

1677. February 13.

CARNEGIE and her SPOUSE *against* CLARK and ALCORN.

No 2.

Provision to the children to be procreated of a marriage of certain urban tenements, found to go to all the children equally, whether male or female.

By contract of marriage betwixt James Carnegie and Janet Smith, James was obliged to infest his future spouse in liferent, and the bairns to have been procreated of the marriage, which failing, the said James his own heirs and assignees whatsoever, in certain tenements in Edinburgh. Of this marriage there were two bairns, James and Elizabeth Carnegie. Elizabeth, and Alcorn her husband, pursued James Carnegie for infestment of the half of the tenement, conform to the contract. The defender *alleged*, Absolvitor, because, by bairns in the clause of the contract, could only be understood such bairns as could be heirs by law *respective, viz.* the eldest son alone, and, failing him, the daughters equally; for our law doth not conjoin male and female in the same succession. It was *answered*, That heirs of a marriage are not heirs by the course of law, but by the provision of parties, who may appoint their heirs as they please; and it is most ordinary amongst burgesses, to provide all their bairns as heirs of their marriages, and who have accordingly been oft-times sustained equally, whether male or female.

THE LORDS found the son and daughter of this marriage to be heirs of provision to their father in this tenement equally.

1677. July 10.—By contract of marriage betwixt Janet Smith and her first husband, he is obliged to infest himself and her in conjunct fee, for the bairns of the marriage, in several tenements in Edinburgh; and there is a clause, by which she restricts herself to the half, in case there be bairns surviving; but thereafter the husband gives her a new infestment of that half, in case the children survive. There survived two children of the marriage, a son and a daughter. The daughter pursues her mother for her fourth part of the rents of these tenements, as being one of the two bairns of the marriage. The defender *alleged, 1mo*, No process at the daughter's instance; because, by the bairns of the marriage, the heirs of the marriage must be understood, and so this daughter can have no right, especially seeing her father provided her to the sum of 3000 merks, whereby his meaning was clear, that he intended not she should be one of his heirs, for he would never have given her more than his son; *2do*, By a subsequent infestment, the defender hath right from her husband to the half of the tenement acclaimed by the bairns, who being heirs of provision, cannot attain the rights of these tenements, till they be infest as bairns of the marriage, and thereby they must represent the defunct, and make good his disposition to the defender. It was *answered* for the pursuer, That this clause is frequent in the contracts of merchants, and hath ever been interpreted to make all the bairns, male and female, to come in *pari passu*; so that the meaning and intention of the father, though it had been express, cannot alter the

common sense of the provision, or prejudice the daughter's right thereby; and albeit the pursuer might be infest as one of the heirs of the marriage, that will not import her being liable to fulfil her father's disposition; because heirs of provision are partly heirs, and partly creditors in the provision, and not simply heirs; and, therefore, as to the terms of the provision, the father cannot alter the same, and the bairns succeeding may quarrel any fraudulent or gratuitous deed of the fathers, in prejudice of the provision, as is commonly known in the debate betwixt heirs of different marriages, where the heirs of the first marriage are not obliged to fulfil the provisions in favour of the bairns of the second marriage, in so far as they derogate from the provisions in the first contract of marriage: And though it was lately found, that a general clause of conquest, during the marriage, did not hinder the father to do any deed upon a cause onerous, or rational consideration, but only excluded fraudulent acts or such as had no reasonable consideration; yet here it is a special provision relating to the tenements the father then had; and it is most irrational his wife should liferent them all, seeing he hath no more; so that such heirs of provision, though they be liable for the defunct's debt, or onerous obligations, yet would not be liable for perfecting the infestment to heirs of a second marriage, as being fraudulent, much less for a provision to their own mother, in prejudice of the provisions in the contract, so that they might assign the provision as creditors, and the assignee might adjudge the tenements, without their entry; or though they entered, they might quarrel this posterior provision to their mother, as contrary to the contract of marriage; but this restriction being, in effect, an assignation to the children of the half of the liferent, in favour of the bairns of the marriage, they may immediately pursue her, or the tenants, for payment of the rents thereupon.

Which the LORDS sustained, and repelled the defence.

Fol. Dic. v. 2. p. 275. Stair, v. 2. p. 504. & 536.

1678. January 21. EADIE KINLOCH against KINLOCH.

A FATHER provides his estate to the bairns of the marriage. There is a son and a daughter. It being queried to the Lords, if the sister might not serve herself joint heir of provision with her brother, the LORDS resolved affirmatively; where the provision is to bairns in the plural number; and this was done by two practicks, 14th January 1663, Thomas Bog *contra* Thomas Nicolson, No. 44. p. 4251.; and 17th February that same year, Margaret Hay against Sir George Morrison, No 1. p. 12839.; and so the LORDS ordained the service to go on, although the brother was already served general heir of provision, and was content his sister should have action against him.

Fol. Dic. v. 2. p. 275. Fountainhall, MS.

No 2.

No 3.