fences, competent in law, againſt the witneſſes; and ſuch further proceedings ſhall thereupon be had before the Lords of Seſſion as to juſtice ſhall appertain.

For Appellant, *Rob. Raymond. Will. Hamilton.*

John Allardice, Merchant in Campvere, *Appellant*; Caſe 90.
Jane Smart, Widow and Executrix of the Appellant's Father, for herſelf and her Children, - - - - - *Reſpondent.*

12th *Feb.* 1721-2.

Proviſions to Heirs and Children —A ſpecial proviſion, in a marriage contract, of ſums of money to be laid out on land or other good ſecurity, and alſo of conqueſt in lands, heritages, fiſhings, ſums of money and others, to the *heirs* of the marriage, went to all the children, and not to the eldeſt ſon only.

A diſcharge of proviſions granted by two children to their father, in conſideration of a certain ſum of money, paid to them, operated in his favour with regard to the remainder of their proviſions, and not in favour of another child, who did not diſcharge.

Fiar.—A houſe, part of the conqueſt of a firſt marriage, is diſponed to a perſon and his wife in conjunct fee and life-rent, and to the bairns of the marriage in fee, whom failing, to the heirs of the huſband: the huſband being fiar might ſettle the life-rent thereof on a ſecond wife.

BY contract of marriage in September 1683 between John Allardice, Merchant in Aberdeen, and Agnes Mercer his firſt wife, the appellant's father and mother both now deceaſed, the ſaid John Allardice obliged himſelf to lay out 3000 merks Scots of his own money, together with the like ſum he was to receive with his wife as her portion, upon land, or other good ſecurity, and to ſettle the ſame upon himſelf and the ſaid Agnes Mercer, in conjunct fee and life-rent of the longeſt liver of them two, and the *heirs* to be lawfully procreate between them; whom failing, to the ſaid John Allardice, his heirs, executors, and aſſignees. The contract contained this proviſo, "that whatſoever "lands, heritages, fiſhings, debts, ſums of money and others, it "ſhall happen either of the ſaid parties to conquer, acquire, or "ſucceed to, during the time of the ſaid marriage, the *heirs* of "the marriage ſhall ſucceed thereto *in integrum.*"

In 1684, after the marriage had taken effect, John Allardice, the appellant's grandfather, by diſpoſition, conveyed a houſe and its pertinents in Aberdeen, to the ſaid John Allardice the father, and the ſaid Agnes his ſpouſe, in conjunct fee and life-rent to the longeſt liver of them two, and to the *bairns* lawfully begotten, or to be begotten, between them in fee; whom failing, to the heirs of John the father.

In 1700 the appellant's mother Agnes died, leaving iſſue the appellant and two daughters, the children of that firſt marriage. And at this time the father's free ſtock amounted to about 18000*l.* Scots,

Scots, beſides the ſaid houſe and pertinents in Aberdeen, valued in his books at 5210*l.* 16*s.* 9*d.* Scots, and all his houſehold goods.

In January 1703 a contract of marriage was entered into between the appellant's father and the reſpondent Jane his ſecond wife, by which he obliged himſelf to lay out 15000 merks of his own money, together with the ſum of 7000 merks he was to receive as the ſaid Jane's portion, upon land or other good ſecurity, and to ſettle the ſame upon himſelf and the ſaid Jane in conjunct fee and life-rent, and to the children to be procreated of the marriage in fee, whom failing, to be the heirs, executors, and aſſignees of the huſband; and be likewiſe obliged himſelf to infeft the wife in the ſaid houſe in Aberdeen in life-rent during her widowhood, in caſe ſhe ſhould ſurvive him, which he obliged himſelf to warrant; but it was provided, that if the reſpondent ſhould after his death be evicted thereout, ſhe ſhould be allowed 100*l.* Scots yearly for the rent of any other houſe ſhe ſhould think fit to take.

