

No 50.
a recommendation in order to procure a pass to retire effects from France. The pass was not procured, yet the wine was found due, without regard to the arrival of the ship.

being informed that Mr Gordon had some wine arrived at Leith, pursued him before the Judge-Admiral for delivery of the piece of wine, or L. 12 Sterling as the price of it, and obtained decret.

Mr Gordon offered a bill of suspension, upon these grounds, *1st*, The performance of the obligation being conditional upon the recommendation's taking effect, and the arrival of the ship the Royal Ann at Leith, and the condition never existing, the obligation fell.

Answered for the charger; The condition of the obligation could not be taxative as to the Royal Ann; for the wine might have been shipped in the Royal Ann, and she perishing by the way, brought home in another bottom; or Gordon, who inclined at the date of the obligation to transport his effects in the Royal Ann, might have afterwards altered his resolution, or the name of that ship might have been changed. *2do*, If Gordon had designed to oblige himself only upon the event of the success of the recommendation, he should have expressed it so; for, *in dubiis*, words are always explained *contra proferentem*.

THE LORDS refused the bill.

Forbes, p. 39.

1738. July 7.

DRUMMOND *against* DRUMMOND.

No 51.

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.

1754. February 26.

DOROTHEA PRIMROSE, and Sisters, *against* His MAJESTY'S ADVOCATE.

No 52.
The condition *si sine hærede masculo decesserit* disappointed by the existence of a son, tho' he outlived the father but two months.

BY a contract of marriage, dated 1724, between Sir Archibald Primrose and Lady Mary his wife, the former is bound to resign his lands, &c. to himself and heirs male of that marriage; which failing, to the heirs-male of any subsequent marriage; which failing, to his other heirs of tailzie; with the following proviso in favour of daughters. 'And, farther, in case there be no heir-male, but allearly a daughter or daughters of this marriage, &c. and that they shall be debarred from succeeding to the estate by Sir Archibald's other heirs-male; then, and in that case, Sir Archibald binds him and his heirs-male and successors in the foresaid lands, to make payment to the daughter or daughters, &c. viz. if one, 24,000 merks; if two or more, 36,000 merks, &c. and that at the first term of Whitsunday or Martinmas after his decease, &c. with annual-rent thereafter.'

Upon the 15th November 1746, Sir Archibald suffered death for high-treason, leaving issue one infant son and seven daughters. In January 1747, his son died. The daughters entered a claim for the 36,000 merks.

Objected for the Crown; That supposing Sir Archibald had died unattainted, the existence of the heir-male disappointed the purification of the condition, upon which depended the provision of the daughters.

Answered for the daughters; That as it is in reality the same thing to all the parties concerned, whether the sons die before or immediately after the father, it cannot be supposed that the parents intended the daughters a provision in the one case, and none in the other; and, in this case, the heir-male, an infant, died two months after his father.

But, *2do*, whatever might be the law where the father's decease is the term under the consideration of parties, yet that was not the case here; for the term under the consideration of parties, for regulating the daughters' provisions, is not the father's decease, but the first Whitsunday or Martinmas thereafter. For suppose two daughters had outlived the father, and one of them had died before the first Whitsunday or Martinmas after his death, it would have been supposed that only one daughter had existed of the marriage; and 24,000 merks, the provision for one alone, would have taken place. This being the case, although the son outlived the father, yet as he died before the term which regulated the provisions to the daughters, their provisions were certainly due. *See* Earl of Dunfermline *contra* Callendar, 27th June 1676, No 7. p. 2941.

Replied for the Crown; That however hard it may be, yet such is the principle of our law, that the condition *si sine liberis*, or *si sine hærede masculo*, has always been understood to be disappointed by the bare existence of such children or heir-male after the father's decease. And there is no speciality in this case to exempt it from the general rule. For though it is very true that the first term of Whitsunday or Martinmas after the father's decease was under the consideration of the parties, yet that was only for regulating the extent of the provisions for the daughters, and from whence that provision was to be payable and to bear interest. But the non-existence of an heir-male at the father's decease was the condition of the debt itself. *See* the cases of Somerville *contra* Tenant, No 11. p. 2949.; Lord Royston and Fraserdale *contra* Halyburton, No 16. p. 2955.; Drummond against Drummond, No 51. p. 3002. There was another point *argued* in this case, *viz.* the effect of the attainder against this bond, supposing the condition to have been purified; and the case of Margaret Oliphant, No 31. p. 2275. was referred to: but as the Court were unanimous upon the first point, this other was not determined.

' THE LORDS dismissed the claim.'

Act. Jas Ferguson, &c.

Alt. Alex. Home, &c.

Clerk, Pringle.

S.

Fol. Dic. v. 3. p. 160. Fac. Col. No 101. p. 150.