less he should offer to prove, that they survived the age of twenty-one years; and it being *alleged*, that one of them survived that age, it was found relevant to make the sum divide betwixt the pursuer and defender. No 1.

In this same process compeared the executor of umquhile James Pitcairn, who was husband to the said Isobel; who *alleged*, That what right she had to the said sum, it belonged to her husband *jure mariti*, and consequently to his executors. It was *answered*, That the obligation bears annualrent and was dated before the year 1641, and consequently being heritable could not belong to her husband *jure mariti*.

Which the LORDS found accordingly, *but* prejudice always to him of any annualrents owing to her the time of his decease.

Gilmour, No 154. *p.* 109.

*** This case is also reported by Newbyth:

UMQUHILE David Edgar, father to Isobel Edgar, the pursuer, by contract of marriage with Anna Blair, his second spouse, and mother to the pursuer, obliges him and his heirs of the first marriage, which failing, his heirs whatsomever, to pay to the bairns of the second marriage, equally amongst them, if there be any more than one, and, if there be but one, that bairn to have the whole, the male children to their parts at the age of twenty-one years complete, and the female at eighteen; and, if the said David should die before the term of payment, he is obliged to pay annualrents at five for the hundred, and after the term of payment, the ordinary annualrent. The said Isobel Edgar being the only bairn alive of the said marriage except David, the heir, pursues him for payment to her, as the only bairn of the marriage besides the heir, of the sum of 4000 merks and annualrents thereof, conform to the hail 4000 merks contained in the provision mentioned in the contract of marriage; and, that the heir of the second marriage, the pursuer's own full brother, being now heir-general, was obliged to fulfil that obligement sicklike as the heir of the first marriage would have been, and yet the said 4000 merks could not be divided betwixt him and his sister, notwithstanding it was *alleged* for him, that by the clause of the contract, the money was to be divided equally betwixt the bairns of the marriage.

Newbyth, MS. p. 18.

1677. *Feb.* 22. BELSHES *contra* BELSHES.

No 2.
Found in conformity with the above.

UMQUHILE James Belshes did nominate his two daughters, Susanna and Jean Belshes, his executors, and thereafter granted a bond of provision in their favours, payable at their age of fourteen years. Jean died before that age; and, in a process betwixt Tofts and James Belshes, heir to the said umquhile James,

No 2. for count and reckoning, for what was due by the said James to his sisters, it was *alleged* for James, that these bonds of provision being moveable, ought first to affect the executry, and he ought to be liberated thereof *pro tanto*, seeing his sisters were executors confirmed by Tofts. It was *answered*, That these bonds of provision being posterior to the testament or nomination, and both being no more than a competent provision, they must be understood as over and above the benefit of the executry and nomination; especially, seeing they bear not in satisfaction of their interest of the executry.

THE LORDS found, that the bonds of provision, albeit posterior to the nomination, were not to be interpreted over and above the executry, but did affect the executry.

It was further *alleged* for James Belshes, the heir, that Jean's provision was not due, because she attained not to the age of fourteen, *nam dies incertus pro conditione habetur*; and the ordinary tenor of bonds of provision, granted to more children, at such an age, hath this clause adjected, 'That the portion of 'the deceased should accresce to the survivors,' which being obvious and ordinary, and here omitted, evidences the defunct's mind not to burden his heir further, than as his daughter should attain her marriageable age, otherwise it had been easy to express the terms, by the years of God, at which the daughter would have been fourteen years. It was *answered*, That this bond of provision bears 'payable to the daughters, their heirs, executors, and assignees, at their 'age of fourteen;' which therefore must be meant of the year in which they would have been fourteen, if alive, which is no uncertain term.

THE LORDS found Jean's provision not due, because she attained not to the age of fourteen, which was the term of payment.

Fol. Dic. v. 1. *p.* 424, *Stair, v.* 2. *p.* 519.

*** Gosford reports the same case:

TOFTS being charged upon a bond of six thousand pounds, granted to James Belshes, did suspend upon this reason, That the charger, by a back bond, was obliged to allow to Tofts, what sums of money should be found due, after count and reckoning, by Susanna and Jean Belshes, and that out of any portion due by Tofts to them; for clearing whereof there being an act of count and reckoning, it was *alleged* for James Belshes, that the bond of provision made by the father to Jean and Susanna could not affect him as heir, because they were executors to their father; and the bond being moveable, the heir can only be liable in so far as the inventory of the testament and executry will not satisfy the same. 2*do*, Albeit the bond of provision did oblige him, as heir, yet *quoad* Jean's part, the same became extinct, it being only payable to her at the age of fourteen years, whereas she died before that time. 3*tio*, The allowance craved by Tofts of a thousand pounds, craved for entertainment at bed and board, besides 48 pounds yearly for their clothes for one of the daughters, and their education

