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some security for the said 8000 merks, at least so much of it as the Lords shall think suitable to his circumstances, to take effect only at his death: A contract of marriage being a *synallagma*, containing mutual prestations, the wife bringing a tocher, and the husband making a proportional settlement for her and the children of the marriage, and it ought not to be in the father's power to frustrate and evacuate these obligements. THE LORDS considered they have oft reduced exorbitant provisions made in posterior contracts, where they were prejudicial to the first, and that the children of the first bed had a *jus quæsitum*, except where he came in as heir, which tied him *præstare factum paternum*; and if this contract had nominated persons at whose instance execution might pass, they could have charged for implement; but the father here being a merchant, and having reserved to himself a power not only of administration, but of disposal for carrying on his trade, and that it was not pretended he was *vergens ad inopiam*, (in which case the Lords would have obliged him to secure her), therefore they refused to sustain action against him during his life; for they thought merchants might be straitened by such processes, and forced to give over their trade; and it was *pessimi exempli* for children to pursue their parents in such a circumstantiate case, and that it was refused both to John Kennedy's children and Thomas Wylie's.

Fol. Dic. v. 2. p. 286. Fountainhall, v. 2. p. 222.

1709. *June* 28. HAY and CARRUTHERS *against* HAY.

No 94. In this case, in circumstances resembling the above, but where there were friends named to sue for implement of the contract, the father was found obliged to secure the sum.

MR JOHN HAY of Lethem, doctor of medicine, in his contract of marriage with Jean Law receives 8000 merks of tocher, and obliges himself, that if there be only daughters procreate of that marriage, and he have no son of any subsequent marriage, then that daughter shall succeed to the sum of 20,000 merks left him by Sir John Nisbet of Dirleton, his granduncle; but if he had sons, then the daughter of the said first marriage should have 8000 merks, viz. 4000 merks at her marriage or majority, and the other half at his death; and then follows a clause, consenting that execution shall pass for seeing the obligements in favour of the children fulfilled, at the instance of some of the wife's friends therein named. Jean Law, the wife, dying, left one daughter, viz. Margaret Hay. Her father marries again, and sells the lands of Lethem to Doctor Stirling, and retires all his money and effects to London, where he sets up; so there is nothing left in Scotland for implementing the 8000 merks obligement; which moves the friends named in the contract to charge him, and use inhibition and arrestment against him, for securing the said Margaret's provision, who is now married to William Carruthers, and claims the 4000 merks made payable at her marriage, and so as to that moiety, *dies solutionis tam cessit quam venit*. Doctor Hay being alarmed with this diligence, he raises against his

