.

Gosford, MS. No 493. *p.* 258.

*** See Stair's and Dirleton's report of this case, No 43. p. 2992, *voce* CONDITION.

1775. *July* 27. HELEN MEARNS *against* AGNES and MARY MEARNS.

No 158.
Liberal construction of an inaccurately worded family-settlement, executed by a father, in a question among his children.

IN 1723, the deceased Alexander Mearns, father to the pursuer and defenders, executed a disposition as follows: 'Know all men by these presents, me 'Alexander Mearns, merchant in the Abbay-hill, for the love and favour I 'have and bear to Mary Lawrie, my well-beloved spouse, and in respect there 'being no contract betwixt us, or provision for her after our marriage, and it 'hath pleased the Lord to bless us with four children; therefore, wit ye me, 'for an liferent and provision to the said Mary Lawrie and my four children, '(she being obliged to educate and aliment them after my decease, in case I 'shall happen to decease before her) to have disponed and assigned, likeas I 'hereby dispone and assign, in favour of the said Mary Lawrie, my well-be-'loved spouse, with and under the provisions and conditions under-written, all 'and hail an tenement of land built by me upon an piece of waste ground, 'lying in the Abbay-hill,' &c.

'By the same deed, Alexander Mearns nominated his wife to be his sole executrix and legatrix; but, after assigning to her his household plenishing, and all debts

and sums of money, goods and gear, merchant ware, and others in his shop, or custody, or accounts in his account-book, and all bonds and bills resting and owing to him; which he gives her power to intromit with. He adds these words; 'And that for her liferent use allenarly.' After which, the deed proceeds in the following words: 'As also, with full power to her to sell and dispone the 'said tenement, excepting the laigh story, shop, and garrets where we dwell, 'which I hereby reserve to my children, she always having the liferent of the 'same, during her widowity, and no otherwise; and the said power of selling 'and disponing is only in case she shall be straitened in the payment of my just 'and lawful debts, which, by her acceptation hereof, she is obliged to pay. 'And in like manner I, by the tenor hereof, assign her in and to the said tack 'granted to me by the Council and Governors of Heriot's Hospital, charter 'and sasine following thereupon; and sicklike, in and to the said tack granted 'by me to the said Maurice Cairns, and into the tack-duty payable by him, 'termly failzies and penalties contained therein. And in token of the premis-'ses, I have delivered to her the hail writs and evidents, to be used and dis-'posed upon by her after my decease, in case I shall happen to decease before 'her.' No 158.

Of the four children alive at the date of this disposition, the pursuer was one. But this notwithstanding, Alexander Mearns, the eldest son, upon his father's death, made up titles, by obtaining precept of *clare constat*, as heir to his father, from the Governors of Heriot's Hospital the superiors, in 1735, upon which he was infeft.

In 1745, the said Alexander Mearns, the son, executed a disposition of the above heritable subjects in favour of his (posthumous) brother Thomas, and his sisters, Agnes and Mary, equally among them, and failing any of them by decease, to the survivors or survivor.

The said Agnes and Mary Mearns having served themselves heirs of provision to their brother Thomas, expede a charter of resignation in 1764, upon which they were infeft: Soon after which they sold the subjects to John Veitch, in whose person they at present stand.

The pursuer, who alleged she was long ignorant of the settlement made by her father in the year 1723, but, upon getting particular information concerning it, she obtained herself served one of the heirs of provision to her father in terms thereof; and now insisted in an action against her sisters for her share of the rents from the time of her mother's death, and of the price which they received from Mr Veitch the purchaser. And the preliminary point agitated in this cause was, whether the settlements made by old Alexander Mearns in 1723 can support this action?

Argued in defence, 1*mo*, That the deed upon which the pursuer's claim is founded, being very old and latent, and no document taken upon it till within these few years, every claim competent upon it must now be cut off by taciturnity and prescription; 2*do*, That, as the deed does not contain a clause dis-

No 158.

pensing with not delivery, and no evidence is brought of its having ever been delivered, no claim can lay upon it; and, *3tio*, That the heritable subjects therein mentioned, are not disponed, either to the pursuer or his other children: That no fee, or right whatsoever, is granted to them; the only person in whose favour the disposition appears to be conceived being Mary Lawrie, their common mother; for that, although children are mentioned in the narrative of the deed, no notice is taken of them in the dispositive clause: That the fee was either conveyed to Mary Lawrie the mother, or remained with Alexander Mearns the father; and that which ever of these may be found to be the case, it must be equally fatal to the pursuer's claim.

Answered, *1mo*, That, although the pursuer was kept ignorant for a long time of the nature of this settlement, there is no room for objecting that it was a latent deed. It was the only right by which the liferent thereby given to the granter's wife, who long survived him, was secured to her; and as the granter died only about the year 1733, so it appears to have been registered in the year 1741. The objection of taciturnity merits no answer. And, with regard to the plea of prescription, it would be sufficient to observe, that it must have been sufficiently interrupted, either by the minority of the pursuer, who was not of age till the year 1740, or by her having no interest to insist during the lifetime of her father and mother; and it must be admitted, that the pursuer entered her claim within less than 40 years after the settlement was attempted to be defeated by her eldest brother making up his titles upon a precept of *clare constat* from the superior in the year 1733.

2do, That this settlement being granted *mortis causa*, to take effect only upon the granter's death, there was no occasion either for instant delivery, or for a clause dispensing therewith. And it is not pretended that any subsequent settlement was made by the said Alexander Mearns. It will surely be extremely hard if it cannot be made effectual to those for whose benefit it was clearly intended.

3tio, That this deed, though no doubt very inaccurately conceived, is perfectly plain and intelligible. The granter had at that time a wife and four children, and appears clearly to have intended to put them all upon an equal footing, by assigning not only his heritable subjects, but also his whole moveables to his wife, and taking her bound to educate and aliment the children after his decease. It is true, indeed, that, in the dispositive clause, assigning the heritable subjects to her, he does not expressly confine her right to the liferent of the subjects, nor does he settle the fee upon his children. But, as it appears clearly from that part of the deed by which he assigns her to the moveable subjects, that she was only to have right to the liferent use of them; so it is equally clear, from the immediately subsequent clause giving her power to sell and dispose only of part of the heritable subjects, in case such sale should be necessary for the payment of his debts, but reserves the remainder to his children, that he understood at the time that he had done every thing necessary

for establishing the fee in his said children equally among them. And taking the case in that point of view, it was most unjustfiable in the eldest son, after making up a title in his own person as heir to his father, to attempt to deprive the pursuer of her just right, by conveying these subjects in the manner he did to his brother Thomas, and the two defenders, one of whom was not even born at the time when their father's settlement was made; and, as the defenders do represent their said eldest brother, it is but just and reasonable that they should be answerable to the pursuer for what he in that manner attempted to deprive her of. No 158.

