dismissed, and that the interlocutor and decree, and the affirmance thereof, therein complained of, be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the respondent the sum of five pounds for his costs in respect of the said appeal.

For Respondent, *Dun. Forbes.*

Case 133. Kaims, 18 Jan. 1726.

William Nisbet of Dirleton, Esq; eldest Son of William Nisbet, Esq; deceased, by his first Wife, and Executor of his said Father, - - - - - *Appellant;*

Janet, Jane, and Willielmina Nisbet, Daughters of the said William Nisbet, deceased, by his second Wife, by Mr. David Erskine of Dun and Others, their Tutors and Curators, - - - - - *Respondents.*

7th *March* 1726-7.

Legitim —Husband and Wife —Provisions to Heirs and Children.—Bonds.— Portions to children in a contract of marriage, if not so expressed, do not exclude their right of legitim.

Upon a wife's renouncing her thirds, by the contract of marriage, the division of the personal estate is bipartite, one half legitim, the other half dead's part.

Provisions to children, in this case, do not come off the whole head of the executry as a debt; but they are first to impute the legitim in payment of these portions, and take the rest as a debt from the deads' part if necessary.

Bonds fall under legitim.

WILLIAM NISBET, late of Dirleton, deceased, had by his first wife the appellant, his eldest son and heir, Walter his second son, and three daughters.

By contract executed in April 1711, previous to Mr. Nisbet's marriage with his second wife, the mother of the respondents, in consideration of the lady's fortune, which was considerable, he settled upon her lands, to the value of 4000 merks per annum, for her jointure, in full satisfaction for her dower, third of moveables, or others which she might claim by law, in case she should survive her said intended husband: and by the same contract he bound himself to lay out the sum of 100,000*l.* Scots in the purchase of lands to be settled upon himself in life-rent, and the heirs male to be procreated of the said intended marriage in fee; but if there should be no heir male of the said marriage, but daughters, Mr. Nisbet bound himself and his heirs to pay the several sums following; if but one daughter, the sum of 36,000 merks; if two daughters, the sum of 50,000 merks; and if three or more daughters, the sum of 60,000 merks, to be divided as the said William

William Niſbet ſhould think fit, and payable, after his deceaſe, at the daughters' reſpective ages of eighteen or marriage, with intereſt from that time; and till the ſame ſhould be payable, he covenanted to maintain, educate, and aliment the daughters according to their quality; with proviſo, that the ſhares of daughters dying ſhould go to ſurvivors; but if one daughter only ſhould ſurvive, ſhe ſhould have 40,000 merks. There was no proviſo, or clauſe in this contract, that the ſums provided to the daughters ſhould be held to be in full of their legitim.

In July 1718, William the father made his will, naming the appellant his eldeſt ſon executor, and univerſal reſiduary legatee, and diſponing his whole moveable eſtate in his favour, with the burthen of certain legacies, and with a proviſo, that the teſtament ſhould not derogate from the proviſions granted to his other children.

In September 1722, when there was iſſue of the ſecond marriage, one ſon David, and two daughters Janet and Jane, two of the reſpondents, William the father, in purſuance of the marriage contract, diſponed certain lands of the value of 100,000*l.* Scots and upwards, in favour of the ſaid David and the heirs male of his body; whom failing, to the other heirs male of the marriage; whom failing, to Walter Niſbet his ſecond ſon of the firſt marriage. And of the ſame date, he granted a bond of proviſion to the reſpondent Janet his eldeſt daughter, for payment of 12,000*l.* Scots to her, at the firſt term after his deceaſe, with intereſt thereafter, which he declared to be a burden upon the 100,000*l.* Scots provided to the heir male of the ſecond marriage; and that it ſhould be in full of her portion natural, and of all ſucceſſion ſhe could claim through her father's deceaſe, or her mother's contract of marriage. On the 28th of March 1724, he granted a bond in ſame terms to his daughter Jane for 9600*l.* Scots.

David, the eldeſt ſon of the ſecond marriage, died before his father, whereby his proviſion went to Walter the ſecond ſon of the firſt marriage; and the bonds of proviſion to the two daughters became void. William the father afterwards died in October 1724, leaving his wife pregnant of the reſpondent Willielmina, born a few months after her father's death; for her no ſpecial proviſion had been made by the father.

