fraud. The strong presumption of fraud in this case at first sight, and the certainty of it afterwards, as proved by the evidence, make a particular exception in a particular case for the detection of fraud, an equitable exception from the general rule of strict law. No 121.

"THE LORDS suspended the letters."

Charger, *J. Craigie.* Suspender, *Macqueen.*

J. D. *Fol. Dic. v. 4. p. 157. Fac. Col. No 142. p. 259.*

1761. *January 27.*

Sir GEORGE LOCKHART of Carstairs, Baronet, *against* JEAN & MARY LOCKHARTS.

No 122.
A person possessed of an estate, under a prohibition not to alter a certain order of succession, gave large provisions to daughters, who could not succeed to the estate. A proof was allowed of the circumstances of the estate and previous communings of friends, in order to ascertain whether the provisions were not excessive.

IN the year 1749, Sir James Lockhart of Carstairs executed a settlement of his estate in favour of his eldest son, William, in fee, and the heirs-male of his body; whom failing, to his other sons in their order of birth, and to their heirs-male, &c.

This settlement contains no limitations, prohibitions, or irritancies, to restrain the several heirs of entail from contracting debts, or from the free disposal and alienation of the estate; but, with respect to the destination of succession, there is this prohibitory clause: "That it shall not be in the power of the said William Lockhart, or any of the substitutes, to invert or alter the order of succession hereby established; and in case any of them shall do in the contrary, the contraveners, and all descending from them, shall not only amitt and lose all right by these presents, but likeways, that all such deeds inverting the succession shall be *ipso facto* void and null."

This deed reserves Sir James's liferent, with full and unlimited power to alter or burden with debt at pleasure.

William, afterwards Sir William Lockhart, the eldest son, made his addresses to Miss Agnew; and Sir James, in order to pave the way for the marriage-contract, executed a deed, first July 1751, in favour of his son William; by which, "for the love and favour he had to the said William Lockhart, his eldest son, and to enable him to make a suitable settlement in case of his marriage, he discharged the powers reserved to him by the above-recited settlement, and restricted his liferent to a certain annuity out of the estate."

On the 25th day of July 1751, William Lockhart married Miss Agnew with the consent and approbation of Sir James, and he received as a portion with the lady L. 1000 Sterling in hand, as also L. 500 Sterling, payable the first term after her father's decease.

By the contract of marriage, the lady was provided to an annuity of 4000 merks, to be increased to L. 300 Sterling in case of no children, and to L. 200 at the first term after her husband's decease, in full of her claim to furniture

No 122. and moveables; and in case there should be only daughters procreated of the marriage, they were provided to L. 3000 Sterling, if one or two; and L. 4000 if three or more, payable at their respective marriages or majorities, with annualrent from the first term after the father's decease.

The marriage dissolved by death of the lady without children.

In 1755, Sir William Lockhart entered into a second marriage with Miss Porterfield, with whom he received in hand L. 1666 Sterling, and L. 333 more payable the first term after the death of Mrs Porterfield her mother. The lady was provided in an annuity of L. 300 Sterling yearly, to be restricted, in the event of a second marriage, to L. 200, with L. 300 for furniture and mournings, to be increased to L. 500 in case of no children. The estate was settled on the heirs-male of the marriage; and, in case of no heirs-male, the daughters were provided to L. 4000 Sterling, if one, and L. 6000, if two or more, payable at their respective marriages or majorities, with interest thereafter; and in the mean time, to be alimented and educated suitable to their station.

In the year 1758, Sir William Lockhart died, leaving only two daughters.

His brother, Sir George, succeeded to him, and brought a process of reduction, in order to set aside the marriage-contract, and to restrict the provisions contained in it.

He *alleged*, That his brother Sir William's moveable estate was exhausted by his personal debts and funeral charges, and the sum due to the lady for furniture and mournings: That the tailzied estate was only about L. 540 a-year, which would not be sufficient to clear the lady's liferent-annuity, and the interest of the young ladys' provision, when the same should become due.

He also offered to prove, from antecedent communings, that the lady's relations themselves were of opinion, that the provisions were exorbitant, as they had very cheerfully accepted of much smaller provisions; and upon the plan of those smaller provisions, a scroll of the contract had been drawn out by the lady's doers, and revised by Sir William Lockhart and his friends; and yet notwithstanding, Sir William, without advising any body, had thought fit to vary the provisions, and to enlarge them beyond what his estate could bear.

The cause came before Lord Edgefield; and the pursuer craved a proof with respect to the circumstances of the estate, and the debts and the previous communings and articles agreed on by the friends on both sides.

This was opposed by the defenders; and the Lord Ordinary pronounced an interlocutor, "finding the reasons of reduction not relevant; and therefore assoilzieing."