The appellant, being bred a merchant, was ſettled at Campvere, and his father gave him an advancement to a conſiderable amount. The two daughters of the firſt marriage were married in the father's life-time, and he gave each of them 4000 merks for their portions; and the daughters, by their contracts of marriage, diſcharged him of all proviſions they could reſpectively claim by their mother's marriage contract or otherwiſe howſoever.

The appellant's father died in May 1718, leaving the reſpondent, his widow, and nine children, four ſons and five daughters, of the ſecond marriage. By his will, and a codicil thereto, he named his wife, the reſpondent Jane, ſole executrix and univerſal legatee, with the burden of payment of 6000 merks to each of the four ſons, and 4000 merks to each of the five daughters of the ſecond marriage, and of ſome ſmall legacies to the children of the firſt marriage. After his father's death, the appellant was cognoſced heir to him in the aforeſaid houſe and premiſes in Aberdeen, and infeft. Beſides that houſe and premiſes, and houſehold goods, the deceaſed left about 39,535*l.* 1*s.* 6*d.* Scots of perſonal eſtate, including heirſhip moveables.

Soon after his father's death the appellant brought an action before the Court of Seſſion againſt the reſpondent, for recovery of the 18,000*l.* Scots, being, as he ſtated, his father's ſtock at the diſſolution of the firſt marriage, after deduction of the 8000 merks paid to his two ſiſters, and for recovery of the ſaid houſe in Aberdeen, as being *conqueſt* of the firſt marriage, and provided to the heir thereof, and to have the ſame freed of the reſpondent's life-rent. The reſpondent made defences, and the matter being debated before the Lord Ordinary, who reported the ſame to the Court, their lordſhips, on the 16th of February 1720, "found that the heirs of the firſt marriage have right to all the "*conqueſt* during that marriage, in regard that at the time of "their mother's death, there was a ſufficient fund to anſwer the "proviſions in both contracts of marriage; and found that the

"proviſions

" proviſions in favour of the heirs of the firſt marriage " are to be underſtood in favour of the children of the mar- " riage; of whom there being three in number, and two of " them having accepted of ſpecial ſums from the father, in " ſatisfaction of all they could claim by virtue of the ſaid con- " tract; therefore the appellant was only entitled to claim a " third ſhare of theſe proviſions; and found that the proviſions " in the ſecond contract of marriage are rational and ſuitable " proviſions; and found that the relict has right to the life-rent " of the houſe provided to her by the contract of marriage with " her huſband, who was fiar."

The appellant reclaimed, and after anſwers for the reſpondent, and a hearing, the Court, on the 14th of July 1720, " found " that two daughters of the firſt marriage having accepted of " proviſions in their contracts of marriage, in ſatisfaction of all " that could fall to them by their mother's contract; which " proviſion being leſs than would have fallen to them as two " of three children of the firſt marriage, ſuppoſing that all the " children of that marriage were entitled to an equal ſhare the " ſurperplus of the two-thirds more than the proviſions received " did not accreſce to the ſon of the ſaid marriage but was at the " father's free diſpoſal; and before anſwer to the debate, whether " the proyiſions in the firſt contract in favour of the *heirs* " of that marriage, did entitle the ſon of that marriage to the ſuc- " ceſſion thereof, excluſive of his two ſiſters, or if the three " children had an equal intereſt, ordained the records of retours " in the Chancery to be inſpected, and that either party might " have acceſs thereto, that it might appear, whether in the caſe of " proviſions of ſums of money, or other moveables in favour of " the heirs of a marriage, the eldeſt ſon of that marriage be not " uſually and uniformly retoured heir of proviſion of the marri- " age, excluſive of daughters, or younger ſons; or if uſually, or " in any caſe, more ſons and daughters of a marriage are found to " be retoured heirs of proviſion, by a virtue of a contract of mar- " riage conceived in the terms aforeſaid; and that the directors " of the Chancery ſhould certify what appeared thereon; and " found that the clauſe of acquiſition in the deceaſed's firſt con- " tract comprehended goods, merchandize and gear; and alſo " found that the ſpecial ſum provided to the children of the ſecond " marriage, is in the firſt place to be taken out of the acquiſition " during that marriage, and that the ſame does affect the acqui- " ſition of the firſt, in caſe, and in ſo far only as the aquiſition " of the ſecond marriage falls ſhort of ſatisfying the ſame.