"THE LORDS find, that Helen Mearns, as one of the four children in the settlement, is entitled to a fourth share and proportion of the free price of the subjects as sold to John Veitch."

And afterwards refused a reclaiming bill without answers.

Act. *Wight.* Alt. *Geo. Wallace.* Clerk, *Ross.*

Fol. Dic. v. 4. *p.* 188. *Fac. Col. No* 189. *p.* 115.

SECT. XXI.

Provisions in a postnuptial contract, whether effectual to compete with onerous creditors?

1746. *June* 18. EXECUTOR of MURRAY *against* MURRAY. No 159.

A PROVISION by a father, in consideration of an additional tocher paid by the wife's father, made in a postnuptial contract of marriage, of a sum to the heir-female to whom the father's entailed estate was to descend, was reduced at the instance of prior creditors, and posterior ones whose money had been applied to the payment of prior debts.

Fol. Dic. v. 4. *p.* 188. *Rem. Dec. D. Falconer.*

*** This case is No 104. p. 990., *voce* BANKRUPT.

1754. *July* 2. STRACHAN *against* CREDITORS of DALHAIKIE. No 160. The provision in a postnuptial contract

JAMES STRACHAN of Dalhaikie, in a postnuptial contract of marriage, 'bound 'and obliged him, his heirs, &c. to satisfy and pay to the children procreated,

No 160.
of marriage, obliging the husband 'to 'satisfy and 'pay to his 'son already 'procreated, 'and to his 'other sons 'that shall 'exist, the 'sum of '18,000 'merks, to-'gether with 'half of the 'conquest,' imports only a provision of succession.

'or to be procreated of the marriage, the following provisions, viz. to the son 'already procreated, and to him and the other sons, in case others shall exist 'of the marriage, the sum of 18,000 merks; together with the just and equal 'half of all sums of money, goods and gear, whether heritable or moveable, 'which the said James Strachan should happen to conquest and acquire during 'the said marriage; and the said James Strachan became bound to satisfy and 'pay these provisions at the first term following his death, and that of Katha-'rine Dunbar his spouse, with annualrent and penalty,' &c.

James Strachan having died insolvent, his only son Ludovick Strachan adjudged the estate for security of the said sum of 18,000 merks; and, in a ranking and sale, it was objected by the other Creditors, that he could draw nothing till his father's debts were paid.

"THE LORDS found, that the clause imported only a provision of succession."

It was *observed*, That the words 'to satisfy and pay' seemed to be improperly applied in this contract. With regard to the conquest to which they are applied, as well as to the liquid sum, they cannot be taken in their proper sense; but must mean only a provision of succession. And if the words must be confined to this sense with regard to one of the articles, a Judge cannot take upon him to give them a more extensive sense with regard to the other; especially where the consequence of such interpretation would be to put a gratuitous creditor upon an equal footing with one for a valuable consideration.

Fol. Dic. v. 4. *p.* 188. *Sel. Dec. No* 64. *p.* 84.

*** The Faculty report of this case is No 105. p. 996., *voce* BANKRUPT.

1771. *January* 23.

JAMES CHALMERS, Writer to the Signet, *against* ROBERT HAMILTON of Bourtriehill.

No 161.
Provisions to children executed in consequence of a reserved faculty, and inserted as a burden on an heritable bond granted by the father to one of his creditors, found effectual against personal creditors.

HUGH MONTGOMERY of Broomlands granted a bond of provision, dated 18th February 1727, obliging himself, his heirs, &c. to pay to his spouse for her liferent, and to the heirs and bairns of the marriage in fee, 10,000 merks Scots.

Three daughters, Jean, Elizabeth, and Mary, and a son Charles, existed of this marriage; and by a deed, dated 24th July 1751, Broomlands gave and appropriated 2,000 merks of the said sum to his daughter Elizabeth, and the like sum to his daughter Mary, in satisfaction of all they could claim through his death.

By a deed, dated 10th June 1763, Broomlands disponed to his son Charles his whole estate, reserving his own liferent, the burden of his debts, a liferent provision to his wife, and the burden of making payment of 2,000 merks to each of his daughters Jean and Elizabeth, and the like sum of 2,000 merks to

Mary and Elizabeth Dicksons, his grandchildren by his daughter Mary; and which were declared to be in satisfaction to them of their interest in the bond of provision above mentioned. No. 161.

Charles the son, in 1764, made a purchase, from Hamilton of Bourtriehill, of lands in Jamaica to the amount of L. 5,000; for which it was agreed that Broomlands the father should grant an heritable bond. Upon the 25th March 1764, he accordingly, with consent of his son, granted an heritable security over his lands of Broomlands, &c. but under the condition that the said security should not affect the rents during his life, nor prejudice the annuity to his wife, nor be any bar or hinderance to his providing Jean and Elizabeth his daughters in 2,000 merks Scots each, and Mary and Elizabeth Dicksons his grandchildren in the like sum between them; 'all of which should be consi-'dered as prior and preferable to the said heritable security, and infeftment to 'follow thereupon.'

Hugh and Charles Montgomery died. The estate was brought to judicial sale, and purchased by Bourtriehill at the price of L. 4220; who understanding that the above provisions to the daughters and grand-daughters were preferable debts, paid them up and took assignations. A ranking having ensued, Bourtriehill produced the heritable security, dated 14th June 1764, with the interests of the daughters and grand-daughters, and assignations from them, and claimed to be preferred.

Compearance was at the same time made for James Chalmers as assignee to a personal bond, of date 14th October 1751, by Hugh Montgomery of Broomlands, for L. 30 Sterling; and thereon he insisted he was entitled to be ranked preferably to the children's provision upon the sum reserved for that purpose.

THE LORD ORDINARY pronounced the following judgment: "Having considered that the debts secured by infeftments upon the lands of Broomlands would exhaust the price thereof—though the 6000 merks Scots claimed by the common debtor's daughters and grand-daughters were laid out of the question, and that the whole debt of L. 5000 Sterling contained in the heritable bond granted by the common debtor to Robert Hamilton is admitted to be an onerous debt, and preferable to the debt founded on by James Chalmers, and that the exception in the said heritable bond is personal in favour of Hugh Montgomery's daughters and grand-daughters—repels the objections pleaded by James Chalmers against the said heritable bond; and finds that his debt is not entitled to be ranked upon or preferable to any part of the sums secured by the infeftment following upon said heritable bond."

