No 17.

sum. But the pursuer, Captain Napier, who has right to this bond as an onerous assignee in his marriage articles, insists, that the clause can have no effect whatever against him; more especially, considering the tenor thereof, as it concerns only such part of the money as should be resting at the death of Mariana; and that therefore he is entitled to a decreet for the sums libelled, without any quality or reservation whatever.

THE LORDS found, that the clause of return of the 7000 merks, contained in Robert Johnston of Kelton his additional bond of provision, was effectual, in case the condition expressed in the clause of return should exist, notwithstanding of the assignation in the contract of marriage between Captain Alexander Napier and Mariana Johnston the pursuers; and that the said pursuers, upon payment of the said sum, must find caution to repeat the same in the event of the existence of the condition mentioned in the said clause of return.

Fol. Dic. v. 3. p. 157. C. Home, No 150. p. 255.

1761. *June* 19.

THOMAS and AGNES SOMERVILLES *against* JOHN SCOT of Whitehaugh.

No 18.
A clause in a contract of marriage, settling provisions on daughters in case of no sons of the marriage, or in case the sons should die before the daughters were provided and married, found only to take effect in the event of there being no heir-male of the marriage, who should take the estate in virtue of the contract of marriage.

IN the 1666, by contract of marriage entered into betwixt Walter Scot, father to Isabel Scot, with consent of Walter Scot of St Leonard's his uncle, and Bessy Scot, daughter of William Scot of Horseleyhill, the lands of Westerhead, Whitehaugh, and others therein mentioned, are conveyed by Walter Scot of St Leonard's to Walter Scot his nephew, and the heirs-male to be procreate betwixt him and his said spouse; whom failing, to the said Walter Scot his nearest heirs-male and assignees whatsomever.

This contract has the following clause: 'And because the foresaid lands are 'tailzied and provided to the heirs-male of the said Walter Scot the younger; 'so that, by the aforesaid provision and tailzie, the daughters and bairns-female 'to be procreated between him and the said Bessy Scot, failing heirs-male, as 'said is, will be altogether debarred and secluded from succeeding to their said 'father in said lands; therefore, it is conditioned and agreed on betwixt the 'said parties, that, in case it shall happen that there be no heirs-male procreated betwixt the said Walter Scot younger and the said Bessy Scot, in their said 'marriage, but only daughters or female children; or being sons or male children, if they shall happen to depart this mortal life before the daughters and 'female children (if any shall happen to be) ane or mae of the aforesaid marriage, shall be provided and married; in that case, the said Walter Scot, the 'younger, binds and obliges him, and his heirs-male and of tailzie, and other 'heirs and successors whatsomever succeeding to him in his said lands, to make 'good and thankful payment, to the said daughters and female children, of the 'sums of money under-written, in manner, and at the terms *respective* after

No 18. 'specified, viz. if there be but one daughter, to her the sum of 6000 merks 'money foresaid; and if there be but two daughters, to the eldest the sum of '5000 merks, and to the second daughter the sum of 3000 merks money fore-'said; and if there be three or more daughters, to the eldest the sum of 5000 'merks money, and to the rest of the children, equally amongst them, the sum 'of 5000 merks money foresaid, and that at the firstterm of Whitsunday or Mar-'tinmas next, and immediately following, the said daughters, ane or mae, and ilk 'ane of them, their ages *respective* of 16 years complete; together with the 'sum of 100 merks money foresaid of liquidate expenses, in case of failzie, for 'ilk 1000 merks money foresaid, &c.; together also with the due and ordinary 'annualrent of profit of said sums, conform to the acts of Parliament, laws, and 'daily practice of this realm for the time, and that yearly, termly, quarterly, 'and proportionally, during the not payment of the same sums *respective*, after 'the foresaid terms of payment thereof; but prejudice always to the execution 'of thir presents for payment-making to the said daughters, ane or mae, and 'ilk ane of them, of their provisions *respective* foresaid, at the several terms of 'payment of the same above-written, or at any other term or time thereafter, '&c.; and sicklike, the said Walter Scot, younger, by thir presents, binds and 'obliges him and his foresaids, honestly and carefully to educate, sustain, and 'entertain, the said daughters, and ilk ane of them, in all things requisite and 'necessary, conform to their degrees and quality, until the several terms of 'payment foresaid; and which sums of money, particularly above-written, so 'to be paid to the said daughters, ane or mae, in manner foresaid, is hereby 'expressly provided, conditioned, and declared, shall be in full contentation and 'satisfaction to the said daughters, and ilk ane of them, of all bairns part of 'gear, portion-natural, executry, lands, heritages, teinds, sums of money, tacks, 'or others whatsomever, which always may befal, pertain, or belong to the 'aforesaid daughters, or any of them, by or through the decease of the said 'Walter Scot, younger, their father.'

