

S E C T. XVIII.

Where the Child will not represent his Father.—Where Children provided by a Contract of Marriage predecease their Father.—Where Provisions are made to Children *nominatim*, and one afterward succeeds as Heir.

No. 148.

1756. *January 20.* Competition CREDITORS OF KINMINITY.

A WIFE having bound herself, in her contract of marriage, to pay a certain sum yearly out of the rents of her jointure-lands, &c. to the heir-male of the marriage, and the heir-male of his body; the husband dying, leaving many debts, the heir-male renounced to represent him, and the creditors *pleaded*, That the provision to the heir should be deducted from the widow's liferent, so as to increase the defunct's *hæreditas jacens* affectable for his debts. THE LORDS found, that the provision to the heir-male did not diminish the widow's jointure.

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

* * This case is No 343. p. 6127. *voce* HUSBAND AND WIFE.

1780. *January 12.*WILLIAM MACONOCHIE *against* JAMES, MARY, and GRIZEL GREENLEE.

No 149.

An assignment by an heir of a marriage, of her interest, how far effectual, she having died before her father.

By marriage-contract between James Beveridge and Janet Smibert, in 1719, the former obliged himself to provide 2000 merks, two tenements in Edinburgh belonging to him, and the conquest during the marriage, 'to himself and the said Janet Smibert in conjunct fee and liferent, and to the heirs procreated, and to be procreated between them, in fee.'

The issue of this marriage, which dissolved in 1730, by the death of Janet Smibert, were two daughters, Jane and Margaret.

Jane, upon her marriage, discharged her father of the provisions due to her. Margaret intermarried with William Maconochie, and assigned to her husband all right accruing to her from the marriage-contract between her parents.

Mrs Maconochie predeceased her father, who died in 1778; and her husband, by virtue of the conveyance already mentioned, pursued her father's Representatives, James, Mary, and Grizel Greenlee, his grandchildren by a second marriage, for the provisions alleged to belong to her.

The merits of this question depended on the right of Mrs Maconochie, the assigner. If, upon the dissolution of her father's first marriage in 1730, she became a proper creditor to him in the provisions stipulated by the marriage-contract, her right was habilely transmitted to the pursuer. If, again, her interest was merely an expectancy of succession, contingent on her outliving her father, the conveyance in favour of her husband was vacated by her predecease.

Pleaded for the pursuer; Notwithstanding the provisions in the marriage-contract, Mr Beveridge remained heir of the special subjects therein stipulated, as also of the effects falling under the clause of conquest, which likewise became special and fixed by the dissolution of the marriage; and had he fulfilled his obligation, by taking the right to these subjects in favour of the heirs of the marriage, it behoved Mrs Maconochie to have completed her right to them by service, as heir of provision to her father, which she could not do while he was alive. But Mr Beveridge fulfilled no part of his obligation; and to this state of matters the judgment of the Court must be applied. Under the marriage-contract, an action was competent to Mrs Maconochie against her father, for compelling implement of his obligation; Erskine, B. 3. Tit. 8. § 38.; which, upon his death, might have been converted into an action for payment, requiring no service to make it effectual; 3d February 1732, Campbell *contra* Duncan, No 39. p. 12885.; Porterfield *contra* Gray, No 32. p. 12874.; Moncrief *contra* Moncrief, No 31. p. 12871.—Her right could have been discharged by her during her father's lifetime; 13th February 1770, David Sinclair Threipland *contra* Sinclair, See APPENDIX; Dr Stewart Threipland *contra* Mrs Henrietta Sinclair, in 1779, See APPENDIX.—These powers could not be exercised by a party having only a *spes successionis*, and show, that a proper *jus crediti* was vested in Mrs Maconochie at the dissolution of her parent's marriage. The term of payment alone was suspended till her father's decease.

Answered; The heirs of a marriage-contract are, in some respects, distinguished from others. Their father cannot, by any gratuitous deed, defeat their right. An action lies at their instance, for compelling him, during his life, to take the rights of the subjects referred to in the marriage-contract, conformably to the terms of the provision; and this action, in the event of their survivance, may be converted into an action for payment, it being settled by the decisions quoted for the pursuer, that no service is requisite, in such a case, for enabling them to discharge their father's general representatives. Still, however, their right is no more, in any case, than a *spes successionis*, depending on the condition of their father's predecease. Hence it is, that the provisions in a marriage-contract, upon the failure of immediate issue, devolve to their descendants *jure representationis*, and these failing, are extinguished altogether. For if, upon the dissolution of the marriage, a right vested in the immediate issue, it would be taken up by their descendants, in the character of heirs to them; if they died without issue, it would descend to their other heirs; and, in every instance,

No. 149. would be attachable by their creditors. In the cases quoted, the discharges granted by the heirs of the marriage had been validated by their father's predecease, whereby their right had become complete and exigible.

"THE LORD ORDINARY found, That the pursuer had no title to insist in this action." And to this judgment the LORDS adhered, upon advising a reclaiming petition for William Maconochie, with answers for James, &c. Greenlee.

Lord Ordinary, *Ellhock.*

Act. *Solicitor-General Murray, Ilay Campbell.*
Clerk, *Orme.*

Alt. *Rae.*

C.

Fol. Dic. v. 4. p. 185. Fac. Col. No 96. p. 185.

No 150.

1786. *June 23.* JAMES BRYCE *against* RICHARD BRYCE.

Where a certain sum has been provided to several younger children *nomina- tim*, one of them afterward succeeding as heir, may nevertheless claim a part.

ARCHIBALD BURGESS disposed his lands to his four grandsons, of whom Archibald Bryce was the eldest successively, in the order of their seniority.

To this destination he annexed the following clause: "But with and under the express burden of a liferent of the said lands herein before disposed, to Margaret Burgess, my daughter, untill the said Archibald Bryce, and the other persons above named, shall attain to the age of sixteen years complete, respectively and successively; and also with the burden of 1500 merks to the said Richard, James, and Robert Bryce, my grandchildren, equally amongst them; and failing any of them by decease, the deceiver's share to accresce to the survivor or survivors," to be paid at their respective majorities.

After the disponent's death, Archibald Bryce, the eldest grandson, having reached his sixteenth year, was infeft in the lands. He died soon after, and was succeeded by his immediate younger brother, Richard, who was not, at that time, of age.

Richard was afterward sued by James, the only other surviving grandchild, (the fourth having predeceased the testator), for the whole 1500 merks. The pursuer

Pleaded, Where a settlement has been made in favour of an eldest son, burdened with provisions to younger children, if the eldest son in life, at the time of making the settlement, dies, the next in seniority, coming in his place, is not entitled to any share of the provisions. The obvious meaning of the testator, in such a case is, to make a division of his effects between him who is to be his universal representative, and those who, though equally connected with him, are not, by our customs, entitled to so large a portion of his estate; and it cannot be imagined, that the first born was intended to be placed in a situation less favourable than his younger brothers, 14th December 1739, Pringle against Pringles, No 115. p. 12986.

This general presumption of the law is here strengthened by the words of the deed, in which, not only the eldest, but every one of the grandsons succeeding to the lands, is equally burdened with the exact sum of 1500 merks, as well