

No 69.

it was just and reasonable to appropriate part of the price to them, especially when he had other funds for satisfying the provision to the Children of the second marriage, namely, the remaining 1500 merks of the price of the lands, his moveables and plenishing, and an annuity of L. 8 Scots yearly out of a house in Burntisland, which had been disposed by his second wife's father to him and his wife in conjunct fee and liferent, and to the heirs to be procreated betwixt them; which failing, to the wife's nearest heirs and assignees.

It was *replied* for the Children of the second marriage, That though the defenders were heirs of provision in the lands of Grangemire, yet as heirs they were liable not only for their father's onerous, but likewise for his rational deeds, particularly for competent provisions made to the bairns of a second marriage, as appears from Lord Stair, B. 2. T. 3. § 41., & B. 3. T. 5. § 19., and a decision 19th June 1677, *Murrays contra Murrays*, Section 11. *h. t.* As, therefore, had they enjoyed the lands of Grangemire, they would have been subject to the pursuer's claim; so having got all the free produce of it, they ought to be in the same way liable, at least in a proportionate share of it; and as to the other funds, it appeared that they were all spent and consumed by their father before his death; and as to the small tenement and annuity in Burntisland, the Children of the second marriage enjoyed these as heirs of provision to their mother, who, by the conception of the disposition appears to have been *fiar*; at least, they having been disposed by her father, they could never come in satisfaction of what the husband became bound to pay to the Children of that marriage on his part.

It was *duplied* for the defenders, That it was not now enough to allege an eventual insolvency after the father's death, when it appears that he had sufficiency of estate at the time of his taking the bonds in question; so that since there was no fraud in taking these bonds payable to the defenders, there could be no action of reduction competent to the pursuers, especially when it cannot be pretended, that the Children of the first marriage got any other provisions from their father.

“ THE LORDS found no fraud in taking the bonds in favour of the Children of the first marriage, and therefore assolizied.”

Reporter, Lord Polton. Act. *And. Macdowal.* Alt. *Ja. Graham sen.* Clerk, *Mackenzie.*  
*Fol. Dic. v. 4. p. 189. Edgar, p. 149.*

1730. January 27. HENDERSON *against* HENDERSON.

No 70.

A FATHER, who was bound to provide certain subjects to the heir of the marriage, having granted provisions to a second wife and children out of the same funds, the children of the first marriage were found entitled to a relief against their father out of a separate subject afterwards acquired by him. See APPENDIX. *Fol. Dic. v. 2. p. 283.*

\* \* See 13th February 1677, *Fraser against Fraser*, No 23. p. 12859.