

No 104.

' upon the act of Parliament 1621, in case it shall appear that Hugh Murray  
' was insolvent at the date of the said contract.' See PROVISIONS TO HEIRS and  
CHILDREN.

Rem. Dec. v. 2. No 72. p. III.

1754. July 1.

Creditors of JAMES STRACHAN *against* LUDOVIC STRACHAN.

No 105.

Provisions to children, in a post-nuptial contract, being made payable after the death of the father and mother, were found to confer no *jus crediti*, and creditors were preferred.

JAMES STRACHAN of Dalhackie became bound, in a postnuptial contract of marriage, to pay certain sums of money to the children, born or to be born of that marriage; the term of payment was declared to be at the first term after the decease of himself and of his wife.

In a competition between Ludovic Strachan, the only child of the marriage, and the creditors of James Strachan, it was *objected* for the creditors, That, with regard to the obligations in the contract aforesaid, Ludovic Strachan was to be considered as an heir of provision only; and therefore could not compete with the onerous creditors of his father.

*Pleaded* for Ludovic Strachan: It is the duty of a father to provide for his children; such provisions are onerous, and constitute them creditors to their father: as he who is solvent may become bound to strangers, so also may he to his own children; as he may make the existence and extent of his obligation to strangers depend on some uncertain event, so also may he in his provisions to his own family. Thus it was decided, 24th January 1724, in the case, Margaret Lyon against the creditors of Easter Ogle, (*see* p. 233.) In that case, provisions were made in favour of daughters to be born, and declared payable on the first of these three events, the day of their marriage, the attaining the age of eighteen, or the first term after the death of the father. And it was found, That a daughter, having right to such provision, might compete with the onerous creditors of the father.

*Pleaded* for the creditors of James Strachan: Contracts of marriage ought, in reason, to constitute the children heirs of provision only; they may, nevertheless, be so framed as to render the children creditors. In this case, however, the children are only made heirs of provision; for that here a sum of money is made payable after the death of the father; and which proves, That, during his life, there was no *jus crediti* constituted in favour of the children. Were this provision a *jus crediti*, this pendent obligation would exclude creditors from the date of the contract, which is absurd. Provisions made payable to children whenever they shall attain a certain age, produce action for payment from that time; the children are therefore creditors in such provisions: for, had these provisions ever been a right of succession, they could not have altered their nature, and become a debt from the term of payment.

The case of Margaret Lyon against the creditors of Easter Ogle is not in point: there the obligation was to pay at a term which might have happened before the

death of the father; it was therefore found to be a *jus crediti*, not a destination to heirs: but the contrary would have been found, had the obligation been to pay at a certain term after the death of the father.

'THE LORDS preferred the creditors.'

For the Creditors, *Sir John Stewart.* *Att. J. Grant.* Reporter, *Murkle.* Clerk, *Justice.*  
*Fac. Col. No 109. p. 160.*

*Dalrymple.*

1755. July 14.

JOHNSTON and WILSON, Assignees of William Telfer, against NISBETS.

ARCHIBALD NISBET of Carphin granted a bond of provision to his daughter Eupham for the sum of 3000 merks.

Eupham Nisbet, after the death of her father, married William Telfer, but without any contract of marriage.

Three months thereafter, in a post-nuptial contract of marriage, William Telfer bound himself to provide 9000 merks to his wife and the children of the marriage; and Eupham Nisbet, on her part, assigned to him, his heirs, &c. her portion of 3000 merks. In this contract, there was a clause dispensing with the legal return, in case the marriage should dissolve within year and day.

Within the year Eupham Nisbet died without children.

William Telfer having assigned away the above bond, and the assignees having pursued the heir of Carphin for payment of it, the executors of Eupham brought a reduction of the contract of marriage, and of all that followed upon it, against the assignees.

The ground of reduction was, That Eupham Nisbet had been fraudulently induced by Telfer, at a time when he was insolvent, to marry him, and to convey her portion to him; in consideration of which, he pretended, on his part, to bind himself to provide the sum of 9000 merks to her and her children, when he had no such sum.

The proof came out, That, at the time of the contract, William Telfer was in very bad circumstances.

In support of the ground of this reduction, two late decisions were referred to; Watson against Cameron in the year 1734, and Ker of Abbotrule against the Creditors of Elliot in the year 1741. (See HUSBAND and WIFE.)

*Answered* for the assignees.

*Imo,* The utmost the law has gone, when the husband cannot perform the prestations contracted on his part, is to allow the wife retention of her tocher, for security of the provisions made to her; but here the wife being dead, has no need for the husband's part of the prestations in the contract.

No 105.

No 106.

A woman possessed of a bond for 3000 merks, conveyed it to her husband in a postnuptial contract. She died soon after; and her executors attempted to reduce the contract, the husband having been insolvent, and incapable to perform his part of the engagements. The reduction dismissed.