

No 95. his whole stock upon land, and thereby render him unable to carry on his business, or even to live comfortably, far less to make any conquest, which yet was in view, because it also was provided to the children of the marriage; the LORDS were sensible, that the demand was rigorous, but they would not take it upon them to relieve the suspender against an express obligation, and therefore found the letters orderly proceeded. See APPENDIX.

*Fol. Dic. v. 2. p. 285.*

No 96. 1738. July 7. DRUMMONDS *against* DRUMMOND.

PROVISIONS to daughters failing heirs-male are not due, if an heir-male survive the granter ever so short a time.

*Kilkerran, (PROVISION TO HEIRS AND CHILDREN.) No 1. p. 455.*

No 97. 1745. July 16. DEANS'S *against* LOCKHART.

Children having bonds of provision, with a clause that what they should have at their decease should fall to their elder brother, have the *jus exigendi*.

THE children of Deans of Woodhouselee having bonds of provision secured on the estate, sold them to George Lockhart of Carnwath; and insisting for the price, he suspended, for that they could not convey to him their bonds, since it was expressly provided, that in case any of the children should die before they were married, their portion, or what they should happen to have at their decease, should fall and be paid to their eldest brother, heir to their father.

It was *urged*, That notwithstanding this clause they had the *jus exigendi*.

THE LORDS refused the bill.

*D. Falconer, v. 1. p. 122.*

No 98. 1758. June 20. MARY MACDONELL *against* HIS MAJESTY'S ADVOCATE.

Provisions to daughters contained in a marriage contract, when due?

By contract of marriage in 1730, between Archibald Macdonell of Barisdale and Isabel Mackenzie, the said Archibald, and his eldest son of a former marriage, Col Macdonell, became jointly bound in favour of the daughters of the marriage, in these words: "And in case there be only daughters procreate of the said marriage, and no heirs-male existing, then, and in that case, they, the said Archibald and Col Macdonells, hereby provide the said daughters as follows, viz. if there be only one daughter, to her the sum of 1000 merks Scots; and if there be two, three, or more daughters, to them all the sum of 3000 merks, whereof a double portion to the eldest, and the remainder to the younger, equally betwixt them; and in case of the decease of any of them, the portion of the daughter deceasing after dissolution of the said marriage, to fall and accresce to the surviving daughters, equally betwixt them; and which portions

and provisions are and shall be payable at the first Whitsunday or Martinmas next and immediately following the decease of the said Archibald Macdonell and Isabel Mackenzie, when the same shall happen, with annualrent thereafter during the not payment, and a fifth part of penalty in case of failzie."

Of this marriage there were no heirs-male, and only two daughters, Katharine and Mary. The marriage dissolved by the death of the husband; but the wife still survives.

The estate of Barisdale was forfeited to his Majesty by the attainder of Archibald Macdonell, the eldest son of the said Col Macdonell.

Mary Macdonell entered her claim in virtue of the clause before recited, to be found a creditor on the estate for 1000 merks, as her portion, with interest thereof from the time of her mother's death, whenever that event shall happen.

*Objected* for the Crown, The obligation is only conditional, depending on the claimant's surviving her mother as well as her father; so that if she predecease her mother, nothing will be due. In all provisions granted by a father to his children, it is an implied condition, That these children should respectively survive the term at which their provisions are made payable. If they die before it, *dies nec cedet nec venit*; 16th January 1665, Edgar, No 1. p. 6325.; 22d February 1677, Belsches, No 2. p. 6327.; and 14th January 1730, Bell, No 12. p. 6342. The sole intention of such obligations is, to afford provision for the children themselves; and therefore it cannot be presumed to be the father's meaning, to make a sum payable to the representatives of the children, either *a testato vel ab intestato*, which the children themselves could never have demanded.

*Answered* for the Claimant, *Dies cessit* by her surviving the dissolution of the marriage, *quamvis non venit* till her mother's death; but still the sum is a certain fund of credit, on which the claimant may contract or dispose for her necessary sustenance during her mother's life. The proviso, That the portion of the daughters deceasing after dissolution of the marriage should fall to the surviving daughters, shows, that the parties intended the dissolution of the marriage to be the term at which the provisions became due, although payment thereof was to be suspended till the death of the surviving parent.

"THE LORDS sustained the claim for payment of the 1000 merks upon the decease of the mother, and annualrent thereafter.

Act. Sir David Dalrymple.

Alt. The Crown Lawyers.

D. R.

Fol. Dic. v. 4. p. 189. Fac. Col. No 109. p. 195.