In a reclaiming petition, Mr Chalmers *pleaded*:

The necessary effect of granting the bond of provision mentioned, and of executing the heritable bond with the reserved faculty, was to convey to the children and grand-children the 6000 merks so excepted. This was a gratuitous alienation in favour of conjunct and confident persons, to the prejudice of

No 161. prior onerous creditors, and was therefore liable to challenge upon the act 1621.

The objection maintained, that the bonds of provision were granted in implement of the obligation in 1727, was not sufficient. That obligation was general, and gave no *jus crediti* to the children; they could not, in consequence thereof, have compelled their father to grant these special bonds of provision; but as they must have made up their titles to this sum by serving heirs of provision, they would of course have been postponed to all his onerous debts, whether prior or posterior.

The bond to Mary and Elizabeth being granted in July 1751 was no doubt prior to the date of the petitioner's debt; but as it was not pretended that it had been then delivered, it must still be held a posterior deed; it being a fixed rule as to bonds of provision, that they could only be considered as effectual from the time that the actual delivery shall be proved. 14th November 1676, Inglis *contra* Boswell, No 236. p. 11567. 24th July 1701, Christy, No 239. p. 11571. And as to the bond to Jean the eldest daughter, as it was mentioned for the first time in the general disposition in favour of the son, 10th June 1763, it was several years posterior to the petitioner's debt.

The objection, that it was the granting of the heritable security for L. 5000, and not the bonds of provision, which rendered Broomlands insolvent, was equally ill founded; for although these bonds were executed before granting the heritable security, yet they were not at that time effectual debts against the granter, who might have destroyed them whenever he had a mind. The heritable security contained reservations in his favour more than sufficient to pay all his anterior debts; and it was only by trenching upon these, and allowing the bonds to become effectual debts, by keeping them uncancelled by him till his death, that his insolvency was created.

The ground, that the exception in the heritable bond was personal in favour of the daughters and grand-daughters, was not founded in law. The whole of the reservations contained in the heritable bond were at the father's disposal, and under his power; he was virtually to have possession of the fund of 6000 merks during his life; he was to have the entire disposal of it, by granting bonds of provision, or revoking them at pleasure; and after his death, if he chose, it was to descend to his children and grandchildren. This reservation therefore was a faculty with which the father was substantially vested; and it was an established principle of law, confirmed by a train of decisions, that no right or reservation whatever could be taken by a person either in his own favour, or in favour of his children, to take effect after his death, and subject in the mean time to his disposal, which was not affectable by the diligence of creditors. For example, an heir's right of challenge upon deathbed—the right to reduce on minority—of revoking a donation *inter virum et uxorem*—a faculty to burden with debts; which were all as much personal as any right that could be conceived; 9th February 1700, Liberton *contra* Countess of Rothes, No

87. p. 971. Holding reservations, such as the present, to be merely personal in favour of those who were mentioned in the reserving clause, and not attachable by the granter's creditors, would be productive of the most dangerous consequence. A person might thereby hold the possession of an estate during his life, have the power of disposing of it to his children, or any of his relations, after his death, or of providing younger children in the most liberal manner, whilst his lawful creditors, after his death, would in that way be totally excluded. No 161.

Independent of the legal challenge upon the act 1621, as the bonds of provision were undelivered, and not payable till after the father's death, the children had nothing more than a *spes successionis*, which must of course be subject to all the father's deeds and onerous debts. By delivering a bond of provision, and making it payable upon a day certain, the father might no doubt have conferred upon the children a real *jus crediti*, which would have entitled them to compete with onerous creditors that were not prior; but this had not been done; and the point had been decided, 2d July 1754, Creditors of Strachan *contra* Strachan, No 160. p. 13053.

The last objection, that a faculty of this kind was understood to die with the person who reserved it, and that the petitioner had taken no steps to make his right effectual during Hugh Montgomery's life, was easily answered. It was a fixed point, that the bare contracting of debt was an effectual exertion of a reserved faculty such as the present, though not expressly referred to; and it had also been found, that a faculty, upon being reserved, accrued *ipso jure* to prior creditors, and entitled them to take the benefit of it, in the same manner as if they had got bonds bearing an express reference to that power. 16th December 1698, Elliot *contra* Elliot, No 22. p. 4130. 19th February 1725, Creditors of Rusko *contra* Blair, No 18. p. 4117.

Mr Hamilton *answered*;

The provisions, in the present case, could in no view be considered as fraudulent alienations posterior to the contraction of the petitioner's debt; they had all an existence as far back as the 1727; and those to the two married daughters had been completed by the deed 24th July 1751, four months prior to the existence of the debt claimed. This last deed being in favour of daughters married and forisfamiliated, was to be presumed to have been delivered of its date; so that the decisions referred to, which related to children *in familia*, did not apply. Though the settlement 10th June 1763, and heritable security in 1764, by which these provisions were reserved, were posterior to the petitioner's debt, yet they were merely deeds in implement of provisions already granted; no new conveyance or alienation in defraud of a prior creditor; so that the provision to the unmarried daughter Jean, though not ascertained till the 10th June 1763, must equally with the two former, as in implement of the bond 1727, be drawn back, and considered as of a prior date to the debt in competition.

No 161. Though provisions to children might, in certain cases, be reduced at the instance of prior creditors upon the act 1621, yet this could only take place where the insolvency of the granter, at the time of making these provisions, was fully proved. There was no insolvency in the present instance at the time alluded to; nor had it been created by these provisions, or existed, till the separate transaction. The granting of the heritable bond in 1764, by which the estate was carried off, in preference to the the latent personal debt due to the petitioner, though not to the provision, made a special burden upon that transaction.

It had been found by the Lord Ordinary, that the petitioner was at any rate excluded by the heritable security for debts beyond the value of the subject, and that the exception in that security was personal in favour of the daughters. The petitioner's argument on this head was founded on the assumed principle that the destination of this subject in favour of children did not hinder creditors from affecting it, every right and subject being liable to their diligence. But this was not a just description of the nature of reserved faculties, and was confounding two things extremely different, viz. an indefinite reserved power to burden with a certain sum of money, without saying for what purpose, and a reservation for certain specific purposes. In the first case, there might be room for a creditor to claim upon the implied exercise of the faculty by contracting debt; but where a special purpose and destination was expressed, there was no room for implying any other thing than what was set forth in the transaction. This distinction, and that a faculty such as the present was merely personal, was well explained, 12th July 1699, Creditors of Kinfawns *contra* Relict and Children, No 21. p. 489. See No 14. p. 4106.

