

July 26. 1822. Creditors of Broughton, June 20. 1739, (10247); Munro, May 19. 1812, (Mor. Supp. Vol. I. No. 10. *voce* Prescrip.)

*Respondents' Authority.*—Grieve, Dec. 7. 1760, (3022.)

SPOTTISWOODE and ROBERTSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No. 40.*)

No. 50. WILLIAM MILLER, Esq. and Others, Appellants.—*Warren—Jeffrey—Skene.*

PATRICK MILLER, Esq. Respondent.—*Greenshields—Thomson.*

*Clause—Provisions to Children.*—A father having made certain mortis causâ provisions in favour of his younger children, and disposed, mortis causâ, his whole estates, real and moveable, to his eldest son, subject to these burdens; and having thereafter bound himself in his eldest son's contract of marriage to leave his whole estates to him, under burden of the provisions 'made by him for his 'younger children;' and having thereafter advanced to them large sums during his life, and granted to them additional provisions, partly of a permanent nature, and partly payable at his death; and the Court of Session having held, that as the provisions made prior to the contract of marriage were fit and proper, it was not competent for the father thereafter to increase them, and that sums paid to the children during his life, must be imputed in extinction of the original provisions;—the House of Lords found, That the question was to be decided by the sound construction of the above clause; and that as the exception in the contract of marriage referred to provisions payable mortis causâ, he was not barred from advancing sums to the younger children during his life; but that all provisions of a permanent nature, or payable after his death, were in fraudem of the contract, and were to be imputed in extinction of the original provisions, and, quoad ultra, ineffectual.

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1ST DIVISION.  
Lord Alloway.

THE late Patrick Miller, Esq. of Dalswinton, had three sons, Patrick, William, and Thomas-Hamilton,—and two daughters, Janet, afterwards Mrs. Erskine, and Jean, afterwards Mrs. Jones. In the month of May 1790 he executed a trust-deed of settlement, by which he conveyed his estate and whole effects to his eldest son Patrick and the heirs of his body, but subject to the burden of the following provisions:—'To William Miller, my second son, 'and his foresaids, of the sum of £7000 sterling, and that over 'and above the sum of £1920 already paid by me for his com- 'mission—to Thomas-Hamilton Miller, my third son, and his 'foresaids, of the sum of £7000 sterling—to Janet Miller, now 'Mrs. Erskine, my eldest daughter, and her foresaids, of the 'sum of £7000 sterling—and to Jean Miller, now Mrs. Jones, 'my youngest daughter, and her foresaids, of the sum of £7000 'sterling.' On the 6th of January 1803 he executed a deed of alteration, by which he declared, 'The said provision of £7000 'sterling to the said William Miller, my second son, is hereby

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‘ diminished and restricted to £4000, which, with the sum paid  
 ‘ for commissions, and £1000 borrowed for him, and two legacies  
 ‘ of £1000 each hereafter bequeathed to his two children, make  
 ‘ £10,000 sterling.’ At the same time he gave the following ad-  
 ‘ ditional provisions:—‘ To the said Thomas-Hamilton Miller, my  
 ‘ third son, and his heirs and assignees, the sum of £1500 ster-  
 ‘ ling, which, with the said provision of £7000 sterling, and  
 ‘ money advanced to and borrowed for him, and obligations which  
 ‘ I am about to come under on his account, make £10,000 ster-  
 ‘ ling,—to Jean Miller, my youngest daughter, £3000 sterling,  
 ‘ which, with the sum already provided to her, also makes £10,000  
 ‘ sterling.’ He at the same time restricted the provision of Mrs.  
 Erskine to £5000, having provided to her other £5000 in her  
 contract of marriage; and declared that these provisions, with the  
 legacies to William’s family, were ‘ all to form real burdens on and  
 ‘ affecting the whole lands and estates conveyed to the said Patrick  
 ‘ Miller, my eldest son, and the other heirs therein mentioned by  
 ‘ the foresaid disposition and settlement, as effectually as if they  
 ‘ had been inserted in the said disposition and settlement.’ Hav-  
 ing afterwards purchased a majority in the army for William at  
 £1100, he restricted his provision to £2900. All of these pro-  
 visions were to be payable after his death.

