No 131. a proper landed estate, the Court proceeding on the authority of our law writers, the probable intention of parties, and the legal presumption in favour of primogeniture, have always preferred the eldest son; Dirleton and Stewart, *voce* Heirs of Provision; Bankton, b. 3. tit. 5. § 48.; 13th February 1768, Kempt against Russel*; 17th June 1789, Fairservice against White, No 57. p. 2317.

As to the subsequent words in the dispositive clause, 'as shall be disposed of by the father to them,' their sole purpose seems to have been to put it in the father's power to disappoint the succession of the heir at law, if he should be so inclined. It appears, however, that so far from wishing to exercise this power, he corroborated the destination laid down in the contract, by granting a disposition in favour of his eldest son.

THE LORD ORDINARY pronounced the following judgment: 'Finds the destination in the contract in question calls all the children of the marriage 'as heirs of provision,' and that they were thereby entitled each to an equal share, if the father did not make a division; finds, That the subsequent part of the 'clause, as shall be disposed of by the father to them,' gave him no greater power than is implied in such cases; and that though both powers enabled him to make an unequal division, yet neither enabled him to give the whole to one, or totally to exclude any of the children.'

On advising a reclaiming petition, with answers, the COURT (27th June 1792) altered this interlocutor, and 'sustained the defence with regard to the lands contained in the contract of marriage libelled on, and assoilzied the defender.'

The pursuers reclaimed; but on advising the petition, with answers, the LORDS adhered to their former judgment.

Lord Ordinary, *Dreghorn.* Act. *Fletcher.* Alt. *Dean of Faculty, Wight.* Clerk, *Menzies.*

R. D. *Fol. Dic. v.* 4. *p.* 184. *Fac. Col. No* 7. *p.* 16

SECT. XV.

Can provisions in favour of Children in a Marriage-contract be disappointed by deeds of the Father?

1743. *June* 9. WILLIAM GRAHAM *against* JOHN COLTRAIN.

No 132. Where an estate was provided by marriage-con-

JOHN STEWART writer in Edinburgh, (afterwards of Phisgill) intermarried, with Agnes Stewart, and, in the contract *anno* 1668, 'she disponed all her lands to him, and to the heirs to be procreated betwixt them of the said mar-

* Not reported.

riage, &c. And, on the other hand, he provided the whole he then had, or should acquire, to the heirs thereof in fee.'

No 132. tract to the heirs of the marriage, the father was found not entitled to entail the estate to the exclusion of heirs-female.

The contract contained a procuratory and precept by her, upon which the husband was infeft in her lands. Of this marriage there were several sons and daughters; David, the eldest son, died without issue before his father, as did Robert, the second son, leaving a daughter called Agnes Stewart. *Anno* 1719, Phisgill executed an entail of his estate, 'in favours of himself, and the heirs male of his body; which failing, to the heirs female of his body, and the heirs-male of their bodies; the eldest heir-female succeeding without division, &c.'

It contained also a clause 'secluding and debarring the daughter of Robert Stewart his son from succeeding to him in his lands and estate, or any part thereof, in all time coming, and likewise the usual clauses de non alienando et non contrahendo.' This tailzie was registrated, and a charter and sasine followed thereon. Upon Phisgill's death, William his third son was served heir of tailzie to him, and he dying without issue, Agnes Stewart, William's eldest sister, took up the estate in the same manner, who likewise dying without issue, James Cultrain, son of Elizabeth Stewart, the second sister, served heir of tailzie to his aunt Agnes Stewart.

Agnes Stewart the daughter of Robert, Phisgill's second son, being advised, that her grandfather and grandmother's estate was provided to the heir of the marriage by the said contract, it was not in her grandfather's power to exclude her by the above settlement 1719, she being the heir of the marriage, granted alongst with her husband Mr Hathorn, a trust-bond to the pursuer, who having charged her to enter heir of line and provision to her grandfather in his lands and estate, adjudged from her and her husband, all their right to the estate of Phisgill, and thereupon brought a reduction of the settlement 1719, upon the following grounds:

1*mo*, Because Agnes Stewart, (Mrs Hathorn,) was the heir of the marriage by the contract 1668, therefore her grandfather could not exclude her by any voluntary or gratuitous deed, and that such was the above entail, whereby her uncle and aunts and their descendants, who were not heirs of the marriage, were preferred to her in the succession.

2*do*, The settlement was directly in contradiction to and *contra fidem* of the contract of marriage, in respect the heirs-male of the husband's body, though of another marriage, are preferred to the heirs-female of the marriage, as also the heirs-female of another marriage, and his collateral heirs-male, are preferred in the succession of the wife's estate to her heirs.

3*tio*, It was irrational, as it not only postpones Mrs Hathorn, the heir of the marriage, and his heirs at law to William his son, but likewise postpones her to all his daughters and their issue, and to his collateral heirs-male; nay farther, excludes her for ever from the succession, without giving her a shilling, though, at the date thereof she was an infant, and neither had or could have offended him.

No 132.