The faculty, therefore, in the present instance, being special and personal, was such of course as no other creditor could derive any advantage from. Independent also of its being incompetent for the petitioner to claim the benefit of this exception, it was *jus tertii* for him to challenge its being made in favour of the children. He was, at all events, cut out by the preferable debts; and hence, though he should prevail in such challenge, it would do him no good, as the only effect it could have would be to make the whole subjects go to the creditors, as if no such exception had been contained in the bond. The dangerous consequences figured were chimerical. If a person executed a deed, and reserved very ample powers, the radical interest was still in him. If, on the other hand, he reserved only certain powers, such as to provide wife or children, creditors and others contracting with him could see what they had to trust to; and if they contracted with one who was totally denuded of his estate, they had themselves alone to blame.

The petitioner's remedy, if he ever had any, was now at an end; he had never insisted for any exercise of this power in his own favour during the life of the person in whom the quality was inherent. A quality of this kind could not

transmit to heirs; and, for the reasons already suggested, there was no room for the implied exercise by the simple contraction of debt. No 161.

The last argument by which the right of challenge upon the act 1621 was abandoned, and the proposition maintained, that the children had but a *spes successionis* to their father, and must be postponed to his onerous debts, had no legal foundation. By these bonds of provision, the children were creditors not only *ex figura verborum*, but in substance and effect. The term of payment being suspended did not hinder them from being creditors; they had no occasion to make up any title by service or otherwise, in order to draw their provisions; so that the circumstance upon which the petitioner's proposition was assumed, did not exist.

THE LORDS refused the petition, and remitted *simpliciter* to the Ordinary.

Lord Ordinary, *Kennet.* For Chalmers, *Blair.*
For Hamilton, *Ilay Campbell.* Clerk, *Tait.*

R. H. *Fac. Col. No 65. p. 193.*

1794. *November 26.* CANNAN *against* GREIG.

No 162.

A WIFE having, in a postnuptial contract of marriage, disponed lands to her husband in liferent, and to the heirs of the marriage in fee, a clause was subjoined, granting power to the husband, 'if he shall see cause, to sell the lands, 'or burden them with debt at his pleasure, in every respect as if he had been 'unlimited fiar, on condition that he granted security to provide the heir in 'L. 2000, payable at his death.' The disponee contracted debts beyond the value of the estate, and died without granting bond or security for the L. 2000 to his heir. THE LORDS found the heir preferable for that sum to all the onerous creditors of the disponee.

Fol. Dic. v. 4. p. 188. Fac. Col.

*** This case is No 60. p. 12005. *voce* PROCESS.

See Cunningham against Cunningham, No 139. p. 13024.

Provisions to children, how far safe against a reduction upon act 1621. See BANKRUPT.

Bond of provision not effectual until delivery or death. See DELIVERY.

Not presumed delivered of the date. See PRESUMPTION.

When understood delivered. See PRESUMPTION.

Rights taken by parents in name of children, when revocable? See PRESUMPTION.

Posterior provisions, when understood in satisfaction of prior. See PRESUMPTION.

Doubtful clauses in deeds of provision, how interpreted. See CLAUSE, and IMPLIED CONDITION.

Provisions in a contract of marriage, or otherwise, how far they imply limitations upon the receiver. See FIAR, ABSOLUTE, LIMITED.

See CONDITION.

See JUS QUÆSITUM TERTIO.

See APPENDIX.

APPENDIX.

PART I.

PROVISION TO HEIRS AND CHILDREN.

1776. *July* 30.

AGNES LAMOND, and JAMES THORNTON her Husband, *against* WALTER LAMOND, Tanner in Larbert.

No. 1.
Particulars of the case No. 120. p. 12991.

BY the contract of marriage, entered into betwixt the father and mother of these parties, Archibald Lamond the father, 'bound and obliged himself, that 'whatever lands, heritages, goods, gear, debts, sums of money, whether heritable 'or moveable, then belonging to him, or which he should afterward conquesce 'or acquire, should be provided and secured to himself and spouse in liferent, 'and to the *heirs and bairns one or more*, to be procreated betwixt them, in fee.' '—And the said Archibald Lamond obliges himself, that he has not done, nor 'shall do any fact or deed, which in any sort may harm, hurt, dislocate or 'prejudge *the children, to be procreate betwixt them, anent their lawful succession* '*thereto.*'

Archibald Lamond left one son and four daughters. Three of them having married with their father's approbation, received tocher's from him upon granting discharges of their claims, in consequence of the contract of marriage. The pursuer Agnes having married contrary to her father's inclination, and having received no tocher nor legacy from him,—now claimed her provisions under the contract.

She contended, that as the subjects were to be provided, '*to the heirs and* '*bairns, one or more, to be procreated of the marriage,*' there could be no doubt that this claim must include the whole children of the marriage. That even if there could be any doubts on this subject, the rank of life in which the contracting parties were situated, (her father having been only a shoemaker in a remote part of the country,) would preclude the idea of an intention

No. 1. of confining the heritable subjects to the heir alone, and thereby raising a family by that settlement, instead of providing equally, as is the common custom of the country, for all the children. That the words, 'heirs and bairns one or 'more,' must entitle the whole children of the marriage to succeed without any regard to whether the nature of the subject conveyed is heritable or moveable. For the principle of interpreting contracts and settlements, agreeable to the will and intention of the parties, is not only consistent with justice, but supported by the opinions of our first lawyers, and established by the uniform decisions of this Court. Thus Mr. Erskine, B. 3. Tit. 8. § 48. has carried this principle even further than what is necessary, to support the pursuer's interpretation of this settlement. His words are, 'Where presumptions arise either 'from other clauses in the settlement, or from the *circumstances of the granter*, 'that he truly intended to comprehend under the word *heir*, or *heirs whatso-* 'ever, his whole issue, that term is explained accordingly;' and in which Lord Bankton seems to agree with him, B. 3. Tit. 5. § 48. She further contended, that the term heirs and bairns, have a fixed and determined meaning in law, comprehending the whole children of the marriage, as will be found by the following decisions, January 29. 1678, Stuarts against Stuart, No. 4. p. 12842. where the Court, upon considering a similar clause to the present, in a contract providing 20,000 merks, and what heritable subjects should be acquired during the marriage, '*to the heirs or bairns of the marriage, one or more*,' the Court found, 'that by the clause of the contract all the bairns of the 'marriage were heirs of provision in the conquest, and that heirs or bairns was 'not alternative, but exegetic, and that the father being debtor in the clause, 'could not effectually alter the clause of conquest in favour of one of the bairns.' There are likewise two cases observed by Lord Harcarse, which establish the same principle, Scott against Scott, February, 1684, No. 6. p. 12842. and Irvine against M'Kirick, December, 1684, No. 7. p. 12843. And there is likewise a late decision to the same purpose in 1769, Wilsons against Wilsons, No. 9. p. 12845.

