1674. *February* 10.

MARION GRAY *against* Her HUSBAND'S SON and HEIR, and CREDITORS.

No 92.
A man by contract of marriage provided his spouse in the liferent of all he had at the time, and the liferent of half the conquest. Good against Creditors, the lady, by the same contract, having disponed her estate to her husband.

MARION GRAY by her contract of marriage dispones some lands in Glasgow, whereof she was heretrix, to her husband, who provided her to the liferent of all the means he had, and to the liferent of the half of the conquest; whereupon she pursued his heir for implement, and after decreet and horning, pursues an adjudication of the half of the liferent of the tenements acquired. The creditors *alleged* that this contract was latent and fraudulent, and could not be sustained in the case of a Merchant against Merchants who had continued trade with him. It was *answered*, That it was an ordinary clause, and for a very onerous cause, anterior to the contracting of the debt; and none of the debts could be contracted for acquiring of the lands, because they are long after.

THE LORDS sustained the contract and adjudication.

Stair, *v.* 2. *p.* 263.

1680. *November* 23. WOOD *against* REID.

No 93.
A father, while in prison, and reputed bankrupt, made an assignation to his son-in-law in lieu of tocher; although onerous, the daughter not being otherwise provided for, found reducible; and that a son-in-law, contracting with a father in such circumstances, must run the hazard of the father's debts.

JAMES WOOD as creditor to umquhile Andrew Balfour, pursues reduction of an assignation procured by Balfour, of a sum belonging to Andrew in favours of Mr Patrick Reid, who married his daughter, as being betwixt conjunct persons, without a cause onerous. The defender having condescended upon several causes onerous; and amongst the rest, that he having married Balfour's daughter, the only child of his marriage, in favours of whom 25,000 merks were provided by her mother's contract; this assignation was all the provision he had, and therefore is in place of a contract of marriage, which being *ad sustinenda onera matrimonii* is an onerous and most favourable contract. It was *answered*, That though it had been a formal contract, yet being granted by Andrew Balfour, who was in prison for debt, and commonly repute bankrupt, it could not prejudge lawful creditors; but Reid having married the woman, her father being in that condition, is not as if her father had been in entire reputation, but it must be understood that he married her *cum periculo* of her father's debts.

Which the LORDS found relevant.

Fol. Dic. v. 1. *p.* 73. *Stair*, *v.* 2. *p.* 804.

1711. *June* 26. AIKENHEADS *against* AIKENHEADS.

No 94.
A man provided the children of his first marriage in

THE deceast Sir Patrick Aikenhead commissary-clerk of Edinburgh, by his first contract of marriage with Grissel Durham, provides the children to 25,000 merks, of which there are four bairns yet living. In his second contract of marriage

No 94. 25,000 merks, and those of his second in 36,000 merks. He had funds sufficient for the whole, but at his death they fell short. The provisions to the second family were reduced, so far as prejudicial to the first; a competency still remaining for the second.

