'right to an equal share thereof: And find that the issue of such of the said children as died before the said James M'Kenzie, have right to their parents' shares of said legacy; but that the nearest in kin of the children who died without issue before James M'Kenzie, have no right to any part thereof.' No 15.

Reporter, *Lord Gardenston.* Act. *J. M'Kenzie.* Alt. *Elphinstone* and *J. M'Kenzie*, jun.
Clerk, *Menzies.*

S. *Fac. Col. No 27. p. 49.*

1793. *June* 19.

MARGARET OLIPHANT and her Husband *against* JOHN OLIPHANT.

No 16.
An heir of entail exercised a reserved faculty to its full extent, by granting a bond of provision to his younger children then existing. He afterwards married a second time, and had a son and a daughter by the second marriage, but died before making any alteration on the former bond of provision. The son of the second marriage having succeeded to the estate, the Lords found, that he was not entitled to any share of the bond of provision, but reserved to the daughter to claim her share.

THE entail of the lands of Bachilton, executed by Patrick Oliphant in 1729, contains the following provision: 'That it shall always be liesome and lawful 'to me, and the hail other heirs of tailzie who shall succeed in time coming, 'to provide my younger, or their younger children, other than the heir who 'shall succeed to the lands and estate before mentioned, with suitable and competent provisions, not exceeding three years free rent of the estate for the 'time.'

Under this entail, John, commonly called Lord Oliphant, succeeded to the estate. In 1776, when he had three children, Henry, Margaret, and Eleonora, he granted to the two latter a bond of provision for L. 1,000, or such other sum, less or more, as should amount to, and not exceed three years rent.

After the date of this bond, John Oliphant married a second wife, by whom he had two children, John, who was above two years of age when his father died in the year 1781, and Janet, of whom he left his wife pregnant.

At his death he had no other fund for the provision of his younger children, except the reserved power to burden contained in the entail. Henry, the eldest son by the first marriage, predeceased his father, leaving one son, John Harrison Oliphant, on whom the estate devolved.

In 1785, Margaret Oliphant took a decree of constitution against him, for one half of the sum contained in her father's bond of provision to her sister and her, and having thereafter led an adjudication against the estate, she brought an action of mails and duties.

John Harrison Oliphant, the defender in this action, at the same time brought a reduction of the bond, and whole diligence proceeding upon it; but having died during the dependence of these actions, the succession opened to his uncle John Oliphant, who thereby became a party to them, and

Pleaded; The reserved faculty was intended as a fund of provision to the whole younger children of the heir of entail. John Lord Oliphant, therefore, by excluding his children of the second marriage, exceeded his powers, and they are entitled, if not to set aside the bond *in toto*, at least to an equal share of its benefit with his younger children. Upon the same principle, although a

No 16. father has the power of distributing the sums provided by a marriage-contract to the younger children, if he should attempt to exclude any one child altogether, that child would be entitled to the same share as if no division had been made.

The case in question is much stronger than if the children of the second marriage had been intentionally excluded. At the date of the bond, the defender and his sister were not in existence, or in the view of the granter. In these circumstances, the law will presume, that it was granted under the implied condition, that if other children should afterwards be born, they should come in for an equal share; 18th July 1729, Anderson against Anderson, No 5. p. 6590.; *Inst. lib.* 2. *tit.* 13. § 1; *Vinnius ad loc. cit.*; *D. l.* 3. § 1. *De injust. rupt. &c. test. l.* 12. *pr. ejus tit.*; *D. lib.* 28. *tit.* 2. *De liber. et post. &c.*; *Voet.* § 4 *ejus tit.*; Blackst. vol. 2. p. 502; Raymond's Reports, p. 441, Lugg *v.* Lugg; Peere William's Reports, v. 1. p. 304, Cook *v.* Oakly.

Answered; The entail gave the heir a power of providing for the younger children, but laid him under no obligation to grant a provision to any one of them, far less to the whole. The spirit of an entail, which is to preserve the estate as free from incumbrances as possible, is adverse to the presumption of such an obligation. As therefore the father might have omitted to take advantage of the faculty altogether, so he is the sole judge of the proper mode of exercising it; the children here had no *jus crediti*, as they would have had, if they had claimed under a marriage-contract.

How far it was an implied condition in the bond, that the children born after its date should have an equal share of it, is a mere question of intention, and presumption is excluded by the circumstances of the present case, where the granter, the heir under a strict entail, survived the execution of the bond fifteen, and the birth of the defender, two years; Bankt. v. 1. p. 227. § 6. 20th December 1758, Yule against Yule. No 51. p. 6400.

The plea of the defender is the more unfavourable, that he has since his father's death succeeded to the entailed estate; and it cannot be presumed, that his father, had he foreseen that event, would have diminished the provisions to his daughters on his account, or at least it is probable that he would have qualified the provision so as that it should cease upon the defender's succeeding to the estate. Little argument can be drawn from the *Tit. De rupt. &c. test.* because by the Roman law *sui hæredes* could only be disinherited *nominatim*; so far, however, as its principles admit of a question of implied intention, it is agreeable to the doctrine now laid down; *l.* 102. *D. De condit. et demonst. lib.* 35. *tit.* 1; *Voet, lib.* 36. *tit.* 1. § 18. *ad S. C. Trebell.*

Replied; If the heir of entail had made no provision upon the younger children, the Court, upon the same principles of equity upon which they had proceeded in similar cases, would have found them entitled to the full extent of the faculty; 10th February 1673, Graham against Lord Morphie, No 10. p. 4100.

THE LORD ORDINARY 'repelled the defences, and decerned against the tenants and factor in the mails and duties libelled.' No 16.

At advising a reclaiming petition and answers, it was

Observed on the Bench; If the defender ever had a right to claim any part of the bond of provision, he could not lose it by succeeding to the estate. But as he was born two years before the death of his father, who, during that time, neither revoked the bond, nor made any alteration upon it, the presumption of law is, that he did not intend that this son should have any share of the provision. The defender's sister is in a different situation. She, as a posthumous child, may be entitled to a proportional part of the bond. But as she is not a party in the present suit, all that can be done is to reserve her interest.

THE COURT accordingly "repelled the defences, so far as the petitioner (defender) claimed any share of the provision in question, as one of the younger children, and found the pursuer and her husband entitled to one half of said provision; reserving nevertheless to Janet Oliphant the petitioner's sister to claim a share of the said provision."

Lord Ordinary, *Hailes*. Act. *Rolland* et alii. Alt. *Macleod-Bannatyne*. Clerk, *Sinclair*.

R. D. *Fol. Dic. v.* 3. *p.* 310. *Fac. Col. No* 63. *p.* 138.

Meaning of various clauses explained by implication; *see* CLAUSE.

Implied substitution; *see* SUCCESSION.

Implied limitation; *see* FIAR ABSOLUTE LIMITED.

Implied will to alter deeds; *see* PRESUMPTION,—Presumed alteration and revocation.

Implied will in cases of entails; *see* TAILZIE.

See APPENDIX.