1724 *January* 24.

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A father, after granting a bond of provision to his daughter, became bankrupt. The Court found that an adjudication in security might proceed upon this bond, though it was not payable till ten years afterwards.

Competition, Mrs Margaret Lyon with the Creditors of Easter-Ogle.

By contract of marriage betwixt the deceased William Lyon, younger of Easter-Ogle, and his wife, *anno* 1710, the land estate was provided to the heir-male of the marriage, and in failure thereof, to other heirs-male; after which followed the clause, subject of the present debate: "And if it shall happen, that there shall be only daughters, and no heir-male of the said marriage; then, and in that case, the said William Lyon, younger, binds and obliges him and his foresaids, thankfully to content, pay, and deliver to the daughter or daughters to be procreated of the said marriage, failing of an heir-male, as said is, the particular provisions and portions, in manner, and upon the conditions after specified, viz. if there shall happen only one daughter, to pay to her the sum of 9000 merks; if two daughters, 10,000 merks, &c." Which provisions are payable at their respective marriages, if the same happen in their father's lifetime; and if not married in his lifetime, at their respective ages of eighteen years complete, or the first term of Whitsunday or Martinmas after his death, either of them falling out; and execution is ordained to pass for implement of the contract, in name of persons therein specified; and there is a power of division of the above tochers reserved to the father. There having existed no heir-male of this marriage; but the father being married a second time, and his affairs like to go into disorder, an adjudication was led against him at the instance of Mrs Margaret Lyon, who is now the only daughter of the first marriage, with concourse of the friends at whose sight execution was ordained to pass, for security of the sum contracted to be paid to her, the day of payment not being yet come; after which there arose a competition and ranking of the said William Lyon's creditors, wherein Mrs Margaret compeared, and competed upon her interest.

Preference was pleaded for the Creditors upon this medium, That this daughter of the marriage is truly to be considered as an heir of provision, and as such liable to her father's creditors *in valorem*, after discussing the heir of line and other representatives of the debtor. Nor can it have influence in the case, that the provision here is conceived in form of an obligation to pay a definite sum; for the right of whatever heir of provision is built upon an obligation either to dispone or pay, or provide and secure, the form and style of the writ does not alter its nature; and since the obligations in such cases are still conceived in favours of persons *nascituri*, who in no sense can be creditors, they have always been interpreted to resolve in a provision of succession, which indeed the father cannot gratuitously disappoint, but yet must give place to his onerous creditors. To apply this to the case in hand, it cannot make a great alteration, whether these provisions become due after the father's death, or at a certain period of the children's age; which is in itself uncertain, and may eventually fall out before or after the father's death. The

provision in either case is in the nature of the thing the same, viz. a settlement for children who exist only *in spe* at the time of the contract. To confirm this, no one doubts that the provision of lands to the heirs-male of a marriage by contract, is, in the intention of parties, as valid and solemn a stipulation, as the provision of sums of money to daughters or younger children; every body agrees, nevertheless, that the onerous deeds and debts of the father are preferable to the provision made to the heir-male, and a burden upon it: Wherefore then should not the case be the same in regard to provisions of particular sums to younger children, since the intention of parties is the same in either case? And the necessity of the thing gives the father a full right of administration over the estate out of which the provision is made to the eldest son, as well as to the younger children. It is true enough, that in one sense, younger children are considered in our law as creditors for the sums provided, and so frequently is the eldest also; but though they are creditors to one effect, viz. that the father is disabled from doing any gratuitous deed in their prejudice, it does not from thence follow, that they are creditors in all respects, and have equal privileges with extraneous creditors for onerous causes; since in reality the right savours more of the nature of succession, than of *jus crediti*, which naturally supposes a plenary right of administration in the father. Hence, in the question June 1697, betwixt the Children and Creditors of Napier, (*See* PROVISION TO HEIRS AND CHILDREN.) the LORDS, upon report, found, "That the obligement in favours of the children of the deceased Mr Robert Napier, in the contract of marriage, having been to an uncertain day, and conditional, the children, or their assignees, adjudgers upon the said contract, could not be heard to compete with the extraneous creditors, unless they proved that the father was solvent the time of his decease." And afterwards, upon a reclaiming bill, and hearing in presence, informations, and list of all the decisions which could be gathered prior to that time, the LORDS found, "That provisions in contracts of marriage *liberis nascituris*, payable after the father's death, and the children's attaining to such ages, less or more, and according as the children should exist more or fewer; albeit all these conditions shall come to be fulfilled, and diligence should be used thereupon by the children, the children cannot be heard to compete, and come in *pari passu* with the onerous creditors;" which was very consistent with another pronounced 24th January 1677, betwixt Graham and Rome, *voce* PROVISION TO HEIRS AND CHILDREN. No 58.