This marriage dissolved by the predecease of Walter Scot, the husband, leaving issue three sons, William, Robert, and John, and two daughters, May and Isabel, who all survived their father.

William the eldest son succeeded to the estate of Whitehaugh, was infeft therein, and died without issue in the year 1750, after having buried both his brothers, who also left no issue. William had executed a tailzie, by which he had settled his estate upon his heirs-male; but provided the liferent thereof to his two sisters May and Isabel, or the survivor of them. Isabel being the only surviving sister, entered to the possession of her liferent in the year 1750; and, in the year 1753, when she was betwixt 70 and 80 years of age, she married Mr William Somerville minister at Hawick, and settled all that she had, or should at any time thereafter acquire, failing issue of that marriage, absolutely and irrevocably upon Mr Somerville's children of a former marriage.

In virtue of that settlement, Thomas and Agnes Somervilles the pursuers, as assignees by the deceased Mrs Isobel Scot their step-mother, brought an action against John Scot of Whitehaugh, as representing the father of Isobel Scot, for payment of the provision of 6000 merks settled upon her by her father's contract of marriage. No 18.

In this cause several points were moved, which received no decision: And the point determined by the Lords was, Whether by the intendment of the contract of marriage betwixt Isabel Scot's father and mother, the provisions to the daughters of the marriage were limited to take place only in the event of there being no heir-male of the marriage who should take the estate in virtue of the contract; or, if they were also to take place upon the failure of the heir-male at any time when the daughters were alive and unmarried.

Pleaded for the pursuers: The words in the clause of the contract are very express, and the condition is twofold; *1mo*, In case there were no heirs-male of the said marriage; and *2do*, In case there were sons, and that they should happen to die before the daughters should be provided and married. If the first branch of the condition had only been expressed, the provisions to the daughters would have taken place, in case there had been no son of the marriage who survived the father; for this condition is always understood to exist, notwithstanding that sons are born of the marriage, if they die before the father, or before they succeed to the estate: And as this is the undoubted construction of the first branch of the clause, so the second branch must mean something further, otherwise it is altogether useless and insignificant. But this does not appear to be the case, nor do the words seem to admit of any ambiguity. For, as the first branch of the clause would have given provisions to the daughters, if no son of the marriage had succeeded as heir to his father; so the second extends to the further event of the heir's deceasing at any time before the daughters, one or more, were provided and married.

'It has not been doubted, That when provisions are stipulated in contracts to daughters, 'in case of no heirs-male procreate of the marriage, or in case they 'shall all fail without attaining to majority,' a son survives and serves heir to his father, and soon after dies in infancy, that the provisions would be due to the daughters: But there is no difference in the conception of that clause and the one at present before the Court, but only as to the period of time fixed for the failure of the heir-male; there, if before his own majority; here, if before his sister's marriage: If, in that case, his taking the estate by service, could not operate a defeasance of the second branch of the condition, which prolongs the obligation in favour of the daughters down to his majority; so such service can as little evacuate the very same condition which prolongs it in their favour in this case down to the period of their marriage.