Pleaded in a reclaiming petition for the pursuer, That though from the entail Sir William was only prohibited to invert or alter the order of succession thereby established, and though he was laid under no limitations as to selling lands, contracting debts, or any other lawful exercise of his property; yet, if it was competent to a proprietor thus limited to give away the whole value of the estate to a child who could not succeed as heir of entail, the limitation

against altering the course of succession would resolve into a mere sound. It would be to no purpose to provide with so much anxiety, that the estate should descend to a certain series of heirs: That that series should not be interrupted by any alteration in the course of succession; and the heir who should attempt to disappoint the entailer's will in this manner should be punished by an irritancy, by which himself and his descendants should be cut off from all hope or right of succession: That if the defender's plea, viz. that it was competent to an heir, by an arbitrary deed, to make a present of the value of the estate, and disappoint the succession which he was limited to maintain and preserve, was good, these things would be all very useless precautions: That it would be a novelty in the law, if, when the same thing may be done in two different ways, one of them should infer the highest punishment and forfeiture against the heir who should attempt it, and all his posterity; and yet the other should not only be safe, but also successful to operate the same extinction of the entail and defeasance of the will of the maker. No 122.

But the law does not admit of such incongruity; for the import of limitations for preserving the order of succession has been long known and well defined; and as a fiar under such limitation cannot alter the course of succession directly, as little will he be allowed to evacuate it indirectly by any gratuitous deed which may tend to disappoint it or render it ineffectual. Thus, in the case Sharp *contra* Sharp, January 14. 1631, No 1. p. 4299, the Court found a mutual tailzie could not be altered by either party, without the consent of the other, though the contractors could sell or annailzie their lands. Lord Durie's opinion, in reasoning on that decision, is clearly in favour of the pursuer; Alexander Binny *contra* Margaret Binny, January 28. 1668, No 3. p. 4304; Sir George Mackenzie in his Institutions, book 3. tit. 8. § 16. Lord Stair, book 2. tit. 3. § 59.

And the very case that here occurs is stated by Lord Dirleton, and answered, Tit. TAILZIES, Quest. 4. p. 300.; as also by Sir James Stewart in the same page, both whose opinions entirely support the pursuer's plea.

It would be fixing too great an incongruity upon the law, to suppose, that a man should be limited to transmit an estate, and yet at liberty to give away the value of it for a song; that he should be strictly tied to a certain series of heirs *in perpetuum*, and yet at freedom to shake off the limitation when he has a mind, without any just or necessary cause. It is plain, that none of the learned writers on the law have thought this indirect method of defeating a limited succession ought to be allowed; and the Court is daily in use to reduce such deeds when done in disappointment of a succession limited by a contract of marriage; and betwixt this case and that, it is not easy to see a difference.

It is mere fallacy to say, that the contract of marriage is an onerous deed; and therefore no inquiry ought to be made into the extent of the provisions.

No 122.

The only thing which makes provisions to be onerous in such contracts, is the rationality of the extent. If they exceed all bounds, they are considered as gratuitous, so as not to defeat the granter's prior obligations.

It was further *pleaded*, That the comparison which the defenders had used before the Lord Ordinary betwixt the contract 1751, which was said to have been executed with consent of Sir James Lockhart, and this contract 1755 is without any foundation. The difference is very wide betwixt the provisions in these two contracts. The first could in no event exhaust the estate, the other must certainly do more than exhaust it as soon as the provisions shall become payable.

It was also *pleaded*, That the proof craved appeared to be entirely competent. The pursuer did not, as the defenders seemed to suppose, purpose to reduce a contract of marriage merely upon parole-evidence, for he has condescended on very strong grounds for restricting these provisions; besides, the evidence offered of the antecedent communings, the exorbitancy of these provisions, and the disproportion they bear to the circumstances of the estate, of which they do more than exhaust the rents, are circumstances which must necessarily be proved; and the Court are never in use to divide proofs, or to canvass the relevancy of every particular fact before the proof is brought, far less to put a stop to any inquiry into the truth.

Pleaded for the defender; That though an onerous or mutual deed of entail, or a settlement of an estate in a contract of marriage upon the heirs of the marriage, establishes a right to such heirs of entail or of the marriage, which cannot be vacated or disappointed by any gratuitous or voluntary deed; yet this will not apply to the case in question, which is the case of a voluntary deed of entail, imposing a certain restraint upon the heirs of entail, by the mere will and destination of the proprietor for the time. In the case of mutual entails or settlements in a contract of marriage, the parties contracting purchase, for a full and adequate consideration, a certain right and interest to themselves and the heirs nominated in the estate so entailed; and therefore, that *bona fides* which regulates all mutual contracts, gives a title to challenge any deed which can, in just construction, be understood to counteract the intentions of the parties covenanting, though the words of the covenant are not violated.

Lord Durie's reasoning, in the case Sharp *contra* Sharp, quoted by the pursuer, applies singly to the case of an entail made for a mutual onerous cause; but does in no shape apply to the case in hand.

