No 65. 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;

the Creditors, on the other hand, objecting, that those provisions were not a proper *jus crediti* effectual against them. In support of the objection they No 66.

Pleaded, It is clear, in general, that provisions to children, whether constituted by marriage-contract, or by bond, if they be not made payable during the father's life, are not effectual against onerous creditors. Stewart against Robertson, No 83. p. 969; Anstruther against Innergelly, No 84. p. 970; 20th June 1672, Bannerman; Fountainhall, 17th June 1697, Napier, No 53. p. 12898.; 14th November 1787, Creditors of Mactavish, No 65. p. 12922.; Ersk. B. 3. Tit. 8. § 39.

In the present case, indeed, it is declared, that the provision shall bear interest from the marriage or majority of the children. But this is a specialty of no real importance. For though those events might have happened in the father's lifetime, they must have been here understood as taking place after his death, as it was impossible that any sooner a claim, for either principal or interest, could arise.

To shew this, suppose a daughter to have been married during the father's life, and to require the interest of her portion, he could have answered, that there was none, however small, which she could call her own, as the amount, to be ascertained by himself, would not be known till his death. Or, if a child, after attaining majority, had bequeathed by will his share of the provision, the same answer must have silenced the legatee.

Thus it appears, that during the life of their father, the children had no *jus crediti*, and therefore cannot compete with his onerous creditors.

Answered, Although before the father's death the principal sum was not payable, it was nevertheless to become due at the period of majority or of marriage. There was then to be *dies cedens*, though not *dies veniens*. From those terms the provisions were to bear interest, and, by consequence, the capital, or stock, must have been owing by and a debt upon the father; for to suppose interest to arise without a capital is absurd.

As to the argument founded on the father's power of distribution, it must be admitted, that, during his life, the children, if all married, or of age, would have been entitled, collectively, to the interest of their provisions; and though an individual could not prefer a separate claim, this is not inconsistent with the *jus crediti* of the whole; which, however, was the point in question.

The children, therefore, being vested in the right of their provision, before their father's death, it is to be considered as a proper debt, and effectual against his creditors. Kames, 24th January 1724, Lyon against Creditors of Easter Ogle, No 59. p. 12909.

THE LORD ORDINARY, "In respect that, by the conception of the contract of marriage, the father was bound to pay interest upon the sums provided to the younger children of the marriage, from the time of their marriage or majority, though the payment of the principal sum was suspended till the death of their father, found it was competent to the younger children to use diligence in their father's lifetime; and found, that although the father was bound to aliment the

No 66. younger children, according to his circumstances, which would be implied, though not expressed, yet, in respect of the state of his affairs, the younger children could not compete with onerous creditors for aliment."

To this interlocutor the Court adhered, on advising two successive reclaiming petitions for the creditors, with answers, the children having acquiesced in the finding as to their aliment.

Lord Ordinary, *Justice-Clerk.* For Creditors, *Rolland.* Alt. *Abercromby, Ross.* Clerk, *Home.*

S. *Fol. Dic. v.* 4. *p.* 187. *Fac. Col. No* 203. *p.* 427.

SECT. VIII.

Where the Husband is not the Granter of the Obligation.

1710. *June* 15. LESLIE *against* CREDITORS of LESLIE.

No 67.

A FATHER, in his son's contract of marriage, having obliged himself to pay a certain sum " to him and his spouse in conjunct fee and liferent, and to the heirs and children of the marriage in fee, whom failing, to the son's heirs and assignees whatsomever;" and the son having, after his wife's decease, granted a disposition of the subject, the LORDS found, That the granter's daughter, and only child of the marriage, was in the common case of an heir of provision, and had interest thereby to challenge any gratuitous deeds done by her father to her prejudice.

Fol. Dic. v. 2. *p.* 282. *Forbes*

*** This case is No 120. p. 1018. *voce* BANKRUPT.

1718. *February.* FEA *against* TRAIL.

No 68. A MAN, in his contract of marriage, obtained lands to be disponed to him from his father, to himself and wife in conjunct fee and liferent, and to the heirs whatsomever of the marriage in fee. In this case it was found, That the husband could do no voluntary or gratuitous deed in prejudice of the heir of the marriage, and particularly that he could not disappoint the heir of the marriage, even by a deed in favour of the second son of the marriage. *See* APPENDIX.

Fol. Dic. v. 2. *p.* 283.