In the following year, Patrick paid his addresses to Miss  
 Cumming, and a great deal of correspondence took place be-  
 tween him, his agent, and his father, relative to the settlements  
 which were to be made upon him and his family. His father  
 having agreed to convey to him, on his own death, the estate  
 of Dalswinton, and his whole moveable estate, proposed that a  
 clause should be introduced into the contract of marriage in these  
 terms:—‘ Declaring always, as it is expressly provided and de-  
 ‘ clared, that the said Patrick Miller senior shall have the free  
 ‘ use and disposal of his whole property, both heritable and  
 ‘ moveable, during all the days of his life, and may borrow money  
 ‘ on heritable security, and otherwise burden the same as he may  
 ‘ think proper, which shall be considered preferable to any se-  
 ‘ curity granted by this deed, and also the burden of such provi-  
 ‘ sions as he has already made *or may make* in favour of his  
 ‘ younger children or grandchildren, and also the burden of his  
 ‘ debts, under which declarations and burdens these presents are  
 ‘ expressly granted, and no otherwise; it being always under-  
 ‘ stood, that the said Patrick Miller senior shall not alter the  
 ‘ succession to his estate above mentioned, to the prejudice of the  
 ‘ said Patrick Miller junior.’ In the contract of marriage, as  
 finally arranged, and to which Mr. Miller was a party, he and

July 30. 1822. his son bound themselves to provide a jointure of £800 to Miss Cumming, in security of which Patrick was to infest her in the estate of Dalswinton, in the event of his surviving his father, and so succeeding to the estate. Mr. Miller also bound himself to pay to his son an annuity of £500, and then there was this clause: ‘As also, the said Patrick Miller senior of Dalswinton binds and obliges himself, his heirs and successors, to provide and secure, and dispoise and make over, heritably and irredeemably, all and whole the lands and barony of Dalswinton, comprehending, &c. from and after his decease; as also all other lands and heritages, as well as all debts and sums of money, and estate, real and personal, that may belong to him at his death, to and in favour of the said Patrick Miller junior; and the heirs-male of his body of this present marriage; whom failing, &c.; with and under the burden always, however, of the debts of the said Patrick Miller senior, and provisions *made by him* for his younger children and grandchildren.’ This deed was executed on the 5th of October 1804, and the marriage thereupon took place.

In the months of April and July 1811, Mr. Miller executed a deed proceeding on the narrative, that, by the advances which he had made to William, the provision of £2900 had ‘been fully satisfied and paid; and it being my wish and intention, although the said advances made, and engagements come under by me to and on account of the said William Miller, should exceed the foresaid provisions, that, notwithstanding thereof, such excess should not form any claim against him or his heirs at the instance of my heirs and successors; and being also desirous, in his particular circumstances, to provide him in the annuity after mentioned;’ therefore he granted a bond of annuity to him and his wife for their lives, and discharged him of all claim for repayment of the advances, or relief from the engagements. At the same time he executed an irrevocable bond of £5000 in favour of William’s children, and another bond in favour of William himself for £8000,—the object of the last bond being to relieve him of certain embarrassments, and which was afterwards assigned by William to Mr. Marshall for behoof of his creditors. In addition to these sums, Mr. Miller, in 1815, executed another bond in favour of William, proceeding on a narrative of his embarrassments; and ‘therefore, and for the love and favour I have and bear to my second son, William Miller, wit ye me, in the first place, to be bound and obliged, as I hereby bind and oblige myself, my heirs, executors, and successors whatsoever, to make payment to the said William Miller, his heirs, executors, or assignees, of the sum of £10,000 sterling, over and above all other advances and provi-

‘ sions hitherto granted by me to him, and that at the first term of Whitsunday or Martinmas after my death, &c. ; and, in the second place, I hereby declare that no acknowledgments, discharges, or other documents granted by the said William Miller to me, shall bind him to the effect of depriving him of the benefit of the provisions, in addition to the former advances and provisions made by me to him.’ July 30. 1822.