And, in support of these reasons, it was *pleaded*, That as Mrs Hathorn's father was the eldest son of the marriage, upon the death of David his elder brother, and was expectant heir thereof, so every right descendible to him, unless limited to heirs-male, did, upon his death, belong to her; and that it was impossible the character of heir of the marriage could belong to her uncle or aunts, &c. while she or her issue existed. That stipulations in a marriage-covenant, in favours of the heir of the marriage, as they are the conditions upon which the parties enter thereunto, as they are binding upon the parents and other parties contractors, so they establish a right of credit in the issue of the marriage, not to be defeated by either of the parties contractors, nor by both concurring together; that the injustice of the settlement 1719 was obvious in many respects; to instance one of several, Phisgill's son of a second marriage, had he survived his wife, would have excluded all the female descendants of the marriage, not only with respect to the father's estate, but also *quoad* their mother's. Nor is it an answer to this observation, that the event did not happen, as the settlement must be considered as it stands; for it being one deed, cannot be divided, but must be reduced *in toto*.

Argued in defence, That provisions to heirs and bairns of a marriage, are in common usage understood equipollent; that the term 'bairns' is exegetic of heirs; and that by our written feudal law, heirs of one's body and children, are equivalent; and so it has been determined, not only in the case of a land-estate, but in provisions of a sum of money. At the same time, the governing rule in all such cases is, to consider the intention of the parties contractors, whether they designed the provision to the eldest son only, or for the whole children equally. Now, if we interpret the above provision by this rule, it must be found to extend to all the issue of the marriage, notwithstanding that the same is made to them under the character of heirs of the marriage. The whole the contractors then had, or should acquire, was provided to the heirs of the marriage; and it would be inconsistent with the parental affection or presumed intention of parties, to limit the same to the eldest son, who, in a strict sense, is the only heir, or to give him the whole in exclusion of the rest.

Wherefore, if this provision belonged equally to all the children of the marriage, the father had power to settle the same upon any one of them he chose to represent him, allowing reasonable provisions to the rest. Now, in the present case, Phisgill preferred his third son to the daughter of the second predeceased, and his own daughters likewise to her. This was a rational settlement, and such as most men would choose to make; therefore, there is no ground for reducing it, especially as the other children got rational provisions, such as they were content with. Phisgill certainly fulfilled the obligation on him to provide his children of the marriage, by settling the estate upon any one of them, and giving the rest suitable provisions. Robert himself, while alive, was suitably provided for, so he could have had no claim; consequently his daughter cannot impeach the settlement. Besides, if needful, it can be proved, that Phis-

gill had good grounds with being dissatisfied with Robert's conduct and that of his wife, so as not to choose their daughter for his representative. January 29. 1678, Stewart, No 4. p. 12842.; December 16. 1738, Campbell, No 127. p. 13004.; Craig, lib. 2. Dieg. 14. § 11; Stair, lib. 3. tit. 15. § 19. January 20, 1725, Adair, See APPENDIX; January 1736, Heirs Portioners of Milne, See APPENDIX; January 1737, Trail, No 114. p. 12985. No 132.

THE LORDS found, that the estate both of the husband and wife, being provided by the contract of marriage betwixt John Stewart and Agnes Stewart, to the heirs of the marriage, the said John Stewart had no power to make the deed of entail 1719; and that the same was *contra fidem tabularum nuptialium*, and therefore reduced the same.

Fol. Dic. v. 4. p. 179. C. Home, No 234. p. 381.

1752. *June* 12,

CHARLES, ELIZABETH, and JEAN OUCHTERLONYS *against* GILBERT OUCHTERLONY of Pitforthie.

No 133.
Provision in a contract of marriage in favour of the children of the marriage, is binding on the eldest son, on whom the father has settled the fee of an estate acquired during the marriage, tho' at the date of that settlement, the father have sufficient separate funds for satisfying the provision.

ALEXANDER OUCHTERLONY, father to the pursuers and defender, by his contract of marriage with Elizabeth Tyrie, obliged himself, his heirs, &c. "to provide and have in readiness, against the term of Martinmas next (1722) the sum of 6000 merks Scots; which, with 2000 merks money foresaid of tocher to be paid to the said Alexander by David Tyrie the bride's father, the said Alexander Ouchterlony binds and obliges him, and his foresaids, to employ upon land or bond, and to infeft and secure himself, and his said future spouse in liferent, in 6000 merks; and the children to be procreated of the marriage in fee of the hail 8000 merks; and how oft the said sum shall be uplifted, to re-employ it in the same manner." And by another clause of the contract, it is declared, "that in case the said Alexander Ouchterlonie shall predecease his future spouse, leaving children behind him in life, one or more, without providing them in part or pertinencies, then, and in that case, David Ouchterlony, brother to the said Alexander, and the said David Tyrie, or their heirs, shall divide to the children, one or more, the foresaid 8000 merks, or what fund may be free, conform to their discretion."

After the date of this contract, Alexander Ouchterlony purchased a land estate of the value of 30,000 merks Scots, and took the rights thereof in favour of himself in liferent, and of Gilbert Oughterlony, the eldest son of the marriage, in fee, but reserved power to burden the said lands with such sums of money as he should think proper, for provisions to his younger children; and with the sum of 11,000 merks, to be employed by him for any use and purpose he should think fit.