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where no particular qualification of fraud can be alleged. In contracts post-nuptial, where the wife clubs a tocher, these fall also to be sustained as onerous, unless where there is a total exception, a provision made to the wife, whereby her husband's just creditors may be damnified. But the third case, which is the present, is different from both. It is true, that, in some sense, this bond may be considered as onerous, in respect of the husband's obligation *jure natura* to aliment his wife; and in this light the husband's circumstances, and extent of his fortune, are to be considered more than his rank and quality. A husband, whatever be his rank and quality in the world, is bound to provide for his wife's aliment: That obligation is a debt upon him, and he is bound to it, whether he have any substance or not; but the quantity must vary according to his circumstances. And if the case be as here, that the husband was absolutely insolvent, though he was bound to aliment his wife, the obligation is of a very different extent from the former; and therefore this bond ought either to be reduced *in toto*, or restricted to a moderate aliment.

THE LORDS restricted the lady's life-rent bond of provision and investment, to L. 50 Sterling yearly, and that in full of all she can claim by the said bond: And declared, that the said L. 50 shall not affect, or come in competition with creditors, whose debts were made real by investment, or secured by inhibition, before the date of the said bond of provision.

C. Home, No 273. p. 442.

1746. June 18.

EXECUTORS CREDITORS OF MR HUGH MURRAY-KYNNYNMOUND *against* AGNES MURRAY-KYNNYNMOUND.

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A person enjoying an entailed estate, gives, in a postnuptial contract, to his only daughter, who was also heiress of the entail, a provision of L. 2000. The provision reducible on the act 1621, if the grantor was insolvent at the date of the contract.

By a postnuptial contract of marriage, entered into between Mr Hugh Murray-Kynnymound advocate, and Isabella Somerville, daughter to Hugh Somerville, writer to the signet, narrating that the terms thereof had been agreed on before the marriage, and that Mr Somerville had already paid to Mr Murray L. 1000 Sterling, in part of portion with his lady: Mr Somerville further obliged himself, and granted bond for another L. 1000 payable at his decease, and to pay to the children of the marriage, other than the heir, or the heir, if a single child, in fee, and to his daughter in life-rent, L. 1000 at the childrens ages of 21, or marriage; and it was further provided, that Mrs Murray should succeed equally to his effects with his other daughter, unless he should otherwise dispose, after his said other daughter had first drawn L. 1000 out of them, to preserve the equality, as there had been but L. 2000 given with her at her marriage. On the other hand, Mr Murray secured his lady in a jointure of L. 200 Sterling, disposed to her his whole household furniture, redeemable by the children of the marriage for 2000, and by any other heir for 4000 merks Scots; settled his estate of Whitfomhill on the heir-male; and failing heirs-male of any other, on the heirs-female of this marriage, and obliged himself to do no deed whereby the heirs of the mar-

riage might be disappointed of any succession competent to them to the tailzied estate of Melgum and Kynnynmound, which last article was not agreed on before the marriage, as the succession to that estate had not then fallen to him; and it was provided, that it should not be in Mrs Murray's power to renounce her jointure, without the consent of certain trustees named.

Mr Murray had granted a security for the first L. 1000 paid to him, before executing the contract, and there was produced in process a memorandum under his hand, entitled, *Articles of contract of marriage* between Mr Hugh Dalrymple advocate, (which name he bore before his succession to the entailed estate,) and Mrs Isabella Somerville, his wife; containing all the terms in the contract, except that concerning the succession to the estate of Melgum and Kynnynmound; and that the estate of Whitfomhill is not in any event agreed to be settled on female.

The clause on which the present question depended, contained an obligation on Mr Murray, in case there were no sons, to pay to one daughter of the marriage L. 2000; if there were two, to pay them L. 2500; and to three or more L. 3000 Sterling.

The estate of Whitfomhill was sold, and Mr Murray dying insolvent, as his creditors alleged, a reduction was by them raised against Agnes Murray, the only child of the marriage of this provision, as fraudulent, excessive, and gratuitous, in prejudice of creditors.

Pleaded for the creditors, Mr Murray was insolvent at the time of contracting the marriage; he died so, and what debts he had contracted after it, were to satisfy prior engagements. This appears to have been in view at making the contract, in which is the unusual clause of putting it out of the lady's power to renounce her jointure, which could only proceed from Mr Somerville's knowledge of Mr Murray's circumstances, and hence his apprehension that his daughter would be in danger of being pressed to renounce. This is a key to the whole transaction, and shews a formed scheme to secure a provision to the children out of the fund of creditors, for no other interpretation can be put upon granting this sum to a child who was to be both heir and executor.