with Sarah Sharp, he provides the children of that marriage to 33,000 merks, and by a posterior bond, yet prior to the marriage, in 3000 merks more; and of this bed there were two children procreate. When he dies, the utmost extent of his estate is found to be L. 36,000 Scots, estimating his houses at 12 years purchase; which falls 7000 merks short of the provisions in the two contracts, which extend to 61,000 merks, and his estate but 54,000 merks, so the question was, on which of the two marriages the diminution and loss should fall? And the children of the second bed craving that the first should bear a proportional abatement of their 25,000 merks, they reclaimed, and raise a reduction of the second contract, as exorbitant and beyond his ability and estate; and insisted on this reason, that *esto* a man cannot be hindered to enter into a second contract and provide for his new wife and bairns, yet it must be no more than what is necessary and rational, without derogating from his prior obligements in his first contract; for which see 16th June 1676, Mitchell *contra* Littlejohn, Stair, v. 2. p. 426. *voce* DEATHBED, and Stair, *tit.* Heirs;* who mentions the two famous cases recorded by Craig of the three sisters Aikmans, and Isobel Baron;† and the second bond for 3000 merks, not being in the contract of marriage, ought to be reduced as a clandestine fraudulent deed, and *contra fidem tabularum nuptialium*; and in a competition betwixt bairns of sundry marriages it has been always found that provisions in a first contract cannot be impaired nor evacuated by posterior grants in favours of children of a second bed, as appears from 19th June 1677, Murrays, Stair, v. 2. p. 523. *voce* PROVISION to HEIRS and CHILDREN; and so became quarrellable on the act 1621. And none will doubt but 36,000 merks was a most extravagant provision *in æstu amoris* to the second bairns, when he only gave 25,000 to the first; and his estate cannot satisfy both; and the first children are the more ancient creditors; and if there be any eventual loss, it is more just it fall on the second, especially considering the inequality of the provisions; and that these excessive gifts are sometimes procured *delinimentis et instigationibus novercalibus*. *Answered* for the bairns of the second marriage, That their mother's contract can never be quarrelled as excessive; for at that time he had an estate sufficient to satisfy both; and if, *ex post facto*, it was otherwise, the son of the first marriage cannot impugn his father's deeds, he being heir, and bound to warrant and ratify them, especially seeing he got several accessions to his fortune, and offices during the second marriage, which he had not in the time of the first; and the author of the *loix civiles*, in his preface about succession, thinks the children of all the marriages are equally creditors to the father, and should come in *pari passu*; as the Lords did lately with George Marshall's bairns, *voce* ADJUDICATION, p. 47. And the providing of children is never accounted a fraud; and therefore, *l.* 1. § 10. *D. Si quid in fraud. patron.* allows a *libertus dotare filiam quo non videtur fraudare patronum*, who had, by the Roman law, the right to his slave's succession, though manumitted, and might rescind any deed to his prejudice; but the providing of children was not reckoned amongst these fraudulent deeds. And notwithstanding of any destination to the bairns of the first marriage, the father still continued

* Page 480. edition 1759.

† *Voce* PROVISION to HEIRS and CHILDREN.

fiar, and retained the power of difpofal to rational ends, being not only bound *jure naturæ* to provide for his wife and children, but likewife obliged *civiliter* by their mother's contract-matrimonial. And as to the difference made betwixt the provifion in the contract, and the feparate bond of 3000 merks, the diftinction is founded on no material juftice nor reafon; for it is before the marriage and *pars contractus* and is not *contra*, but only *præter pacta dotalia*, and is as due as the 33,000 merks in the principal contract, and of equal force and authority therewith. THE LORDS reduced the fecond contract, in fo far as might be extended to diminifh any part of the 25,000 merks provided in the firft; and found that fum behoved to be made up to the bairns of the firft marriage, efpecially confidering there was a competent provifion fuitable to his eftate left behind to the children of the fecond marriage. *See* 14th November 1711, *inter eosdem*, Fount. v. 2. p. 671. *voce* TUTOR and PUPIL.

No 94.

Fol. Dic. v. 1. *p.* 73. *Fountainhall, v.* 2. *p.* 650.

*** Forbes reports the fame cafe thus:

SIR PATRICK AIKENHEAD having, in his contract of a fecond marriage with Sarah Sharp, provided 33,000 merks; and, in a feparate bond, a day pofterior to that contract, and before the marriage, 3000 merks more; in the whole 36,000 merks to the children of that marriage: The children of the firft marriage, (to whom 25,000 merks was provided in the contract with Griffel Durham, their mother,) raifed reduction of the provifions in favours of the children of the fecond, upon this ground, That Sir Patrick Aikenhead's eftate, at his death, did not exceed 36,000l.; and therefore the provifions made by him to the defenders ought to be reduced as extravagant and *in fraudem* of the purfuers, who were lawful creditors for the fum provided to them in their mother's contract.

