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Replied for the pursuers :—Albeit the Lords have found that, notwithstanding of a general provision of conquest to the children of a marriage (which is a sort of provision by succession) the father continued heir, and could dispose of it in favours of wife or children of a subsequent marriage : Yet special provisions of particular sums, made to children of a first marriage, cannot be evacuated or impaired by posterior grants to children of a second; June 19, 1677, *Murrays contra Murray*, Stair, v. 2. p. 523. *vocè* PROVISION TO HEIRS AND CHILDREN; especially if these grants be exorbitant. Now, after deducting the 25,000 merks, there's more than a competency behind, to provide the two children of the second marriage. The authorities adduced by the defenders, to prove that the children in this case must come in proportionably, according to their respective provisions, are not to the purpose. For my Lord Stair, p. 460, (480.) speaks only of bonds granted to several heirs portioners, which being of the nature of *prælegata* in the civil law, make them mutually creditors and debtors to one another : Whereas children of a first marriage are not heirs, but creditors with respect to children of a second. Again, though a rational tocher given to a daughter, was not reckoned in the civil law to be a deed *in fraudem Patroni*, an extravagant tocher was quarrellable as such. And the Lords bringing in Marshall's children of a first marriage who had but slender provisions, *pari passu* with his children of a second, whose provisions were exorbitant, can be no argument for sustaining excessive provisions here in favours of children of a second marriage, in prejudice of a moderate provision made to those of the first. For *non est consentiendum parentibus qui injuriam adversus liberos suos in testamento inducunt : Quod plerumque faciunt, maligne circa sanguinem suum inferentes judicium, novercalibus delinimentis instigationibusve corrupti, L. 4. ff. de inofficioso testam.*

THE LORDS sustained the reason of reduction against the contract and bond libelled, in so far as they are prejudicial to the sum of 25,000 merks provided to the children of the first marriage : There being a further competency remaining to the children of the second marriage.

Forbes, p. 510.

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An assignation by a father to his son, reducible as *inter conjunctos*, although in the son's contract of marriage; unless the father had a sufficient separate estate; the assignation not being to the

1712. July 3.

JOHN HEPBURN of Humbie, & JOHN GORDON, Merchant in Edinburgh, against
The LORD STRATHNAVER.

IN a competition betwixt the Lord Strathnaver, and John Hepburn, for the Earl of Sutherland's share of the equivalent money, the Lords found the Earl's assignation thereof to the Lord Strathnaver, his son, in his contract of marriage, reducible upon the act of Parliament 1621, as being *inter conjunctos* without an onerous cause, unless the assignee can instruct, That the cedent had then a separate unincumbered estate sufficient to pay all his debts : For it was thought, that the marriage could not be sustained as the onerous cause of this assignation, from the

inserting thereof in the contract; which made it no more valid than if it had been a gratuitous assignation in a paper apart; seeing it is not provided in favours of the wife or children of the marriage, but simply to the Lord Strathnaver himself, his heirs and assignees.

Fol. Dic. v. 1. p. 73. Forbes, p. 606.

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wife or children, but to the son himself and his assignees.

1715. February 17.

ALEXANDER INGLIS *against* Dr MENZIES, and Mrs KATHARINE MENZIES his Lady.

By contract of marriage betwixt Dr Menzies and his Lady, Mr John Menzies, the Doctor's father, provided L. 40,000 Scots, or thereby, to the Doctor and his Lady, and the children of the marriage; and the Lady was provided to a liferent of 2000 merks yearly out of her husband's estate.

Mr Inglis being creditor in great sums to Mr John Menzies, raised a reduction of the foresaid contract of marriage, and several other deeds done by Mr John, in favours of his son and daughter-in-law, for making the said sum to be advanced by him effectual, upon this ground, that Mr John was much worse than nothing at the time when he made this ample provision to his son; and, to make the same effectual, he had conveyed several heritable subjects, and caused take infeftments privately upon them, and kept these infeftments latent for 58 days; and, when his credit began to be suspected, he kept the creditors in treating; but at last was forced to retire within less than 60 days of the registration of the sales; and the pursuer insisted for reducing the wife's liferent provision, as being exorbitant and fraudulent, to the enorm lesion of the creditors. But,

'THE LORDS considering the quality of the Lady, being daughter to the Laird of Weem, who brought a portion of 8000 merks, and was noways partaker of the fraud; therefore they found the contract was onerous, in so far as concerned a suitable liferent-provision; and found the defender's liferent of 2000 merks to be restricted to 1800 merks, in case of children, was not exorbitant.' See another branch of this case, Division 5th, *b. t.*

Fol. Dic. v. 1. p. 72. Dalrymple, No 136. p. 189.

* * Bruce reports the same case thus:

By contract of marriage betwixt Dr Menzies and his Lady (second daughter to Menzies of Weem) Mr John Menzies, the father, obliges himself to provide 52,000 merks to his son the Doctor, and the heirs of the marriage, &c. wherein also a liferent of 2000 merks is provided to the Doctor's Lady; which, in case of children of the marriage, is restricted to 100l. Sterl. with reservation also of the liferent of 22,000 merks to Mr John himself and his Lady: The Doctor's Lady's portion being 8000 merks, and payable to the husband, not to the father. Mr John having shortly thereafter become bankrupt: In the ranking of his creditors,

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A bankrupt, before his insolvency was known, having contracted for a jointure to his son's spouse; the Lords refused to restrict it, finding it onerous and suitable. The tocher was 8000 merks, the jointure 2000 merks, to be restricted to 100l. Sterling in case of children.

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