

1741.

PRINGLE
v.
PRINGLE.

THOMAS PRINGLE of Symington, - *Appellant* ;
ALISON PRINGLE and HUSBAND, - *Respondents*.

21st January, 1741.

PROVISION TO CHILDREN.—A clause in a marriage contract, provided a certain sum to the children of the marriage, in satisfaction of all they could claim, except what the father should further provide to them of his own free-will,—found that the eldest son, by accepting a disposition of the landed estate from his father, is not deprived of his right to claim his share of this sum, as a child of the marriage.

[Clerk Home, No. 145. Kilk. p. 147. Elchies, No. 15, *voce* Mutual Contract. Brown's Supp. V. p. 693.]

IN the marriage contract of Robert Pringle and No. 59. Anne Rutherford, (father and mother to the parties to this appeal,) the said Robert bound himself, in case of his wife's predecease, to pay to the children of the marriage the following provisions :
 ' If there be only one son or daughter procreate
 ' of that said marriage, to content or pay to the
 ' said son or daughter the sum of 8000 merks, and
 ' if there be two or more children, to pay to them
 ' among them all the sum of 1200 merks money
 ' aforesaid, which sums of money provided to the
 ' child or children to be procreate in the said mar-
 ' riage in the cases above mentioned, are to be
 ' divided and proportioned among them by the

1741.

PRINGLE

v.

PRINGLE.

‘ said Robert Pringle their father, as he shall think
 ‘ fit ; for which division, the said Robert Pringle,
 ‘ his declaration and appointment, at any time of
 ‘ his lifetime under his hand, shall be a sufficient
 ‘ warrant and rule ; and in case the said Robert
 ‘ Pringle their father shall not make the said divi-
 ‘ sion under his hand in his own time, then it shall
 ‘ be leasome and lawful to four of their friends and
 ‘ nearest of kin, two on the father’s side, and two
 ‘ on the mother’s side, to proportion and divide
 ‘ their provisions, as the said Robert Pringle their
 ‘ father might have done the same ; and which
 ‘ portions and provisions above provided to be
 ‘ divided as said is, the said Robert Pringle in the
 ‘ case aforesaid, binds and obliges him, his heirs,
 ‘ executors, and successors whatsoever, to pay to
 ‘ the said daughters to be procreate of the said mar-
 ‘ riage, at their full and perfect age of sixteen
 ‘ years compleat respectively, and to the son or
 ‘ sons to be procreate therein at their full and per-
 ‘ fect age of twenty-one years complete, or at the
 ‘ said daughters or sons their respective marriages,
 ‘ which of them shall first happen, together with
 ‘ the due and ordinary annualrent of the said pro-
 ‘ visions conform to the Act of Parliament, yearly,
 ‘ termly, and continually, during the not-payment
 ‘ thereof ; and which sums of money provided to
 ‘ the said children, one or more, to be procreate
 ‘ in the said marriage, is hereby declared to be in
 ‘ full contentation and satisfaction to them of all
 ‘ they can crave of the said Robert Pringle their
 ‘ father, except what further of his own proper
 ‘ will he shall provide to them, as also what shall
 ‘ accrue and belong to them as heirs and nearest
 ‘ of kin to the said Robert Pringle their father, in

‘ case he shall not have children in any other marriage.’

1741.

PRINGLE

v.

PRINGLE.

The issue of this marriage were, Thomas Pringle, the appellant, two other sons, and one daughter, Alison Pringle, one of the respondents.

In June 1698, Robert Pringle executed a voluntary disposition of his landed estate in favour of the appellant, (then an infant,) reserving to himself full power to burden and affect it with debts, or to sell it, &c. in such manner as he should think proper. The disposition bears to have been made for the love and favour the father bore to his son, and for certain other onerous causes.

He likewise gave certain portions to his two younger sons, and took from them discharges of any claim they might have under the marriage contract. He made no declaration with regard to the division of the 12000 merks, nor did he execute the reserved powers with regard to the landed estate.

He died intestate in 1738, predeceasing his wife, and leaving personal property to the amount of 19000 merks. The appellant took possession of the estate, and the respondent, Alison Pringle, was confirmed executrix, and soon after was married to the other respondent, Macdowal.

