SECT. VII.

The manner of eſtimating Liferents in the Computation of a ſeparate Eſtate.

1679. *December* 11.

The CREDITORS of MOUSWELL *againſt* the CHILDREN of MOUSWELL.

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The funds of a father, who has granted liferent annuities to his children, became thereby *secundum eventum* deficient; the liferents were calculated according to the probable duration of the lives at the time of granting, which did not exhauſt the funds; ſo the proviſions were ſuſtained.

THE Laird of Mouſwell, in his ſon's contract of marriage, diſpones to him his eſtate, reſerving his own liferent of a part, and likewiſe reſerving power to him to take on and burden the eſtate with any ſum he pleaſed, not exceeding 18,000 merks, for proviſion of his bairns, and other lawful affairs, and with a clauſe of warrandice from his own fact and deed allenarly; which reſervations were to be inſert in his ſon's infeftment; thereafter he grants bonds to his bairns, with a precept of ſaſine, whereupon they were infeft in the land; but thereafter his creditors purſued his third ſon, as ſucceſſor to the eldeſt, and thereupon obtained decreets, and appriſed the eſtate for the father's debts, anterior to the father's exerciſing the faculty, by giving bonds of proviſion to his children, and thereupon the creditors purſue reduction of the bairns infeftment and proviſions, as being in prejudice of them, anterior lawful creditors.——In which the LORDS found, That if the father had a ſufficient eſtate to pay all his debt, and the bairns portions, when he granted them their bonds, that the ſame could not be annulled as fraudulent. And now by the probation it appeared that the father had an eſtate of L. 2400 yearly, and found them eſtimate at 16 years purchaſe, a wood worth 10,000 merks, and 5000 merks reſting of his ſon's tocher; and that the father's wife was provided to 1000 merks yearly, and his ſon's wife to 1200; and that the father and ſon did ſhortly thereafter die; that the one was within 40, and the other within 20 years at that time; and that both have enjoyed their liferent theſe 24 years, and excluded the creditors; and that the father, at the time of exerciſing the faculty, had 18,000 merks of debt.——THE LORDS would not ſuſtain the burden of the liferents *secundum eventum*, but as they were worth when the faculty was exerciſed, and eſtimate the liferent of the elder to five, and the liferent of the younger to ſeven years purchaſe; by which account the father had free above L. 30,000 when he exerciſed the faculty; and therefore the LORDS ſuſtained the bairns proviſions.—It was now further *alleged* by the creditors, That the faculty reſerved by the father was exhauſted, becauſe it is proven, that he was in L. 18,000 of debt when he exerciſed it, and therefore could not burden the ſon's fee with any farther, eſpecially ſeeing in the contract he is obliged to warrant the ſon's right from his own deed, and his anterior debts being his deeds affecting his eſtate by his creditors appriſers, the ſon or his heirs would have recourſe againſt the father upon the warrandice, for relieving the eſtate of anterior debts, and

much more might the ſon, his heirs or aſſignees, by theſe appriſings, exclude any further burden by the childrens proviſion; likeas the clauſe bears, for providing of his childrens proviſions, or his other lawful affairs, and there could be no more lawful affairs than the paying of his anterior debts.—It was *answered* for the children, That they opponed the clauſe, bearing a power to the father to take on debts and burden, which could not be exhauſted by the father's debts already taken on; and as to the general clauſe of warrandice, it is, as all other clauſes ought to be interpreted, *ſecundum ſubjectum et materiam*, and can import no more than the ordinary explication of ſuch clauſes. That the father had not, and ſhould not make any other right or diſpoſition of the eſtate; but if ſuch clauſes were extended to prior perſonal debts, when contained in gratuitous diſpoſitions, by which nothing is intended but to give the right *talis qualis*, it would invert the nature of donations, and ruin fathers, who ordinarly diſpone their eſtates to their apparent heirs in their contract, reſerving only a liferent of ſome part; which liferent, if it might be ſo burdened, and evacuate by their anterior debts, they by their gratuitous diſpoſition, might be made to ſtarve, and no perſon contracting with them can be ſecured, but their anterior debts will affect their eſtate, notwithſtanding of the diſpoſition to the apparent heir, yea, and make him liable perſonally as ſucceſſor *titulo lucrativo*. It is true, that where the ſon gets but a portion for his ſubſiſtance, ſuch clauſes may be extended; but not where the eſtate is diſponed to the apparent heir; unleſs there were a clauſe obliging the father to purge the eſtate of anterior debts, or that the ſon accepted it with the burden of ſuch debts, which would import him to be free of the reſt.—It was *replied*, That contracts of marriage being of the greateſt truſt, the wives and their relations contracting and bringing in portions, they do always look upon the eſtate as free, except in ſo far as it is expreſsly burdened; and if they might be excluded by all anterior debts, theſe might reach the value of the eſtate; and whatever might be ſaid of donations, which are ſimply *ex pura liberalitate*, yet that cannot be extended to contracts of marriage, which are always interpreted onerous: Nor can clauſes of warrandice be otherwiſe interpreted, even in donations, than according to their tenor, and *in dubio* ought to be interpreted *contra proferentem*, ſeeing that the father might have ſaid that they were only againſt future deeds.—The children *duplied*, That in ſuch contracts, not ſo much the words, as the meaning of the parties are to be regarded; nor can it be conjectured, that any father would diſpone his eſtate for ſo ſmall a portion, and reſerve a liferent, which his prior debts would affect, if that caſe had been propoſed; but on the contrary, the wife and her friends could not be ignorant that the law burdened his eſtate with his anterior debt, as much as any expreſs clauſe could, and therefore ought to have ſecured themſelves by an obligement to purge the debt; but in this caſe the clauſe bearing expreſsly, To take on debt and to burden the eſtate, therefore it can never be exhauſted with debts already taken on; neither is there here any pretence of fraud, but a very deliberate right granted to the ſon, twice as much as all the burdens; and the faculty was ſo tenderly uſed, that the father gave

