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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-

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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,