Supposing the case to be without fraud on the part of Mr Somerville, the provision falls to be reduced as exorbitant. When a man is to marry his daughter, he may be allowed to make the best bargain for her that he can, but after marriage the provisions fall to be considered as voluntary; and in Mr Murray's circumstances, in which no credit can be given to the narrative of the contract, that it was preconcerted, the jointure itself was rather too large; but Miss Murray was to succeed to the estate of Melgum and Kynnynmound, and to her grand-father's L. 1000, which made the provision unnecessary and gratuitous; for though the portion might be considered as a sufficient onerous cause to support the lady's jointure, yet it cannot support this provision to a child expecting besides such a succession: And even eventual bankruptcy will set aside deeds absolutely gratuitous.

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By the tailzie it was in Mr Murray's power to burden the estate with provisions to younger children, to the extent of three years rent, in which case, it is apprehended, he could not have laid them on his own proper effects to the prejudice of his creditors; and neither can he be allowed to do it in favours of this child, who gets both the three years rent and the remainder of the estate.

With regard to such of the creditors as became so after the contract, their money was applied to the payment of prior creditors; and the Lords have found debts contracted by an heir of entail, and so applied, a burden on the tailzied estate, 29th January 1731, Gordon of Garty against Sutherland of Kinminity, *see* TAILZIE. *2dly*, They are in the same case with that of the decision, 2d July 1673, Street against Jackson and Mafon, Stair, v. 2. p. 197. *voce* FRAUD; where an infestment granted to a son was reduced on debts after contracted.

Pleaded for Miss Murray, The deed was neither gratuitous, nor was the granter then in a state of insolvency. It was not gratuitous, considering the portion given; and here the tailzied estate falls not to be considered, being already secured to the child without any deed of Mr Murray; so that all that is provided in her favours is her mother's portion. And this cuts down all allegations of designing fraud, when the bargain was reasonable and equal; and Mr Somerville had no reason to suspect his son-in-law's credit, who was in possession of a proper estate, besides his liferent of the tailzied estate and profits of business. Neither can any inference be drawn from the clause, putting it out of the lady's power to renounce, which he was used to insert in contracts of his drawing, and actually did it in his other daughter's contract.

2dly, As the creditors are presently endeavouring to charge several of the debts claimed by them on the tailzied estate, it will depend on their success in that question, whether Mr Murray's effects be insolvent at this hour; so that the reduction ought at least to be superceded till the event of that cause.

Observed on the bench, That Miss Murray might have been excluded from the succession of the tailzied estate, by the existence of a son of a subsequent marriage, in which case nothing was settled on the issue of this marriage but the provision.

' THE LORDS, 18th June 1745, found, That the provision of L. 2000 Sterling, contracted by Mr Hugh Murray, in his contract of marriage with Mrs Isabella Somerville, to the only daughter of the marriage, was not reducible on the act of Parliament 1621, although the said Mr Hugh Murray had been insolvent at the time of the said contract.'

On a reclaiming bill and answers, in which the Lords were chiefly moved with this circumstance, that the L. 2000 to an heir-female was beyond what was provided to the heir-male, in case any had existed; and therefore, if the provisions in his favours were adequate, this to a daughter could not be loaded upon but as gratuitous.

' They found, 25th July 1745, that the provision was reducible on the act of Parliament 1621, in case it should appear that Mr Hugh Murray was insolvent at the date of the contract.'

Pleaded in a bill for Miss Murray, That the creditors had at first endeavoured to cut her out of this provision, by putting an interpretation upon the clause, as if it had only been intended to take effect, in the event of her being excluded from the succession by an heir-male of another marriage; but, by an interlocutor of the Ordinary, adhered to, it was found that she was creditor upon the executry and moveables for the sum; and therefore it being fixed, that this was provided in her favours, if it be not an irrational provision, it must be made good to her, notwithstanding it be a further provision than what is made upon an heir-male. Mr Murray was seised in an estate above L. 300 *per annum*, a terce whereof he might have settled upon his lady, though he had received nothing with her; so that the only question is, Whether what he received be not sufficient to support the provisions made on her and her child, over L. 100 of jointure. But without being so nice, it is apprehended L. 2000 of portion was an adequate consideration for L. 200 jointure to his lady, and L. 2000 to be paid to the child, in the event of her attaining majority or marriage; for as the present argument proceeds on the supposition of Mr Murray's bankruptcy, the stipulated succession to the estate of Whitsomhill must go for nothing; and the tailzied estate was settled on the petitioner prior to the contract, without any deed of Mr Murray's: So that her grandfather might have, without regard to that, retained his money, which he might have disposed of to her mother and her, or insisted on these terms: Not to mention the L. 1000 bound to Mr Murray's children of the marriage, which may very well be reckoned an additional inducement of the provision made by him in their favours.

