

1737. June 15.

CHRISTIAN STENHOUSE *against* JEAN YOUNG, and WILLIAM COWAN her Husband, for his Interest.

No 122.

A father who is bound by his contract of marriage to provide a certain sum to the heirs or bairns of that marriage, if he give a sum to one of the daughters in her contract of marriage, is not presumed to have given it as a *præcipuum*.

By contract of marriage, entered into betwixt Alexander Young and Janet Wilson, he became bound to secure 6000 merks, and the conquest during the marriage, to himself and his wife in conjunct fee and liferent, and to the heirs or bairns of the marriage.

Of this marriage there were three daughters, viz. Agnes, Jean and Christian; in the youngest of whose contract with James Stenhouse, Alexander obliged himself to grant, in name of portion with her, a wadset upon a tenement belonging to him in Libberton's Wynd, for 2000 merks, payable the first term after his own and his wife's decease; which tenement, together with several other houses, the said Alexander Young had purchased during the subsistence of his own marriage, and which he had taken to himself and spouse in conjunct fee and liferent, and to his heirs whatsoever.

Anno 1706, Alexander Young died without securing the 6000 merks provided to his heirs or bairns of the marriage; after which, Agnes the eldest daughter died; and Christian who was married to the said James Stenhouse dying likewise, her daughter Christian Stenhouse having made up a title to the half of her grandfather's tenements, brought an action against Jean Young her aunt, and William Cowan her husband, to account to her for the half of the rents of the houses which they had intromitted with; in which this question occurred, Whether the 2000 merks given to Christian by her father in her contract of marriage was to be deemed a *præcipuum*; or if it behoved to be deducted out of the half of the 6000 merks which the pursuer was now entitled to by the death of Agnes Young her aunt?

Pleaded for the pursuer; That although Alexander Young provided the succession of 6000 merks to the heirs or bairns of the marriage, whereby they became creditors therein, each for their respective shares; yet, notwithstanding thereof, he had a discretionary power to divide that sum among them in what proportion he thought fit; which in the present case he had done, in so far as his granting a wadset to the pursuer's mother was an express declaration she should have the wadset. And as to the other subjects, his taking them to himself and his heirs whatsoever, was an evidence sufficient that he designed these should divide equally amongst them: So that here the intention of the father was as strong as if he had made an express settlement, disposing the tenement in Libberton's Wynd to Christian, and the other houses to her and the defender equally; in which case there could have been no doubt that the father's will was, that Christian should have 4000 of the 6000 merks, and Jean only 2000 merks; or, which is the same thing, that he intended to give the sum in the wadset as a *præcipuum* to Christian, and that the rest of the subjects should divide equally betwixt her and Jean; for the taking of a conveyance of houses

to himself and his heirs whatsoever, was as explicit a declaration of his will as if he had taken the conveyance to himself and his heirs male, and thereafter made a settlement in favour of his heirs whatsoever. And, on the other hand, his granting a wadset to Christian was as plain an evidence of his intention with respect to that tenement, as if he had taken the original conveyance from his author to her, redeemable by his heirs whatsoever, upon payment of 2000 merks.

Pleaded for the defender; That it was evidently contrary to the father's intention that the 2000 merks should be deemed a *præcipuum*; because, at the time he provided Christian, he had three daughters: So that his giving her 2000 merks was plainly intended as her proportion of the 6000 merks to which she had right by her father's contract; and the way how the pursuer comes to be entitled to the 1000 merks more is only by the death of Agnes her aunt, whereby one third share of the 6000 merks falls now to be divided betwixt the pursuer and defender.