In like manner Mr. Miller, subsequent to the date of the contract of marriage, made additional provisions to his second son, Mr. Thomas-Hamilton Miller. In particular, on the marriage of that gentleman in 1809, his father granted to him and his family a bond of provision for £5000, and in 1811 bestowed upon him and his wife an annuity of £150. He also, in 1813, granted a bond of £7000 to Claud Russell, Esq. trustee for the creditors of Mr. Thomas-Hamilton Miller ; and in 1815 he bound himself to pay to the latter £5000, over and above all other provisions and advances which he had made for him, and discharged them accordingly. In 1811 he executed bonds of provision in favour of each of his daughters for £7000, in addition to the sums already provided to them.

From an early period Mr. Miller had kept a regular account of every sum which he had advanced to his children, who were accordingly entered as debtors for the amount in his books. From these it appeared that there was a balance against each of his two sons, William and Thomas, of upwards of £10,000, and against his daughters of about £1000 each.

With a view to carrying the above provisions into effect, and discharging these book-debts, and for other purposes, Mr. Miller, in 1815, executed a trust-deed of settlement, in which, after narrating those which he had formerly made, he stated, that ‘ I have, both prior and subsequent to my said deed of settlement, 6th January 1803, made sundry payments or advances on account of William Miller and Thomas-Hamilton Miller, my sons, and Mrs. Janet Miller alias Erskine, and Mrs. Jean Miller alias Jones, my daughters, which payments were entered in my books to their respective debits : I hereby declare, that prior to the date hereof, I have discharged the whole of said payments or advances by entering the same to profit and loss in my said books, and docqueting the same with a declaration to that effect ; and therefore the whole vouchers of said payments and advances are also hereby declared to be cancelled or delivered up, and to be no longer of any force or effect, and shall not be held as any deductions from the provisions in favour of my said children, by my deed of settlement last mentioned.’

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Towards the end of the same year Mr. Miller died, and his eldest son thereupon succeeded to the estate; and having unsuccessfully exposed the estate to sale at £140,000, and finding, as he alleged, that the succession was more than exhausted by his father's debts, and the provisions in favour of his brothers and sisters and their children, and conceiving that those granted subsequent to the date of his contract of marriage in 1804 were not effectual, he brought an action of declarator and reduction to have this ascertained. He there concluded 'to have it found and declared, 'that the provisions and sums of money settled and provided by 'the said Patrick Miller by his deed of settlement, 5th May '1790, and deed of alteration thereof, the 6th day of January '1803, under the deductions therein and after specified, form the 'only good and available settlements in favour of his said children 'and grandchildren, and that any sum or sums of money advanced and paid by the said Patrick Miller to any of his said 'children or grandchildren, or sums paid or debts contracted to 'others for their behoof, form an article of charge against the 'said child or children respectively, and fall to be imputed pro 'tanto to the amount of the provisions ultimately to be found 'due to them.' He also concluded, that the sums entered to the debit of his brothers and sisters in his father's books, 'and such 'other and further sums as shall appear from the said books, to 'be otherwise condescended upon, to have been paid and advanced to, for, and on account of the said children or grandchildren, ought to form an article of charge against them; and 'the foresaid discharge in the said trust-deed, whereby it is declared that none of these articles should form an article of charge 'against them, should be held pro non scripto, and declared to 'have no force or effect;' and on these principles he concluded for a count and reckoning.

Against this action the younger children stated in defence,—

1. That the late Mr. Miller having been left only a patrimony of £700, while his elder brother was greatly enriched, had received a deep impression against the unequal distribution of property occasioned by the law of primogeniture:—that he had openly avowed on all occasions that he was resolved that no such distinction should be made in the distribution of his effects, and that his younger children should be equally as well provided for as the eldest son:—that, prior to the contract of marriage in 1804, a great deal of correspondence had taken place with his eldest son, from which it was established that Mr. Miller was resolved that he should not be fettered in any way, either as to contracting debts, or making additional provisions in favour of his younger

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children ; and therefore that the words of the clause ought to be interpreted and explained by that correspondence, from which it appeared that it was the intention of Mr. Miller to reserve a right to make additional provisions.