After the father's death, the reſpondents brought an action againſt the appellant before the Court of Seſſion, in which they claimed the 60,000 merks ſpecified in their mother's contract of marriage, as a debt upon the appellant; and alſo a moiety of the reſidue of the clear perſonal eſtate as their legitim. The appellant pleaded, that the legitim was only due to children who had no other proviſion, and that the reſpondents were excluded from legitim by the proviſions made for them in their mother's contract of marriage. The reſpondents in anſwer contended, that theſe proviſions were not given or to be accepted of in full of legitim, but were only to ſecure a certain ſum to the children in all events, but not to deprive them of their legal proviſions.

The Lord Ordinary, on the 17th of July 1725, "Found that "the proviſions in the marriage-contract in favours of the re- "ſpondents did not exclude the legitim." And the appellant having reclaimed, the Court adhered to the Lord Ordinary's interlocutor on the 2d of December 1725.

The appellant having petitioned againſt this interlocutor, after anſwers thereto, the Court, on the 18th of January 1726, "Found that the deceaſed's moveable eſtate admitted only "a bipartite diviſion, betwixt the children's *legitim* and the "deceaſed's *deads part* by equal portions: and found, that "the proviſions of the deceaſed's contract of marriage in fa- "vour of his children the reſpondents muſt come off the "whole head of the executry as a debt; and that what re- "mains after payment of theſe proviſions and of the deceaſed's "other moveable debts, the children come to have a right to "the equal half thereof as their *legitim*." The appellant having petitioned againſt this interlocutor, the Court, on the 8th of February 1726, "adhered to that part of the former interlocutor "finding that the deceaſed's moveable eſtate admits only of a "bipartite diviſion betwixt the children's *legitim* and the de- "ceaſed's *deads part* by equal portions; and found, that the "reſpondents had a ſhare in virtue of their legitim to the half of "the principal ſums in bonds due by the deceaſed." And after a hearing on the point of the *collation* contended for, the Court, on the 11th of ſame month, "Found that the proviſions of the "deceaſed's contract of marriage in favours of his children the "reſpondents, muſt come off the whole head of the executry "as a debt; and therefore adhered to their former inter- "locutor."

Entered, 22 Feb. 1725-6.

The appeal was brought from "an interlocutory ſentence of "the Lord Ordinary, made the 17th of July 1725, and the af- "firmance thereof by the Lords of Seſſion the 2d of December "following; as alſo from ſeveral other interlocutory ſentences "of the Lords of Seſſion, of the 18th of January, 8th of Febru- "ary, and the 11th of ſame February 1726.

Heads of the Appellant's Argument.

The teſtator in his contract of marriage with the reſpondents' mother, having obliged himſelf, his heirs and executors, to pay 60,000 merks to the daughters of the marriage, the reſpondents can claim no more than that proviſion, which the appellant, as heir to his father, would have been obliged to pay them, if the perſonal eſtate had not amounted to that ſum. It is indeed true, that a father may make proviſions to his children by bonds, or other voluntary deeds, which will not exclude their legitim unleſs ſo expreſſed, becauſe of the preſumed intention of the father to reſerve to them ſuch a claim; but where proviſions are made by contract, before marriage, in the way of ſtipulation with the intended wife and her friends, fixing the ſhare of the father's perſonal eſtate to which the children are to ſucceed; in that caſe, as the

the father's eſtate is obliged, in all events, to pay them the proportion ſtipulated in the contract, ſo he is left at liberty to diſpoſe of the reſt as he pleaſes.

If the reſpondents were not barred by the proviſions made for them, in the mother's contract of marriage, yet theſe proviſions behove to be imputed to the legitim (*i. e.* muſt be reckoned as part of it), and the children could, in ſo far only as theſe proviſions fall ſhort, have an action of ſupplement. That this was the rule in the Roman law cannot be a queſtion; therefore, as this doctrine of legitim was wholly derived from thence, it ought to determine the preſent caſe, if it were not ſufficiently eſtabliſhed by the law of Scotland. Bonds of proviſion granted to children, or portions given with daughters at their marriage, were always imputed in payment of their legitim. The Lord Stair, and Sir George Mackenzie, ſtate this as a ſettled point in the law of Scotland, as founded in the nature of the thing. The law gives a legitim to the children for their proviſions; but does not exclude the father's paying this legitim, either in whole or in part, during his life; and every indefinite payment or proviſion made, during the father's life, muſt be imputed towards ſatisfaction thereof, from the undoubted maxim of law, that, *debitor non præſumitur donare.*

Stair's Inſt. B. 3. tit. 8. § 45. Mackenzie's Obſerv. 10 Act Parl. 3 Car. 2.

