

same; the appellant in 1713 executed a renunciation of all the title and interest he had to these premises, and that renunciation was absolute without any condition; the appellant after that time has possessed as a tenant at will, and run greatly in arrear, which obliged the respondent to bring his action of removing against him, whereupon he recovered judgment; the respondent has been for several years kept in law suits by the appellant a pauper, and will in all events be a very great loser.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutory sentences or decrees therein complained of be affirmed.* Judgment, 5 July 1721.

The Appellants' Case is signed by himself.
For Respondent. *Rob. Raymond. Will. Hamilton.*

Ex parte

David Falconer, of Newtown, Esq. *Appellant;* Case 89.
The Principal and Masters of King's College, and the Provost, Baillies and Council of Aberdeen, - - - - - *Respondents.*

31st Jan. 1721-2.

Presumption.—Two deeds of mortification in favour of the same persons, but of different dates, and for different sums, found in the grantors repositories, did not both subsist.
A proof of his intention allowed by the instrumentary witnesses.

THIS appeal was upon a point precisely similar to the other appeal at the instance of the same appellant, (No. 84 of this Collection). In addition to the two deeds in the former appeal recited, relative to the education of the scholars at the school of Conveth; the late Sir Alexander Falconer of Glenfarquhar, executed two others for maintaining and educating certain boys at the King's College of Aberdeen.

On the 3d of December 1712, Sir Alexander Falconer, by a deed upon the same recital with the first deed in the former appeal recited, left, mortified, and appointed 180*l.* Scots, payable yearly by his heirs out of certain lands, to the principal and masters of King's College Aberdeen, for educating and maintaining three boys at the rate of 60*l.* Scots each yearly, at the Philosophy College there; which boys should be sufficiently qualified, and be of the name of Falconer, in the first place, if any such there were, and in default of them, of any other boys duly qualified, that should be born or educated within the parish of Conveth; the first payment to be at the first term of Whitsunday, or Martinmas after his decease. The patrons and presenters were the same as in the former

former deed, namely his heirs and successors of the name of Falconer.

On the 7th of August 1716, Sir Alexander executed another deed upon the same recital as in the former, whereby he left and mortified 320*l.* Scots, payable out of the same lands, in the same manner and at the same terms with the former, to the Provost, Baillies and Council of Aberdeen, for maintaining at the said King's College, four boys of the name of Falconer, if any such there were, and in default of such, any other boys that should be born or educated within the parish, or at the school of Conveth; adding a clause not contained in the former, "that for the security
" of his heirs, the trustees should report the boys' discharges to
" the patrons and presenters within a year and a day after they
" should receive such year's allowance;" and a proviso, "that
" in case of variance between the patrons and the said magi-
" strates, the first minister serving the cure for the time at the
" church of Aberdeen, and the minister of Conveth, were to
" decide and determine the same."

Neither of these deeds were delivered, but found, with the two others in the former appeal mentioned, in the repositories of the deceased at the time of his death. The respondents brought an action also against the appellant, the heir of Sir Alexander Falconer, deceased, for payment of the several sums contained in both the aforesaid deeds. The appellant made defences, and the Court, on the 29th of December 1719, "found both the mortifi-
" cations made by the said Sir Alexander Falconer, of Glenfar-
" quhar, in favour of the College of Aberdeen, to subsist."

The appellant reclaimed, and by his petition, amongst other things, prayed leave, as in the former case, to examine the instrumentary witnesses; but the Court, on the 15th of January 1721, "adhered to their former interlocutor, and refused the desire of
" the petition."

The appeal was brought from "an interlocutory sentence or
" decree of the Lords of Session of the 29th of December 1719,
" and the affirmance thereof the 15th of January following."

His argument was the same as in the former appeal.

Whereas this day was appointed for hearing Counsel ex parte upon this petition and appeal, counsel appearing for the appellant, but no counsel for the respondents, and the appellant's counsel being heard and withdrawn: and the order and judgment of this House of the 4th of May last, on the appeal wherein the said David Falconer was appellant, and others were respondents, being read;

It is ordered and adjudged, that the said interlocutor of the 29th of December 1719, finding the two mortifications subsisted as two separate donatives, and the interlocutor of the 15th of January following, in affirmance thereof, be reversed: and it is further ordered and adjudged, that the appellant be at liberty to examine the instrumentary witnesses according to his petition to the Lords of Session for that purpose, reserving to the Principal and Masters of King's College of Aberdeen, and the Provost, Baillies, and Council of the said City of Aberdeen, all de-

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fences, competent in law, against the witnesses; and such further proceedings shall thereupon be had before the Lords of Session as to justice shall appertain.

For Appellant, *Rob. Raymond. Will. Hamilton.*

John Allardice, Merchant in Campvere, *Appellant; Case 90.*
 Jane Smart, Widow and Executrix of the
 Appellant's Father, for herself and her
 Children, - - - - - *Respondent.*

12th Feb. 1721-2.

Provisions to Heirs and Children — A special provision, in a marriage contract, of sums of money to be laid out on land or other good security, and also of conquest in lands, heritages, fishings, sums of money and others, to the *heirs* of the marriage, went to all the children, and not to the eldest son only.

A discharge of provisions granted by two children to their father, in consideration of a certain sum of money, paid to them, operated in his favour with regard to the remainder of their provisions, and not in favour of another child, who did not discharge.

Fiar. — A house, part of the conquest of a first marriage, is disposed to a person and his wife in conjunct fee and life-rent, and to the bairns of the marriage in fee, whom failing, to the heirs of the husband: the husband being *fiar* might settle the life-rent thereof on a second wife.

BY contract of marriage in September 1683 between John Allardice, Merchant in Aberdeen, and Agnes Mercer his first wife, the appellant's father and mother both now deceased, the said John Allardice obliged himself to lay out 3000 merks Scots of his own money, together with the like sum he was to receive with his wife as her portion, upon land, or other good security, and to settle the same upon himself and the said Agnes Mercer, in conjunct fee and life-rent of the longest liver of them two, and the *heirs* to be lawfully procreate between them; whom failing, to the said John Allardice, his heirs, executors, and assignees. The contract contained this proviso, "that whatsoever lands, heritages, fishings, debts, sums of money and others, it shall happen either of the said parties to conquer, acquire, or succeed to, during the time of the said marriage, the *heirs* of the marriage shall succeed thereto *in integrum*."

In 1684, after the marriage had taken effect, John Allardice, the appellant's grandfather, by disposition, conveyed a house and its pertinents in Aberdeen, to the said John Allardice the father, and the said Agnes his spouse, in conjunct fee and life-rent to the longest liver of them two, and to the *bairns* lawfully begotten, or to be begotten, between them in fee; whom failing, to the heirs of John the father.

In 1700 the appellant's mother Agnes died, leaving issue the appellant and two daughters, the children of that first marriage. And at this time the father's free stock amounted to about 18000/ Scots,