2. That as a spes successionis only was conferred by the contract of marriage in favour of the eldest son, and as Mr. Miller remained vested in the absolute right of the estate, he was entitled to make what advances he chose from the bulk of his fortune, either in the shape of annual allowances to the younger members of his family, or of payments bonâ fide to their creditors, and that his promise to convey the estate to his elder son had only reference to the amount or value of it as at the period of his death ; and,—

3. That, on a correct estimate of its value, it would be found that the succession was extremely lucrative, and much beyond that which Mr. Miller had all along contemplated should belong to his eldest son.

The Lord Ordinary found, ‘ First, That in the contract of ‘ marriage betwixt the pursuer and Miss Martha Cumming, ‘ and to which the late Patrick Miller, Esq. of Dalswinton, ‘ the pursuer’s father, was a party, his father came under several most onerous obligations ; viz. 1. To pay £800 of ‘ jointure to Miss Cumming, if she should survive the pursuer, ‘ to be restricted in the event therein mentioned. 2. To pay an ‘ annuity of £500 to the pursuer all the days of his life. 3. To ‘ make over and dispone not only all and whole his lands of Dalswinton, but also all other lands and heritages, as well as debts ‘ and sums of money and estate, real and personal, that might ‘ belong to him at the time of his death, to and in favour of Patrick Miller the pursuer, and the heirs-male of the body of the ‘ present marriage, &c. ; with and under the burden always of ‘ the debts of the said Patrick Miller senior, and provisions made ‘ by him for his younger children and grandchildren ; and, 4. The ‘ said Patrick Miller senior binds and obliges him and his fore- ‘ saids to execute all writs and deeds requisite for carrying the ‘ said obligation upon him into execution : And the deed also ‘ contains obligations upon the pursuer, in the event of his father’s ‘ death, to infest and seise his wife in the foresaid annuity in the ‘ lands of Dalswinton and others, and to make payment of certain ‘ provisions to younger children, other than the heir of the marriage succeeding to the lands of Dalswinton. Second, That, in ‘ terms of this obligation granted nominatim to his eldest son, the ‘ late Mr. Miller was bound to leave the estate of Dalswinton and ‘ his other property to him and the heirs of that marriage, and ‘ that this obligation could not be defeated by any gratuitous deed

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' the clause before recited, burdening them with the debts of Mr.  
' Miller, and with provisions made by him for his younger child-  
' ren and grandchildren, he might, in virtue of that reservation,  
' have granted reasonable provisions to his younger children and  
' grandchildren, if fair and reasonable provisions had not pre-  
' viously been made ; but that this reservation could not entitle  
' Mr. Miller to defeat and render altogether useless the previous  
' obligation he had come under, by gratuitous and exorbitant pro-  
' visions in favour of his younger children and grandchildren.  
' Fourth, That it is expressly alleged by the pursuer, that even  
' supposing the estate of Dalswinton had been sold at the upset  
' price at which it was lately exposed, being £140,000, and ac-  
' cording to the valuation put upon the other funds, instead of  
' any part of the estate remaining to the eldest son, there was a  
' deficiency of no less than £19,000 for the payment of his debts  
' and provisions to his younger children,—the amount of his debts  
' being £90,501 : 12 : 2, and the provisions to his younger child-  
' ren and grandchildren £86,500. Fifth, That the amount of  
' these provisions, in so far as they exceed reasonable and fair  
' provisions granted posterior to the contract of marriage, must  
' be reduced as gratuitous and exorbitant, and granted contra  
' fidem tabularum nuptialium. Sixthly, That although, in the  
' circumstances of the case, there seems to be clearly an excess in  
' the provisions to the younger children, yet it seems difficult to  
' ascertain the amount of that excess until the value of the estates  
' and other property left by the late Mr. Miller can be ascertained,  
' especially as the parties differ so materially with regard to the  
' value of that property. Seventh, That any debts which the  
' late Mr. Miller came under an obligation to pay for his sons to  
' third parties, although effectual as debts against the father, must  
' still be held as provisions paid on account of his sons, and ac-  
' cordingly must be taken in computo of the sums claimed by  
' them ; and, Eighth, That the bond granted by Mr. Miller to  
' Claud Russell, as trustee for the creditors of Mr. Thomas-Ha-  
' milton Miller, must be held as in extinction pro tanto of his pro-  
' visions, exclusive of those settled upon his wife and children by  
' the contract of marriage, to which his father was a party ; and  
' therefore appointed each party to give in a condescence,  
' stating, in the first place, the whole sums drawn by the differ-  
' ent younger children and grandchildren from their father's  
' funds ; second, the sums provided to them by the different  
' deeds ; and, third, the value of the whole of Mr. Miller's estates,  
' real and personal, and the grounds upon which the calculation  
' of that value proceeds.'