In the decision, Binny *contra* Binny, also mentioned for the pursuer, the case was, that Margaret Binny obliged herself, by a voluntary bond, to resign and settle her lands, failing heirs of her own body, to her father, and his heirs, and obliged herself to do nothing contrary to that course of succession. Thereafter, in her contract of marriage, she disponed the land *nomine dotis* to her husband. The father's heir pursued Margaret to fulfil the bond; "The Lords found,

That she was obliged to resign with consent of her husband, conform to the bond, seeing there was inhibition used before the contract; but they did not decide whether this clause would have excluded the debts to be contracted by Margaret or her heirs upon a just ground without collusion; but found, that she could not make a voluntary disposition to exclude that succession, in respect of the obligement to do nothing in the contrary." No 122.

This decision, though unexceptionable, would not apply to the case in hand; but the defenders do maintain, that this decision was not agreeable to the principles of law. A voluntary settlement of succession, though containing an obligation not to alter the destination of succession, will certainly not bar the proprietor from his natural right of disposal, by any onerous and *bona fide* contract. The contract of marriage in which the wife's lands are disponed to her husband was of this nature, and ought to have been effectual; and Lord Bank gives this clearly as his opinion, vol. 1. p. 584.

The opinion of Sir George Mackenzie and Lord Stair do not apply to the case in hand; the one relating to the alteration of succession by a gratuitous deed, and the other to a mutual onerous entail, which imports a greater restraint upon the powers of the heir of entail, than any voluntary settlement can do.

The opinion quoted from Dirleton and Stewart's answers can be of no authority in the present case. Dirleton's question supposes a very particular case, and the prohibition supposed by him extends to a general one, that the heir of entail shall do no deed by which the heirs nominated shall be disappointed of the succession, and that he shall keep the tailzie inviolable; yet notwithstanding this extensive prohibition, by Dirleton's opinion, the heir of entail is fiar, and may dispone the lands for onerous causes.

The prohibition in Sir James Lockhart's entail is simply not to alter the order of succession; but he lays the heirs under no other limitation. But, by the principles of our law, limitations by a voluntary settlement cannot be extended to any case beyond what is specially expressed in the entail. The heirs of entail are absolute fiars, and have every power of proprietor, excepting in so far as they are expressly limited: They cannot vary the destination of succession, but they can do every other act which is competent to an unlimited proprietor, even although it should consequently disappoint the succession settled by the maker of the entail; and this is agreeable to the doctrine laid down by Craig, p. 343, and Stair, p. 228, as also Mr Erskine, B. 3. T. 8. § 39. This doctrine has also been established by the decisions of the Court, June 17. 1746, Campbell *contra* Wightman, *voce* TAILZIE; November 8. 1749, Sinclair *contra* Sinclairs, IBIDEM. The application of what has been said to this case is obvious. There is no limitation in Sir James Lockhart's entail of the heir's power to provide a wife and children; and therefore there can be no ground to challenge his provisions.

No 122.

2*do*, It was *pleaded*; That the provisions in this contract were no larger, if properly considered, than the provisions in Sir William's first contract with Miss Agnew, which was entered into with the approbation of Sir James the maker of the entail; for though the provisions to the daughters may at first view appear larger in the second than in the first contract of marriage, yet there is this material difference, that in the first contract the provisions bear annualrent from the death of Sir William; in the second, only from the marriage or majority of the daughters; and, upon a fair comparison, it will appear, that of the two, the last is the most moderate, because the difference betwixt the interest and aliment would bring the former greatly to exceed the latter.

It was also observed in general, with regard to the proof demanded, that a formal onerous contract executed in writing cannot, by the fixed principles of our law, be liable to reduction upon parole-evidence. The formal deeds of parties in writing are legal evidence of what was finally settled amongst them; and it would unhinge all security by written documents, if any regard was had to previous verbal communings, which are generally loose and unsettled, and never can be retained in remembrance with any certainty.

"The Lords allowed a proof, the pursuer previously condescending upon the facts he intended to prove, and the witnesses by whom he intended to prove them."

Act. *Wight, Ferguson.* Alt. *Garden.* Clerk, *Kirkpatrick.*

J. M. *Fac. Col. No* 12. *p.* 19.

1762. *December* 9.

Duke of Hamilton and Tutors, and Earl of Selkirk *against* Archibald Douglas.

No 123.

The Duke of Douglas, in a postnuptial contract of marriage with the Duchess, dated 1759, settled his estate on the heirs-male of the marriage; whom failing, on those of any subsequent marriage; whom failing, on the heirs-female of the marriage; and failing them, on his own nearest heirs and assignees whatsoever. The Duke of Hamilton, who was an heir under ancient investitures of the estate, argued, that he fell under the description of heir whatsoever by this contract of marriage, in opposition to Archibald Douglas, Esq. the heir of line; and, in support of this construction, the Duke gave in a condescendence of facts, tending to shew, that the Duke of Douglas had no intention, under this termination of his settlement in the contract of marriage, to call his heir of line, but, on the contrary, the heir of the ancient investiture; and of this condescendence a proof by witnesses was craved. *Answered* for Archibald Douglas, Esq; The term heirs whatsoever, denotes the heir of line or heir general. It is allowed, that in some cases *ex præsumpta voluntate*, arising from the face of the deeds themselves, this term may receive a different