

No 49.

only a provision to younger children, when the elder was formerly provided for.

But, *2do*, Supposing the deeds reducible of their own nature, they must be supported from the pursuer's consent. The moment a man is on death-bed, there arise three several interests, which he cannot hurt, that of the heir, of the children, and of the relict: Now it has been many times determined, the relict and children's renunciation will bar them; and why ought not the heir's to have the same effect? There can no difference be conceived betwixt this case, and that of lands disposed to an heir, with a reserved faculty: The accepting of a provision in full of all pretensions, and then quarrelling this deed, is equally approbating and reprobating; and it cannot be denied to be a prejudice to the heir, to take that under a burden, which, had it not been for the deed on death-bed, he would have taken free.

It was disputed whether Patrick Irvine had heirship moveables, being only in- feft in houses in Prestonpans.

THE LORDS, 4th December, sustained the reasons of reduction; and there- fore reduced the dispositions libelled, and found the defunct had heirship move- ables, and that the pursuer had a right to them: And this day they refused a reclaiming bill and adhered. See HEIRSHIP MOVEABLES.

Act. *A. Mardowal.*Alt. *G. Bown.*Clerk, *Gibson.*Fol. Dic. v. 3. p. 123. *D. Falconer, v. 1. p. 27.*

1743. June 15.

Competition, CREDITORS of REDHOUSE with THOMAS GLASS, &c.

No 50.

A man entail- ed his estate to heirs-male, making a pro- vision to daughters and heirs female. Having a son, it was con- tended a daughter had no claim, not being heir- female. Found, that heir-female meant only daughter.

CAPTAIN HAMILTON of Redhuse tailzied his estate to ——— Hamilton his- son, and his heirs-male, &c.; and, by a clause in the deed, he provided, 'That in case there shall be daughters, and heirs-female procreate of his body, alive at the time of his decease, then, and in that case, he obliged his heirs-male and tailzie therein specified, to pay the said daughters and heirs-female, ane or mae, 10,000 merks, to be equally divided amongst them after his decease.' The Captain died leaving one son, and a daughter named Helen, who was mar- ried to Mr Adam Glass. In the ranking of the creditors on this estate, Helen's children claimed to be ranked for this 10,000 merks provided by the foresaid bond of tailzie, to be paid to the daughter, or heir-female, procreate or to be procreate of Captain Hamilton's body.

Objected for the Creditors, That the provision of 10,000 merks did obviously appear, from the scope of the deed of entail, to have been allenary intended to take place in favour of such daughter as was vested with the character of heir-female of Captain Hamilton's body, which could never apply to Helen Ham- iltion, the Captain's daughter, as there was one son procreate of the Captain's body, who survived his father: and that it was only meant to be effectual, in

case they were excluded from the succession to the lands of Redhouse by a collateral heir-male, in virtue of the foresaid tailzie, as a recompence to the daughters or heirs-female,

That, through the whole of the deed, the persons entitled to this provision are uniformly designed 'daughters and heirs-female,' conjunctively; which, in other words, imports that the provision was not intended for the daughter *qua* such, but under the legal character of 'heir-female;' so that both characters must unite in one person before the provision could be claimed. In some cases, the words, 'heirs-female of a man's body,' have been construed as *tantamount* with daughters; but, in the present question, the whole circumstances do concur to enforce the legal and proper construction of these words. It was further observed, that, by the Captain's contract of marriage, the fee of the estate stood provided to the heir-male of the marriage; and, as he seemed very anxious to preserve the succession in the male-line, it was not presumeable he meant to burden his son with so exorbitant a provision to an only daughter, especially considering that the whole yearly rent of Redhouse was no more than L. 1000 Scots at the date of the tailzie, and even that greatly burdened. In a word, it is plain the Captain only intended this provision as a satisfaction to his daughters, in the case of the estate's going by them to a collateral heir-male; as it is likewise evident from this, that he made no provision for younger sons; which, it is natural to suppose, he would have done at the same time, if he had intended to provide daughters *qua* such.