Pleaded for the defender; That though, in the construction of law, the first branch of the foresaid condition might have been understood to respect the period of the father's death, according as there should be heirs-male of the mar-

No 18.

riage then existing or not; yet it would not thence follow, that, because the parties to that marriage-contract judged it reasonable to add an explanation, viz. that the once existence of issue-male of that marriage should not evacuate the portions to the daughters, in case these sons happened afterwards to die; that therefore this was intended so far to alter the purpose of the original provision to the daughters, that, supposing a son of the marriage to take and enjoy the estate for any length of time, the provision to daughters should, during that whole period, be under suspense, and depend upon the uncertain event of the after failure of sons of that marriage. And when the other clauses of this contract of marriage are taken into consideration, it appears very clearly, that the fair and equitable construction of this clause is such as the defender maintains, viz. That the provisions to the daughters were limited to take place only in the event of there being no heir-male of the marriage who should take the estate at the time of the father's death. For,

1mo, The professed motive of establishing this provision to the daughters of the marriage, was their being debarred and excluded from their natural right of succession to their father's estate. But this expression does not apply to the succession of a son, the brother of these daughters. Daughters are not secluded from their father's succession, when their brother takes it; which plainly demonstrates, that it was the state and condition of the family at the time of the father's death, which was alone meant and intended by the father's contract of marriage.

2do, These portions are declared to be in full contentation and satisfaction to them of all bairns part of gear, &c. which any ways may fall, pertain, or belong to them by or through the decease of the said Walter Scot, younger, their father; still alluding to the father's death, when the daughters were by law entitled to their bairns part of gear, &c. out of their father's means as they then stood. But it cannot be seriously maintained, that, had the daughters, at their father's death, brought an action against their brother for payment of their bairns part of gear, or portion-natural, the portions ascertained to the daughters, to take effect upon the uncertain and remote contingency of the failure of all their brothers without issue, could have been obtruded to them in bar of their claim; and yet this would follow as a necessary consequence from the pursuer's plea.

3tio, The father is taken bound to educate and aliment the daughters until the terms of payment of their foresaid provisions. But it surpasses all comprehension to suppose, that it could be intended to lay the father and his heirs under an obligation of alimenting and entertaining these daughters to the remotest period, until their portions should become payable, upon the uncertain event of the failure of all their brothers without issue. These are absurdities which are all avoided by the construction of the clause maintained by the defender, but which are unavoidable consequences of the plea maintained by the pursuers; and which therefore demonstrates, that the meaning which they want

to put upon this clause is without any foundation, and could not be the intention of the contracting parties. No 18.

THE LORDS, on the 25th February 1761, 'found, that, according to the intendment of the contract of marriage betwixt Walter Scot and Bessy Scot, in the year 1666, the provisions to the daughters of the marriage, though inaccurately expressed, were only to take effect in the event of there being no heir-male of the marriage who should take the estate in virtue of the contract of marriage; and, as there was an heir-male of the marriage who succeeded to the estate, and lived to the year 1750, found the provisions to the daughters never became due; and therefore assoilzied, and decerned.

Upon a reclaiming petition and answers, 'the LORDS adhered.'

Act. *Ferguson.* Alt. *Lockhart.*

J. M. *Fol. Dic. v.* 3. *p.* 157. *Fac. Col. No* 39. *p.* 78.

1793. *December* 10. OLIPHANT *against* OLIPHANT.

No 19.

AN heir under an entail, which contained a reserved faculty, of providing younger children to a certain extent, having exercised that faculty to its full extent, by granting a bond of provision in favour of two daughters, then his only younger children; afterwards married again, and died without making any alteration on the bond of provision. A posthumous child being born of this second marriage, the LORDS found the child entitled to her share of the bond of provision.

Fol. Dic. v. 3. *p.* 158. *Fac. Col. No* 63. *p.* 138.

*** *See* The particulars, *voce* IMPLIED WILL.

SECT. II.

Condition of Marrying with Consent.

1578. *December* 12. CULLERNIE *against* LAIRD of ST MONANCE.

THE Laird of Cullernie pursued the L. of St Monance in name of his sisters, upon his obligation for the soume of L. 500, in the whilk obligation S. was obliged and bound to give the said soume to Cullernie's sisters, with this provi- No 20. A person having given a bond to a wo-