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Both parties having reclaimed, the Court remitted to an accountant 'to prepare a statement of the estate and funds of the late Mr. Patrick Miller, and with the burdens thereon, debts due by him, and provisions made by him for his several children.' From his report it appeared, that, taking the estate at the above upset price, the total funds left by Mr. Miller amounted to £148,500; that his debts extended to £90,999. 6s., leaving a free residue of £57,500. 14s.; but the provisions and advances for the younger children and their families amounted to £84,000, so that there was a deficiency of nearly £27,000. On advising that report, the Court found, 'That the several provisions made by the late Patrick Miller for his several younger children, before the date of the pursuer's contract of marriage of 5th October 1804, were suitable and adequate; and that, in the whole circumstances of the state of the said Patrick Miller's affairs and fortune, after the date of the said contract, and down to the time of his death, it was not competent for him to make any addition to the said provisions; and remitted to the Lord Ordinary to inquire how far payments made by the said Patrick Miller to the several defenders, or advances made by him to them, or on their account, before the date of the said contract of marriage, and more especially how far such advances or payments made to them, or on their account, before their forisfiliation respectively, are or are not to be imputed in extinction of their said provisions; and, with these additions and variations, adhered to the Lord Ordinary's interlocutor.' Against this judgment William Miller and the other younger children presented a petition; but the Court, on the 6th of March 1818, refused it.\*

Having afterwards obtained leave from the Court, they entered an appeal; and the House of Lords found, 'That by the provisions contained in the contract of 5th October 1804, entered into by the late Patrick Miller deceased, on the marriage of his eldest son, the respondent, Patrick Miller, he bound and obliged himself, his heirs and successors, to provide, secure, and dispoise, and make over, heritably and irredeemably, the estate of Dalswinton, and his whole other estate, real and personal, that might belong to him at the time of his death, under burden always of the debts of the said Patrick Miller, the father, and provisions made by him for his younger children and grandchildren:—that the exception contained in the said marriage-contract of provisions made by him for his younger children and grandchildren ought not to be construed to extend to enable him, by gratuitous provisions in favour of his younger

\* Not reported.



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 ' marriage-contract with respect to the provisions thereby intended  
 ' to be made in favour of the respondent Patrick Miller and his  
 ' wife and children ; but that in as much as the provisions made  
 ' by the said Patrick Miller for his younger children and grand-  
 ' children, by deeds executed previous to the said marriage-con-  
 ' tract of 5th October 1804, were made to take effect only on his  
 ' death, the same were not in their nature provisions for his said  
 ' children and grandchildren during his life, and that therefore  
 ' any gifts or payments of money given or made by him to or for  
 ' such younger children or grandchildren in his lifetime, which  
 ' were not in the nature of permanent provisions for them, ought  
 ' not to be considered as in extinction or satisfaction of the pro-  
 ' visions so made for them previous to the said marriage-contract,  
 ' and intended to take effect on his death ; but that the several  
 ' provisions made by the said Patrick Miller, deceased, for his  
 ' children and grandchildren, by deeds executed after the said  
 ' marriage-contract, ought to be considered as in fraud of the said  
 ' marriage-contract, so far as they exceed the provisions made for  
 ' such younger children and grandchildren respectively, by deeds  
 ' executed before the date of the said marriage-contract, and so  
 ' far as such children or grandchildren are respectively interested  
 ' therein, and except so far as any provisions so made for such  
 ' grandchildren may be deemed to have been substituted in lieu  
 ' of provisions made for their respective parents before the date  
 ' of the said marriage-contract ; but that the same, so far as the  
 ' same ought not to be considered as in fraud of the said marriage-  
 ' contract, ought to be considered as in satisfaction, or in part-  
 ' satisfaction, of the provisions made for such younger children  
 ' and grandchildren, by deeds executed before the date of the  
 ' said marriage-contract. And further, that the obligations which  
 ' the said Patrick Miller, deceased, entered into after the date of  
 ' the said marriage-contract, for the benefit of any of his children  
 ' for valuable considerations, although effectual as debts against  
 ' the estate of the said Patrick Miller, deceased, ought to be con-  
 ' sidered as provisions for such children, and taken in computo of  
 ' the sums claimed by them respectively under the provisions  
 ' made for them respectively by deeds executed by the said Pa-  
 ' trick Miller, deceased, before or after the date of the said mar-  
 ' riage-contract : And it is ordered, that, subject to these find-  
 ' ings, the cause be remitted back to the Court of Session to re-  
 ' view the several interlocutors complained of, and to do there-  
 ' in as shall be consistent with these findings, and as shall be  
 ' just.'

