SECT. II.

Provisions payable at the Granter's Decease, or at a distant Term certain.

No 10.

1687. *July.* ELLIOT *against* ———.

ONE Elliot having granted a bond of provision to his second son and his sister, payable to them, their heirs and executors, the next term after the granter's decease; in the end whereof, it was provided, by a distinct clause, That notwithstanding the payment was delayed till his death, yet the money should not be payable by his heir, till they respectively attained to the age of 16 years; under which condition, these presents are granted, and no otherwise;

THE LORDS found, That the clause imported a condition, being *inter liberos*, and was not *prorogatio termini solutionis*; and that the same did not belong to their executors, unless they prove they attained to 16 years; though here there was no substitution or return mentioned.

Fol. Dic. v. 1. *p.* 424. *Harcarse*, (BONDS.) *No* 215. *p.* 49.

No 11.

1717. *December* 7. CAMPBELL of Calder *against* RUTH POLLOCK.

A FATHER having granted to his second son a bond of provision payable five years after date; the son dying before the term of payment, the question occurred, if this bond was payable to his assignee. It was *argued*, that it was conditional, viz. "if the son should happen to survive the term of payment," equally as where such bonds are conceived payable at a certain age, which are never due, if the children arrive not at that age. *Answered*, That *dies incertus habetur pro conditione, non dies certus*. THE LORDS found the bond valid and assignable by the son, notwithstanding he died before the term of payment. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 425.

1730. *January* 14. BELL *against* DAVIDSON.

No 12.

A MAN granted a bond of provision to his grandchild, for love and favour, payable the first term after his decease. This was argued to be of the nature of a conditional legacy, which could have no effect, the creditor having pre-

deceased the granter. THE LORDS found the bond fallen by the predecease of the grand child. But a reclaiming petition having been offered, the matter was finished by a transaction. *See* APPENDIX.

No 12.

Fol. Dic. v. 1. *p.* 424.

1757. *November* 17. ISABEL GORDON *against* KATHARINE ROSS.

No 13.
A person burdened his son with a provision to his grandson, payable at the granter's death, and subject to revocation. The grandson predeceased the granter, who never revoked the deed of provision. Found that the provision was rendered null by the predecease of the granter.

ALEXANDER GORDON of Kilgour executed a family-settlement, whereby, under other provisons, he assigned and disponed to his son John Gordon, part of his moveables, and a wadset of 10,000 merks, affecting Lord Sutherland's estate: After which followed these words in the dispositive clause; " With the burden always of my said son's payment-making to William Gordon, his son, and my grandson, of the sum of 3000 merks; and with the burden of payment-making to Isabel Gordon, my eldest grandchild, of the sum of 1200 merks; and of payment to them of the annualrents of the said principal sums after my decease, and termly during the not payment thereof; with full power to my son to intromit with, and dispose of the said moveables disponed to them, as said is, after my decease; and to my said son and his heirs, to charge and pursue for the said L. 10,000 Scots money foresaid; possess my wadset lands, whereby the same is due; use requisition, and all other things necessary thereanent; and anent the premises, to do as accords." And the deed reserves a power of revocation to the granter, and dispenses with the not delivery.

Alexander died without revoking, and William, his grandson, died before him.

In a competition betwixt Isabel Gordon, his grand-daughter, and Katharine Ross, widow of John, and creditor to John upon his contract of marriage, Isabel Gordon insisted to be preferred upon the wadset in Lord Sutherland's estate; 1*mo*, in her own right, for the 1200 merks provided to her by her grandfather; 2*do*, in her brother William's right, to whom she was heir, for the 3000 merks provided to him by her grandfather.

To Isabel's claim for the 1200 merks; *objected* by Katharine Ross, That though burdening clauses of the nature of this one are generally understood to create a real lien upon the subject disponed; yet a distinction ought to be made betwixt the case where the debt *ab ante* existing, the granter only burdens his own subject with his own debt, and the case where, as in the present question, the provisions were by the disposition only created debts upon the disponee.

" THE LORDS found the provision a real burden on the wadset."

To Isabel's claim, in her brother's right to the 3000 merks, *objected* for Katharine, That the sum being subject to the grandfather's power of revocation, payable only at the first term after his death, and interest from that term,

No 13.

ought to be considered upon the same footing as a bond of provision by a father to a child; having an implied condition, That if the child predeceased the father, or died before the term when the provision became due, it did not transmit to the child's heir.

Answered for Isabel, This was no bond of provision to a child, William had his own father living to provide for him; but was a debt created by Alexander upon the subject he disponed; and, therefore, like other debts, transmits to heirs. There is nothing in the circumstance, that it was subject to a power of revocation. The disposition to John vested in him the right immediately. The only effect of the power of revocation was, that the right so vested might afterwards have been defeated; but that never happened; and, therefore, it remained always vested in John, with the burden imposed upon it of the debt to William, and, consequently, to William's heir, though William happened to die before the sum was exigible.

"The Lords found, That the conveyance of 3000 merks, in favour of William, was vacated by his predeceasing the granter."

For Isabel, *Montgomery*, *Lockhart*. For Katharine, *Macintosh*.

J. D. *Fol. Dic. v.* 3. *p.* 300. *Fac Col. No* 60. *p.* 98.

SECT. III.

Deeds containing Substitutions.

1624. *November* 11.

The Bairns of Wallace of Ellerslie *against* Their Eldest Brother.

No 14.
A father made a bond of provision in favour of his children, obliging himself to pay to each of them a certain sum, with this clause, that if any of them should die without heirs of their body, their share should accresce to the survivers. Two of the

Umquhile old Wallace of Ellerslie having made a bond in favour of his bairns, obliging him and his heirs to pay to each of them a certain sum of money, by and attour that which should fall to them by his decease, as their bairn's part of gear, and by and attour any legacy which he might leave to them in his latter-will; upon this bond the said bairns pursue their eldest brother, as heir to their father, to make payment to them of the said sums. In the which process, the Lords sustained the action at the pursuer's instance, albeit it was alleged, that the bond was made 25 years before the defunct's decease, during the which whole time, the bond never became the pursuer's evident, nor at no time during the lifetime of the maker, but remained still ever till he died beside himself, and since his decease was only recovered by the pursuers, by what means it is uncertain: which allegeance was repelled, seeing now the bond was in the hands of the pursuers the time of their pursuit, as their evident, which the Lords found sufficient.