cannot be allowed; because he being tutor can crave no more than what their father ordained to be paid to their mother, or, at most, the annualrent of their several provisions. It was *answered* for Tofts, to the *first*, that he opponed the bonds of provision which were granted by the father, after the making up of his testament; and, *intuitu* that the executry was mean and small, he did grant this bond of provision for their better maintenance and advancements to marriage; likeas the bond bears, that the father obliges himself and his heirs whatsoever, and successors in his lands and heritages, at their age of fourteen years, and in the mean time to maintain and educate them, which clearly makes the heir liable, and not the children, as executors; and, if it were otherwise, would destroy the whole benefit of the executry, contrary to the father's intention. It was *answered* to the *second*, That albeit Jean died before the age of fourteen, yet that did not extinguish her fortune, because the father was obliged to pay the sum to her, her heirs and executors; and so not being a personal debt, albeit the term of payment was suspended, and that she died before that time, it did not hinder but the same falls to her nearest of kin, as was found in a case betwixt Sir Thomas Stewart and his brother, No. 8. p. 30. where a bond of provision made by their father to their sister, but not payable until her marriage, it was found that it did not become extinct by her death before marriage. It was *answered* to the *third*, That the annualrent of their several provisions not being able to entertain them at bed and board and in clothes and education, Tofts being their tutor, ought not to be burdened with what he disbursed, more than their annualrent, his expenses being as moderate as could have been allowed for persons of their quality; and albeit their father did ordain their mother to have no more, yet there is a vast difference betwixt a tutor and a mother, who hath natural obligations, and being liferenter, might be now obliged. THE LORDS, as to the *first* point, having considered the bond of provision, and finding that it was a clear moveable bond not secluding the executors, and binding the heir only, they found that it ought to affect the executry in the *first* place; as to the *second*, They found that the bond of provision not being payable to the daughters until they should obtain the age of fourteen years, that Jean dying before that time, it did extinguish her part, and could not belong to her nearest of kin; and that the case was far different from that of Garntullie's, where the daughter was absolutely fiar of the provision, and the payment was only continued until she should be married, that the money might be in security; whereas here the intention of the father was, that the portion should not become due, unless Jean became capable of marriage by attaining to a fit age. As to the *third*, They found that the tutor should crave no more for aliment and education yearly, but the just annualrent of their provisions, which seems hard where pupils are persons of quality; and that the exhausting of executry for provisions being liable to be reduced at creditors' instance, then the principal sum shall become so mean and inconsiderable, that it is impossible they can be educated, and have clothes, by the annualrents,

No 2.

No 2. which cannot afford so much as put them in the quality of the meanest tradesmen or labourers; but, notwithstanding, it was so carried in this, and insinuated by some, that it ought to be a leading case.

Gosford, MS. No 972. p. 654.

1682. *February.* Sir JOHN CLERK of Pennycook *contra* His SISTERS and Mr DAVID FORBES.

No 3. 'FOUND that when a sum is provided to children in a contract of marriage, if any be born and die in the father's lifetime, before getting of a bond of provision, the destination will not fall in their executry, nor can it be claimed by other bairns.

Fol. Dic. v. 1. p. 423. Harcarse, (BONDS.) *No 175. p. 38.*

1686. *Nov.* 25. KELSO *contra* M'CUBY of Knokdolian.

No 4. FERGUS M'CUBY having, by his bond, obliged himself to pay 10,000 merks to his nephew by a second brother deceased, at his age of twenty-one years, and to aliment him in the mean time, the creditor left 2000 merks, by way of legacy, to his mother's relations, and died before he was twenty-one years old; and the legators having pursued for payment, it was *alleged* for the defender, The words, *at the age of twenty-one years*, are a part of the obligation-clause, and a condition which did not exist; and this sense on it may be the more easily admitted, seeing the bond bears love and favour.

2*do*, The bond is conceived in favour of the defunct personally, and *not* to heirs and executors.

Answered, That the clause imports not a conditional obligement, but only a delay of payment; and although the bond bears love and favour, it obliges the creditor to renounce all interest he could claim by the death of his father or grandfather, which makes it onerous. 2*do*, Assignees not being excluded by any taxative clause, the bond was assignable, and also might be legated.

THE LORDS found the bond to be pure, and not conditional, and decerned the defender to pay the legacies, the legatars securing him *pro tanto* against the defunct's nearest of kin, which was the quality of the bond.——This appears different from former decisions.

Fol. Dic. v. 1. p. 424. Harcarse, (BONDS.) *No 210. p. 47.*