The parties thereupon procured certificates from the deputy-director of Chancery, the firſt of which, obtained by the appellant, dated the 18th of July 1720, " certified after inſpection of the " regiſter of retours he found that the eldeſt ſon of a marri- " age is uſually and uniformly retoured as heir of proviſion of the " marriage, and that ſolely and no other perſon joined with him; " and that in no caſe did it occur therein, that more ſons and " daughters of a marriage are retoured heirs of proviſion by vir- " the of a contract of marriage conceived in favour of the heirs

" of a marriage." The other obtained by the reſpondent, dated the 10th of January 1720-1, bore " that it did not occur in the " regiſters of retours in Chancery, that any perſon is ſerved heir " of proviſion to ſums of money or other moveables."

After production of theſe certificates and hearing the import of the word *heirs* debated, the Court on the 11th of January 1720-1, " found that the three children of the firſt marriage had an " equal intereſt in the proviſions contained in their mother's con- " tract of marriage."

Entered, 6 Nov. 1721.

The appeal was brought from " ſeveral interlocutory ſentences " or decrees of the Lords of Seſſion in Scotland, of the 16th of " February, and 14th of July 1720, and of the 11th of January " following."

Heads of the Appellant's Argument.

Though by the conception of the firſt contract, the heirs of the marriage are to ſucceed, which, when the ſubject of the ſucceſſion is perſonal, may admit of the interpretation, that the proviſion was in favour of the children; yet ſtill the father had the power of diviſion, and as he has only given 4000 merks to each of the daughters, which they accepted, this was nothing but a dividing to each of them their ſhare thereof, leaving the reſt for his only ſon to ſucceed to, who, properly ſpeaking, is the only heir of the marriage. Without this the ſaid contract could never be fulfilled, whereby the ſucceſſion to the conqueſt was provided to the heirs of the marriage *in integrum*. And this appears to have been the father's intention; ſince he took no aſſignment of any pretenſions his daughters might have thereto, but gave them ſuch a proviſion as he thought was ſuitable, with reſpect to the heir, and the extent of his fortune.

As to the houſe in Aberdeen, it is out of the queſtion; the appellant's father, during his firſt marriage, having received a diſpoſition from his father to him, in favour of himſelf and his wife, in conjunct fee and life-rent, and to the heirs of that marriage in fee; and the appellant, who alone could be heir of the marriage in lands, is accordingly cognoſced heir and infeft. It appears from the ſecond contract of marriage, that both parties were diffident of the effect of the reſpondent's life-rent in the Houſe; for though the appellant's father warranted it, yet he provided that in caſe of eviction, his heirs ſhould only be liable in 100*l.* Scots *per annum*, for the rent of another houſe; which 100*l.* Scots ought to be taken out of the acquiſition during the ſecond marriage, rather than that the appellant, the heir of proviſion of the firſt marriage, and conſequently a creditor, ſhould be burdened therewith.

As to the father's ſtock, which amounted to 18,000*l.* Scots, at the diſſolution of the firſt marriage, and to 20,000*l.* by the improvement thereof at the time of entering into the ſecond marriage, the proviſion of 15,000 merks to the children of the ſecond marriage, where the remainder included the ſpecial proviſion of 6000 merks in the firſt contract was invalid. But there neither

was

was nor could be a diſpoſition nor aſſignation to any part of the deceaſed's ſtock at the time of entering into the ſecond marriage: all the father could do was to oblige himſelf in the ſum of 15,000 merks certain to the children of the ſecond marriage, which muſt always be ſuppoſed to be made good out of any other ſeparate eſtate, which he had, or might acquire without prejudice to his obligations in his firſt contract of marriage; the children of that marriage being properly creditors to the father. And the father, at his death, left an eſtate behind him ſufficient to ſatisfy both his marriage contracts.

