

granted till some be infest as fiars. It was *answered*, That the conception of the bond being in favours of the bairns as fiars, they with the mother may well renounce; and it is against form, that the parents being but liferenters, the bairns can be infest as heirs to a liferenter. It was *duplicated*, That though the bond was conceived in favours of the longest liver of the two parents, yet seeing the children are not infest, nor can be infest under the general name of children, and children might have failed, and may fail to be more or fewer of the marriage, as providence disposeth, it is just alike as if the bond had been conceived in favours of the heirs of the marriage; but with this difference, that if it had been in favour of the heirs, the right of sonship would have been preferred. Now, if it had been so conceived, no question the heirs of the marriage would have been infest as heirs to their father; consequently the bairns, whether sons or daughters, or both, must be served as heirs of provision to the father; and in this case the word liferent must resolve in a conjunct-fee.

THE LORDS found that the bairns should be infest as heirs of provision to their father, and renounce.

*Fol. Dic. v. 1. p. 302. Gilmour, No 73. p. 54.*

1672. February 10.

JAMES WEMYSS, and BALNEMOON his Assignee against JOHN MACINTOSH.

BALNEMOON being assignee to 2000 merks which Macintosh was obliged to pay to James Wemyss in name of tocher with his daughter, did pursue Macintosh for payment thereof. It was *alleged* for the defender, That the cedent, James Wemyss, was obliged to employ the said tocher, and other 3000 merks, to himself and his wife in liferent, and to the heirs of the marriage, which he never having done, cannot crave payment, but upon re-employment, and the assignee Balnemoon can have no right thereto. It was *replied*, That Wemyss the cedent being only obliged to employ the said tocher to himself in liferent, and to the heirs of the marriage, albeit it were so employed, he remained fiar thereof, and might assign the same, seeing the tocher was to be employed to himself and his heirs of the marriage, and not bairns, and that heirs could not be interpreted bairns, it being Wemyss' first contract of marriage; whereas, if it had been to the heirs of a second marriage, it might have altered the case, there being a general heir of a first marriage.

*Fol. Dic. v. 1. p. 302. Gosford, MS. No 471. p. 244.*

No 49.  
the parents being infest, cannot be renounced by the children till they are infest as heirs of provision to their father.

No 50.  
A sum being payable to a husband in name of tocher, to be employed to himself and his wife in liferent, and to the heirs of the marriage, was found assignable to, or arrestable by, his creditors, as being fiar thereof.