Answered, That by the memorandum in Mr Murray's handwriting, the estate was not in any event to be contracted to heirs-female, wherefore the provision to daughters was only intended to take place, in case of their not succeeding to his estate; and this the respondent imagined to have been the intention, though it was not so expressed in the contract. The petitioner had argued wrong in alleging, that no part of the provisions made upon the daughter could be brought *in computo*, besides this L. 2000; for the hope of the succession, though not settled by a deed of Mr Murray's, was a cause for granting the portion, and he also obliged himself to do no deed by which that hope might be frustrated; and the respondents apprehended they could point out a method by which that might have been done. The settlement of the estate of Whitsomhill fell also to be considered; for though the argument went on the supposition of Mr Murray's bankruptcy, yet the petitioner would not say, that Mr Somerville was in the knowledge thereof when he made the stipulation, or if he were, it would be a sufficient cause of reduction.

THE LORDS adhered: See PROVISION TO HEIRS AND CHILDREN.

Reporter, *Arniston.* Act. *R. Craigie & H. Home.* Act. *A. Macdougall & Brown.*
Clerk, *Kirkpatrick.*

Fol. Dic. v. 3. p. 50. D. Falconer, No 117. v. 1. p. 142.

* * * Lord Kames thus reports the same case :

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In the year 1730, Hugh Dalrymple advocate intermarried with Isabella Somerville, second daughter to Hugh Somerville clerk to the signet, without a marriage-contract. In the year 1736, Hugh Dalrymple succeeded to the united estates of Melgum and Kinninmont, which by an entail, failing certain persons therein named, were settled upon him and the heirs-male of his body ; which failing, the heirs-female of his body. In the year 1739, Hugh Dalrymple, now called Hugh Murray, being in an uncertain state of health, and having issue but one child, a daughter, with little prospect of more children, a contract of marriage was executed, upon the narrative that Mr Somerville had advanced to his son-in-law the sum of L. 1000 Sterling, and had then granted bond to him for another L. 1000, payable at his the granter's death. Further, Mr Somerville becomes bound to pay to Isabella Somerville his daughter in liferent, and to the children of the marriage, one or more, in fee, a third L. 1000 with interest, after his death. On the other hand, Mr Murray became bound to invest his spouse in a liferent of L. 200 Sterling, payable out of his proper estate which was not entailed. *2dly*, He became bound to resign his proper estate in favour of himself and the heirs-male of his body ; which failing, to the heirs-female of his body. *3tio*, ' In case there should be no sons existing at the dissolution of the marriage, but only daughters ; he became bound to pay to the daughter or daughters, at marriage or majority, the sum of L. 2000, 2500, or L. 3000, as there should be one two or more daughters existing at the dissolution of the marriage.'

The marriage dissolved by Mr Murray's predecease, leaving his said daughter, for he never had another child, to succeed to his whole fortune. But he having died *oboratus*, and his creditors having laid hold of his moveables and of his unentailed estate, a claim was made by his daughter for the above-mentioned L. 2000, provided to her in case of no heirs-male of the marriage. And it being found by the Court that she was entitled to this sum, notwithstanding her having succeeded to the entailed estate, the creditors brought a reduction upon the act 1621, insisting that Mr Murray was insolvent at the date of the contract of marriage ; and that, to provide L. 2000 Sterling to a child, who was to succeed to an opulent entailed estate, was a gratuitous deed, and therefore reducible upon the first clause of the statute. And the sum of the reasoning in support of this reduction, was as follows, *1mo*, Though a man acts unjustly who does any deed to hurt his creditors, yet while he is under no legal impediment to manage his affairs, such as interdiction, inhibition, or notour bankruptcy, it must be lawful for third parties, who know nothing of his circumstances, to contract and deal with him. Thus, there is nothing to bar an insolvent person from borrowing money, buying, or selling ; nay, there is nothing to bar him from lending his credit as cautioner, whatever risk he may run thereby, being a contract often necessary for carrying on what is commonly called business.

But, in the *second* place, law, which prescribes just bounds to the power of persons insolvent, does not countenance arbitrary or irrational deeds which may prejudice creditors; nor, in such matters, is it necessary to specify, that the deed is intended to prejudice creditors, and consequently fraudulent: every gratuitous or irrational deed is fraudulent by construction of law, whether the wrong be intended or not, and is reducible upon the great rule of equity *quod nemo debet locupletari aliena jactura*; and it can be noway hurtful to commerce to cut down such deeds.

