No 96. such of them as were prior to the ſaid contract, repeated a reduction upon the act 1621, *alleging*, That the jointure was exorbitant, becauſe the father, who is the obligant, was, at the time of contracting, inſolvent, and therefore it was fraudulent in him to make ſuch proviſions in prejudice of his creditors, which therefore ought at leaſt to be reſtricted to a competent proviſion.

Answered for the defenders: That law only preſumes fraud from a deed's being gratuitous, where it is ſo, not only on the part of the obligant, but of the receiver; therefore, whatever may be objected againſt Mr John, yet, as to the Doctor's Lady and her friends, who knew nothing of his condition, the contract was fair, and the marriage made it onerous, as to the liferent; as was decided 19th January 1676, Stamfield *contra* Brown, No 73. p. 954. where the contract was the liferent even of all the huſband had. 2*do*, In the preſent caſe the liferent, conſidering the tocher, and the Lady's rank, can never be judged exorbitant. 3*tio*, Though the tocher was only payable to the huſband, not to the father, yet this makes no alteration; for to whomever it was payable, the Lady was obliged, and actually did pay, and to whomever it was payable, ſhe was to have neither more nor leſs proviſion.

Replied for the purſuers, That it is unjuſt the Lady ſhould, in prejudice of creditors, enjoy ſo ample a jointure as 2000 merks, when ſhe brought no more with her but 8000, and which did flow by a voluntary conveyance from Mr John Menzies, who was *lapsus*, and the payment contrived to be made to the Doctor, leſt the creditors might have affected the ſame, if paid to Mr John himſelf, as is uſual in ſuch caſes. So that the conveyance of the funds made to the ſon, was the very onerous and mutual cauſe of the tocher, which the Doctor's Lady got along with her; and which funds were truly the creditors money, ſince Mr John had nothing of his own to beſtow.

THE LORDS found the Lady's proviſion both onerous and ſuitable.

Act. *Gray & Robert Dundas* Alt. *Graham & John M'Leod.* Clerk, *Sir Jas Justice.*
Bruce, No 72. p. 87.

No 97.
In a ranking of creditors, the children of the firſt and ſecond marriage of the common debtor, provided in ſums in the contracts of marriage of their reſpective mothers, were ranked *pari paſſu* and proportionally.

1715. *July* 6.

The LADY AUCHINVOLE and Her DAUGHTER, *againſt* Her STEP-DAUGHTER.

IN the competition betwixt theſe parties in the ranking of Auchinvole his creditors, for preference upon his eſtate, for the ſeveral proviſions contained in his firſt and ſecond contracts of marriage; the Lords gave a deciſion on the 12th November laſt, which ſtands marked in that Seſſion's deciſions:* But there being alſo in that interlocutor a remit to the ordinary to hear parties, how far the proviſions to the daughter of the ſecond marriage could burden the heir of the firſt, or if the proviſions in favours of the heirs of the firſt and ſecond marrige ought equally and proportionally to affect, and be paid out of the defunct's eſtate. At reporting——

* Bruce, No 4. p. 5. *voce* HUSBAND and WIFE.

No 97.

It was *alleged* for the relict, That ſhe having brought 15,000 merks of tocher, and the huſband having contracted 5000 more, and ſhe provided to the liferent of the whole, ſhe ought to be preferred for the ſame, ſhe being, with reſpect to it, an onerous creditor, and therefore preferable to the daughter of the firſt marriage, who is heir of proviſion to her father; eſpecially ſince the huſband had *de facto* received her tocher, as appeared by a declaration under his hand, that he had got payment. And for the ſame reaſon ſhe contended, that ſhe, as mother and aſſignee by the daughter of the ſecond marriage, might be preferred for the fee of the 20,000 merks; at leaſt ought to come in *pari paſſu* with the daughter of the firſt marriage.