*According to the nature and intent of  
 the provisions so made upon the date of  
 the said Marriage Contract!*

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LORD CHANCELLOR.—My Lords, the cause in which William Miller and others are appellants, and Patrick Miller respondent, is certainly an extremely important cause. The appellants state their case thus:— They state that the late Mr. Miller, the father of the appellants, was a younger son; and then they proceed to state certain circumstances, which I think it is not necessary to trouble your Lordships with. There is a vast deal of correspondence referred to, prior in date to a deed which was executed, on which the question in this case principally turns. My Lords, all the previous correspondence I lay entirely out of the case, because I cannot conceive that any thing can be more dangerous than the construing deeds by the effect of letters and correspondence previous to the execution of them. It is stated, that it was originally proposed that the deed should have this clause in it:—‘ Declaring always, and it is hereby expressly provided and declared, that the said Patrick Miller senior shall have the free use and disposal of his whole property, both heritable and moveable, all the days of his life, and may borrow money on heritable security, and otherwise burden the same, as he may think proper, which shall be considered preferable to any security granted by this deed, and also the burden of such provisions as he has already made or may make in favour of his younger children or grandchildren, and also the burden of his debts; under which declaration and burdens these presents are expressly granted, and no otherwise, it being understood that the said Patrick Miller senior shall not alter the succession to his estate above mentioned, to the prejudice of the said Patrick Miller junior.’

My Lords, the correspondence was continued after this clause had been sent to the parties; and at last the deed was executed, on the construction of which the question arises:—‘ And in contemplation of the marriage, and for a provision to the said Patrick Miller during the lifetime of his father, and for the better enabling him to fulfil the foresaid obligation for securing the said Martha Cumming furth of the estate of Dalswinton, and also the better to enable him to make the provisions for the children after mentioned, the said Patrick Miller of Dalswinton hereby binds and obliges him, his heirs and successors whatsoever, to pay to the said Patrick Miller junior, during their joint lives, the sum of £500 sterling yearly, but to be restricted during the first two years to the sum of £300; and thereto further binds himself, and his heirs and successors, to provide, secure, and dispone the estate of Dalswinton, and his whole other estate, real and personal, that may belong to him at his death, to and in favour of the said Patrick Miller junior, and the heirs-male of his body of this present marriage; whom failing, the heirs-male of any subsequent marriage; whom failing, to the heirs whatsoever of the body of the said Patrick Miller junior of this present marriage; whom failing, to the heirs whatsoever of his body of any subsequent marriage; whom failing,’ to the appellants, and the heirs in their order, &c.; ‘ but with and under the burden always, however, of the debts of the said Patrick Miller senior, and provisions made by him for his

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‘ younger children and grandchildren.’ He had made provisions previous to this marriage-contract ; and one question between the parties is, Whether, by the words ‘ provisions made by him for his younger children and ‘ grandchildren,’ he meant those provisions which had been made for the younger children previous to the execution of this marriage-contract ; or whether the expressions ought to be construed as if the words should be ‘ provisions made or to be made ?’

Your Lordships, however, will observe a difference between the expression in the actual marriage-contract, and of that clause which I have read to your Lordships in the first instance, namely, ‘ the burden of such ‘ provisions as he has already made, or may make.’ After a great deal of procedure in the Court below, the Lord Ordinary pronounced this interlocutor—[His Lordship then read the interlocutor.]

