APPENDIX.

PART I.

PROVISION TO HEIRS AND CHILDREN.

1776. *July* 30.

AGNES LAMOND, and JAMES THORNTON her Husband, *against* WALTER LAMOND, Tanner in Larbert.

No. 1.
Particulars of the case No. 120. p. 12991.

BY the contract of marriage, entered into betwixt the father and mother of these parties, Archibald Lamond the father, 'bound and obliged himself, that 'whatever lands, heritages, goods, gear, debts, sums of money, whether heritable 'or moveable, then belonging to him, or which he should afterward conquesce 'or acquire, should be provided and secured to himself and spouse in liferent, 'and to the *heirs and bairns one or more*, to be procreated betwixt them, in fee.' '—And the said Archibald Lamond obliges himself, that he has not done, nor 'shall do any fact or deed, which in any sort may harm, hurt, dislocate or 'prejudge *the children, to be procreate betwixt them, anent their lawful succession* '*thereto.*'

Archibald Lamond left one son and four daughters. Three of them having married with their father's approbation, received tocher's from him upon granting discharges of their claims, in consequence of the contract of marriage. The pursuer Agnes having married contrary to her father's inclination, and having received no tocher nor legacy from him,—now claimed her provisions under the contract.

She contended, that as the subjects were to be provided, '*to the heirs and* '*bairns, one or more, to be procreated of the marriage,*' there could be no doubt that this claim must include the whole children of the marriage. That even if there could be any doubts on this subject, the rank of life in which the contracting parties were situated, (her father having been only a shoemaker in a remote part of the country,) would preclude the idea of an intention

No. 1. of confining the heritable subjects to the heir alone, and thereby raising a family by that settlement, instead of providing equally, as is the common custom of the country, for all the children. That the words, 'heirs and bairns one or 'more,' must entitle the whole children of the marriage to succeed without any regard to whether the nature of the subject conveyed is heritable or moveable. For the principle of interpreting contracts and settlements, agreeable to the will and intention of the parties, is not only consistent with justice, but supported by the opinions of our first lawyers, and established by the uniform decisions of this Court. Thus Mr. Erskine, B. 3. Tit. 8. § 48. has carried this principle even further than what is necessary, to support the pursuer's interpretation of this settlement. His words are, 'Where presumptions arise either 'from other clauses in the settlement, or from the *circumstances of the granter*, 'that he truly intended to comprehend under the word *heir*, or *heirs whatso-* 'ever, his whole issue, that term is explained accordingly;' and in which Lord Bankton seems to agree with him, B. 3. Tit. 5. § 48. She further contended, that the term heirs and bairns, have a fixed and determined meaning in law, comprehending the whole children of the marriage, as will be found by the following decisions, January 29. 1678, Stuarts against Stuart, No. 4. p. 12842. where the Court, upon considering a similar clause to the present, in a contract providing 20,000 merks, and what heritable subjects should be acquired during the marriage, '*to the heirs or bairns of the marriage, one or more*,' the Court found, 'that by the clause of the contract all the bairns of the 'marriage were heirs of provision in the conquest, and that heirs or bairns was 'not alternative, but exegetic, and that the father being debtor in the clause, 'could not effectually alter the clause of conquest in favour of one of the bairns.' There are likewise two cases observed by Lord Harcarse, which establish the same principle, Scott against Scott, February, 1684, No. 6. p. 12842. and Irvine against M'Kirick, December, 1684, No. 7. p. 12843. And there is likewise a late decision to the same purpose in 1769, Wilsons against Wilsons, No. 9. p. 12845.

To this it was answered by the defender, That even admitting the pursuer's interpretation of the contract in question, to be just, yet certainly it was competent to the father to divide the funds, so provided, among his children in any manner which he should think most proper. That the father having purchased two different portions of land, he took the disposition of the one subject to himself and his wife in liferent, and to *his heirs*, successors and assignees, heritably and irredeemably in fee; and that of the other subject to himself and spouse in liferent, and to the *defender in fee*. And surely it will not be disputed, that the very title deeds to the subject are equivalent to the most formal deed of division, that the father possibly could make.