To this it was answered by the defender, That even admitting the pursuer's interpretation of the contract in question, to be just, yet certainly it was competent to the father to divide the funds, so provided, among his children in any manner which he should think most proper. That the father having purchased two different portions of land, he took the disposition of the one subject to himself and his wife in liferent, and to *his heirs*, successors and assignees, heritably and irredeemably in fee; and that of the other subject to himself and spouse in liferent, and to the *defender in fee*. And surely it will not be disputed, that the very title deeds to the subject are equivalent to the most formal deed of division, that the father possibly could make.

But on the general point it was observed, That although among persons in the sphere of life of the contracting parties in this case, the common custom may prevail of providing for all the children equally; yet it is common in every

sphere of life to grant some preference to the eldest son; and according to the general rules of law, the same words in the contract of a Peer, or in that of a shoemaker, must receive the same interpretation. Upon the general principle of law, there can be no doubt, that where in executing conveyances, contracts, or the like, parties make use of proper technical terms, then the law must decide according to the proper and ordinary meaning of such terms. The legal import of the word *heirs*, must determine in what manner, and in what order the children of the marriage shall succeed; the addition of *bairns*, means only that the issue of the marriage are to have their right in their legal order. It cannot be supposed, that by coupling the word *bairns* with the legal expression of *heirs*, the maker of the settlement intended that the one should stand in opposition to the other, and that the legal effect of the distinction to *heirs* was to be entirely destroyed by adding *bairns* to it. If the whole children were meant to be called, whatever the nature of the succession should be, it is quite improper to use the word *heirs*, which legally imports a quite different mode of succession. In fact, that this is the opinion both of Lord Bankton, B. 3. T. 5. § 49, 50, and of Mr. Erskine, whom says, in the very section quoted by the pursuer, 'That words which have a fixed legal meaning, ought, when made 'use of in settlements or securities, to be understood in that meaning.' And the passage quoted by the pursuer refers only to sums of money, and not to heritable subjects; for here an evident distinction arises both of persons and things, and the heir and younger children are called to their succession according to the order of the law. No. 1.

Agreeable to these principles the Court has repeatedly decided, excepting in such cases, where from the face of the deed itself it is obvious, that it was meant and intended, that the whole subject should divide among the children *in capita*. Thus in a late case, Kemps against Russel, 1768, (not reported,) the Lords found that a provision made in a contract of marriage, to the heirs and bairns, did not import that the land estate was to divide among the whole children of the marriage, but only that the estate should descend to the heirs of the marriage: and which general point was again decided in another late case Murdoch against Scott.

The Lord Ordinary had pronounced an interlocutor in favour of the heir, but the Court altered that interlocutor, and found (18th July 1776,) 'That by 'the conception of the contract of marriage founded on, the provisions therein 'stipulated, are in favour of the whole children; but find that there remained 'in the father a power of division; and that the disposition taken by Archibald 'Lamond the father, to himself and spouse in conjunct fee and liferent, and to 'Walter Lamond his son *nominatim*, must carry the subject thereby disponed to 'the said Walter the son; and find that Agnes Lamond has right only to 'the share of the remainder of the estate, after taking therefrom that subject; 'and remit to the Lord Ordinary to proceed accordingly.'

No. 1. A petition reclaiming against this interlocutor was refused (30th July 1776,) without answers.

Lord Ordinary, *Hailes.* Act. *Buchan Hepburn.* Alt. *Crosbie.*
D. Armstrong.

D. C.

1776. *December* 20. RICHARD DICK *against* ROBERT LINDSAY and Others.

No. 2.
Particulars of the case No. 140. p. 13025.

Robert Dick, dyer in Jedburgh, by contract of marriage, assigned and disponed to the children of the marriage, which failing, to his own heirs and assignees, the whole heritable and moveable subjects that should pertain to him at his death, under the burden of certain provisions to his wife. This settlement, being displeased with the conduct of his son Richard, he afterwards altered, leaving only some trifling annuities to Richard's wife and children; upon which an action was raised at their instance against the trustees under these latter deeds of the father, concluding that the same should be reduced as *ultra vires* of the granter, and contrary to the provisions and obligations contained in the contract of marriage.

This action came before Lord Gardenstone Ordinary, who ordered memorials to the whole Court.

For the pursuers of the reduction, pleaded, 1*st*, Although children by virtue of a marriage-contract take up the subjects provided to them by a right of succession as heirs of provision to their father, yet they are so far considered to be *creditors* under the marriage contract, that the father cannot by any voluntary or gratuitous deed, disappoint that right of succession. Even in onerous contractions, (although undoubtedly available to creditors in a competition with children,) the obligation in the marriage-contract remains full and unimpaired *quoad* the father, in so much that the children have a good claim of recourse against his cautioner or separate representatives to the amount of the encroachments made upon their provisions by his onerous debts or deeds. On this head our law is clear, Stair, B. 3. Tit. 5. § 13.

Supposing therefore the trustees had been successful in establishing every one point of which they had undertaken a proof, and had shown that Richard Dick, was foolish, idle, and extravagant,—still these circumstances could not have the effect to liberate the father from his obligations in the marriage-contract.—Because a person is foolish or extravagant, he does not therefore cease to be creditor in any obligation legal or conventional which is conceived in his favour; and were a father's powers over subjects provided by a marriage-contract to depend, not upon any general rules of law, but upon the particular character of the children and their being sensible prudent persons, or the reverse, it is easy to see, what uncertainty in this branch of the law must be the consequence.

No. 2.

2*d*, The evidence adduced on the part of the trustees by no means proves that Richard Dick was foolish, idle, or extravagant; but that all the distresses in which he has been involved, have arisen from the harsh usage of the father.

Answered for the trustees; 1*st*, The proof does completely establish the folly and extravagance of Richard Dick.

2*d*, But even without any proof of misbehaviour on the part of Richard, the father's powers were sufficient to enable him to execute the settlement which is now endeavoured to be reduced. Provisions of this kind in contracts of marriage do not tie up the father's hands,—Erskine B. 3. T. 8. § 40. Even in the case of special provisions of lands or sums of money, it has always been considered that the father's powers are ample, if nothing arbitrary or fraudulent is done, so as entirely to alter the line of succession, and defeat the provision; but much more ought this to be in the father's power where the provision is indefinite, as in the presnt case.

The Court (20th December 1776,) pronounced an interlocutor sustaining the defences against the reduction.

Lord Reporter, *Gardenstone.* Act. *Blair.* Alt. *Ilay Campbell.*

J. W.

*** See Cunningham against Cunningham, 9th July 1776, APPENDIX, PART I. *voce* CLAUSE, No. 1.

1792. *February* 2. MACKENZIE'S CREDITORS *against* his CHILDREN.

No. 3.

This case, (No. 66. p. 12924.) was appealed. The House of Lords ORDERED and ADJUDGED, that the appeal be dismissed, and the interlocutors complained of be affirmed.