Answered: As it was admitted, that, in some cases, the words, 'heirs-female of a man's body,' have been construed as signifying the same thing with daughters, when, from the circumstances of the case, such appears to have been the intention of the donor, that the daughters should take, though, properly speaking, they were not 'heirs-female,' it was plain, that 'heirs-female' is an expression frequently used inaccurately in contracts of marriage, and other writings, and often synonymous with the word *daughters*; and it is certain, that, generally speaking, unless the contrary appear by other circumstances, when a provision is made to daughters and heirs-female, the intention is that the same shall go to daughters. It is true, that, when a provision is granted under two characters, clearly understood, and expressed by words having a certain and determinate meaning, both characters must concur; but yet certain it is, that the word *and* is sometimes construed *disjunctive*, and not *copulative*, and is taken to be the same as *or*; and therefore, when two words *are* joined together, whereof the one has a determined meaning, the other a vague and undetermined one, in order to express a creditor in a sum, though they are tacked together by an *and*, the natural construction is, that the one is exegetic of the other; and that the certain meaning of the one fixes the vague and undetermined signification of the other, so as to be exegetic and not taxative. Neither was it an irrational deed in the Captain, as he gave not only his land-estate to his heir, but likewise his whole moveables, particularly a bond for 8000 merks; and, if there

No 50.

had been ever so many daughters, they would have got no more, though in the event there happened only to be one who had a right thereto: And, if the intention had been that the provision should only be payable by the collateral heir-male, the sum would have been made payable upon the succession's opening to him, instead of which it is made payable upon the Captain's decease; which shows he meant the provision should be effectual, even though he left a son, in which case the daughters could not be 'heirs-female' in a proper sense.

THE LORDS found, That, by the conception of the clause in the tailzie, whereby the heirs of entail were obliged to pay to the tailzier's daughters and heirs-female, one or more, the sum of 10,000 merks, Helen Hamilton, the only daughter of the maker of the entail, was entitled to the provision, in the event which happened of the tailzier's own son succeeding to the estate, as well as she would have been entitled to the said provision if the estate had devolved upon the collateral heirs of entail.

N. B. The above interlocutor was reclaimed against.

Fol. Dic. v. 3. p. 124. C. Home, No 237. p. 384.

No 51.

A person in a post-nuptial contract of marriage, burdened his heir male with provisions to his daughter or heir-female. Found, that the term *heir-female* was mere exegetic, and did not comprehend a son's daughter.

1747. July 1.

EWING *against* MILLER.

IN a post-nuptial contract in August 1699, between Thomas Whitehill, *alias* Ewing, of Keppoch, and Sarah Gordon his spouse, Whitehill obliged himself to provide and secure the heir-male of the marriage in the fee of the L. 5 lands of Keppoch, &c.; and in case there should happen to be no heir-male of the marriage, but one daughter or heir-female, he bound himself and the heir-male succeeding to him in the said lands to pay to the said daughter or heir-female 3000 merks; and in case there should happen to be two or more daughters (without repeating the exegetic *or heirs-female*) to pay to the said daughters L. 3000.

Of this marriage there were two sons and one daughter, all of whom predeceased the father without male issue; but the second son left a daughter Sarah, and the daughter left a son.

The father Thomas being under no restraint as to the settlement of his succession by the failure of the issue male of his body, settled his estate on Thomas Miller his grand-child by his daughter, and gave a bond of provision for for 1000 merks to Sarah the daughter of his second son. With this, Sarah not contented, pursued the disponee Thomas Miller for the sum of 3000 merks, to which she laid claim as the daughter or heir-female of the marriage, to whom 3000 merks was provided by the contract of marriage; for, though not the immediate daughter, she was the only daughter or heir-female existing at the father's death, and as *fili appellatione omnes liberi intelliguntur*, so in many cases, particularly that of the tailzie of Kinfauns, the term *daughter* was extended to grand-children. See TAILZIE.