With regard to the interlocutor finding that the three children of the firſt marriage had an equal intereſt in the proviſions contained in their mother's contract of marriage; the import and conſtant acceptation of the word *heirs*, in all deeds and writings, is always underſtood in favour of the eldeſt ſon; the only caſe wherein daughters are joint-heirs with the eldeſt ſon, in the perſonal eſtate, being where they are left unprovided by the father; which is no way applicable to this caſe. The uniform and uſual practice of the records of retours in the Chancery in Scotland, evidently ſhews that the appellant only was capable of being retoured heir of proviſion in the contract of marriage, and he accordingly was ſo retoured. By this interlocutor the two daughters are entitled to an equal ſhare of the whole proviſions in the contract, both real and perſonal, which is directly contrary to the conſtant practice of the Scots law, and the univerſal cuſtom of all degrees of perſons, who always make a difference between the eldeſt, and younger ſons, and daughters, even where proviſions are to *children*; much more when to *heirs*. It is evident that this was the intention of the parties to the contract by their uſing ſimply the word *heirs*, the meaning of which they could not be ignorant of, and by the particular enumeration of the ſubjects provided to the heirs, viz. lands, heritages, fiſhings, &c.

The decree of the Court ſeems inconſiſtent with itſelf, ſince the Court of Seſſion, by the firſt part of their interlocutor of the 16th of February 1720, find that the heirs of the firſt marriage have a right to the acquiſition during that marriage, which the reſpondent has acquieſced in; and yet it is not alleged, that more than 8000 merks has been paid: and the proviſion to the appellant and his ſiſters by the codicil to their father's will comes far ſhort of fulfilling the proviſions in the firſt contract.

Heads of the Reſpondent's Argument.

The appellant has only a right to the third of what his father had at the diſſolution of the firſt marriage, for the proviſion is in favour of *heirs to be lawfully procreate* between the father and mother; which can have no other meaning but the children of the marriage, and not of the heir male only, eſpecially in caſes where there is nothing but perſonal eſtate; and the rather ſince the 6000 merks agreed to be ſettled, is to go in the ſame way as the conqueſt, which plainly ſhews the import and meaning to have

been all the children, otherwiſe the younger children muſt have had nothing.

The father being bound to apply the conqueſt to the children of the firſt marriage, he might diſcharge that obligation the beſt way he could to the ſatisfaction of the parties; and as he was the debtor, whatever advantage is obtained by any tranſaction, muſt be to the uſe of the father; for he muſt be preſumed rather to diſcharge himſelf, than to acquire any right to another. The two ſiſters were then entitled each of them to a third ſhare, the father agrees with them for a leſs ſum, and that muſt and can only be to the benefit of the father, who was their debtor; and this the rather ſince he had been at the expence of their education and marriages after his ſecond marriage, which ſo far diminiſhed the conqueſt of the ſecond marriage, to which the reſpondent and her children had a right. Nor could there be any occaſion for an aſſignment to the daughters ſhares, for the father being debtor, the releaſe extinguiſhed the debt; and the father was ſo far from intending any benefit to the appellant by theſe tranſactions, that he expreſsly declared in his ſettlements, that the ſum of 10,000 merks, and fee of the houſe given to him, ſhould be in full of all he could claim by his mother's contract of marriage, or any other way whatſoever.

With regard to the houſe in Aberdeen, the father was ſeiſed thereof in fee, he could have diſpoſed of it to whom he pleaſed, and conſequently the ſettlement thereof upon the reſpondent for her life only, cannot be called in queſtion by the appellant; and the rather ſince the father has warranted the ſaid houſe to the reſpondent, which warrandice deſcends to the appellant as his heir, and he is thereby bound to perform his father's deeds, and cannot call any of them in queſtion; which caſe was determined by the Houſe of Lords in 1718-19, in the caſe Ayton v. Colville.