Alleged for the defenders: Their provifions cannot be reduced, becaufe their father, at the granting thereof, had a vifible eftate fufficient to fatisfy all his children's provifions, albeit it fell fhort *ex eventu;* which lofs muft affect the purfuers and defenders equally and proportionably, according to the extent of their provifions, Craig, Lib. 2. Dieg. 14. Pag. 238. Stair, Inftit. Tit. Heirs, p. 480. § 15. And in a late cafe of George Marfhall's Children, *voce* ADJUDICATION, p. 47. the children of both marriages were brought in equally, according to their provifions, though there was but one daughter of the fecond marriage who was provided in the double of what was allotted to any child of the firft marriage. For the father, notwithftanding the provifions made to the children of the firft marriage, continued fiar, and could difpofe of his means for fuch an onerous and reafonable caufe as provifions to children of a fecond marriage. And by the civil law, *Libertus filium dotando non videtur fraudare Patronum; quia pietas patris non est reprehendenda, L.* 1. § 10. *ff. si quid in fraud. Patroni.*

No 94.

Replied for the pursuers:—Albeit the Lords have found that, notwithstanding of a general provision of conquest to the children of a marriage (which is a sort of provision by succession) the father continued fiar, and could dispose of it in favours of wife or children of a subsequent marriage: Yet special provisions of particular sums, made to children of a first marriage, cannot be evacuated or impaired by posterior grants to children of a second, June 19, 1677, Murrays *contra* Murray, Stair, v. 2. p. 523. *voce* PROVISION to HEIRS and CHILDREN; especially if these grants be exorbitant. Now, after deducting the 25,000 merks, there's more than a competency behind, to provide the two children of the second marriage. The authorities adduced by the defenders, to prove that the children in this case must come in proportionably, according to their respective provisions, are not to the purpose. For my Lord Stair, p. 460, (480.) speaks only of bonds granted to several heirs portioners, which being of the nature of *prælegata* in the civil law, make them mutually creditors and debtors to one another: Whereas children of a first marriage are not heirs, but creditors with respect to children of a second. Again, though a rational tocher given to a daughter, was not reckoned in the civil law to be a deed *in fraudem Patroni*, an extravagant tocher was quarrellable as such. And the Lords bringing in Marshall's children of a first marriage who had but slender provisions, *pari passu* with his children of a second, whose provisions were exorbitant, can be no argument for sustaining excessive provisions here in favours of children of a second marriage, in prejudice of a moderate provision made to those of the first. For *non est consentiendum parentibus qui injuriam adversus liberos suos in testamento inducunt: Quod plerumque faciunt, maligne circa sanguinem suum inferentes judicium, novercalibus delinimentis instigationibusve corrupti*, L. 4. *ff. de inofficioso testam.*

THE LORDS sustained the reason of reduction against the contract and bond libelled, in so far as they are prejudicial to the sum of 25,000 merks provided to the children of the first marriage: There being a further competency remaining to the children of the second marriage.

Forbes, p. 510.

No 95.
An assignation by a father to his son, reducible as *inter conjunctos*, although in the son's contract of marriage; unless the father had a sufficient separate estate; the assignation not being to the

1712. *July* 3.
JOHN HEPBURN of Humbie, & JOHN GORDON, Merchant in Edinburgh, *against* The LORD STRATHNAVER.

IN a competition betwixt the Lord Strathnaver, and John Hepburn, for the Earl of Sutherland's share of the equivalent money, the Lords found the Earl's assignation thereof to the Lord Strathnaver, his son, in his contract of marriage, reducible upon the act of Parliament 1621, as being *inter conjunctos* without an onerous cause, unless the assignee can instruct, That the cedent had then a separate unincumbered estate sufficient to pay all his debts: For it was thought, that the marriage could not be sustained as the onerous cause of this assignation, from the