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tion must also have returned; because, according to the defender's argument, the procreation and existence of children constituted a separate independent condition, nowise connected with the dissolution of the marriage within year and day: And in the other event, of the marriage dissolving, though at the distance of fifty years, after the procreation of perhaps twenty children, if these children did not exist at the dissolution of the marriage, the tocher was still to return. These, and others that might be mentioned, are so many glaring absurdities attending the defender's construction of this clause, that it is impossible it can be received.

*Observed* on the Bench; The words of this clause are very strong in favour of the defender. The obvious import of the words is, That *quandocunque* the marriage should be dissolved, if there were no children existing, the tocher should return. But the Court, *ex æquitate*, may reject the express words, and explain their meaning from the intention of parties, which is as clear on the other hand.

THE LORDS 'found, That, in respect it is acknowledged, that the marriage subsisted about two years, and that there was a child procreated of the marriage, who lived for several months, the pursuer was entitled to the wife's tocher, although the said child died before the dissolution of the marriage, by the death of the mother.'

Act. *Lockhart*.Alt. *Mew Dalrymple*.

G. G.

*Fol. Dic. v. 3. p. 161. Fac. Col. No 72. p. 120.*

## S E C T. IV.

Condition, when understood purified.—Condition of "being decerned," includes decerniture by Decree Arbitral.

1672. *June 21.* CARSTAIRS and RAMSAY *against* CARSTAIRS.

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A daughter pursuing for her provision, which was due to her failing heirs male of the marriage; her claim was repelled,

JOHN CARSTAIRS, in his contract of marriage, having exprest this clause, that in case there were no heirs male of the marriage, so that the daughters would be totally excluded, the estate being all tailzied to heirs male, therefore, and for help and provision to the daughters, and failing heirs male of the marriage, and no otherwise, the said John and his heirs male and of tailzie are obliged, that if there be but one daughter to pay her L. 16,000 at her age of sixteen years; Anna Carstairs, the only daughter of the marriage, pursues for payment upon

the foresaid clause.—The defender *alleged*, That the libel was not relevant, inferring payment on this clause, because it cannot be competent to the daughter, so long as there may be an heir male of the marriage, which cannot be yet said to failzie, both the father and mother being alive.—It was *replied*, That the father is, and hath been for a long time furious, separate from the mother ; and furious persons use not to be capable of begetting children, and the mother is past fifty years ; so that it is all alike as if the father or mother were dead.

THE LORDS found the libel not relevant, neither sustained the reply.

*Fol. Dic. v. 1. p. 191. Stair, v. 2. p. 88.*

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the father and mother being both alive, though the father had been a long time furious, and the mother past fifty.

\* \* \* Dirleton reports the same case :

A FATHER, in his contract of marriage, being obliged to provide the heir female of the marriage, and to pay to her L. 20,000 at her age of fifteen years, and until then to entertain her ; there being only one child and daughter of the marriage, she and her husband pursued the father and his curators, he being furious, to pay the said sum.—It was *answered*, That the said provision being only payable to the heir female, the pursuer neither had nor could pursue upon that quality and interest during the father's life ; specially, seeing both he and his wife, the pursuer's mother, were living, and of that age that they may have heirs male of the marriage, or other daughters ; and if they should have male children, the case and condition of the provision would *deficere*, and not exist ; and if they should have more daughters, the pursuer could not have right to the whole sum acclaimed.—It was *replied*, That the father was in effect *civiliter mortuus* ; and the pursuers would find caution to refund, in either of the said cases.

THE LORDS found the defence relevant, and that such provisions being settled upon heirs female, by reason, and in case of exclusion of the heirs female of the marriage, when lands are entailed to heirs male, and there are no heirs male of the marriage, the term of payment could not be understood to be during the marriage.

Reporter, *Strathurd.*

Clerk, *Gibson.*

*Dirleton, No 172. p. 69.*

\* \* \* See This case by Gosford, *voce* PROVISION TO HEIRS AND CHILDREN.