No. 50. of this Collection.

The greateſt part of the appellant's father's eſtate was gained during the ſecond marriage: the fortune the reſpondent brought was more than twice as much as that of the appellant's mother; the appellant has had his education at the expence of his father, and has received much more, than any of the children of the ſecond marriage, who muſt be educated, and whoſe proviſions are much diminiſhed by this expenſive ſuit, and the proviſions for the children of the ſecond marriage are entirely rational.

Judgment, 12 Feb. 1721-2.

After hearing counſel, *It is ordered and adjudged that the ſaid petition and appeal be diſmiſſed, and that the interlocutory ſentences or decrees therein complained of be affirmed.*

For Appellant, *Rob. Raymond.* *C. Talbot.*
For Reſpondent, *Sam. Mead.* *Will. Hamilton.*

Hog v. Laſhley on appeal 7 May, 1792.

In the important caſe of Hog v. Laſhley, in the Houſe of Lords 7 May 1792, a judgment of the Court of Seſſion was affirmed, which found that renunciations by children of their claim of legitim operated in favour of a child who did not renounce, and not

not of the father. In the preſent caſe the Houſe affirmed a contrary doctrine laid down with regard to the renunciations made by the children of the firſt marriage of their proviſions by contract.

John Walker of Edinburgh, Merchant, - *Appellant*, Caſe 91.
Robert Forreſter of Edinburgh, Merchant,
and William Macpherſon of Edinburgh,
Writer, - - - *Reſpondents*.

16th *Feb.* 1721-2.

Bona fide conſumption.—An adjudication obtained in 1678, being found extinguiſhed by receipts of the rents: in a ſubſequent action of count and reckoning, the Court having found the defence of *bona fides* ſufficient to liberate till the date of the interlocutor, finding the adjudication compenſed, and that the defenders were not put *in mala fide* by the citations and arreſtments, the judgment is reverſed, and they are ordered to account from the date of the arreſtments uſed at commencement of the former action.

Coſts and Expences.—In an action relative to the commencement of *mala fides*, the Court having found that the ſame did not commence from the date of citation and arreſtment, but from the date of the decree, and refuſed the purſuer his expences; on a reverſal of the judgment, it is ordered that the Court tax, and aſcertain the expences in that action, and that the ſame be then paid to the appellant.

JOHN HANDYSIDE, who was the proprietor of ſeveral houſes in the city of Edinburgh, being indebted to the reſpondents, or thoſe under they claim, they obtained an adjudication of theſe houſes for payment of the ſaid debt, in December 1677; and by virtue thereof got into poſſeſſion of the ſame in 1678. As ſtated by the appellant, the debt due to the reſpondents or thoſe under whom they claim amounted to 277*l.* 15*s.* 6*d.*, and the yearly rents of the premiſes were 66*l.* 13*s.* 4*d.*

In 1713 Janet Handyſide, the daughter of the ſaid John Handyſide, who had been abroad for ſeveral years, and who claimed right to the premiſes as heir to her father who had died many years before, conveyed all her right and title to the premiſes, and all her right of reverſion, to the appellant; who was thereupon infeft.

The appellant ſoon after brought his action before the Court of Seſſion againſt the reſpondents, to have it declared, that the debt due to thoſe under whom they claimed was ſatisfied and paid by their receipt of the rents and profits; and to have the reſpondents decreed to account for what they had received over and above the payment and ſatisfaction of their juſt demands. And in 1714, the appellant likewiſe arreſted the rents in the hands of the tenants; but the reſpondents having found ſecurity to make the ſame forthcoming as accords, the arreſtment was looſed, and the reſpondents were ſuffered to continue in poſſeſſion till the event of the cauſe.