All the Scots lawyers agree, that when there is a relict ſurviving, as in the preſent caſe, the executry is *tripartite.* To ſuch legitim the children have a right by ſucceſſion, and not from any communion or joint intereſt in their father's eſtate. And it is *jus tertii*, for the children to queſtion which way their father has diſpoſed of two thirds; and of this there is an expreſs precedent in the caſe of Allardice *v.* Smart, affirmed in the Houſe of Lords 12th February 1721-2, where a proviſion of 24,000 merks was made, in a contract of marriage, to the children of the marriage: the father having tranſacted with ſome of the children for ſmall ſums, the Court of Seſſion found the benefit of thoſe tranſactions did not accreſs to the remanent children; and although in that caſe the children had a joint intereſt, yet the *jus accreſcendi* did not obtain.

Allardyce *v.* Smart, No. 90. of this collection.

But the *jus relictæ* ariſes from the joint communion betwixt the huſband and wife, and the legitim being a debt upon the father to provide ſuch a ſhare of his eſtate to his children, after his deceaſe, whenever that debt comes to be diſcharged, and the joint eſtate of the huſband and wife is diſburthened thereof, an equal diviſion betwixt the relict and executor muſt neceſſarily happen; and all the lawyers who have ſaid that when the wife predeceaſeth, the executry is at any time *bipartite*, have conſidered the caſe in this light, viz. that upon the wife's demiſe, her executors have claimed a third, whereby only two thirds remain under the father's adminiſtration, to be divided, upon his deceaſe, betwixt the children and his executors; ſince, then, the wife's executors can claim, and are preſumed to have claimed her third, and the children dying before their father are no more conſidered than if

they never had exiſted, the reaſoning cannot reciprocally hold from the one to the other.

By the act of parliament 1669. c. 19. there is no more intended than a regulationof *quots* payable to the biſhop; and all the lawyers who have written on the ſubject, particularly Sir Geo. Mackenzie, have put no other gloſs upon it. The legiſlature might certainly tax what part of a man's moveable eſtate they thought fit; but ſuch taxation could never regulate the ſucceſſion of moveables otherwiſe eſtabliſhed.

Heads of the Reſpondents' Argument.

The intention of the marriage-articles was, no doubt, in all events, to ſecure a certain proviſion for the daughters, becauſe it might be uncertain what the perſonal eſtate of their father might amount to at the time of his deceaſe; but that was by no means to exclude them from the proviſion the law makes for them; for had the intention of the parties been ſuch, it would have been ſo expreſſed, but it not being mentioned to be in excluſion of their legitim they are entitled to both. This is the unanimous opinion of all the lawyers of Scotland, particularly Ld. Stair's Inſt. tit. Executry, § 45. Sir John Niſbet, fo. 9. Sir John Stewart, fo. 14. and 132.

The father has a right to, and is the common adminiſtrator of all the perſonal eſtate during his life only: at his death the perſonal eſtate is ſubject to be divided according to the direction of the law. If, therefore, it excludes the wife's right by a ſettlement upon her, that does not veſt her right in the huſband, but the perſonal eſtate of the father, which otherwiſe would have been divided into thirds, will be divided into moieties. If there are children who have accepted of a proviſion in lieu of their legitim, that does not give the benefit of their ſhare to the huſband, but the wife in that caſe is entitled to a moiety; and there is the ſame reaſon, that where the wife accepts of a ſettlement in lieu of her third, the children ſhould have the benefit of that, and be entitled to one moiety.

By the inſtructions given to the commiſſaries in confirming of teſtaments, the rules of diſtribution are laid down thus: If there are no children, or only children that are *foris-familiat* (that is, have accepted of a portion in full of their legitim), the teſtament is to divide in two; and though the caſe of a wife's renouncing is not expreſsly taken notice of, yet the reaſon is the ſame; for ſince the non-exiſtence and renunciation of the children are put upon the ſame footing, the ſame reaſon holds where there is no wife, or where ſhe has renounced; if there was no wife, the diviſion would be in moieties; if ſhe had renounced, the diviſion ought to be the ſame; and ſo it is in the caſe of children, and the practice of the Commiſſary Court is the ſame in both caſes. By the act 1669. c. 19. it is enacted, "That the commiſſaries admit of no diviſion in teſtaments in favours of the widow who "has renounced, and if a bipartite or tripartite diviſion be prayed

" by the executor at the confirmation upon her account, if it " ſhall appear ſhe has renounced, the teſtament ſhall be con- " firmed without diviſion upon her account." Conſequently, ſince ſhe is excluded, and no diviſion to be made on her account, the diſtribution muſt be in the ſame manner as if there was no wife, that is by moieties. Nor will it alter the caſe that the proviſion made for the wife is out of a real eſtate, and conſequently a fund out of which the children could have no legitim; for if a real eſtate were given to younger children and accepted by them in ſatisfaction of their legitim, their renunciation would have the ſame effect as if ſo much of the perſonal eſtate had been paid them; and ſo if the huſband ſells a real eſtate, though the widow and children would have had no intereſt therein, if it had not been ſold, yet the price becomes perſonal eſtate, and adds to that common fund in which the wife and children are ſeverally intereſted.