On the other hand, it was *pleaded* for Mrs Margaret Lyon, If it is possible in a contract of marriage to contrive obligements by the husband in favours of younger children to be procreate of the marriage, whereby these children would become just and lawful creditors to their father, so as to compete with his other posterior creditors, it is certainly done in this case; for scarcely can obligements be contrived more express: Where obligations are conceived in form of provisions in favours of heirs of a marriage, there indeed the provi-

No 58. sions are always affectable by the father's creditors, at whatever time the debts are contracted; the word heirs importing of itself a representation, subjecting *in valorem*; which, by the way, is the foundation of the decision Graham *contra* Rome. But the present contract of marriage is conceived in quite another form, and the parties here have carefully and anxiously distinguished betwixt the provisions in favours of those who were intended to be heirs, and the obligements in favours of the daughter and younger children: For besides the conveyance of the land estate, there is a separate clause of provision of 5000 merks in favours of the heir-male of the marriage, which deserves to be considered; there William Lyon younger, "obliges himself to ware and employ that sum upon land or annualrent, and to provide the same to himself in liferent, and to the heirs-male to be procreate of the marriage in fee;" which sum, therefore, would undoubtedly been affectable by his creditors. But the obligements in favours of the daughters and younger children are expressed in the strongest manner, to make them, not heirs of provision, but proper and true creditors; for there he does not oblige himself to ware and employ, but to content, pay and deliver to them their several sums, and at the several terms of payment therein mentioned. To strengthen this, let it be noticed, this daughter is not so much as apparent heir, there being a son alive of a second marriage; and her provision might have fallen due even during her father's life, when therefore he would not have had an heir: And if she outlive the term of payment, her provision upon her death, will fall to her nearest of kin and be affectable by her creditors, even though her father were alive: All which are incompatible with the nature of a right of succession; for if the children were to be accounted heirs of provision, the succession could not devolve upon them, but by the death of him to whom they were heirs; and should they decease before him, the subject could never descend to their representatives as such, or be affected by their creditors; but either the provision would be wholly evacuated, or devolve upon the next heir of the fiar. It is no solid difficulty, that the obligements are conceived *liberis nascituris:* The question comes just to this, whether an obligement to a person not yet existing, but to be procreate, can be valid and effectual? or if it be void and null? for if the obligement is good for any thing, it must, upon the existence of the person in whose favours it is conceived, be effectual to compete with other creditors, according to the diligence done upon it; and in that view, it is presumed it cannot well be made a question. Had this obligement been granted in favours of children to be procreate by any other person than the granter, who can doubt of the validity thereof? what difference does it make in law, that it is in favours of the granter's own children, since these children were not by the obligement to represent him, or to be heirs of provision; there can therefore remain no doubt, but this obligation in the contract of marriage was binding and valid from the beginning; and that the daughter who was born very soon thereafter, and before contracting

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any of the competing debts, was thereby from the time of her birth, a just and lawful creditor for the sums payable to her by the contract, as much as if a bond of provision had at that time been granted to her *nominatim*, and duly delivered; and consequently there does not appear any ground in law, whereupon these obligements can be reduced by subsequent creditors, or they preferred to her, otherwise than according to the priority of their respective diligences. It remains but to notice some decisions, to show this plea is not without precedent: Sir Alexander Hamilton of Hags, in his first contract of marriage, bound himself to provide the sum of 24,000 merks to the daughters of the marriage, payable at their respective ages of sixteen years: THE LORDS, 21st February 1690, " Found by the conception of the foresaid contract of marriage, the daughters are not heirs of provision, nor is the provision thereby conceived in their favours a simple destination of succession; but found by the contract, the daughters are formally stated creditors to their father; and therefore repelled the grounds of preference proponed for the posterior creditors, and preferred the children according to their diligence, the same having been raised in the childrens own name, against the father, in his lifetime, after the elapsing of their respective terms of payment." Another decision is as follows: Sir Robert Preston, in his contract of marriage with his second wife, obliged himself to pay 20,000 merks to the heirs and bairns of the marriage, at their age of fifteen years, and to infeft them in lands for security, &c. In a competition of these children with their father's onerous creditors, the LORDS, 15th July 1691, " Found, that the children of Preston, by their father and mother's contract of marriage, were only heir *designative*, and not heir substitute, but real and formal creditors for sums therein contained." *

" THE LORDS found the Creditors not preferable, but that the daughter must come in *pari passu* with them, according to their several diligences."

Fol. Dic. v. 1. *p.* 540. *Rem. Dec. v.* 1. *No* 45. *p.* 89.

*** Edgar reports this case.

WILLIAM LYON of Easter-Ogle, in his contract of marriage with his first wife, provided his land estate to the heir-male of that marriage; and in case none should exist, he became bound 'to content, pay, and deliver, to the 'daughter or daughters to be procreated of it, certain provisions and portions, 'payable at their respective marriages, if the same should happen in his life-'time; but, in case of his predecease, at their ages of 18 years complete, or 'at the first term of Martinmas or Whitsunday after his death, either of them 'last falling out.'

