

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

as with their mother's liferent. The circumstance, of the defender's succeeding as heir before he attained the age at which the provisions were exigible, seems likewise to be material, since no claim ever could be entered by him as a younger child. See IMPLIED CONDITION.

No 150.

Answered, When sums of money have been provided to younger children in general, it may be admitted, that the distribution ought to be made among those only to whom this character is strictly applicable. The decision, however, must be different, where the provision is in favour of the particular children, *nominatim*. Here there is no room for arguments of presumed intention, because the words are clear. Each party lays claim to the sums allotted to him, not as a younger child, but as specially favoured by the deed.

But, in the circumstances which here occurred, the defender is still to be considered as a younger child. His claim, as such, the moment his elder brother became proprietor of the lands, was completely vested, though the term of payment was postponed to a period more remote, and the subsequent events could not create any alteration.

THE LORD ORDINARY had found the defender liable for the whole 1500 merks; but the case being brought under review, in a reclaiming petition for the defender, with answers for the pursuer, the Court, moved by the circumstance of the younger children being mentioned by name, found, that the defender was only liable to the pursuer in the half of the 1500 merks, and remitted to the Lord Ordinary to proceed accordingly.

Lord Ordinary, *Ellick.* Act. *Elphinston.* Alt. *Wight.* Clerk, *Orme.*
C. Fol. *Dic. v. 4. p. 188.* Fac. *Col. No 276. p. 425.*

1789. June 26.

THOMAS WOOD, as Administrator-in-law for his CHILDREN, *against* THOMAS AITCHISON.

JOHN AITCHISON, the father of Thomas Aitchison, in his marriage-articles, became bound, during the subsistence of the marriage, "to lay out L. 400 upon land in Scotland, or upon other good and sufficient security there, heritable or personal, for annualrent, and to take the rights and securities of the land, or of such other security for annualrent as aforesaid, in favour of himself and his wife, and longest liver of them, in liferent, and to the children or child to be procreated betwixt them, whom failing, to the said John Aitchison, his heirs and assignees whatsoever, in fee."

No 151.

The issue of children, predeceasing the term of payment, are entitled to that share which their parent could have claimed.

Of this marriage there were four children, who survived their mother; but at the death of John Aitchison, the father, only one son, whose name was Thomas, was alive. Another of the children, however, a daughter, who had been married to Thomas Wood, left issue.