The Case then proceeds to state the amount of the debts, the amount of the provisions, and a great variety of provisions which were made for the younger children after the contract of marriage was entered into.

My Lords, the Court pronounced this interlocutor—[His Lordship then read the interlocutor of the Inner-House.]—There were some subsequent proceedings that are likewise appealed from ; but the substance of which it is not necessary to mention, as they are chiefly matter of form.

Your Lordships observe, that both the interlocutor of the Lord Ordinary and the interlocutor of the Court seem to proceed not merely upon the principle of construction of the settlement, but the Lord Ordinary refers to what he calls the reason and propriety in point of quantum of the provisions that are made after the marriage-contract ; and he seems to hold that those provisions would be good, if, upon the whole, they were suitable to the circumstances and fortune of the father. That is altogether independent of the question arising upon the mere construction of the marriage-contract. The Court seems to differ from that—not in respect of the propriety of acting upon that principle—but in respect to the application of it ; for it finds that the ‘ provisions made by the late Patrick ‘ Miller for his several younger children, before the date of the pursuer’s ‘ contract of marriage of 5th October 1804, were suitable and adequate.’ The Court, your Lordships therefore perceive,—not stating that they found their judgment upon the construction of the settlement, but upon the fact, that in their opinion the provisions were suitable and adequate,—go on to state, that ‘ in the whole circumstances of the state of the said Patrick ‘ Miller’s affairs and fortune, after the date of the said contract, and down ‘ to the time of his death, it was not competent to him to make any addition to the said provisions ;’—having found, as they had, that the provisions were suitable and adequate at the time of the contract. They likewise appear to have investigated the circumstances, and the state of his affairs and fortune after the date of the contract ; and regard being had to those circumstances, and the state of Mr. Miller’s affairs and fortune after the time of the contract, and down to the time of his death, they held that, under those circumstances, it was not competent for him to make

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any addition to those provisions,—meaning to give a judgment which would seem to imply that the Court was itself of opinion, that if the circumstances of the state of his affairs and fortune after the date of the contract, and down to the time of his death, had been different from what they were, it might have been competent to him to add to the amount.

My Lords, I should be extremely unwilling to enter into any discussion as to whether it is the principle in the Scotch law, that if the parties enter into a marriage-contract, it is competent to the Court of Session, or any Court, to say that the rights of the parties shall not be governed by that marriage-contract, but that the Court itself shall exercise the right and duty of looking into the affairs of the father, and to determine—not what the marriage-contract gives the parties—but what it might be reasonable on the part of the Court to say the father ought to have given those parties. I will not say one word more upon that subject; because it does not appear to me to be necessary in the present case, and that your Lordships may with great security ground your judgment upon the effect of the marriage-contract alone. What I would therefore propose would be, that your Lordships should find, &c.—[His Lordship then read the judgment which he proposed should be pronounced.]

This judgment, your Lordships will see, proceeds upon the construction of the marriage-contract; and proceeding upon that construction, I humbly offer it to your Lordships as my opinion, that the words in the marriage-contract must be taken to mean provisions made before that marriage-contract. You cannot construe these words as provisions made or to be made; and if the effect of the correspondence is looked to, (which I should hold to be a very singular thing,) it will be seen that that is what is intended.

My Lords, provisions were made by deeds of settlement after the contract for various amounts, and Mr. Miller's family were very many in number. The Court has not proceeded to state its opinion as to the validity or invalidity of those different provisions. It appears to us, therefore, that we should not run before the Court in so doing, and that the judgment of this House should go no further than to lay down the principle as to the construction of the instrument, and to leave it to the Court, after that judgment, to deal with the case as the principle of that judgment may require. For that purpose, I should propose, subject to these findings, to refer the cause back to the Court of Session to review the several interlocutors complained of, and to do therein as shall be consistent with these findings, and as shall be just.

My Lords, I can venture to assure your Lordships, that infinite attention has been given to this case. I hope we are finally right in this view of it. I am quite sure, if there is any error, it has not been for want of due care to avoid it; for I do not recollect a case to which I have given a more earnest attention than this.

J. CAMPBELL,—A. MUNDELL,—Solicitors.

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