1801. *January* 28. ALEXANDER WATSON, *against* JOHN PYOT.

No 4.

Where an estate was, provided in a marriage-contract to the father, and the heirs-male of the marriage, an absolute conveyance of a considerable part of it,

ALEXANDER WATSON, with consent of his father, in his marriage-contract with Mrs. Jane Fulertown, became bound to resign the estate of Turin to himself and 'the heirs-male to be procreated betwixt him and the said Jane Fuler-'town; which failing, to the heirs-male of the said Alexander Watson's body 'of any subsequent marriage; which failing, to the heirs-male to be procreated 'betwixt him and the said Jane Fulertown; which failing, to the heirs-male of 'the said Alexander Watson's body of any subsequent marriage; which fail-'ing, to the said Alexander Watson, his heirs and assignees whatsoever; the 'eldest heir-female succeeding always without division.'

No. 4.
and of other lands not included in the contract, by the father during his lifetime to the eldest son, was found not to discharge the latter's *jus crediti* under the contract, so as to entitle the father afterward to exclude him altogether from the remainder.

It was likewise found, that the father had not power to entail it, in the manner mentioned in this report.

There were two sons of the marriage, John and Alexander.

During the lifetime of the former, the father executed an entail of the lands contained in the contract, and of others afterwards acquired by him, upon the series of heirs called by the contract; but upon John's death this entail was revoked, and Alexander, who had been bred a merchant, having given up business, his father, 17th May 1781, granted an obligation to dispone to him the lands there mentioned, consisting partly of a portion of the lands included in the contract, and partly of an after acquisition, under burden of £5000 of the debts then due by the granter, proceeding on the narrative, that 'my son is 'not anywise provided or secured for a proper living to support him in his pre-'sent situation, and that I am very desirous he should be provided, as far as 'my circumstances will permit.' And on 5th July 1781, he accordingly granted an absolute disposition to the lands, in terms of the obligation.

The son was immediately infeft upon the precept in the disposition.

Before this time, the father had sold part of the lands contained in the contract.

On the 30th July 1781, Alexander Watson *senior* executed a separate disposition of the remaining lands, to himself in liferent, and his son in fee, reserving to himself ample power to dispose of the subjects and revoke the deed.

On these two dispositions one Crown-charter was expede, narrating both, and confirming the base infeftment of the son, upon the disposition of 5th July 1781.

Upon this charter, separate infeftments were taken, one in favour of the son, and the other in favour of the father and son, for their respective interests. Both infeftments were included in one instrument of sasine.

On the 28th November 1781, the father and son executed a contract, reciting the engagements on both sides, in consequence of the obligations 17th May 1781; stating that the conveyance had been already granted by the father, and the debts paid by the son; regulating the payment of public burdens between the parties, and reserving to the father the right to dig marl, and the servitude of certain roads in the lands conveyed; but taking no notice of the disposition 30th July 1781, or titles following on it.

The contract ends with a declaration, 'that what has been already performed 'by the parties before written, with what is still incumbent upon them, by the 'foregoing contract, comprehends and includes all the obligations prestable by 'the one party to the other, by the agreement before mentioned.

Upon the Crown-Charter the son was enrolled as a freeholder, as was the father also, upon the restricted qualification remaining with him.

Alexander Watson married a second time, but never had any children of the marriage.

In 1793, many years after this marriage, he executed a strict entail of the lands remaining with him, to himself in liferent, and 'to Alexander Watson,

'my only son now in life, in fee; whom failing, to any other heirs-male of 'my body, and to the heirs of their bodies; whom failing, to the heirs whom-'soever of the body of the said Alexander Watson; whom failing, to the heirs-'male of the body of Isobel Ogilvie *alias* Pyot,' and other substitutes. By this entail, the highest jointure to a widow was fixed at £150, and £2000 was the utmost sum which could be given to younger children, and Alexander Watson *junior* was to have no power of providing either his wife or children, unless he, within six months, executed a similar entail of the lands previously conveyed to him. No. 4.

In 1795, Alexander Watson *senior* executed a suplementary deed to the same effect, but containing a more ample description of the lands conveyed by it.

In 1796, he executed a disposition, proceeding on a narrative of the entails 1793 and 1795, and that his son was already in possession of about one-half of his estate, by the previous conveyance in his favour; and that his late conduct had induced him to exclude his son from the remaining lands, except on the event and condition after mentioned, and therefore he called John Pyot, eldest son of the Isobel Ogilvie mentioned in the former entails, and the heirs-male of his body; whom failing only, he called the heirs-male of his son's body, on condition of his entailing the other lands formerly conveyed to him by a deed of a similar nature, and, with this alteration, Alexander Watson *senior*, approved of the former deeds executed by him.

This deed contained neither procuratory nor precept, and, on that account, a supplementary one was executed in 1797, likewise entailing the lands, and recalling the three former entails executed by him, with this exception, that they should remain in force if the last deed should, from any cause whatever, prove ineffectual.

Upon the death of Mr. Watson *senior*, the son brought a reduction of the four deeds executed by his father to his prejudice, in which the points at issue came to be,

1*mo*, How far the son's *jus crediti* under the marriage contract was virtually discharged by the conveyance in his favour in 1781, so as to render effectual the deeds executed by his father in 1796 and 1797?

2*do*, Supposing the *jus crediti* to remain in force, and these two deeds to be ineffectual, How far the entails executed in 1793 and 1795 were struck at by the contract?

On the *first* point,

The defender admitted, that the father could not gratuitously exclude the pursuer in terms of the marriage-contract; but he contended, that his *jus crediti* under it had been derelinquished by his acceptance of the disposition 5th July 1781, by which above a half of his father's whole property was immediately bestowed on him in fee-simple. This conveyance, (it was said) the pursuer might have good reason to prefer to the uncertain right vested in him by the

No. 4. contract, which depended on his survivancy, and might be disappointed by his father's selling the lands, or burdening them with debts. The pursuer cannot be entitled to both; (Dict. *voce* PRESUMPTION, Div. 3. Sect. 4.) Both parties understood the father to have afterwards complete power over the lands remaining, as is evident from the reservation in the disposition 30th July 1781, and subsequent deeds executed by him, as well as by the son's acceptance of the Crown charter.

The pursuer

Answered: The lands conveyed under the burdens attached to them, were not worth a sixth part of the lands retained, and afforded no more than a suitable immediate provision to an only son, who had relinquished a profession at his father's request; so that there is no room for presuming a discharge of his valuable right under the contract. Indeed, the contract in November 1781, recites the whole obligations incumbent on both parties in consequence of the disposition of 5th July 1781, yet takes no notice of the intermediate deeds, nor discharges the claims under the marriage-contract, which would not have been omitted, if meant to be included in the transaction.