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No 60. only L. 6000 to his numerous children, and provided not the ſhare of the deceaſing to accreſce to the ſurviving, but to return to the heir; ſo that ſeveral of the bairns being now dead, there remains but 5000 merks of the 18,000 merks contained in the faculty, which is but a mean aliment to the children.

THE LORDS found this clauſe, as it was conceived, could not be exhauſted by the father's anterior debts, notwithſtanding of the clauſe of warrandice aforeſaid. *See* WARRANDICE. *See* PROVISIONS to HEIRS and CHILDREN.

Fol. Dic. v. 1. *p.* 69. *Stair, v.* 2. *p.* 720.

*** *See* This caſe from Fountainhall, MS. *voce* FACULTY.

1682. *December* 20.

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The above judgment afterwards altered; and it was found, that the liferents ſhould be reckoned according to the full time they had to run; and if ſubſiſting at the time of challenge, ſome additional conſideration ought to be made for the probable future duration.

See No 58. p. 932. where the liferents having expired, while the cauſe was ſtill in dependence, they were computed according to the full time they had ſubſiſted.

IN the competition betwixt the children and the creditors of Mouſwell, December 11. 1679, *ſupra*, the Lords having ſuſtained it relevant to elide a reduction, upon the act of Parliament 1621, of bonds of proviſion granted by a father to his children, that he, at the time of granting theſe bonds, had an eſtate ſufficient for theſe bonds, and all his other debts; and having ordained the creditors to condeſcend upon, and inſtruct what debt the father then had, and the children to inſtruct what eſtate he then had, there was a probation adduced as to both; and particularly it was found proven, that the lands of Mouſwell were worth L. 2300, by the computation whereof at ſixteen years purchaſe, it appeared, that the father had then a ſufficient eſtate; of which decreet, reduction was raiſed upon this reaſon, that the fee of the lands being, at the granting of the bond of proviſion, in the perſon of the granter's ſon, theſe lands could not be reckoned any part of the granter's eſtate; and ſeeing this reaſon did not concern the juſtice of the Lords decreet, but an error in fact, as to the explication in the probation, the Lords ought to turn the decreet into a libel, and to conſider only that part of the probation relating to the father's eſtate; and if the fee, which in the ſon's perſon before the bond of proviſion, be ſubduced, the father's eſtate will not anſwer anywiſe to his debt; ſo that the children's right ought to be reduced. And in the like caſes between the Lord Bargeny and Pinkel, and alſo between Stark of Killermonth, and one Heriot, where the probation led and adviſed was found, after extracting, to have been adviſed upon a miſtake, as not directly concerning the point to have been proven by the act, the Lords turned theſe decreets into libels. *See* PROCESS.

Anſwered for the children:—Decreets of ſeſſion *in foro* are the great ſecurities of people, and cannot be taken away by any pretence of miſtake or iniquity. *2do*, 'Tis probable, though the decreet did not expreſs ſo much, the Lords found the fee's being in the ſon's perſon did not alter the caſe, ſeeing it was liable to the creditors reduction, as being *poſt contractum debitum*, and ſo no impediment to hinder the father to grant bonds of proviſion.