

IMPLIED CONDITION.

SECT. I.

Provision to Children payable at a certain age.

1665. January 17.

EDGAR against EDGAR.

ISOBEL EDGAR pursues for 4000 merks, provided in her mother's contract of marriage by this clause, whereby her father having married her mother to his second wife, obliged him and the heirs of the first marriage, which failing, his heirs and executors, to pay to his bairns of the second marriage 4000 merks, albeit there were but one of them; and, if there were more, the same sum to be divided among them, the portions of the male children to be paid at their age of twenty-one, and the female at the age of eighteen; and to pay them five of each hundred after his death till the terms of payment: *Ita est*, The heirs of the first marriage failed by decease, and there were four bairns survived of the second marriage, whereof two died before they attained to their age mentioned in the clause, and now there remain but two, the pursuer and her brother, who is become heir; whereupon she *alleges*, that she hath the benefit of the whole 4000 merks. It was *answered* for the Brother, That he hath right to the half, because he is a bairn of the marriage as well as she, and albeit he be become heir, yet that takes not away his share by this obligation as a bairn of the marriage. *2do*, Albeit his being heir would exclude him, yet the portions of the two that are deceased, having become heirs by their survivancy, transmit the same to their nearest of kin, and so he and the pursuer are equally nearest of kin. The pursuer *answered*, That the heirs of the first marriage having failed, the clause stands now as if it had been conceived thus, that the father had obliged himself and his heirs, which comprehends all heirs, to pay to the bairns of the second marriage, which must be understood of bairns beside

No n
Provisions to children payable at a certain age, were found not due, they having died before attaining that age.

No 1. the heir, because the heir is constituted debtor, and so cannot be thought to be creditor in the same clause.

THE LORDS found the conception of the clause, that the brother, by falling now heir was excluded; seeing it was clear, by the meaning of the defunct, that his heir should have his lands, and his bairns of his second marriage, should have, though but one, 4000 merks; but here the heir of the first marriage was never served heir; they also found, that the portions of the children being to an uncertain day, and not conceived to their heirs or assignees, that they dying before that day, had no right to the stock, but only the annualrent *medio tempore*, so that the stock accresced to the surviving children, as if the defunct had never existed, and that their assignees or creditors could not have affected the same; and so found the brother had no right as nearest of kin to the two deceasing children, not attaining the age mentioned in the contract. See PROVISIONS TO HEIRS AND CHILDREN.

Fol. Dic. v. 1. p. 424. Stair, v. 1. p. 250.

* * Gilmour reports the same case :

By contract of marriage betwixt umquhile David Edgar of Kethick and Anna Blair, his second wife, *anno* 1633, David having then a son of his first marriage, did oblige himself and the heirs of the first marriage, which failing, his heirs whatsoever, to pay to the bairns of the second marriage, a certain sum at their age of twenty-one years, if they were sons, and if daughters at their age of eighteen years, with annualrent till the term of payment. The son of the first marriage, as also the two eldest sons of the second marriage having died, the third, named David, is served and retoured heir to his father, and there being only one daughter of that marriage, Isobel pursues the said David as heir to his father, for the whole 4000 merks. It was *alleged*, That she can claim only a fourth part, because there were four children surviving the father, and the heir of the first marriage. *Answered*, That the two eldest sons died before the payment of the principal sum; and, as to the defender's part, he could have none, because he is heir, *et eo nomine* debtor in the whole, and so the pursuer is only creditrix thereof. *Replied*, That the superveniency of his being heir did not take away the former right belonging to him as bairn; neither did the death of his two elder brothers, who were not heirs, take away their right as bairns, whose right fell to him as heir to them, the obligation being heritable and carrying annualrent, being dated before the act of Parliament 1641. *Duplied*, That the principal sum was not due to them, they having died before they came to the age of twenty-one years, and the obligation as to them, was a conditional obligation if they should come to that age; so that no part of the sum can belong to them, nor to the defender as being heir.

THE LORDS found that no part should belong to the defender, neither for himself as being heir to the debtor, nor to him as being heir to his brethren, un-

less he should offer to prove, that they survived the age of twenty-one years; and it being *alleged*, that one of them survived that age, it was found relevant to make the sum divide betwixt the pursuer and defender.

No 1.

In this same process appeared the executor of umquhile James Pitcairn, who was husband to the said Isobel; who *alleged*, That what right she had to the said sum, it belonged to her husband *jure mariti*, and consequently to his executors. It was *answered*, That the obligation bears annualrent and was dated before the year 1641, and consequently being heritable could not belong to her husband *jure mariti*.

Which the LORDS found accordingly, *but* prejudice always to him of any annualrents owing to her the time of his decease.

Gilmour, No 154. p. 109.

* * * This case is also reported by Newbyth:

UMQUHILE David Edgar, father to Isobel Edgar, the pursuer, by contract of marriage with Anna Blair, his second spouse, and mother to the pursuer, obliges him and his heirs of the first marriage, which failing, his heirs whatsoever, to pay to the bairns of the second marriage, equally amongst them, if there be any more than one, and, if there be but one, that bairn to have the whole, the male children to their parts at the age of twenty-one years complete, and the female at eighteen; and, if the said David should die before the term of payment, he is obliged to pay annualrents at five for the hundred, and after the term of payment, the ordinary annualrent. The said Isobel Edgar being the only bairn alive of the said marriage except David, the heir, pursues him for payment to her, as the only bairn of the marriage besides the heir, of the sum of 4000 merks and annualrents thereof, conform to the hail 4000 merks contained in the provision mentioned in the contract of marriage; and, that the heir of the second marriage, the pursuer's own full brother, being now heir-general, was obliged to fulfil that obligation sicklike as the heir of the first marriage would have been, and yet the said 4000 merks could not be divided betwixt him and his sister, notwithstanding it was *alleged* for him, that by the clause of the contract, the money was to be divided equally betwixt the bairns of the marriage.

Newbyth, MS. p. 18.

1677. Feb. 22.

BELSHES *contra* BELSHES.

UMQUHILE James Belshes did nominate his two daughters, Susanna and Jean Belshes, his executors, and thereafter granted a bond of provision in their favours, payable at their age of fourteen years. Jean died before that age; and, in a process betwixt Tofts and James Belshes, heir to the said umquhile James,

No 2.
Found in conformity with the above.