Anſwered for the heir of proviſion: That ſhe did not diſpute the relict's preference as to her liferent, but denies, that by her contract of marriage, her huſband is obliged for the liferent of the 20,000 merks, but only for 5000. And as to the 15,000, *viz.* her own portion, the huſband was never debtor in the liferent of it, unleſs he had uplifted the money, which does not appear; for, as to the above-mentioned declaration, it being a voluntary deed of the huſband in favours of his wife, and impetrate without any juſt and real cauſe, it can never be probative againſt the daughter of the firſt marriage, an anterior lawful creditor by the proviſions of her father's and mother's firſt contract of marriage. And therefore neither was the defunct ſo much as debtor in the proviſion to the child of the ſecond marriage farther than the 5000 merks which he contracted. For the 15,000 was heritably ſecured on the eſtate of Erſkine, and no inſtruction, as ſaid is, that it was uplifted by the defunct: And therefore the utmoſt that can be pretended for the daughter of the ſecond marriage, is to come in equally and proportionally with the daughter of the firſt for 5000. Nay, though it could be proven that the 15,000 merks was uplifted by the defunct, yet the daughter of the ſecond marriage could plead no preference to the proviſions of the daughters of the firſt: But, on the contrary, the preference is to the firſt contract; for albeit ſuch contracts do not preclude a man from doing rational deeds, and that a ſecond contract is a rational deed, yet the reaſonableneſs of the proviſions is not to be conſidered with reſpect to the tocher that comes by the ſecond wife, when the queſtion is betwixt the heirs of the ſecond and firſt marriage; but with reſpect to the father's eſtate towards the fulfilling the firſt proviſions; for otherwiſe there could be no ſecurity by a firſt contract of marriage, when the parties could not poſſibly know what proviſions the huſband might make in another marriage.

Replied for the relict and her daughter: That the declaration above-mentioned, was a ſufficient inſtruction that the huſband had received the portion: And ſo the Lords found in another branch of the ſame ranking, betwixt the Laird of Ferguſlee and the relict; wherein alſo he made the ſame exception, and was overruled by the Lords upon this reaſon, That the huſband having got the bonds into his hands, and they now nowhere appearing, and having given a declaration that he got payment, it was a ſufficient exoneration and inſtruction of payment even to the debtor.—And as to what was pleaded againſt the daughter of the ſecond

No 97. marriage her preference, *Replied*, That notwithſtanding of proviſions in favours of the children by the firſt contract, the father may (as was owned by the other ſide) do rational deeds, even in prejudice of the children's proviſions by that firſt contract. Now, there could not be a more rational, nay onerous deed, than when he got 15,000 merks of portion with a Lady, to provide 5000 of his own to be added thereto for a proviſion to the children of the marriage. And this was rational even as to the children of the firſt marriage, who had a fair hazard to ſucceed to the whole 15,000 merks, the ſum being provided to his heirs whatſoever, failing heirs of the marriage.

THE LORDS preferred the Lady for her liferent, and found the daughters came in *pari paſſu* proportionally, effeiring to their reſpective ſums.

For the Lady, *Boswell.* Alt. *Sir John Ferguson.* Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 73. *Bruce, No* 114, *p.* 141.

1729. *November* 18.

CREDITORS of SIR DAVID THOIRS *againſt* LADY MIDDLETON.

No 98.
A proviſion by a perſon inſolvent, to his nephew's wife in her contract of marriage, held to be onerous and not reducible.

A PERSON inſolvent became bound in his nephew's contract of marriage, among other proviſions, to pay the wife an yearly annuity of 2000 merks, to commence after the huſband's deceaſe, in ſecurity of which he infeft her in certain lands. The granter's creditors raiſed a reduction of this alienation, upon the act 1621, *alleging* it to be *ultra vires* for the granter, to make voluntary alienations of his effects, in prejudice of his prior lawful creditors.——THE LORDS refuſed to ſuſtain the reduction, the ſaid liferent proviſion being onerous as to the wife, in ſo far as upon the faith thereof, ſhe had entered into the marriage contract.

Fol. Dic. v. 1. *p.* 72.

No 99. 1730. *June* 12. COCK *againſt* COCK.

A MAN, who in a ſecond contract had provided the children of the marriage to the fee of L. 6000, thereafter diſponed to his eldeſt ſon, by his firſt wife, in that ſon's contract of marriage, two tenements, valued at about 3000 merks, which proved to be moſt of his ſubſtance, burdening the ſame with L. 1000 Scots to the children of the ſecond marriage.——THE LORDS found the deed gratuitous, *quoad* the eldeſt ſon and his children, and reducible *in toto* upon the act 1621.

Fol. Dic. v. 1. *p.* 73.