

common sense of the provision, or prejudice the daughter's right thereby; and albeit the pursuer might be infest as one of the heirs of the marriage, that will not import her being liable to fulfil her father's disposition; because heirs of provision are partly heirs, and partly creditors in the provision, and not simply heirs; and, therefore, as to the terms of the provision, the father cannot alter the same, and the bairns succeeding may quarrel any fraudulent or gratuitous deed of the fathers, in prejudice of the provision, as is commonly known in the debate betwixt heirs of different marriages, where the heirs of the first marriage are not obliged to fulfil the provisions in favour of the bairns of the second marriage, in so far as they derogate from the provisions in the first contract of marriage: And though it was lately found, that a general clause of conquest, during the marriage, did not hinder the father to do any deed upon a cause onerous, or rational consideration, but only excluded fraudulent acts or such as had no reasonable consideration; yet here it is a special provision relating to the tenements the father then had; and it is most irrational his wife should liferent them all, seeing he hath no more; so that such heirs of provision, though they be liable for the defunct's debt, or onerous obligations, yet would not be liable for perfecting the infestment to heirs of a second marriage, as being fraudulent, much less for a provision to their own mother, in prejudice of the provisions in the contract, so that they might assign the provision as creditors, and the assignee might adjudge the tenements, without their entry; or though they entered, they might quarrel this posterior provision to their mother, as contrary to the contract of marriage; but this restriction being, in effect, an assignation to the children of the half of the liferent, in favour of the bairns of the marriage, they may immediately pursue her, or the tenants, for payment of the rents thereupon.

Which the LORDS sustained, and repelled the defence.

*Fol. Dic. v. 2. p. 275. Stair, v. 2. p. 504. & 536.*

1678. January 21. EADIE KINLOCH against KINLOCH.

A FATHER provides his estate to the bairns of the marriage. There is a son and a daughter. It being queried to the Lords, if the sister might not serve herself joint heir of provision with her brother, the LORDS resolved affirmatively; where the provision is to bairns in the plural number; and this was done by two practicks, 14th January 1663, Thomas Bog *contra* Thomas Nicolson, No. 44. p. 4251.; and 17th February that same year, Margaret Hay against Sir George Morrison, No 1. p. 12839.; and so the LORDS ordained the service to go on, although the brother was already served general heir of provision, and was content his sister should have action against him.

*Fol. Dic. v. 2. p. 275. Fountainhall, MS.*

No 2.

No 3.