SECT. IX.

Import of an Obligation to Provide, in a Contract of Marriage, with regard to the Father.

1725. *January* 20.

ROBERT and ELIZABETH KINELLS, Children of the second Marriage of Robert Kinell late of Grangemire, *against* The CHILDREN of the first Marriage.

No 69.
One, in his first contract, provided certain lands to the children of the marriage. In his second contract, he bound himself to secure his second family in a sum out of the moveables and plenishing upon the same lands. He sold the lands, of which the first family received the proceeds. The second family could not reduce the sale.

THE said Robert Kinell, in his first contract of marriage, had provided the lands of Grangemire to the Children of that marriage. He afterwards sold the lands for 7000 merks, and took bonds in name of the Children of that marriage for 5500 merks, as part of the price, and he uplifted and spent, or paid debts with the remaining 1500 merks.

Before he had sold the lands, and taken the said bonds, he had, in a second contract of marriage, obliged him, his heirs, &c. to secure and provide to the Children of that marriage the sum of 1000 merks, out of the first and readiest of his moveables and plenishing of his room of Grangemire; but these moveables were sold and consumed by him in his lifetime.

After his death, the Children of the second marriage raised a reduction and declarator against the Children of the first, concluding, that they being creditors for 1000 merks; and it not appearing, that there was sufficiency of estate for satisfying the bonds for 5500 merks, and their claim of 1000, therefore these bonds ought to be declared proportionally affected with the said 1000 merks, because in so far as they were wholly taken in name of the Children of the first marriage, they were reducible as gratuitous and fraudulent, upon the act 1621.

THE LORDS had upon the 14th of January 1724 found, "That the father having obliged himself to pay 1000 merks out of his moveables to the Children of the second marriage, although he had disposed of all his moveables, yet his obligation to the Children of that marriage was not thereby void or extinct."

The said Children being therefore still creditors to their father in 1000 merks, insisted for a share of the provisions that were taken payable to the Children of the first marriage, being all the fund the father left, and which could not be appropriated wholly to these Children, in prejudice of them who were just creditors before the taking of these bonds.

It was *answered* for the defenders, That they were heirs of provision in the lands of Grangemire by their father's first contract of marriage; and therefore when these lands were sold, it was by no means fraudulent; on the contrary

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 disponed by his second wife's father to him and his wife in conjuct 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 proportinal 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 disponed 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 assoilzied."

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.