But on the general point it was observed, That although among persons in the sphere of life of the contracting parties in this case, the common custom may prevail of providing for all the children equally; yet it is common in every

sphere of life to grant some preference to the eldest son; and according to the general rules of law, the same words in the contract of a Peer, or in that of a shoemaker, must receive the same interpretation. Upon the general principle of law, there can be no doubt, that where in executing conveyances, contracts, or the like, parties make use of proper technical terms, then the law must decide according to the proper and ordinary meaning of such terms. The legal import of the word *heirs*, must determine in what manner, and in what order the children of the marriage shall succeed; the addition of *bairns*, means only that the issue of the marriage are to have their right in their legal order. It cannot be supposed, that by coupling the word *bairns* with the legal expression of *heirs*, the maker of the settlement intended that the one should stand in opposition to the other, and that the legal effect of the distinction to *heirs* was to be entirely destroyed by adding *bairns* to it. If the whole children were meant to be called, whatever the nature of the succession should be, it is quite improper to use the word *heirs*, which legally imports a quite different mode of succession. In fact, that this is the opinion both of Lord Bankton, B. 3. T. 5. § 49, 50, and of Mr. Erskine, whom says, in the very section quoted by the pursuer, 'That words which have a fixed legal meaning, ought, when made 'use of in settlements or securities, to be understood in that meaning.' And the passage quoted by the pursuer refers only to sums of money, and not to heritable subjects; for here an evident distinction arises both of persons and things, and the heir and younger children are called to their succession according to the order of the law. No. 1.

Agreeable to these principles the Court has repeatedly decided, excepting in such cases, where from the face of the deed itself it is obvious, that it was meant and intended, that the whole subject should divide among the children *in capita*. Thus in a late case, Kemps against Russel, 1768, (not reported,) the Lords found that a provision made in a contract of marriage, to the heirs and bairns, did not import that the land estate was to divide among the whole children of the marriage, but only that the estate should descend to the heirs of the marriage: and which general point was again decided in another late case Murdoch against Scott.

The Lord Ordinary had pronounced an interlocutor in favour of the heir, but the Court altered that interlocutor, and found (18th July 1776,) 'That by 'the conception of the contract of marriage founded on, the provisions therein 'stipulated, are in favour of the whole children; but find that there remained 'in the father a power of division; and that the disposition taken by Archibald 'Lamond the father, to himself and spouse in conjunct fee and liferent, and to 'Walter Lamond his son *nominatim*, must carry the subject thereby disponed to 'the said Walter the son; and find that Agnes Lamond has right only to 'the share of the remainder of the estate, after taking therefrom that subject; 'and remit to the Lord Ordinary to proceed accordingly.'

No. 1. A petition reclaiming against this interlocutor was refused (30th July 1776,) without answers.

Lord Ordinary, *Hailes.* Act. *Buchan Hepburn.* Alt. *Crosbie.*
D. Armstrong.

D. C.

1776. *December* 20. RICHARD DICK *against* ROBERT LINDSAY and Others.

No. 2.
Particulars of the case No. 140. p. 13025.

Robert Dick, dyer in Jedburgh, by contract of marriage, assigned and disponed to the children of the marriage, which failing, to his own heirs and assignees, the whole heritable and moveable subjects that should pertain to him at his death, under the burden of certain provisions to his wife. This settlement, being displeased with the conduct of his son Richard, he afterwards altered, leaving only some trifling annuities to Richard's wife and children; upon which an action was raised at their instance against the trustees under these latter deeds of the father, concluding that the same should be reduced as *ultra vires* of the granter, and contrary to the provisions and obligations contained in the contract of marriage.

This action came before Lord Gardenstone Ordinary, who ordered memorials to the whole Court.

For the pursuers of the reduction, pleaded, 1*st*, Although children by virtue of a marriage-contract take up the subjects provided to them by a right of succession as heirs of provision to their father, yet they are so far considered to be *creditors* under the marriage contract, that the father cannot by any voluntary or gratuitous deed, disappoint that right of succession. Even in onerous contractions, (although undoubtedly available to creditors in a competition with children,) the obligation in the marriage-contract remains full and unimpaired *quoad* the father, in so much that the children have a good claim of recourse against his cautioner or separate representatives to the amount of the encroachments made upon their provisions by his onerous debts or deeds. On this head our law is clear, Stair, B. 3. Tit. 5. § 13.

Supposing therefore the trustees had been successful in establishing every one point of which they had undertaken a proof, and had shown that Richard Dick, was foolish, idle, and extravagant,—still these circumstances could not have the effect to liberate the father from his obligations in the marriage-contract.—Because a person is foolish or extravagant, he does not therefore cease to be creditor in any obligation legal or conventional which is conceived in his favour; and were a father's powers over subjects provided by a marriage-contract to depend, not upon any general rules of law, but upon the particular character of the children and their being sensible prudent persons, or the reverse, it is easy to see, what uncertainty in this branch of the law must be the consequence.