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daughter a reduction and declarator, to hear and see it found and declared, that no execution can pass against him, during his lifetime, for any part of the 8000 merks, it being only provided conditionally, in case he have sons by another marriage, the event of existence, or failing of which, can never be known till his death, which term she must wait. *Alleged*, That her provision can never be suspended to her father's death, for that contradicts the whole tenor of the contract; for if that had been the term of payment, it were impossible to conceive how it was made payable at two terms, one half at her marriage or majority, which should happen first, and the last half at his death, for then it would have all been made payable at his death. *Answered*, The 8000 merks obligement was plainly conceived in suspensive and conditional terms; for if he chanced to die without leaving any sons, then she will get a much better provision, viz. Dirleton's 20,000 merks; and seeing her father is yet alive, and has no sons, and it is uncertain if ever he will have any to debar her from that lucrative succession, and it cannot be known till his death whether he will have sons or not, she can pretend no right to the said 8000 merks as long as her father lives, till it appear whether he leave any sons behind him; so the inhibition and arrestment were groundless and preposterous, and ought to be discharged as irregular; and cited a practick marked by Dirleton, 21st June 1672, Ramsay *contra* Carstairs, No 43. p. 2992. where the term of payment was found not to exist so long as there was a possibility of an heir-male. *Replied*, That she can have little hope of Lord Dirleton's money, because it is not extant, in so far as he uplifted the same when he bought Lethem, and it being now sold, she knows not where to fix this chimerical succession. And *esto* the obligement for the 8000 merks were conditional, and depending on the existence of a son; yet it is certain, that though conditional creditors cannot exact payment before the event and purification of the condition, yet they may do legal diligence for securing the same, during the dependence of the condition, upon the existence whereof the debt becomes absolute, pure and simple, as if there had been no condition annexed; and thus Dirleton, *voce* Arrestment, affirms conditional debts may be arrested, which, by analogy of law, could not be, unless it were a real debt upon the existence of the condition. And Sir George Mackenzie, in his Observations on the act of Parl. 1621, on these words, "to be intented by any true creditor," is positive, that he to whom a debt is owing *sub conditione*, may have action to make his debt effectual when the condition shall exist; and defining this case, he makes a creditor the *genus*, and creditors *pure*, *sub conditione*, *et in diem* to be the subaltern *species*; and concludes, that a conditional creditor may pursue to have his debt secured when the term shall come, though it be not yet come; which quadrates with that common maxim, *ille vere est creditor qui perpetua exceptione removeri non potest*: and to subsume, *creditor sub conditione non potest perpetua exceptione removeri, ergo est veres creditor*; and reason teaches no less; for how soon the condition exists, it is retrotracted to the date of the obligation, and makes it as valid as if it had been *ab*

initio pure and simple; and if it were otherwise, this inconvenience would follow, that debtors in conditional bonds may dilapidate and squander their estates at their pleasure, or abstract their effects, without any legal remedy to hinder them, which is absurd. Now, to apply all this, *esto* the 4000 merks, as the half of the 8000 merks, were a conditional debt, depending on the event of her father's having, or not having a son, it is hugely unreasonable that no diligence can be done for securing this till the event tell whether it will be due or not, especially seeing he has abstracted and withdrawn all his effects out of the kingdom, and left nothing to pay it *in eventu*, except a personal action against his heirs, which we may easily conjecture will be vain and frustraneous. THE LORDS were straitened in this point, on the one hand, not to encourage children to disturb their parents with processes, contrary to that dependence and duty nature requires; and, on the other, that parents may not evacuate and elude their provisions-matrimonial, introduced in favour of their children, which are *uberrimæ fidei*. Therefore the LORDS ordained it to be farther argued.

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1709. *July* 2.—IN the cause Hay *contra* her Father, mentioned *supra* 28th June 1709, the LORDS having considered the case, they were all clear of these two points, 1*mo*, That the father ought to secure her in the fee of 8000 merks, provided to her in the event of his having a son by another marriage, seeing he had transferred his domicile and retired his effects; 2*do*, That he ought to find caution to her for the annualrent of the 4000 merks, as the first moiety due to her after her marriage, and whereof the term of payment was now come. But some of the LORDS thinking she ought to enter to the payment of the annualrents of that half presently, and if she happened to succeed to the L. 1000 Sterling left by Dirleton, then her father would get allowance and deduction of these payments out of that greater sum *pro tanto*; this last point was remitted to be farther heard, and likewise the nature of Dirleton's security; and if it was uplifted, or re-employed again for the heir-male in the first place, and failing of him to the daughter, as heir of line, in the next place.

Fol. Dic. v. 2. *p.* 286. *Fountainhall, v.* 2 *p.* 507 & 509.

1727. *June.* ANDERSON *against* ANDERSON.

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ANDERSON, brewer, having, in his contract of marriage, become bound betwixt and Whitsunday then next to lay out 6000 merks of his own stock, and other 6000 merks payable to him in name of tocher, upon land or other sufficient security, to himself and spouse in conjunct-fee and liferent, and to the children of the marriage in fee; and soon after the term being charged to implement; suspended upon this reason, That however the clause was conceived, it could never be the intention of parties, that he should be bound to lay out