

No 64. the larger portions may become due. In that case, what the children now receive, will be imputed in satisfaction *pro tanto* of their augmented provisions.

Some of the Lords were of opinion, that the condition of a male child's surviving the father was suspensive of the payment of the portions to any of the younger children till the father's death; because it could not be sooner known with certainty, that a male child, either of that or a subsequent marriage, would succeed to the estate; and, therefore, that the younger children's provisions being precarious and fluctuating till that event, they could not be considered as proper creditors to their father in his lifetime.

But the majority of the Court held the descriptive words in the contract, "male child who shall succeed," to import the same as "male child who should succeed;" and that a male child having existed when the term of payment of the younger children's portions came, the situation of the family, at that period, was to be regarded; and, therefore, that the father having, in the event which has happened, made himself a debtor to the children in his own lifetime, they are to be considered as proper creditors, and ranked according to their diligence.

"THE LORDS found the younger children entitled to be ranked conform to their diligence, along with the other creditors upon their father's estate."

For the Creditors, *Ferguson, Dav. Græme.* For the Children, *Rae, Macintosh, Lockhart.*
Reporter, *Bankton.* Clerk, *Pringle.*

D. R. *Fol. Dic. v. 4. p. 187. Fac. Col. No 160. p. 284.*

1787. November 15.

The YOUNGER CHILDREN OF LAUHLAN MACTAVISH *against* His CREDITORS.

No 65.

Provisions to heirs and children, when understood to create a *propter jus crediti*?

By the marriage-contract between Lauchlan Mactavish and his wife, his landed estate was destined "to the heir-male of the marriage; whom failing, to the heir-male to be procreated by Mr Mactavish in any subsequent marriage; whom failing, to the heir-female of the marriage; the eldest heir-female always succeeding without division; with a power to Mr Mactavish, if he thought fit, to prefer any of the younger sons of the marriage to the elder; or, in case of no heir-male existing, to prefer any of the younger daughters of the marriage to her eldest sister."

The following clause was then added: "And, moreover, the said Lauchlan Mactavish binds him, his heirs and successors, to make payment to the children to be procreated of this marriage, other than the heir who shall enjoy the lands, the respective sums in the events after mentioned, viz. 1st, If an heir-male or female of this marriage shall succeed, and survive majority, there shall be paid to the younger children, whether sons or daughters, if one, the sum of L. 1000, if two, the sum of L. 1200, if three, or more younger children, the sum of

L. 1500: *2dly*, If there be no heir-male of the marriage, surviving at the dissolution thereof, or if there be an heir, or heirs-male of the marriage, who shall die without lawful issue, and the estate devolve on the heir-male of another marriage, in that event there shall be paid to the daughters of this marriage, if one, the sum of L. 1200, if two, the sum of L. 1500, and if three, or more, the sum of L. 2000; the whole of the said provisions to be divided among the children entitled thereto in the events foresaid, by such proportions as the said Lauchlan Mactavish shall appoint, by any writing under his hand, and, failing such division, equally amongst them."

By another clause, the above-mentioned sums were declared to be payable to the respective children, upon their marriage, or attaining the age of majority; Mr Mactavish becoming bound to maintain them until one or other of these terms should arrive.

Mr Mactavish's affairs having gone into disorder, a claim was, during his life, entered by his younger children, for the sums which had been provided to them. And, in support of this claim, which was opposed by his Creditors, it was

Pleaded, Although bonds of provision, not exigible till the father's death, are in general held to be of the nature of rights of succession, which do not enable the children to maintain a competition with his onerous creditors, the case is different, where they have been so framed, as to afford a proper ground of action during his lifetime. And it is not necessary for this purpose, that the term of payment should be such as must unavoidably precede the father's death. It is enough if this is merely possible. In the present case, where the payment is to be made on the childrens' majority or marriage, and where the father is in the mean time obliged to provide a suitable maintenance to them, there seems to be no doubt of the complete efficacy of their right. It is true, that the sums provided to them are, in certain events, enlarged or diminished. But this, at the utmost, could only have the effect of limiting their *jus crediti* to the smallest of these sums; and although the father has been authorised to distribute the whole in such proportions as he thinks fit, this ought not to have any influence, because he cannot thereby, in any shape, narrow the obligation he has come under, or oblige the whole children to accept of a less sum than has been provided to them. This point, indeed, appears to have been precisely determined, 31st January 1759, Henderson's Children *contra* his Creditors, No 64. p. 12919.

Answered, The marriage-articles, in the present case, have been so conceived, that the children cannot, previously to their father's death, insist for the sums provided to them. Not only is it in his power, at any time during his life, to select, out of all the children, male or female, respectively, the person who is to be his heir, male or female, in the lands, and, in this manner, to exclude the child, so named, from any part of the stipulated sums; but it is only after the

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heir-male or female has actually succeeded, a circumstance which cannot occur while the father is alive, that the provisions are exigible. And the same consequence must follow, from the uncertainty in the extent of the sums due in the different events which have been specified, as well as from the power which is given to the father, of determining, at any time, what proportion of those sums shall be paid to each child. As to the decision in 1759, it is a single one, contrary to the general tenor of former determinations, and unsupported by any after practice. And what seems sufficiently to distinguish it from the present case, the provisions were declared to be due on the existence of an heir-male who shall succeed; so that the Court might consider these words as implying a condition of an heir-male existing, not of his actually succeeding; an interpretation which is here altogether inadmissible.

Some of the Judges, moved by the determination in the case of Henderson's Children, were inclined to admit the pursuer's claim; but the majority considering that case as erroneously decided,

"THE LORDS found, that the children of Lauchlan Mactavish, claiming under their father's marriage-contract, cannot compete with his onerous creditors."

A petition, reclaiming against this judgment, was refused without answers.

Reporter, *Lord Braxfield.*

Act. *Dean of Faculty, Rolland.*

Alt. *M. Ross.*

Clerk, *Sinclair.*

C.

Fol. Dic. v. 4. p. 187. Fac. Col. No 2. p. 5.

1792. *February 2.*

CREDITORS OF KENNETH MACKENZIE *against* His CHILDREN.

No 66.

A provision, by marriage-contract, good against creditors, though not payable till after the father's death, interest being due from the periods of the childrens' majority or marriage.

By his contract of marriage, Kenneth Mackenzie of Redcastle became bound "to make payment to the younger children, to be procreated of the marriage, the sum of L. 2000, to be divided amongst them as he should direct by a writing under his hand; the said provisions to be payable only at the father's death, and to bear interest from the majority or marriage of said children, whichever of these events should first happen; and they to be maintained at bed and board ay and until the period at which the interest upon their provisions should fall due and be payable."

At his death he left four children, all under age and unmarried. Before that time his creditors began to lead adjudications against his estate; as did also his three younger children, in security of the aforesaid L. 2000 of provision, and of the interest from their majority or marriage; and likewise for a certain sum in name of aliment, awarded to them by arbitration some years before his death.

The estate, which was loaded with debts beyond its value, being afterwards brought under judicial sale, the Children claimed to be ranked for these sums;