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. 12881. 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.
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.

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."

No 72. impute the provisions given to the rest, as he was otherwise able to provide for them.

When this interlocutor came to be applied, Kilconquhar *pleaded*, That notwithstanding the estate's being contracted to the eldest daughter, it remained in his power to give competent provisions to the younger, without being obliged to lay these on his separate funds afterwards acquired; that he had accordingly given to them portions, as also to this pursuer; which sums, with interest from their being severally advanced till the time of the succession's opening to her, behoved to be deducted out of the value of the estate which he was obliged to leave her.

Pleaded for the pursuer; That a father was indeed not tied up by his contract of marriage from burdening the heir with rational provisions, because the quality of heir subjected him to fulfil his deeds, and his other quality of creditor could only profit him, to the annulling of such as were neither onerous nor rational; but this did not hinder the heir, where the father had other funds out of which he might provide his children from seeking relief out of them, for that his quality of creditor entitled him to.

Pleaded for the defender; That the obligation contained in a contract of marriage in favour of an heir, was naturally subject to provisions to the younger children; nor was the father bound to lay that burden on his other funds; as a fiar of an entailed estate, with power to provide younger children, was not bound to lay their provisions on his separate estate, if he any had.

2do, For the pursuer, Kilconquhar, when he gave his daughters their portions, took them obliged to make up titles to, and convey in his favour an heritable subject belonging to their mother; and therefore this payment, for which he received an equivalent, cannot be considered as implement of the contract.

Answered, This debt was disponed to him in his contract of marriage, and the necessity of the daughters conveying arose from the want of a procuratory of resignation in that deed, which must be presumed, as the pursuer cannot condescend on any other portion he got with her mother.

Replied, If the debt is supposed conveyed, then it is probable that it was settled together with the rest of the estate on the eldest heir-female of the marriage; and this must be presumed against the defender in conformity to the above interlocutor, as he does not produce the contract according to the obligation incumbent on him.

Duplied, The finding the estate of Tarbat settled on the heir-female, did not proceed solely on the not production of the contract, which the defender has unhappily lost, but on the testimony of Dr Bethune who says nothing of this sum, which it is not probable would be so settled, since it is only a debt although heritably secured, not any land estate.

"THE LORDS, 4th February, found that the 5000 merks provided to each of the two youngest daughters, could not be imputed in part of the price of the lands of Little Tarbat; but found that the 5000 merks provided to the eldest

daughter the pursuer behoved to be imputed in part of the said price; and this day refused a bill, and adhered."

No 72.

Reporter, *Dun.* Act. *Lockhart.* Alt. *R. Craigie et J. Graham.* Clerk, *Gibson.*
Fol. Dic. v. 4. p. 189. D. Falconer, v. 1. No 167. p. 220.

*** Kilkerran reports this case:

THOMAS BETHUNE of Tarbat, by his contract of marriage with his first wife in 1684, provided his estate of Tarbat to the heir-male of the marriage, whom failing, to the daughters and heirs-female of the marrriage, the eldest succeeding without division.

This marriage dissolved by the death of the wife in 1693, leaving issue three daughters. In 1703, he entered into a second marriage, and his three daughters of the first being all afterwards married, the second in 1708, the eldest in 1713, and the youngest in 1725, he, in their several contracts of marriage, gave each of them 5000 merks of tocher, bearing to be in full of their bairn's part of gear and portion natural; and after all, he sold the lands of Tarbat at the price of 34,600 merks, and purchased the lands of Kilconquhar, taking the rights thereof to himself and his second wife, and the heirs of his second marriage.

Elizabeth, the eldest of the three daughters of the first marriage, coming to understand that the estate of Tarbat stood provided to her by her mother's contract of marriage, though now amissing, she, with concourse of Mr Henry Rymer her husband, pursued Thomas Bethune her father, in an exhibition of his contract of marriage with her mother, libelling the estate of Little Tarbat to be thereby provided to her in the event which had happened, and concluding that he ought to be decerned to secure the said 34,600 merks, the price at which he had sold the same, to her, in terms of the said contract.

And it having, on a former debate on the 21st July 1742, been found, that the defender was bound to exhibit the contract; and, in respect of the circumstances appearing in that debate, that on his failure to exhibit the same, there was sufficient evidence to presume the contract to have been of the tenor libelled;—and the same not having been exhibited, he now *pleaded* in defence, That the tochers by him given to the pursuer and her two sisters, and annualrents thereof from the period of their several marriages, were all to be sustained to him, as deductions from the pursuer's claim.