The disposition 30th July was executed by a writer unacquainted with the contract of marriage, and merely for the purpose of executing freehold qualifications in favour of the father and son. The latter was no party to, and was not acquainted with the terms of the disposition and charter following on it, which last indeed narrates both dispositions, and therefore can have no more effect on the rights of the pursuer, than if separate charters had been executed.

On the *second* point, the pursuer

Pleaded: The heir under a marriage-contract, has a *jus crediti* against his father, which, though it does not prevent the latter from selling the lands, or burdening them with debt, or granting reasonable provisions to a second wife, and children, which are in law considered to be onerous, yet gives the heir, in such cases, a claim of relief against the separate estate of his father, and, even in the lifetime of the latter, founds an action against him for purging incumbrances: and the gratuitous deeds of the father are wholly ineffectual against him.

The heir is thus entitled to claim the estate *tanquam optimum maximum*, which cannot be said where it is loaded with the restrictions of an entail, by which the heir is reduced nearly to the situation of a liferenter; and the mutual onerous contract cannot be said to be *bonâ fide* implemented, when a liferent only is given to the heir of the marriage.

The contract at least prevents gratuitous deeds, and such, an entail must always be considered, in questions with the granter; Gordon of Auchline, No. 112. p. 12984; Ker of Abotrule, No. 116. p. 12987; 25th July 1751, Douglas, No. 119. p. 12989; 28th July 1778, Speirs against Dunlop, No. 141. p. 13026.

No. 4.

Further, the only plausible argument in support of an entail, in such case, is, that its restrictions are so rational, that it must be presumed that the mother and her relations would have agreed to them, if they had been proposed at the time; but the entail, in the present case, contains various irrational and oppressive clauses; in particular, if it does not affect the places even of the pursuer's sons; in all events, it deprives his daughters of their places in the destination, in terms of the contract, if there had been children of the second marriage. It also unreasonably limits the provision to widows and young children, and obliges the pursuer to entail in the same manner the lands previously disponed to him in fee-simple.

Answered: A marriage-contract is not meant to deprive the father of the usual exercise of property; he may sell the lands; he may burden them with debts; and, in general, restrictions are not to be inferred against him by implication.

It is true, the contract must be fairly implemented; but the execution of an entail, so far from being *in fraudem* of it, is the most effectual way of enforcing the object of it, which is to secure the succession to the other children of the marriage, as well as to the eldest son. When no fetters are imposed, the latter may gratuitously disappoint his own children, and the other heirs of the marriage. He may execute an entail, even excluding them altogether; and it would be singular, if the father could not execute an entail to enforce the destination of the contract.

Nor is the argument affected by the relief competent to the heir, when the father sells the lands, or burdens them with deb . This relief proceeds upon the principle, that it is *in fraudem* of the contract to sell or incumber the lands while he has other funds. If he could, the contract would be useless; but a father cannot be said to act *in fraudem* of the contract, when he executes an entail to enforce it. His doing so, indeed, makes the succession less agreeable to the heir, but this is not an interest which the heir can be allowed to plead in opposition to it. There is in truth no difference between a voluntary destination and that arising from a marriage-contract, as to the powers of enforcing it by an entail; Stair, B. 2. Tit. 3. § 41; B. 4. Tit. 18. § 6; Ersk. B. 3. Tit. 8. § 39; Craick, No. 111. p. 12984.

The entail in the present case was fair and rational. There never were any children of the second marriage, and, if there had, they are called by the entail in the same order only as in the contract.

The provisions allowed to wives and children were suitable to the circumstances of the estate; it was most natural for the father to wish the lands previously conveyed to the pursuer to be reunited to those which remained with himself; and the only sanction in case of the pursuer's not doing so was, that he should not be allowed otherwise to provide his widow and children from the entailed lands, but, in that case, the lands previously conveyed to him were amply sufficient for that purpose.

No. 4.

In the cases founded on by the pursuer, the entails were unreasonable.

The Lord Ordinary reported the cause on Informations.

The Court were clear, that, in the circumstances of the case, the previous conveyance to the son did not weaken his *jus crediti* under the contract; and as to the father's power of entailing, the Lords, waving the decision of the general point, were of opinion, that the entails complained of were ineffectual against the heir of the marriage.

'In respect of the special circumstances of the case, the Lords sustained the 'reasons of reduction of the whole deeds libelled.'

Lord Ordinary, *Dunsinnan.* Act. *Cha. Hay.* Alt. *D. Cathcart.*
Clerk, *Menzies.*

D. D. *Fac. Coll. No.* 215. *p.* 487.

1806. *January* 21. CHRISTIE and Others, *against* DUNN and Others.

No. 5.
Whether provisions to heirs and children vest without service or confirmation, to the effect of transmission?

ARCHIBALD ROBERTON, in his contract of marriage with Isobel Harvie, became bound to provide the whole property which he then had, and all that he might afterward acquire during the subsistence of the marriage, to himself and his wife in liferent, and to the children of the marriage, in fee. There were two sons, who both survived their mother; and, in 1793, Roberton executed an assignation *mortis causâ*, distributing his effects between them. The younger died before his father, whose death happened in February 1800, and the elder died in Jamaica, in the month of November of that year; having, in August preceding, executed a settlement, bequeathing his whole property to his cousin John Harvie Christie, Esq. advocate, and certain other persons, whom he named his executors. In this will, no notice was taken of his father's death, or of any claim which he had upon his father's succession.

Mr. Harvie Christie took out a confirmation before the Commissaries of Edinburgh, under the son's testament, and afterward he executed another confirmation before the Commissary of Glasgow, with the view of taking up the son's right under the assignation by the father in 1793.

James Dunn, and the other nearest of kin to Archibald Roberton, applied for a confirmation of his effects in that character.

A process of multiplepoinding was brought by the person in whose hands the property of the deceased was lodged, in which compearance was made for the executors of the son and the nearest of kin of the father.

The Lord Ordinary pronounced the following interlocutor: 'Finds, That 'in virtue of the marriage-contract between the said Archibald Roberton *senior*, 'and Isobel Harvie, bearing date the 6th day of December 1763, the provisions 'therein contained in favour of the children of the marriage came to be vested

'in Archibald Roberton *junior*, as only surviving child of the marriage after 'the death of his father and mother, so that he as creditor had right to the 'said provisions, without the necessity of any confirmation; and having such 'right, did effectually convey the same by his settlement in favour of the said 'John Harvie Christie, to the sums in the hands of the raisers of the multiple-'poinding; and decerns in the preference, and for payment accordingly.' No. 5.