The appellant contended, that by act of parliament 1661, c. 32. bonds bearing intereſt are declared moveable as to ſome particular caſes, yet no notice is taken of the children's legitim, and therefore that they muſt, as to that, remain ſtill heritable, and conſequently not fall under the legitim. But theſe bonds are by the act declared moveable, that the ſame might fall to the executors, or belong to the neareſt of kin, that is making them moveable as to all effects; and the legiſlature having it in view to determine in what caſes they ſhould remain heretable, expreſſed it to be, *Quoad fiſcum & relictam*; as they determined in what caſes they were to be heretable, and there is no mention of the legitim, they muſt as to the children be conſidered as moveable. And ſince by this act they go to executors or neareſt of kin, excluſive of the relict, they muſt be divided wholly into legitim and dead's part.

Collation, or bringing into hotchpot, was only introduced as a remedy for preſerving an equality amongſt brothers and ſiſters, and concerns only the diviſion of the legitim betwixt them, but has no effect upon the extent of that legitim, nor upon the extent of the dead's part, or the widow's ſhare. The right to the legitim is not a ſucceſſion but a diviſion ariſing upon the death of the father, and exactly of the ſame nature with the third due to the widow; and ſuppoſing the widow ſhould by the marriage have a particular ſum ſettled to be paid her upon the death of her huſband, ſhe will not be obliged to bring that into hotchpot, or impute it *pro tanto*; no more ought the children what is provided for them. Eſpecially ſince the proviſion by the marriage-articles in favours of the reſpondents is to be conſidered as a debt, and as ſuch is to be paid before any diviſion can be made, for the diviſion operates only upon the reſidue of the perſonal eſtate after all debts paid, and if they are creditors they ought not to impute; and of the ſame opinion is Sir George Mackenzie, for he ſays,

" If children get bonds of proviſion from their father, they are " not thereby excluded from their legitim, nor are they obliged " to collate theſe bonds of proviſion, and to impute them as a part " of their portion natural, but they have right to them as mere B. 3. tit. 9. § 11.

" creditors, and may likewiſe ſeek their legitim :" and thus it has been determined in ſeveral caſes.

Judgment, 7 March 1726-7.

After hearing counſel, *It is ordered and adjudged, that the interlocutory ſentence of the Lord Ordinary of the 17th of July* 1725, *and the affirmance thereof be affirmed; and it is further ordered and adjudged, that ſo much of the interlocutory ſentence of the* 18*th of January* 1726 *as appoints only a* bipartite *diviſion betwixt the children's legitim and the deceaſed's part by equal portions be affirmed; but that the other part of the ſame interlocutory ſentence whereby the Lords of Seſſion, found " That the proviſions in the deceaſed's contract of marriage in " favour of the children, the plaintiffs, muſt come off the whole head " of the executry as a debt," be reverſed: and it is alſo ordered and adjudged, that the interlocutory ſentence of the* 8*th of February* 1726 *be affirmed; and it is hereby further ordered and adjudged, that the reſpondents have their full legitim as to the demands of the* 60,000 *merks, or any part thereof that may become due by the marriage-contract, when the ſame ſhall become due and be demanded; that then what ſhall have been received on the account of the legitim ſhall be accounted and imputed as payment* pro tanto *of the marriage contract.*

For Appellant, *P. Yorke.* *Dun. Forbes.*
For Reſpondents, *C. Talbot.* *Will. Hamilton.*

That part of the judgment here reverſed, relative to the children's proviſions being taken off the whole head of the executry as a debt, is given as an exiſting precedent by Lord Kaims in his Deciſions. I do not find this ſtated in the Dictionary, or in Bankton or Erſkine; but the judgment of the Houſe of Lords ſeems directly contrary to the doctrine laid down in Erſkine, B. 3. Tit. 9. § 22. on this point, ſupported by two deciſions, Dickſon, 19th June 1678, and Murray, 16th July 1678.

This caſe agrees more with the deciſion in the important caſe of Hog and Laſhley, in the Houſe of Lords, 7th May 1792, than the caſe of Allardyce *v.* Smart here mentioned does. The preſent, however, is not upon points preciſely ſimilar to thoſe in theſe other caſes.