1760. *June* 13.

JOHN WATSON of Muirhouſe, and other CREDITORS of ANDREW SCOT, *againſt* The YOUNGER CHILDREN of the deceaſed ROBERT SCOT, Merchant in Glaſgow.

No 100.
A man became bound, in his contract of marriage, to provide a certain ſum to the *heirs whatſoever*. The eldeſt ſon ſucceeded and made up titles to the whole eſtate. Afterwards when the ſon's funds had become leſs than his debts, tho' no diligence had been done againſt him, he executed a bond of proviſion in favour of his brothers and ſiſters, on the narrative that his father had not provided for them. They were infeft, and in a ranking they were preferred according to the date of their infeftment.

BY contract of marriage, in 1705, between Robert Scot and Agnes Stark, he provided her in a liferent annuity of 500 merks, to be uplifted out of certain tenements. This annuity was to be reſtricted to 300 merks, in caſe of bairns exiſting at his death; or if they ſhould all happen to die before majority or marriage, her full proviſion was to take place. He alſo became bound 'to provide, 'in favour of the heirs whatſoever to be procreate of the marriage, the ſum 'of L. 8000 Scots: And in implement thereof, *pro tanto*, he provided to 'the ſaid heirs the foreſaid tenements of land, and he alſo provided to his 'heirs whatſoever to be procreated of the ſaid marriage, the fee of the haill con-'queſt; and bound and obliged himſelf, and his foreſaids, that he ſhould do no 'fact or deed to hurt or prejudge his ſaid future ſpouſe, or the bairns to be pro-'create of the ſaid future marriage, of their reſpective proviſions of liferent and 'fee above written.'

Robert Scot died in 1725, and left a ſon, Andrew, and five younger children, then infants.

Andrew Scot made up titles to his father's heritage, and was infeft as heir to him, without objection made by the younger children.

In 1740, when (as it afterwards appeared) Andrew Scot's debts exceeded his effects, but no diligence had been done againſt him, he granted a bond of proviſion to his brother Robert, and four ſiſters, for 3400 merks, of which his brother was to have 1000, and each of his four ſiſters 600 merks.

The bond bore this recital: 'Foraſmuchas my ſaid father died a conſiderable 'time ago, without making any ſettlement of his affairs, or proviſions in favour 'of his other children, and they being ſtill unprovided for by me; and reaſon and 'equity requiring, that a ſuitable proviſion were made to them out of their ſaid 'father's ſubjects, to which I have ſucceeded as eldeſt lawful ſon and heir to 'him; therefore, and for the love, favour, and affection I bear to them,' &c.

Upon this bond infeftment was taken about two months after its date.

In a ranking of Andrew Scot's creditors, this bond was *objected* to upon the act 1621, as having been a gratuitous deed, granted to conjunct perſons, after he had contracted debts beyond the value of his effects, in prejudice of his lawful and onerous creditors.—It was *anſwered*, That the bond was onerous and effectual, as having been granted in ſecurity or ſatisfaction of the younger childrens ſhare of the proviſions in their father's marriage contract, and when no diligence had been done againſt the granter.

Pleaded for the creditors, 1*mo*, The children had no right to any ſhare of the proviſions in the marriage contract 1705. The ſum of L. 8000 was thereby heritably ſecured on certain tenements, and provided to the heirs whatſoever of the marriage; which is a technical term, admitting of no ambiguity in a ſettlement

No 100. of ſucceſſion to lands, but importing, that the eldeſt ſon is called firſt, in excluſion of all the younger children. 2*do*, The bond in queſtion was not granted in implement of the proviſions in that contract, had any been thereby made for the younger children. Its narrative makes no mention of the contract; but, on the contrary, bears, that they were unprovided by their father, and that the granter had ſucceeded as heir to him; and that therefore he granted it for love and favour, which is the ſtrongeſt deſcription of a gratuitous deed. And, 3*tio*, Suppoſing the bond had been given in implement of thoſe proviſions, and that the ſame had been due; yet, as it proceeded from the voluntary act of the debtor, in order to give his brother and ſiſters a preference to his other lawful creditors, when they were not demanding it, and when he knew his inſolvency, it muſt be conſidered as an act of fraud, which the law cannot ſupport.

Answered for the younger children, 1*mo*, Where ſums of money, whether heritable or moveable, or burgal tenements, are provided in the marriage contracts of mercantile people, to heirs of the marriage, the whole children or bairns are thereby underſtood to be called as heirs of proviſion, though the heir of line would be entitled to ſucceed in ſuch a ſettlement of a land eſtate, where the repreſentation of a family may be ſuppoſed in view; February 1727, Macdoual, Stewart's anſwers, *voce* HEIRS of PROVISION, (*voce* PROVISION to HEIRS and CHILDREN.) But here the parties to the contract have further explained their intention of calling the whole children, by the reſtriction of the wife's annuity in caſe of bairns exiſting, and the father's obligation to warrant to the bairns their proviſion of fee; and when heirs and bairns are called in ſuch a contract, the clauſe is underſtood to be *exegetic*, and to call the whole bairns; 13th February 1677, Carnegie againſt Clark and Alcorn, Stair, v. 2. p. 504. *voce* PROVISION to HEIRS and CHILDREN; 17th February 1736, Ranken*.

2*do*, The narrative of the bond ſets forth nothing but what was true; only it does not tell the whole truth, or that by the contract the younger children were entitled to about 10,000 merks, inſtead of 3400 ſecured to them by this bond. Suppoſing the granter to have overlooked the contract deſignedly, it can afford no objection to the validity of the bond, when it ſtill appears, that he was debtor to them in a much larger ſum by that contract, which he muſt be preſumed to have had in view when he granted this ſecurity.

And, 3*tio*, Notwithſtanding the act 1621, it is competent to an onerous creditor, at any time, to take payment of a debt juſtly due to him, or to take a conveyance of any ſubject in ſecurity of it, although the debtor be then inſolvent, if he has not been interpelled by prior diligence; 31ſt January 1627, Scougal, No 1. p. 879. Nor can this be conſidered as a ſecurity voluntarily given by the debtor, as he was in law and juſtice bound to have given it, the ſubjects on which the bond is granted being the ſame with thoſe provided in the contract, of which the children could have compelled their brother to denude in their favour, as far as their ſhares extended; ſo that he truly held the ſame only in truſt.

* Examine General Liſt of Names.

'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 infeftment.' 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.

No 101.
A proviſion to a wife, by antenuptial contract, ineffectual ſo far as exorbitant.

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 granter; 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, *Gardenſton.* Act. *W. Craig.* Alt. *M. Roſs.* Clerk, *Home.*

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

Stewart.

SECT. XIII.

The Onerosity of Proviſions made in Poſtnuptial Contracts.

1683. *March* 23. GARTASHORE *againſt* BRAND.

No 102.
A proviſion to a wife, whether by

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