As it is obvious, therefore, that the father did not design to give a *præcipuum* to his daughter, this question, of consequence, falls to be determined by the same principles that govern collation in the children's claim of legitim; upon which footing the pursuer must collate the 2000 merks that were given to her mother; as her contract of marriage bears no clause that she should have both the 2000 merks, and her share of the 4000 merks over and above; it is therefore foreign to the point to mention the father's power of division, or whether or not he might have given the 2000 merks as a *præcipuum*; because in fact he did not do it. And with respect to the argument drawn from the pretended division alleged to have been made by Mr Young's taking the right to himself and his heirs whatsoever, it was *answered*, That it is quite imaginary to suppose a purchaser does intend, by taking the right in that manner, to make any alteration in the provisions covenanted to his children in his contract of marriage; seeing the design of executing the securities in that way means no more than to secure the buyer in the ordinary form, leaving the provisions to be made effectual as directed by the contract of marriage, which no purchaser chooses the seller should be privy to.

THE LORDS found, that Alexander Young being bound, by his contract of marriage, to secure in land, or other sufficient security, the sum of 6000 merks to himself and spouse and longest liver in liferent, and to the bairns of the marriage in fee; that the two daughters Jean and Christian were by the said contract creditors upon the said 6000 merks; and 2000 merks being stipulated to be secured to James Stenhouse, husband to the said Christian, in name of tocher, upon the tenement in Libberton's Wynd; found that the said 2000 merks ought to be imputed *pro tanto* in payment of the said Christian's share of the said 6000 merks; and that, after deducting the said 2000 merks, there remains only 1000 merks due to the said Christian, and the pursuer her daughter, as her share of the said sum; and found, that Jean Young the other sister remains

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still creditor to her father in the other 3000 merks; and that the free estate of Alexander Young must in the first place be applied to the payment of the said respective sums of 3000 merks and 1000 merks; and that the remainder falls to the said Jean Young and Christian Stenhouse equally betwixt them.

G. Home, No 56. p. 96.

1740. February 8. ALISON PRINGLE *against* THOMAS PRINGLE of Symington.

No 123.

Import of a clause in a marriage contract providing a certain sum to the children of the marriage, in satisfaction of all they could claim except what farther the father should provide to them of his own free will.

By contract of marriage betwixt Robert Pringle and Ann Rutherford, in the 1687, ' he obliged himself, his heirs, executors and successors, to pay to the children of the marriage, in case of his wife's predecease, the following provisions, viz. If there were two or more children, the sum of 12,000 merks, to be divided as he should think fit, and that at the male childrens age of 21, and the females age of 16, or either of their marriages, whichever should first happen, which should be in full satisfaction to the children of all that they could claim from their father, excepting what further he should provide to them of his free will.' Of this marriage there were issue three sons and one daughter. Anno 1698, he granted a disposition of his lands of Symington, in favours of Thomas Pringle his eldest son, then an infant, on the narrative of love and favour, and certain other onerous causes, &c. Robert, in his own lifetime, provided his two younger sons, and took from them discharges of any claim they might have upon the contract. Ann Rutherford predeceased her husband, who died in the 1738, leaving besides his land estate disposed to his son Thomas, an executry to the extent of 17,000 merks and upwards. Upon which Alison Pringle the daughter confirmed herself executrix to her father, and brought an action against her eldest brother Thomas for certain sums, part of the executry intromitted with by him.

The defence *pleaded* for him was founded on the contract, viz. that thereby the sum of 12,000 merks was provided to the children of the marriage, payable at there respective ages as therein set furth, by the defunct's executors, and that he was creditor in a proportion of that sum, exceeding the sums claimed from him by his sister, his father's executor, whereby her claim was excluded by compensation.

In support of this, it was observed in general, that it was a rule in our law, that though the heir and executor, with respect to creditors, be considered as *eadem persona*, yet in questions betwixt themselves they came under a different consideration; and the heritable and moveable successions make the defunct to be considered as two different persons, and having two different heirs: Hence it is, that if the executor be creditor to the defunct in an heritable debt, his succession as executor will not extinguish the debt *confusione*, but the debt will be good against the heir, and will receive execution in the same manner as it would do in the defunct's lifetime; and so of the heir, if he was