The respondents then raised an action against the appellant before the commissaries for L.190, which was in the father’s repositories at the time of his death. The appellant admitted the receipt of the sum, but pleaded compensation upon the ground of his right to a share of the 12000 merks provided in the marriage contract. The respondent insisted

1741.

PRINGLE

v.

PRINGLE.

that the disposition of the landed property was a satisfaction of that demand.

The commissaries found, (10th Feb. 1739,) ‘ That the disposition of 1698 did not exclude the appellant from his share of the provisions stipulated in the marriage contract.’

But the Court, upon advising a bill of advocacy, which was reported by the Lord Ordinary, found, (14th December, 1739,) ‘ That the son having succeeded to his father by disposition to his land estate, his share of the 12000 merks was thereby extinguished.’

The Lord Ordinary therefore advocated the cause, and repelled the plea of compensation, (21st December;) and the Court adhered, (8th Feb. 1740.)

Entered
Feb. 26, 1740.

The appeal was brought from these interlocutors of the 14th and 21st December, 1739, and 8th February, 1740.

Pleaded for the Appellant :—It makes no difference to the appellant whether he be considered as having succeeded to the estate by disposition or by descent : for, 1st, The taking a land estate as heir, cannot be held as in satisfaction of any obligation the father came under to his heir, under the marriage contract.

2. A disposition, which the granter could alter at pleasure, could not have been intended as in satisfaction of a prior personal obligation.

3. Nothing was done by the father to show that such was his intention. If he had intended this, he would have taken a discharge as he did in the case of his two younger sons.

4. The provisions, moreover, are declared to be

1741.

in full satisfaction of what the children can crave from their father, except what further he should provide to them of his own free will, or what should belong to them as his heirs or nearest of kin.

PRINGLE
v.
PRINGLE.

- *Pleaded for the Respondent* :—It could not have been intended that the eldest son should have a double portion, (the real estate being of much greater value than 12000 merks,) and yet come in for a share of this sum. So far was the father from intending this, that, in the disposition of 1698, he had it in view, that he might throw some part of the provisions for the younger children upon the real estate.

After hearing counsel, it is ordered and adjudged, ' That so much of the interlocutor of the 21st ' December, 1739, whereby the Lord Ordinary did ' advocate the cause be, and the same is, hereby ' affirmed; but that the residue of the said inter- ' locutor, as also the interlocutor of the Lords of ' Session of the 14th December, 1739, and other ' interlocutors adhering thereto of the same month ' be, and the same is hereby reversed; and it is here- ' by declared and adjudged, that the disposition ' granted by the appellant's father of his land estate ' to the appellant, does not exclude him from his ' share of the provisions stipulated by his father in ' his contract of marriage to the children of the ' marriage: and therefore, it is hereby ordered and ' adjudged, that the appellant do claim so much ' thereof as will compensate his share of the ' 12000 merks, provided by the said contract, and, ' that in order to ascertain the appellant's share ' thereof, both parties do inform the Court of Ses- ' sion therein, according to the courses of that

Judgment,
21st January,
1741.

1741.

PRINGLE

v.

PRINGLE.

‘ Court, and that the said Court of Session do proceed thereupon, according to law and justice.’

For Appellant, *W. Noel, A. Hume Campbell.*

For Respondent, *William Hamilton, W. Murray.*

This reversal is not noticed in any of the reports of the case.

KENNETH M'KENZIE, - - *Appellant ;*
WILLIAM URQUHART, *et alii,* - *Respondents.*

26th January, 1741.

TAILZIE.—ACT 1685, c. 22.—An entail completed by infestment, but not recorded in the register of tailzies, is not effectual against the creditors of the heir of entail.

[Elchies, *voce* Tailzie, No. 13.]

No. 60. GEORGE VISCOUNT TARBET in 1688 executed an entail of the estate of Cromarty in favour of his second son, Sir Kenneth M'Kenzie, but reserved to himself a right of redemption upon payment of a certain sum. This entail contained all the necessary clauses of a strict entail, and was registered in the register of entails. Resignation followed—a crown charter was expedited; and infestment was taken by Sir Kenneth.

In exercise of the reserved right, Lord Tarbet did, in 1695, redeem the lands according to the