There was no heir-male of the marriage; and so soon as the father's circumstances began to be suspected, an adjudication was led against him in the name of Margaret Lyon, a daughter of that marriage, with concourse of the friends, at whose instance execution was to pass by the contract. The adju-

* These two cases will be found *voce* PROVISION TO HEIRS AND CHILDREN.

No 58. dication was obtained within year and day of his other creditors-adjudgers; and though it was before the term of payment of her provision, yet, upon this title, she competed with them.

It was *pleaded* for the Creditors, 1*mo*, That provisions in a contract of marriage to children *nascituri*, payable at an uncertain day, and in greater or lesser extent, according to different events, were of the nature of succession, so far, at least, as to give a preference to debts contracted by the father before the term of payment of these provisions, and make them effectual against his estate, in competition with these children. In support of this plea two decisions were adduced, one observed by Lord Dirleton, Graham against Rome, *voce* PROVISION TO HEIRS AND CHILDREN; and another, which is not in any printed Collection, June 16th, 1697, the Children and Creditors of Napier of Falside; * where the LORDS found, "That provisions in contracts of marriage, *liberis nascituris*, payable after the father's death, and the childrens attaining to such ages, less or more, and according as the children should exist, more or fewer; albeit all these conditions should come to be fulfilled, and diligence should be used thereupon by the children, the children could not be heard to compete and come in *pari passu* with the onerous creditors."

2*do*, They *pleaded*, That adjudications upon any debt before the term of payment of it, and especially in the case of provisions to children, (if they were at all regular or legal,) could by no means compete with adjudications led upon bonds, the terms of payment of which were come and bygone, and whereon the law had allowed *paratam executionem*.

It was, on the other hand, *argued* for the Daughter, in answer to the Creditors' plea, 1*mo*, That provisions in marriage-contracts conceived in favour of younger children, whereof the term of payment might exist in their father's lifetime, were in law looked upon as debts, and these children were as much creditors to their father as any other person: That the obligation upon which her adjudication was founded being conceived in such terms, as that the father was obliged to pay and deliver, it was the same thing as if he had granted a bond to an extraneous person, and made her case quite different from that of an heir of provision: That, by the above mentioned clause, the daughters portions might have been due and exigible, in one event, from the father in his own lifetime, which sufficiently shewed that they were proper debts; and though, in another event, which has happened, they became only due after his death, yet that does not alter the nature of the obligation; because, it is the conception of the clause in the contract, and not the event, that must be the rule of judging. To confirm this doctrine, there were likewise two decisions brought, Hamilton against the Tenants of Hags, *voce* PROVISION TO HEIRS AND CHILDREN; the case of which was, 'That, in a contract of marriage, 'certain provisions were made payable to daughters at their respective ages 'of 16 years, with annualrent thereafter; upon which an adjudication being 'led, they competed with the father's creditors;' and the LORDS found, that,

* *See* PROVISION TO HEIRS AND CHILDREN.

by the conception of the clause in the contract of marriage, the daughters were not heirs of provision, nor was the provision thereby conceived in their favour a simple destination of succession; but found, that, by the contract, the daughters were formally stated creditors to their father; and, therefore, repelled the grounds of preference proponed for the posterior creditors; and preferred the children, according to their diligence, the same having been raised in the childrens' own name against the father in his lifetime, after the elapsing of their respective terms of payment. The other decision, the Children and Creditors of Sir Robert Preston, (IBIDEM) 'where Sir Robert having, in his marriage-contract, obliged himself to pay a certain sum 'to the heirs and bairns of the marriage, at their age of 15 years, and to infeft them in lands for their security; in a competition betwixt the Creditors 'and Children, though it was pleaded for the Creditors, that the obligement 'in the contract of marriage was only a destination of succession, and being 'a private latent deed, could not prejudge posterior creditors;' yet the LORDS found, that the children of Preston, by their father and mother's contract of marriage, were only heirs *designative*, and not heirs substitute, but real and formal creditors for the sums therein contained. No 58.

2*do*, It was *contended* for the Daughter, That since she was clearly a creditor by the obligation, an adjudication was the only proper diligence for securing her claim, and enabling her to compete with her father's other creditors, who might otherwise have excluded her.

THE LORDS found the creditors not preferable, but that the daughter must come in *pari passu* with them, according to their several diligences.—*See* PROVISION TO HEIRS AND CHILDREN.

Duncan Forbes & *John Ogilvie* for the Creditors. Alt. *Ro. Dundas Advocatus.*
Clerk, *Dalrymple.*

Edgar, p. 6.

SECTION VIII.

Inhibition.

1611. *November* 27. GAVIN HAMILTON of Raploch *against* BRISBANE. No 59.

IN a double poinding betwixt the Guidman of Raploch and Mr William Brisbane, for the mails and duties of certain lands, wherein Gavin had infeft his son Claud