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sight, but that the same ought to be supplied by the Court, provided it can be made evident what would have been the will of the parties, had the event been foreseen. About this there can be no doubt; for, if the Earl was willing to give a jointure of 50 chalders to his spouse, in case his brother or his nephew should succeed to his estate, *multo magis* in the case of a forfeiture.

'The claim accordingly was sustained for 50 chalders.'

*Sel. Dec. No 213. p. 278.*

1781. February 2.

Dr JOSHUA M'KENZIE *against* LEGATEES of Mrs ELIZABETH HOLTE.

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A lady conveyed to a person, for behoof of his son, a sum which, in case of the son's death, was to devolve to the children of three families equally. This legatee having died, it was found that the sum must be divided among the children of the three families *in capita*, and not among the families collectively; that children born after the testator's death, but before the legatee's death, had right to a share; that the issue of those children who died before the legatee, were entitled to their parent's share; but that the heirs of those who died without issue before the legatee's death, had no claim.

Mrs ELIZABETH HOLTE, by her last settlement, conveyed to Dr M'Kenzie her whole funds, in trust, for behoof of his children; 'but, in case of the death of James M'Kenzie (one of them), she appointed the sum of L. 700 to be paid and divided by her said trustee, equally among the children of Janet M'Kenzie, and the children of Anne M'Kenzie, and the children of Anne Monro.'

James M'Kenzie having died, the legacy became due to the persons above-mentioned. Some difficulty, however, occurred in the mode of distributing it.

Of the children of the different families, one was not born till after the death of the testatrix, and several others who had survived the testatrix were pre-deceased at the time of James M'Kenzie's death, and one of these had left issue.

Doubts, therefore, arose concerning the following points; *1mo*, Whether the division prescribed by the settlement should be made *in capita*, or *in stirpes*; *2do*, Whether the child born after the testatrix's death was entitled to a share; and *3tio*, Whether the issue or next of kin of such of the children as survived the testatrix, but died before James M'Kenzie, had also a right to a portion.

In order to obtain, for the direction of his conduct, the judgment of the Court upon the different claims resulting from these particulars, the trustee called all the parties interested into Court, by a process of multiplepointing, when appearance was made for a considerable number of them.

Some of the Judges, in reference to the first point, were of opinion, that the mode of expression used by the testatrix, in the above quoted clause of the deed, especially in the repeated insertion of the particle 'and,' seemed to indicate an idea of a division between the several families collectively, and not among the children of them all, as mere individuals.

The judgment of the Court, however, was as follows:

'Find that the sum of L. 700, bequeathed by Mrs Elizabeth Holte, in the event of the death of James M'Kenzie, to the children of Janet and Anne M'Kenzie, and Anne Monro, falls to be divided amongst the said children equally *in capita*; and that each of the said children who existed at the death of the said James M'Kenzie, though born after the death of the testatrix, has

right to an equal share thereof: And find that the issue of such of the said children as died before the said James M'Kenzie, have right to their parents' shares of said legacy; but that the nearest in kin of the children who died without issue before James M'Kenzie, have no right to any part thereof.'

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Reporter, Lord Gardenston. Act. J. M'Kenzie. Alt. Elphinstone and J. M'Kenzie, jun. Clerk, Menzies.

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Fac. Col. No 27. p. 49.

1793. June 19.

MARGARET OLIPHANT and her Husband against JOHN OLIPHANT.

THE entail of the lands of Bachilton, executed by Patrick Oliphant in 1729, contains the following provision: 'That it shall always be liesome and lawful to me, and the hail other heirs of tailzie who shall succeed in time coming, to provide my younger, or their younger children, other than the heir who shall succeed to the lands and estate before mentioned, with suitable and competent provisions, not exceeding three years free rent of the estate for the time.'

Under this entail, John, commonly called Lord Oliphant, succeeded to the estate. In 1776, when he had three children, Henry, Margaret, and Eleonora, he granted to the two latter a bond of provision for L. 1,000, or such other sum, less or more, as should amount to, and not exceed three years rent.

After the date of this bond, John Oliphant married a second wife, by whom he had two children, John, who was above two years of age when his father died in the year 1781, and Janet, of whom he left his wife pregnant.

At his death he had no other fund for the provision of his younger children, except the reserved power to burden contained in the entail. Henry, the eldest son by the first marriage, predeceased his father, leaving one son, John Harrison Oliphant, on whom the estate devolved.

In 1785, Margaret Oliphant took a decree of constitution against him, for one half of the sum contained in her father's bond of provision to her sister and her, and having thereafter led an adjudication against the estate, she brought an action of mails and duties.

John Harrison Oliphant, the defender in this action, at the same time brought a reduction of the bond, and whole diligence proceeding upon it; but having died during the dependence of these actions, the succession opened to his uncle John Oliphant, who thereby became a party to them, and

*Pleaded*; The reserved faculty was intended as a fund of provision to the whole younger children of the heir of entail. John Lord Oliphant, therefore, by excluding his children of the second marriage, exceeded his powers, and they are entitled, if not to set aside the bond *in toto*, at least to an equal share of its benefit with his younger children. Upon the same principle, although a

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An heir of entail exercised a reserved faculty to its full extent, by granting a bond of provision to his younger children then existing. He afterwards married a second time, and had a son and a daughter by the second marriage, but died before making any alteration on the former bond of provision. The son of the second marriage having succeeded to the estate, the Lords found, that he was not entitled to any share of the bond of provision, but reserved to the daughter to claim her share.