3^{to}, With regard to contracts of marriage, which lie in the middle betwixt these two extremes, every rational article suitable to the condition of the parties, (not to talk of their circumstances,) must be effectual, because an insolvent person is not barred from entering into a contract of marriage; and therefore, if the contract be rational and equal, considering the condition of the parties, and their reputed circumstances, there is no law against such a contract. Lord Stair observes, 'That competent provisions to wives or husbands are not accounted gratuitous but onerous, *ad sustinenda onera matrimonii*, and for other mutual provisions; but, if exorbitant, they will be liable *in quantum locupletiores facti*.'

4^{to}, This must hold more strongly in postnuptial contracts of marriage, where the mutual provisions ought to be strictly equal. In contracting a marriage, the parties are allowed to stand upon terms, and may refuse to proceed but upon certain conditions; which in a great measure must justify every article that is not glaringly irrational: but after the marriage there can be no such excuse for high provisions on either side; therefore every excess ought to be cut down as so far gratuitous, upon the principle *quod nemo debet locupletari aliena jactura*.

5^{to}, The Court has always used more liberty with provisions to the heirs or children of the marriage, than with the wife or husband's provision; and justly, for if such provisions were indulged, it would open a wide door to defraud creditors; considering that giving to an heir is but one step beyond preserving the fund for the insolvent person himself: neither is there here any real hardship upon the children, who are only deprived of what in equity and good conscience ought not to have been contracted in their favour. This point is established in our practice by many decisions.

To apply these observations: Here a contract of marriage is made at a time when Mr Murray, in an uncertain state of health, had little prospect of other issue than the daughter already procreated. In this condition, he provides no less than L. 2000 Sterling to this daughter, which was to be made effectual to her even though she should succeed to the entailed estate; a most irrational provision to an heir, and unjustifiable, supposing Mr Murray at that time insolvent. For, if a son of the marriage was to rest contented with his right of succession, what good pretext could there be for giving an only daughter, who was to have the same benefit, an additional sum of L. 2000 Sterling?

Found, that the provision of L. 2000 Sterling, contracted by Hugh Murray in his contract of marriage to the only daughter of the marriage, is reducible

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' upon the act of Parliament 1621, in case it shall appear that Hugh Murray
' was insolvent at the date of the said contract.' See PROVISIONS TO HEIRS and
CHILDREN.

Rem. Dec. v. 2. No 72. p. III.

1754. July 1.

Creditors of JAMES STRACHAN *against* LUDOVIC STRACHAN.

No 105.

Provisions to children, in a post-nuptial contract, being made payable after the death of the father and mother, were found to confer no *jus crediti*, and creditors were preferred.

JAMES STRACHAN of Dalhackie became bound, in a postnuptial contract of marriage, to pay certain sums of money to the children, born or to be born of that marriage; the term of payment was declared to be at the first term after the decease of himself and of his wife.

In a competition between Ludovic Strachan, the only child of the marriage, and the creditors of James Strachan, it was *objected* for the creditors, That, with regard to the obligations in the contract aforesaid, Ludovic Strachan was to be considered as an heir of provision only; and therefore could not compete with the onerous creditors of his father.

Pleaded for Ludovic Strachan: It is the duty of a father to provide for his children; such provisions are onerous, and constitute them creditors to their father: as he who is solvent may become bound to strangers, so also may he to his own children; as he may make the existence and extent of his obligation to strangers depend on some uncertain event, so also may he in his provisions to his own family. Thus it was decided, 24th January 1724, in the case, Margaret Lyon against the creditors of Easter Ogle, (*see* p. 233.) In that case, provisions were made in favour of daughters to be born, and declared payable on the first of these three events, the day of their marriage, the attaining the age of eighteen, or the first term after the death of the father. And it was found, That a daughter, having right to such provision, might compete with the onerous creditors of the father.

Pleaded for the creditors of James Strachan: Contracts of marriage ought, in reason, to constitute the children heirs of provision only; they may, nevertheless, be so framed as to render the children creditors. In this case, however, the children are only made heirs of provision; for that here a sum of money is made payable after the death of the father; and which proves, That, during his life, there was no *jus crediti* constituted in favour of the children. Were this provision a *jus crediti*, this pendent obligation would exclude creditors from the date of the contract, which is absurd. Provisions made payable to children whenever they shall attain a certain age, produce action for payment from that time; the children are therefore creditors in such provisions: for, had these provisions ever been a right of succession, they could not have altered their nature, and become a debt from the term of payment.

The case of Margaret Lyon against the creditors of Easter Ogle is not in point: there the obligation was to pay at a term which might have happened before the