

' THE LORDS repelled the objections to the bond, and found the younger children entitled to be ranked on their interest produced in their due course, conform to the date of their infestment.'

No 100.

For the Creditors, *Lockhart.* Alt. *Ferguson.* Clerk, *Kilpatrick.*

Fol. Dic. v. 3. p. 49. Fac. Col. No 220. p. 404.

D. Rae.

1785. February 8. JANET DUNCAN against JOHN SLOSS.

By an antenuptial contract of marriage, John Sloss settled a large jointure on Janet Duncan his second wife; for payment of which, after his death, she sued his heir, a child of the first marriage, on whose provisions it encroached.

Pleaded for the defender: The jointure in question is exorbitant, being greatly disproportionate to the means of the grantor; and therefore, *quoad* the excess beyond its rational or just amount, it is to be postponed to the claims, as well of his children by the prior marriage, as of his other creditors; Gosford; Stair; 19th January 1676, Stansfield *contra* Brown, No 73. p. 954.; Kilkerran, *voce* BANKRUPT, 26th July 1744, Creditors of Sir James Campbell, No 103. p. 988. *Fac. Col.* p. 225. 12th July 1758, Noble *contra* Dewar, *voce* TAILZIE; Erskine, p. 564. Fountainhall, 23d March 1683, Gartshore *contra* Brand, No 102. *infra.*

Answered: The authorities quoted relate to postnuptial contracts alone; for it has not yet been found, that provisions to wives, contracted for by antenuptial deeds, are not onerous debts in the fullest sense.

The cause was reported by the Lord Ordinary; when

The Court restricted the jointure in question to a rational extent, in the same manner as if it had been granted in a postnuptial contract.

Lord Reporter, *Gardenton.* Adv. *W. Craig.* Alt. *M. Ross.* Clerk, *Horne.*

Fol. Dic. v. 3. p. 50. Fac. Col. No 197. p. 310.

Stewart.

S E C T. XIII

The Onerosity of Provisions made in Postnuptial Contracts.

1683. March 23. GARTASHORE against BRAND.

ALEXANDER GARTASHORE, late bailie in Edinburgh, and Elizabeth Brand, relict of Gavin Weir, competing:—THE LORDS, on Castlehill and Pitmedden's report,

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No 102.

A provision to a wife, whether by

No 102.

antenuptial or
postnuptial
contract, in-
effectual, so
far as exor-
bitant. See
Duncan a-
gainst Sloss,
No 101. p.
587.

preferred the relict to Gartshore, in respect her judicial renunciation produced, bears not to be upon oath, and notwithstanding of the extract of the instrument produced, or that it is offered to be proven by the oaths of bailie Douglas and the clerk, that she did swear; which probation the LORDS refused: But found her liferent provision, compared with her husband's estate and debt, exorbitant, being the annualrent of L. 10,000; and therefore referred to the President and these two Lords, to endeavour to settle the parties, and to modify and abate her annuity: For they thought, a trading merchant that was contracting debts, ought not to lay 2000 merks of his own means, to every 1000 merks he got with his wife in tocher, to the prejudice of his creditors, as was done here. And accordingly they having met, with the rest of the Lords' consent, declared they would modify her jointure, unless she would accept of the sum of 6000 merks in full satisfaction; which she accepting, then they ordained her to assign her jointure and contract matrimonial, to James Weir, her child's tutor, for payment to himself *primo loco* of the annualrent of the said 6000 merks which he was to advance to her, and the rest of it among and for the behoof of the creditors of the pupil, according to their diligences; and so they preferred the tutor to Gartshore, who offered to pay the widow the 6000 merks modified, upon her assigning him to her right.

Fountainball, v. 1. p. 229.

1744. July 26.

The LADY of SIR JAMES CAMPBELL of Auchinbreck, and his CREDITORS,
Competing.

No 103.

A postnuptial
provision to a
wife, held to
be onerous,
in so far as
suitable and
moderate.

AFTER Sir James Campbell had contracted debts above the value of his estate, he, in April 1736, married a young woman, who had for some time been in his family as governess to his children, without any contract of marriage; but in October 1736, he granted her a liferent bond of annuity for L. 100 Sterling, besides a house with some conveniences, containing precept of sasine, whereon she was infeft. Of this bond, his creditors having raised reduction on the act 1621, the LORDS 'Restricted the lady's liferent bond of provision and infeftment to L. 50 Sterling yearly, in full of all she could claim by the said bond.'

Some of the Lords were of opinion, That where a woman marries without a contract, upon the faith of the legal provision, any postnuptial provision is a gratuitous deed, and as such, reducible at the instance of prior creditors; and that, were it otherways, there would be nothing to hinder any man who had married without a contract, after he knew himself insolvent, to settle a provision on his wife preferable to all his personal creditors.

But the opinion which prevailed was, that marriage itself is an onerous cause, which yet will not be sufficient to sustain the provision any further than what may be a moderate subsistence; for so far only the husband is under obligation.