Against this interlocutor, James Dunn, and the other nearest of kin of Roberton *senior*, presented a petition, and

Pleaded: When a subject is taken to a father in liferent, and to a child in fee, it can only be taken up by the latter by a service as heir. His case resembles that of the substitute of an entail, which contains merely a prohibition to alter the succession, who, although he may during the life of the institute raise an action to get the better of any alteration attempted in the succession, must, upon the death of the institute, be served heir, just as much as if the subject had been held in fee-simple; Hay against Earl of Tweeddale, 21st July 1676, No. 21. p. 12857. Lyon against Garden, 26th July 1715, No. 28. p. 12863; Macintosh against Macintosh, 27th December 1716, No. 36. p. 12881; Campbell against Campbell, January 1742, No. 29. p. 12865. Anderson against Heirs of Sheills, 16th November 1747, No. 30. p. 12868. Consequently, as Roberton *junior* was never served heir to his father, the right vested by the marriage-contract and assignation was never transmitted to him; and as it remains still *in hæreditate jacente* of his father, it may be taken up by his heirs-at-law.

Answered: By the terms of the marriage-contract, the right vested in the children is not merely a *spes successionis*, but of the nature of a *jus crediti*, which is therefore transmitted to their representatives, without the necessity of making up titles by service or confirmation. If an estate is taken to a father in liferent, and a son in fee, there is no necessity for a service on the death of the father, because the fee of the subject was not vested in him, but in his son, who therefore transmits it immediately to his disponees without making up any title; Lyon against Creditors of Easter Ogle, 24th January 1725, No. 59. p. 12909. Gibson against Arbuthnot, 4th February 1726, No. 37. p. 12885; Porterfield against Gray, 9th December 1760, No. 32. p. 12874; Cameron against Robertson, 18th November 1784, No. 33. p. 12879.

The Lords, on advising the petition, with answers, 'adhered;' and afterward unanimously refused a reclaiming petition without answers.

Lord Ordinary, *Cullen.* Act. *Inglis, Douglas.* Agent, *T. Johnstone.*
Alt. *A. Bell.* Agent, *J. Weir.* Clerk, *Mackenzie.*

J. *Fac. Coll. No. 232. p. 525.*

1806. *July* 4. POLLOCKS, *against* POLLOCK.

No. 6.
An estate being devised to husband and wife in conjunct fee and liferent, to the children according to the division of their parents, and to be restricted to an annuity in the survivor of the spouses,—what right thereby vests in the children?

ROBERT POLLOCK, proprietor of the lands of Netherlinn, executed a settlement in 1760, in favour of his daughter Margaret, and Robert Pollock her husband, in which he disponed his lands, 'under the burdens and limitations 'after mentioned, to and in favours of the said Margaret Pollock and Robert 'Pollock, spouses, in conjunct fee and liferent, and to the children procreate 'and to be procreate betwixt them, according to their parents' division; which 'failing, equally among them and their heirs; whom failing, to the said Mar-'garet Pollock and her own nearest heirs and assignees, in fee.' The limitation which was introduced in a subsequent part of the deed was, 'that the survi-'vor of the said Margaret Pollock and Robert Pollock, spouses, shall, at the first 'of their deaths, betake themselves to, and their liferent of the said whole sub-'jects, is, and shall be thereafter, restricted to the foresaid sum of 100 merks 'Scots, a cow grazed, herded and foddered, the west chamber aforesaid well 'furnished to live in, and sufficient yearding and furnishing, and home-leading, 'sufficiency of elding to serve him or her yearly, and the furniture of the cham-'ber, to be disposed of by the survivor at pleasure, and the remainder to go 'to the subsistence of their children.' Robert Pollock reserved to himself and his wife, a provision during their lives, in the same terms, and surrendered the possession of the lands to his daughter and her husband.

After the death of Robert Pollock, the lands were possessed by Robert Pollock *junior*, and Margaret his wife, who resided upon them with their family, which consisted of five children. Robert Pollock *junior* died in 1778, and his widow and family continued their possession of the lands. Two of the daughters were afterwards married; and the rest of the family, consisting of two sons and a daughter, resided on the lands with their mother.

An action of declarator was brought by the two married daughters and their husbands, against the mother, concluding, that the defenders right in the subjects in question, should, at the period of her husband's death, have been restricted to the particular provisions specified in her father's settlement; and that she had it not in her power, after her husband's death, to settle the subjects in any way to the prejudice of the pursuer's right to their two-fifths: That the defender should be decerned to give up possession of the said two-fifth parts, under the burden and reservation of the restricted liferent; and that she should account to the pursuers for their shares of the rents and profits of their two fifth parts of these heritable subjects from Martinmas 1778, the first term after the death of Robert Pollock their father, with interest thereon.

The Lord Ordinary took the cause to report, and the pursuers

Pleaded: The object of the deed of settlement was, to make a provision for the children of the marriage; and the lands were disponed to the defender and her husband, under the express limitation, that the right of the division should be restricted to a certain annuity, to which he had restricted himself in the set-

tlement. Although the fee of the lands was vested in the defender, she is not an absolute, but only a fiduciary fiar. Whatever, therefore, might be the case in a question with creditors, she must be held, in a question with her children, to hold the lands in trust for them, under the burdens and limitations imposed by her father; one of which was, that at her husband's death she should betake herself to her liferent; Lillie against Riddle, February 24, 1741, No. 56. p. 4267. Gerran against Alexander, June 14, 1794, No. 55. p. 4402. Newlands against Creditors of Newlands, July 9, 1794, No. 73. p. 4289. No. 6.

Answered: By the dispositive clause of her father's settlement, the defender was constituted fiar of the lands conveyed. For when property is disponed to a parent in liferent, and to the children in fee, the parent is considered as absolute fiar; Douglas against Ainslie, July 7, 1761, No. 58. p. 4269. Cuthbertson against Thomson, March 1, 1781, No. 67. p. 4279. The object of the limiting clause in this settlement is, that 'the remainder may go to the subsist-'ence of the children.' But no right is conferred upon any particular child, who may choose to withdraw from the family, to force a division of the property, and carry off his share. The right is conferred on the children *tanquam familiæ*, and is enjoyed by those children who still remain members of the family.

The Lords, 'upon report of the Lord Glenlee, and having advised the mu-'tual informations for the parties, find, that there is no sufficient ground for 'any claim at the instance of the pursuers *hoc statu*; and, therefore, sustain 'the defences, assoilzie the defender, and decern.' And they afterwards refused a reclaiming petition, without answers.

Lord Ordinary, *Glenlee*. Alt. *Forsyth*. Act. *Boyle*. Agent, *W. Howison*. Agent, *P. Wishart*, W. S. Clerk, *Pringle*.

J. *Fac. Coll. No. 257. p. 577.*