And as to her own 5000 merks, the Lords were unanimous that it was to impute, on the common principle of *debitor non præsumitur donare;* but that the annualrents thereof were not to impute; for though she was only creditor for the lands, or their value at her father's death, yet the father is bound to ali-

No 72.

ment; and they considered him to be relieved of her aliment from and after her marriage, which was a greater burden than the annualrent of the 5000 merks could have defrayed. But as to the 5000 merks of tocher given to each of the other two daughters, the Lords were much divided.

On the one hand it was said for the pursuer, that though a father have power to burden his heir of provision with portions to his younger children, that is only in case he have no other estate; but that where he has a separate estate, as it could not be controverted but he had in this case sufficient to answer all his debts and rational provisions to his children, he could not leave these provisions upon the subject provided to the heir of the first marriage, who, though heir, was also creditor, and entitled to relief from the separate estate.

On the other hand it was said for the defender, that relief is indeed competent to the heir of provision, where the father charges the estate provided to the heir of the first marriage with onerous debts, or with provisions to a second wife, or the children of a second marriage, because in that case the father acts contrary to the obligation which he is under to the heir of the first marriage, and incurs the warrandice exprest or implied in his first contract; and though where there is no separate estate, the heir must suffer, that is not because of the imaginary paternal power in the father so far to defeat his own obligation, but because of the debtor's bankruptcy before the heir's claim exists; but that no relief is competent to the heir, of provisions, so far as rationally made in favour of younger children of the same marriage, because, by granting such provisions, the father in reality implements his contract, in so far as, in all such contracts of marriage, it is an implied agreement, that the father may provide the younger children with rational portions out of the estate provided to the heir of the marriage. The father is only debtor for the estate to the whole issue; and upon making the same good, the contract is extinguished by performance. And as upon that ground in law it was urged, that no relief was competent to the heir, of provisions to the younger children of the same marriage, even where the father was possessed, at the dissolution of the marriage, of a separate fund, so this equitable consideration was added in support of it, that a father could not be understood to be so bound to his own heir, as either to be obliged to leave his younger children unprovided, or to strip himself, so as to leave no fund for a settlement on a second wife and children.

But 2*do*, Whatever difficulty there might be, were the question, Whether there might not be relief to the heir out of any separate fund the father might have at the dissolution of the marriage, yet as it could never be carried farther than that period, and that in this case the separate estate which the father now has, had been acquired after the dissolution of the first marriage, there could be no pretence for relief of the provisions to the younger children, out of conquest made after that marriage was dissolved.

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Replied for the pursuer, That the distinction between the father's power to provide younger children of the same marriage, and the wife and children of a second marriage, was not founded in law, nor authorised by precedent. It has often been a topic of argument, that provisions to heirs of a marriage are provisions *familiæ*, and not limited to a particular person as heir, but never listened to. (*Vide* Dec. 15. 1738, Campbells *contra* Campbells, No 22. p. 6849.) Where a land estate is in a contract of marriage provided to heirs, the heir is creditor, and the father has no stronger implied power to burden the heir with provisions to younger children of the same marriage than to burden him with provisions to the wife and children of a second marriage; both are in his power in consequence of his right of fee and power to do rational deeds, whereof the heir of provision has, in the character of creditor, relief out of the father's other funds. Nor was the dissolution of the marriage the period at which the extent of his separate estate was to be considered, but rather the time that the provisions were made, or when the relief is sought. As the obligation in favour of the heir is not diminished by the dissolution of the marriage, the father still remains debtor in it, and must peform it, just as any other debtor must pay his debt, at whatever period he acquires the funds which enable him to do it. Wherefore, as it cannot be denied, but that in this case the defender now has, and had at the date of the several provisions to his two younger daughters, a separate estate sufficient to answer these provisions and to pay his other debts, as the eldest daughter as heir of the marriage would have been entitled to relief, had she paid these provisions to her sisters, so being paid by the father, they cannot impute towards implement of his obligation in favour of the pursuer.

THE LORDS by majority of voices found, "That the 5000 merks provided to each of the defender's younger daughters cannot be imputed in part of the price of the lands of Tarbat; but found that the 5000 merks provided to the pursuer, the eldest daughter, were to be imputed in part of tbe said price, but not the annualrent thereof."

Kilkerran, (PROVISION TO HEIRS AND CHIDREN.) *No* 8. *p*. 460.