

inserting thereof in the contract; which made it no more valid than if it had been a gratuitous assignation in a paper apart; seeing it is not provided in favours of the wife or children of the marriage, but simply to the Lord Strathnaver himself, his heirs and assignees.

Fol. Dic. v. 1. p. 73. Forbes, p. 606.

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wife or children, but to the son himself and his assignees.

1715. February 17.

ALEXANDER INGLIS *against* Dr MENZIES, and Mrs KATHARINE MENZIES his Lady.

By contract of marriage betwixt Dr Menzies and his Lady, Mr John Menzies, the Doctor's father, provided L. 40,000 Scots, or thereby, to the Doctor and his Lady, and the children of the marriage; and the Lady was provided to a liferent of 2000 merks yearly out of her husband's estate.

Mr Inglis being creditor in great sums to Mr John Menzies, raised a reduction of the foresaid contract of marriage, and several other deeds done by Mr John, in favours of his son and daughter-in-law, for making the said sum to be advanced by him effectual, upon this ground, that Mr John was much worse than nothing at the time when he made this ample provision to his son; and, to make the same effectual, he had conveyed several heritable subjects, and caused take infeftments privately upon them, and kept these infeftments latent for 58 days; and, when his credit began to be suspected, he kept the creditors in treating; but at last was forced to retire within less than 60 days of the registration of the sales; and the pursuer insisted for reducing the wife's liferent provision, as being exorbitant and fraudulent, to the enorm lesion of the creditors. But,

'THE LORDS considering the quality of the Lady, being daughter to the Laird of Weem, who brought a portion of 8000 merks, and was noways partaker of the fraud; therefore they found the contract was onerous, in so far as concerned a suitable liferent-provision; and found the defender's liferent of 2000 merks to be restricted to 1800 merks, in case of children, was not exorbitant.' See another branch of this case, Division 5th, *b. t.*

Fol. Dic. v. 1. p. 72. Dalrymple, No 136. p. 189.

* * Bruce reports the same case thus:

By contract of marriage betwixt Dr Menzies and his Lady (second daughter to Menzies of Weem) Mr John Menzies, the father, obliges himself to provide 52,000 merks to his son the Doctor, and the heirs of the marriage, &c. wherein also a liferent of 2000 merks is provided to the Doctor's Lady; which, in case of children of the marriage, is restricted to 100l. Sterl. with reservation also of the liferent of 22,000 merks to Mr John himself and his Lady: The Doctor's Lady's portion being 8000 merks, and payable to the husband, not to the father. Mr John having shortly thereafter become bankrupt: In the ranking of his creditors,

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A bankrupt, before his insolvency was known, having contracted for a jointure to his son's spouse; the Lords refused to restrict it, finding it onerous and suitable. The tocher was 8000 merks, the jointure 2000 merks, to be restricted to 100l. Sterling in case of children.

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such of them as were prior to the said contract, repeated a reduction upon the act 1621, *alleging*, That the jointure was exorbitant, because the father, who is the obligant, was, at the time of contracting, insolvent, and therefore it was fraudulent in him to make such provisions in prejudice of his creditors, which therefore ought at least to be restricted to a competent provision.

Answered for the defenders: That law only presumes fraud from a deed's being gratuitous, where it is so, not only on the part of the obligant, but of the receiver; therefore, whatever may be objected against Mr John, yet, as to the Doctor's Lady and her friends, who knew nothing of his condition, the contract was fair, and the marriage made it onerous, as to the liferent; as was decided 19th January 1676, *Stamfield contra Brown*, No 73. p. 954. where the contract was the liferent even of all the husband had. *2do*, In the present case the liferent, considering the tocher, and the Lady's rank, can never be judged exorbitant. *3tio*, Though the tocher was only payable to the husband, not to the father, yet this makes no alteration; for to whomever it was payable, the Lady was obliged, and actually did pay, and to whomever it was payable, she was to have neither more nor less provision.

Replied for the pursuers, That it is unjust the Lady should, in prejudice of creditors, enjoy so ample a jointure as 2000 merks, when she brought no more with her but 8000, and which did flow by a voluntary conveyance from Mr John Menzies, who was *lapsus*, and the payment contrived to be made to the Doctor, lest the creditors might have affected the same, if paid to Mr John himself, as is usual in such cases. So that the conveyance of the funds made to the son, was the very onerous and mutual cause of the tocher, which the Doctor's Lady got along with her; and which funds were truly the creditors money, since Mr John had nothing of his own to bestow.

THE LORDS found the Lady's provision both onerous and suitable.

A^t. *Gray & Robert Dundas* A^t. *Graham & John M'Leod.* Clerk, *Sir Jas Justice.*
Bruce, No 72. p. 87.

No 97.

n a ranking of creditors, the children of the first and second marriage of the common debtor, provided in sums in the contracts of marriage of their respective mothers, were ranked *pari passu* and proportionally.

1715. July 6.

The LADY AUCHINVOLE and HER DAUGHTER, *against* HER STEP-DAUGHTER.

IN the competition betwixt these parties in the ranking of Auchinvole his creditors, for preference upon his estate, for the several provisions contained in his first and second contracts of marriage; the Lords gave a decision on the 12th November last, which stands marked in that Session's decisions.* But there being also in that interlocutor a remit to the ordinary to hear parties, how far the provisions to the daughter of the second marriage could burden the heir of the first, or if the provisions in favours of the heirs of the first and second marriage ought equally and proportionally to affect, and be paid out of the defunct's estate. At reporting—

* Bruce, No 4. p. 5. *voce* HUSBAND and WIFE.