

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.

And as to the case supposed of a husband's settling a provision upon his wife, after he knew himself become insolvent, even in that case, it was thought the provision might be sustained to the extent of a subsistence.

But be that as it will, the present case was thought different, as in the supposed case there is more an appearance of fraud than in the present case, where there was no change of the husband's circumstances between the marriage and the time of granting the provision; and, as it was not controverted, but that at the marriage he might have granted a provision, it was thought to be straining too hard to say, he could give none thereafter, although no change had happened in his circumstances.

Fol. Dic. v. 3. p. 50. Kilkerran, (BANKRUPT.) No 4. p. 51.

* * * C. Home reports the same case thus :

IN the ranking of the creditors of Sir James Campbell of Auchinbreck, Sir James's lady produced a bond of provision granted by her husband to her, on which infestment had followed, which proceeded on the narrative, that she had not been secured in a competent jointure, as had been communed and agreed upon betwixt them before the marriage; and therefore, in implement thereof, he disposed to her an annuity of L. 100 Sterling yearly, free of all burdens; and likewise the liferent of certain lands therein mentioned, extending to about 400 merks Scots of yearly rent, *proviso*, that in case she married after Sir James's decease, she should restrict the same to L. 50 Sterling yearly.

Objected for the creditors, That this interest could be sustained to no extent, in respect Sir James, being absolutely insolvent, could not make a provision for his wife to the prejudice of his creditors; and if it could be sustained at all, it could only be to a very moderate extent; more especially as she brought no tocher, and that Sir James was insolvent at the time of granting the bond, and owing debts far exceeding the value of his estate, for a considerable part of which infestments were taken, and others ready to be taken.

Answered: The provision must stand to the full extent, as it was not gratuitous but onerous. That it proceeded on an antecedent paction, not executed in writing. That in considering the extent of a provision, the husband's rank and quality, as well as his circumstances, fell to be considered, and that Sir James was a man of considerable figure and fortune. That if this provision had been made in a contract of marriage, it would have been good to the full extent; and there was no difference betwixt an antenuptial and postnuptial contract, or bond of provision granted by the husband to the wife after marriage, and the provision was so far from being large, that it was very moderate.

Replied: There was a very great difference betwixt contracts executed before or after marriage, and voluntary bonds of provision by a husband to a wife, who contracts nothing on her part, nor even agrees to accept thereof in lieu of her legal provision, as in this case. For, in the first case, the provision must stand,

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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.

No 104.

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-