

Sir James Sinclair of Dunbeath, Bart. - *Appellant*; Case 17.
 John Sinclair of Ulbster, Esq. - *Respondent*.

2d, June 1713.

Provisions to Children.—A portion being left to a daughter; with a proviso, that she should not dispose of or incumber the same, or interest thereof, till the times of payment should be elapsed; she might, nevertheless, make an assignment thereof, in trust for herself, to have an action carried on to recover the interest.

Appeal brought for delay.—In this case the respondent found entitled to such interest, as he might have entitled himself to by registering the horning, had he not been restrained by the appeal.

Costs.—40*l.* given against the appellant.

WILLIAM SINCLAIR of Dunbeath, Esq. and John Sinclair his eldest son, both since deceased, did by bond of provision bearing date the first of January 1688, oblige themselves jointly and severally to pay the several sums of money, or portions therein respectively mentioned to the said William's younger children, and particularly to Ann his daughter 8000 merks scots, or 444*l.* 8*s.* 10½*d.* sterling, within five years after the said William's decease, and interest for the same to commence six months after his death, and to be paid monthly, quarterly, and continually until payment of the said respective portions, And the bond contained a proviso, that it should not be lawful for the said children to require payment of their said portions, before their respective marriages and having a child by such marriage, or to dispose of, or incumber their respective portions, or the interest thereof, till the times of payment should be elapsed.

The said William Sinclair afterwards did, by a deed on the 19th of August 1690, bearing to be in consideration of certain sums of money, at least for relieving him of the burden of the children's portions to his satisfaction by William Sinclair his second son, sell and dispone to the said William the son his whole personal estate: and he died in September 1690. After the father's death, William the son possessed himself of the whole personal estate, which was of great value, and far more than sufficient to discharge the said portions; and he settled the whole of them except his said sister Ann's. William having died, was succeeded by the appellant, also his brother and heir; and Ann received from her brother William in his lifetime, and her brother the appellant after his decease, for and upon account of the interest of her said portions, several sums of money in the whole amounting to 72*l.* 9*s.* 1*d.*

The appellant having afterwards refused to pay his sister Ann her said portion or the interest thereof, and she being unable to carry on an action against him on account of her poverty, she assigned the bond of provision, and all money that was or should become due or payable to her, for principal or interest thereupon, *in trust nevertheless for herself*, to the respondent her relation,
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who was willing to prosecute such suit in his own name against the appellant if necessary.

After several years forbearance, and repeated applications to the appellant, without being able to procure any part of the said Ann's provision, the respondent, who had advanced several sums of money for her support, as well to reimburse himself as for recovering what was further due upon the said bond, for the use and benefit of the said Ann, brought an action in his own name against the appellant before the Court of Session, for recovery of what was due upon the said bond of provision.

The appellant appeared to the said action, and acknowledged, that he represented his said brother; but alleged that the said portion was not to be paid until the said Ann should be married and have a child by such marriage which had not happened; and that by the proviso in the bond, she had no power to transfer or charge the interest thereof, before the term of payment were elapsed. And the said Ann's assignment being of interest to grow due, and not payable when such assignment bore date, no action could be brought by the respondent, even for the interest as the assignee of the said Ann. In answer to this the respondent acknowledged before the said Court, that the said assignment was in trust for the said Ann, and insisted that it was therefore the same thing as if the action had been in her own name. The Court on the 24th of January 1711-12, "repelled the said allegation."

And afterwards the Court on the 15th of February 1711-12, unanimously "found, that the said assignment of the said William Sinclair, the father, to the said William his son, being upon the narrative for certain sums of money really and with effect paid and delivered to him, at least for relieving him of the burden of the provisions of his children, done, paid, and performed by the said William his son to his content and satisfaction; and that the said William the son having given bonds of provision to the other children, he ought likewise to have paid the respondent and the said Ann Sinclair, the sums granted to her in the said bond of provision."

And in regard the said Ann Sinclair had restricted her action to the interest of her said portion, after the appellant had petitioned for a rehearing, the Court on the 23d of February 1711-12, adhered to their former interlocutor, as to the interest of the aforesaid portion, and without prejudice to the portion itself, and to sue for the same, after the term of payment is elapsed.

The appeal was brought from "two interlocutors of the Lords of Session, the first of the 15th, and the other of the 23d of February 1711-12."

Heads of the Respondent's Argument.

The appellant on purpose for delay, and to hinder the respondent from proceeding further for the obtaining the effect of the said interlocutors, did on the 14th of March 1711-12, lodge his petition of appeal against the same, but did not serve the respondent with the

Entered,
14 March
1711-12.

the order made thereupon, till the 24th of June following, so that the respondent could not put in his answer to the said appeal, in order to have the matter discussed during that Session, whereby the appellant hath not only delayed the payment of the interest of the said portion amounting to about 44*l.* but has prevented the respondent from giving him a charge of horning and registering thereof, as he might long ere now have done, and have been thereby, according to the law of Scotland, entitled to interest for the said sum, from the time of such registering.

Counsel appearing for the respondent, but no counsel for the appellant, *It is ordered and adjudged, that the said petition and appeal of Sir James Sinclair be dismissed, and that the two interlocutors therein complained of be affirmed; and it is further ordered that the Lords of Session do order Sir James Sinclair the appellant to pay to the respondent John Sinclair, all such interest as the said John Sinclair might have entitled himself unto by diligence had he not been restrained from doing diligence by reason of the said appeal to this house; and it is also further ordered thae the said Sir James Sinclair shall pay or cause to be paid to the respondent the sum of 40*l.* for his costs sustained by reason of the bringing the said appeal into this House.*

Judgment,
2 June
1713.

For Respondent, P. King.

Adam Cockburn of Ormiston, one of the
Senators of the College of Justice, and
Dame Ann his Wife, - - -
John Hamilton of Bangour, a Minor, by
his Guardian, - - -

Appellants;

Respondent.

Case 18.

Forbes, 4 &
23 July,
1712.

12th June 1713.

Construction.—In a question with regard to funeral expences, and expences of confirmation, the House of Peers having reversed a judgment of *lis finita* and found that the assignee of an executrix *might insist* for these claims, it was still competent to plead prescription thereto.

Funeral Charges. Prescription.—The accounts paid by the said assignee, without the 3 years were prescribed where she herself was not contractor, but where she was contractor did not prescribe.

Confirmation.—The Expences of confirmation though not especially conveyed to the said assignee, but paid by her, are found to exhaust the executry.

Debitor non præsumitur donare.—By marriage contract a wife is provided to the household furniture, the husband afterwards grants her a bond and the liferent of a house is settled upon her, these may subsist as separate and distinct rights.

AFTER determination given in the former appeal (No. 11 of this collection), the parties returned to the Court of Session, and the appellants claimed the whole funeral expences, and charges of confirmation; and insisted that in consequence of the judgment of the House of Peers, no objection thereto could now be stirred on the part of the respondent. The latter contended, on the other hand, that objections were still competent; and insisted that