

sum of money is provided to heirs of a marriage, the whole children must be entitled to it, as heirs in that subject; *2do*, Whatever be the proper signification of this clause, the father's intention in this circumstantiated case, was certainly to bring in all the children of the marriage equally; for where there could be no possible view of establishing a family, is it credible, that of a small provision of money naturally divisible amongst all the children, the father could intend the whole to any one child, exclusive of all the rest? This cannot be imagined; and if the father's intention is certain, no matter what terms he made use of, proper or improper.

Answered to the first, Heirs indeed is a general term, comprehending both heirs and executors; but heirs of a marriage is not a general term, it can have but one precise meaning, because executors of a marriage is not a *nomen juris*. And here is the error of the pursuer's reasoning; for does it follow, because under the general word, heirs, executors are also comprehended, therefore heirs does always mean the whole children of a marriage, in opposition to the heir strictly so called? To the *second, answered*, Where words are express, as they are certainly in this case, there is no place for conjectural meanings.

"THE LORDS sustained process."

Fol. Dic. v. 2. p. 276. Rem. Dec. v. 1. No 95. p. 188.

1769. December 1.

JOHN and WILLIAM WILSONS, SONS OF ANDREW WILSON of Templelands,
against GEORGE WILSON, eldest Son of the said ANDREW WILSON.

ANDREW WILSON of Templelands, in his contract of marriage with Alison Christie, became bound "to infest and seise the said Alison Christie with himself, and longest liver of them two, in conjunct fee and liferent, and to the heirs and bairns lawfully to be procreated betwixt them in fee; which failing, the said Andrew Wilson, his heirs and assignees whatsoever, heritably and irredeemably, in all and hail the town and lands of Templelands," &c. By another clause, he bound himself to provide a certain sum of money, and to take the rights thereof, to the heirs and bairns of the marriage. By another clause, he provided the conquest of the marriage to be taken in the same way; viz. to himself and spouse in conjunct fee and liferent, and to the heirs and bairns lawfully to be procreated. And it was further declared, "That the provisions above written, conceived in favour of the said children, shall be divided and proportioned amongst them as the said Andrew Wilson shall think fit."

On the dissolution of the marriage there existed five sons; George, James, Andrew, John, and William; and the two last having brought an action

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Meaning of the term "heirs and bairns," or "children" in a contract of marriage.

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against their brother George for communicating to them a proportional share of their father's heritable and moveable estate, the question came to be, according to what proportions the effects falling under the contract, viz. the lands of Templelands, and the father's other effects, which were supposed moveable, were to be divided among the children, and according to what rules the succession thereto was to be determined.

George, as heir of the marriage, *alleged*, That he had an exclusive right to the lands of Templelands; the pursuer, on the other hand, maintained that these lands, as well as the other subjects under the contract, fell to be divided among the children equally. THE LORD ORDINARY found, "That the succession of the lands of Templelands does by the contract devolve to George Wilson the defender, the eldest son of the marriage; and that the whole other provisions in the contract belong to the pursuer."

The pursuer reclaimed; and on advising the petition and answers, and in determining the question, the LORDS considered it purely as a *quæstio voluntatis*, and that it fell to be decided according to the meaning and intention of the parties expressed in the deed. This meaning was sufficiently clear. By the expression heirs and bairns of the marriage, it was obvious that the father and other parties to the contract meant and intended the children of the marriage. If this, as it must be, was allowed to be the case with respect to the money provisions in the contract, it must hold also as to the lands of Templelands. The expression in both clauses was the same; and no reason could be given why the same expression in the same deed should mean one thing in one clause and another thing in another. Neither could it be said that the meaning of this expression behoved to vary *secundum subjectam materiam*, as the subject to which it was applied was heritable or moveable; for had the money-provision in the contract been laid out on land, which, in terms of that deed, it might, it could not have been disputed that it would still have been divisible among the children.

The last clause of the contract made the point still clearer; it comprehended the lands of Templelands, as well as all the other subjects of the contract; and declared the whole to be divisible among the children; among those whom the contract, in its prior clauses, had denominated heirs and bairns of the marriage; which, in the clearest manner shewed, that in the eyes of these parties, children of the marriage, and heirs and bairns of the marriage, were synonymous terms.

Authorities and decisions were referred to by both parties. For the pursuer, December 1684, Irvine *contra* Makittrick, No 7. p. 12843.; February 1684, Scot *contra* Scot of Bonnington, No 6. p. 12842.—For the defender, Stewart, Ans. to Dirleton, *voce* Provisions in favour of Bairns: Bankton, v. 2. p. 337; 13th February 1677, Carnegie *contra* Clark, No 2. p. 12840.; 10th

July 1677, *Carnegie contra Smith*, *IBIDEM*; 29th January 1678, *Stewart contra Stewart*, No 4. p. 12842.; 17th February 1736, *Ranken contra Ranken*, *voce SUCCESSION*; 13th February 1768, *Kemp contra Kemp*. * But the majority of the Judges were of opinion, that the question fell to be determined by the meaning of parties as expressed in the deed; and as that meaning was sufficiently clear, they did not think themselves at liberty, from the authorities of lawyers and decisions which the parties had never heard of, to give it any other explanation

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The following judgment was given 1st December 1769: "In respect it appears from the conception of the several clauses in the contract of marriage, that the whole provisions in the contract were intended to be in favour of the whole children equally, and the whole subject to the power of division by the father; and failing of him by the nearest of kin; find, That the whole subject must be divided equally amongst the whole children of the marriage." And upon advising a petition and answers, they adhered.

Lord Ordinary, *Pitfour*. For the Pursuer, *Crosbie*. For the Defender, *Lockhart, J. Graeme*.
Clerk, *Gibson*.

*R. H.**Fac. Col. No 5. p. 12.*

S E C T. II.

Import of a Provision to be a Bairn in the House.

1619. February 14. M'MATH against M'CALL.

MARGARET M'CALL and her spouse pursue Patrick M'Call her brother, executor to John M'Call their father, and M'Call her other brother, and heir, for his interest, for payment to her and her spouse of the equal half of the goods in their father's confirmed testament, and for the half also of the bonds libelled due to her father, and assigned by him to Patrick, whereto Patrick has right as executor or bairn; *hoc medio*, because their father by his bond was obliged, his heirs and executors, to make her at his death as meikle of his gear as any of his two sons, and should noways defraud her thereof, and that she

No 10.

A bond to a married daughter, bearing that she should have as much of her father the granter's gear, at his death, as the rest of the children,

* Not reported.