

1734. December 5. FOTHERINGHAM *against* FOTHERINGHAM of Pourie.

No 71.

WHEN a father, in implement of his contract of marriage, does *de facto* employ the covenanted sum, and takes the same payable to himself, and after his decease to the heirs or children of the marriage, the sum, as his property, may be affected by his creditors; but then, as the obligation in the contract imports not barely that he is once to settle the sum, but to make it truly effectual to the heirs or children, which implies a prohibition to contract debt, so as to disappoint the heirs and children of their succession; this prohibition is sufficient to bar gratuitous creditors, though not onerous creditors, which nothing can do unless an irritant clause be added. Upon this footing it was found, that if the subject be carried away by onerous creditors, an action lies against the father and his cautioner at the instance of his children, for re-employing the sum, or making good the same to them after his decease. See APPENDIX.

Fol. Dic. v. 2. p. 283.

* * The same was found in the case of M'Intosh in 1717, No 36. p. 1288r.

And if a father, as being *fiar*, do any deed in prejudice of such an obligation, the heir of the marriage may charge him to purge the same, or to re-employ the like sum, see Fraser *against* Fraser in 1677, No 23. p. 12859.

1747. February 17.

ELIZABETH BETHUNE and Mr HENRY RYMER, Regent in St Leonard's College in St Andrew's, her Husband, *against* BETHUNE of Kilconquhar.

No 72.

THOMAS BETHUNE of Little Tarbat, afterwards of Kilconquhar, had, by his first wife, three daughters, to each of whom he gave, at their respective marriages, the sum of 5000 merks Scots, taking from them at the same time an obligation to make up titles to, and convey to him an heritable debt due to their mother then deceast, which afterwards was accordingly done.

Elizabeth the eldest daughter pursued her father, to secure to her the price of Little Tarbat, which he had sold, as being destined by the marriage contract between her mother and him, to the eldest heir female of the marriage; and in this process both copies of the contract being proved to have come into his possession, and not appearing, and Dr Bethune his brother deponing on the tenor thereof, the LORDS "found him bound to exhibit it; and if he failed, that there was sufficient evidence to presume against him, that the contract was of the tenor libelled, providing his lands and estate of Little Tarbat, and all other estate at that time belonging to him, failing heirs male of the marriage, to the eldest daughter without division."

A person having provided an estate in his contract of marriage to the eldest heir-female, failing males; and thereafter having given portions to his daughters; it was found he might impute the portion given to the eldest, to the price of the estate which he had sold, and for which she pursued his heir, but could not.