

This judgment was affirmed in the House of Lords, 7th March 1751.

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Fol. Dic. v. 4. p. 187. Rem. Dec. v. 2. No 91. p. 151.

* * * D. Falconer and Kilkerran's reports of this case are No 54. p. 4398.
voce FIAR ABSOLUTE, LIMITED.

1759. *January 31.*

JOHN BALLINGALL, and other CREDITORS of FRANCIS HENDERSON of Grange of Barrie, *against* THOMAS, WILLIAM, and JEAN HENDERSONS, Younger Children of the said FRANCIS HENDERSON.

By marriage-contract, dated 26th June 1738, between Francis Henderson and Jean Reid, with advice and consent of their respective fathers, James Henderson, the father of Francis, in consideration of the bride's portion of 6000 merks, disposed the estate of Grange of Barrie to his said son Francis, and the heirs-male to be procreated between him and the said Jean Reid; whom failing, to Francis's heirs and assignees whatsoever.

The said contract likewise contained the following clause: " Sicklike, if there shall happen to be a male child procreated in this intended marriage, who, by the conception of this present contract, shall succeed to the lands of Grange of Barrie, in that case the said Francis Henderson binds and obliges him, and the said male child, thankfully to content, pay, and deliver, to the younger children to be procreated betwixt him and the said Mrs Jean Reid, the portions and provisions following, viz. if there be only one child, to the said child the sum of 3000 merks Scots; if two children, to them 4000 merks; and if three or more children, to them 6000 merks; which portions and provisions are to be divided amongst the said children, as the said Francis Henderson shall think fit to appoint by a writ under his hand, and they are to be due and payable to them at their respective majorities or lawful marriages, either of them first happening, with annualrent thereafter; and the said Francis Henderson, during his lifetime, and his eldest son after his decease, are hereby bound to aliment and educate the said younger children honestly, conform to their rank and quality, ay and while their said provisions fall due. But if it shall happen that there be no male children procreated in this intended marriage, and only daughters procreated therein, and that the said Francis Henderson survive the said Mrs Jean Reid, and have male children in a second marriage, then, and in that case, the said Francis Henderson binds and obliges him, his heirs and successors, thankfully to content, pay, and deliver, to the daughters to be procreated betwixt him and the said Mrs Jean Reid, the portions and provisions following, viz. if there be only one daughter, to her the sum of 7000 merks; if two daughters, to them 9000 merks; and if three or more daughters, to them 11,000 merks Scots; which portions and provisions are to be divided

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An obligation in a marriage-contract to pay a sum to younger children at a term during the father's life, constitutes them proper creditors.

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amongst the said daughters, as the said Francis Henderson shall think fit ; and the said Francis Henderson does hereby bind and oblige him, his heirs and successors, to make payment of the said provisions to the said daughters, at their majorities or lawful marriages, either of them first happening, with annualrent thereafter, and to alimnt and educate them honestly, conform to their rank and quality, until their said portions fall due."

Of this marriage, besides the eldest son, there existed three younger children, viz. two sons, Thomas and William, and one daughter, Jean.

Francis, the father, having contracted sundry debts, his creditors adjudged his estate, and his three younger children also adjudged the same within the year of the first adjudication, for payment of 6000 merks, as due to them in virtue of the first part of the clause in the marriage-contract above recited.

A ranking of Francis Henderson's Creditors ensued, where the question occurred, Whether the younger children were or were not entitled to be ranked as onerous creditors *pari passu* with the other adjudgers?

Pleaded for the other Creditors, *imo*, The eldest son of the marriage, whose interest is supposed to be chiefly attended to at settling the contract, is only called to succeed to the lands as heir of provision to his father, and, consequently, his father's onerous creditors are preferable to him. Now, he being the person subjected in payment of the younger children's provisions, in the event of his succeeding, it follows, that those provisions are only a burden upon his right of succession, and, therefore, must share the same fate with it. *2do*, By the conception of the contract, the provisions to the younger children are not due till both the term of payment is come, viz. marriage or majority, and also the condition under which they are stipulated has existed, namely, that a male child of the marriage has actually succeeded to the estate, in virtue of the settlement contained in the contract : The words are, " If there shall happen to be a male child procreated, who shall succeed," &c. ; which import, not only that a male child must be born of the marriage, but that such a child must *de facto* succeed to the estate, before the provisions to the younger children are payable. Now, as such succession cannot open to the son before the father's death, the provisions cannot be payable till after his death, which is a construction likewise agreeable to the words of the obligation on the father during his lifetime, and on his eldest son after his decease, to alimnt the children till their portions should become due, indicating, that they would not fall due in the father's time.

If it is thus clear, that, by the first branch of the clause, under which the children now claim, their portions are not payable till after the death of their father, who is still alive ; then it follows, that they must be considered as heirs of provision, and cannot compete with his onerous creditors, as has been adjudged in many cases ; 24th January 1677, Graham, No 42. p. 12887. ; 24th July 1696, and 17th June 1697, Napier, No 53. p. 12898. ; and 1st July 1754, Strachan, No 105. p. 996. And,

3tio, The provisions made in different parts of the clause to the younger children, and to the daughters of the marriage, are evidently intended to take effect in different events, and not to have both place; but as the father may yet marry a second wife, and have a son by her, and as the sons of the first marriage may all die before him, whereby the provision made for the daughter of that marriage, in the after part of the clause, might become due, it is obvious, that the provisions made in the first event, and which are now claimed, may still fall to the ground; and, consequently, being thus precarious while the father lives, the same must be considered as provisions made payable after the father's death, and so fall to be postponed to his onerous creditors.

Answered for the Children, *1mo*, The settlement of the estate on the heir-male of the marriage is a provision of succession, which the eldest son could only take by service, subject to the father's onerous debts, but the portions of the younger children are constituted by the father's personal obligation. These are not burdens on the fee provided to the heirs-male, but debts due by the father himself, and to which the heir of the marriage can only become liable by succeeding in his father's place.

2do, The portions are made payable at precise periods, viz. marriage or majority, which might come, and have accordingly arrived, during the father's life. If at such term of payment the father was living, the portions were exigible from him, or, if dead, from his eldest son. The proviso, that the aliment to be furnished till marriage or majority should then cease, farther shews, that the portions were then intended to become due, although the father should be still alive. Nor do the words in the beginning of the clause, "If there shall happen to be a male child procreate, who shall succeed," import a condition suspensive of the payment of the portions provided to the younger children till an heir-male of the marriage had actually succeeded. These words are only descriptive of the circumstances of the family under which lesser portions should be due, than those provided in the after part of the clause, on the failure of issue-male of the marriage. If there was a male child existing at the time the portions became exigible, who should or might succeed, by conception of the contract, then the obligation to the younger children was evidently intended to be performed, and the father was bound to pay accordingly the sums provided in such event. The portions being thus payable, eventually, by the father in his own lifetime, were truly a just and onerous debt due by him, and consequently entitled to be ranked on his estate, conform to the diligence done for securing the same, equally with his other onerous contractions, agreeable to the decision in a similar case, 24th January 1724, Creditors of Easter Ogle, No 59. p. 12909.; and, *3tio*, Though it is true, the different provisions made in this clause are intended to take place in different events, yet that cannot affect the question. The lesser portions, if already due, may certainly be exacted, although it is still possible that the other event may afterwards exist, in which

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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.*
Reporter, *Bankton.*

For the Children, *Rae, Macintosh, Lockhart.*
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 under-
stood to
create a pro-
per *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