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the father's own judgment, for repelling the reasons of reduction pleaded by Sir William, of his father's deed; and therefore, in giving their votes, expressed themselves thus, that the deed was not so irrational as to be reduced.

Nevertheless it carried, "that the deed was irrational, and the same was accordingly reduced." But as this was by the narrowest majority, so the case appeared so dubious to the President, when he gave his casting vote, that he added, that he might have been of another opinion had Sir John given any other subject, though to the same extent; but as the subject given was land, he thought it irrational.

The children having reclaimed, the fact came out to be, that the disposition by Sir John had not been made to the children themselves, but to their mother his second wife, upon whom he had depended for her dividing the subject among the children, but without laying her under any restraint to that effect; and then, without hesitation, "the same was reduced."

Kilkerran, (PROVISION TO HEIRS AND CHILDREN.) *No* 11. *p*. 465.

1749. *February* 24.

The CHILDREN of JOHNSTON and his CREDITORS, Competing.

No 146.

THE deceased Johnston of Kirkland granted bonds of provision to Alexander and Margaret Johnstons, his younger children, payable at the first Whitsunday or Martinmas after their marriage, or their age of 21 years, reserving a power to alter; whereon they having claimed to be ranked with his other creditors, the Lord Ordinary, "in respect of the reserved power to alter, found they could not be ranked with the onerous creditors."

Against this interlocutor the said Alexander and Margaret having reclaimed, the Lords proceeded on a different *ratio decidendi*, in these words:

"Having considered the petition, and it appearing to the Lords, that the condescendence of effects belonging to the father at his death is not sufficient to instruct that he had sufficient effects to pay his debts and children's provisions, they refused the petition, and adhere."

Kilkerran, (PROVISION TO HEIRS AND CHILDREN.) *No* 12. *p*. 465.

1761. *February* 7.

JAMES BRUCE of Kinnaird *against* Mrs AGNES GLEN, Widow of the deceased David Bruce of Kinnaird, and her CHILDREN.

No 147.
After providing the estate to the eldest

DAVID BRUCE of Kinnaird, in his marriage-contract with Mrs Marion Graham his first wife, in consideration of 10,000 merks received with her, became bound to settle his whole lands and estate of Kinnaird and others upon the heirs-male

to be procreated of that marriage; which failing, the heir-male of any other marriage; which failing, the heirs-female, &c. He likewise obliged himself to provide Mrs Marion Graham in an annuity of L. 100 Sterling, and to infeft her in the house and yards of Kinnaird in liferent, during the minority or not marriage of the heir, and the said Mrs Marion's viduity; and suitable provisions were also settled on the younger children.

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The pursuer, James Bruce, was the only child of this marriage. The free yearly rental of the estate was L. 395 : 3 : 1d. Sterling, in which computation the parks of Kinnaird were estimated at L. 50 Sterling.

David Bruce, after the death of his first wife, married Mrs Agnes Glen, the defender; and, by a postnuptial contract of marriage, bound himself to infeft her in an annuity of L. 100 Sterling, to be uplifted forth of his lands of Kinnaird, in case she should survive him; and he also bound himself to secure the sum of 36,000 merks, to be divided among the children of the marriage in manner therein mentioned. Of this marriage there existed twelve children, eight of whom survived their father.

In 1753, after this marriage had subsisted for many years, Mr Bruce executed another deed in favour of his wife, reciting the former provision made to her; and that he was now resolved, for certain onerous causes and considerations, to grant to the said Mrs Agnes Bruce his spouse, for the better support of her and her children procreated in the said marriage, an additional jointure and provision during all the days of her lifetime, in case she should happen to survive him; therefore he bound and obliged him, his heirs and successors, duly to infeft and seize the said Mrs Agnes Bruce in liferent, in case she should happen to survive him, as also, Alexander Bruce his eldest son of that marriage, and failing of him, by decease before the said Mrs Agnes Bruce, then to the next immediate elder brother of the said marriage, and that for the space of five years after her decease, in all and hail the mansion-house of Kinnaird, office-houses, yards, gardens, and the whole inclosures lying round the house.

Mr Bruce also, about the same time, executed a very strict deed of entail, the intention of which was to secure the estate to the children of the second marriage, and to restrict the son of the first marriage to a liferent.

The pursuer having brought a reduction of both these deeds, the defenders acquiesced in a judgment of the Lord Ordinary, reducing the entail; and the question being reported with regard to the other deed, settling the house, garden, and inclosures, upon Mrs Bruce in liferent, and the son of the second marriage, for five years after her dearh; the pursuer *insisted*, That it should be reduced as gratuitous and unreasonable, and in express contradiction to the tenor of the marriage articles between Mr Bruce and the pursuer's mother, on the faith of which that marriage had been contracted.

Answered for the defenders; It is a point established, that when a man provides his estate to the heirs of a marriage, he continues to be fiar, and though he cannot do any deed purely gratuitous and fraudulent to disappoint the heir, and frustrate the settlement of succession, yet he has an unquestionable power

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to burden his estate for rational and onerous causes. The deed in question cannot be considered as a fraudulent device to disappoint the heir's right of succession; on the contrary, it was a moderate and rational exercise of the father's right of property in the estate, for a pious and necessary purpose, without any heavy or perpetual burden upon the heir's right of succession. Mr Bruce had a greater family by his second wife than was expected when the contract of marriage was entered into with her; and when a father, finding that the provisions made for his younger children are, by their great number, become too scanty, gives his wife an additional income or annuity, expressly for the purpose of enabling her to support and educate a numerous family of infant-children, such deed cannot be pronounced to be either merely gratuitous, irrational, or fraudulent.

"THE LORDS sustained the reasons of reduction of the additional provision; and refused a reclaiming petition for the defenders."

Act. *Sir David Dalrymple & Ferguson.* Alt. *Garden & Lockhart.* Clerk, *Justice.*
J. C. *Fol. Dic. v.* 4. *p.* 183. *Fac. Col. No* 18. *p.* 32.

*** Lord Kames reports this case:

1761. *February* 6.—BY the marriage-articles betwixt David Bruce of Kinnaird and Marion Graham, February 1729, he became bound "to settle his whole lands and estate of Kinnaird upon the heir-male of the marriage." The marriage dissolved by the death of the wife, leaving James Bruce the only child of the marriage. Some years after, David Bruce married Agnes Glen; and in a post-nuptial contract of marriage, *anno* 1737, she conveyed to her husband her bond of provision for 9000 merks, and was provided to an annuity of L. 100 Sterling in lieu of all that could be claimed by her or her executors upon dissolution of the marriage. Further, Mr Bruce became bound "to provide and secure to himself, and to the heirs or bairns to be procreated of the said marriage, the sum of 36,000 merks."

In the year 1753, Mr Bruce having many children by his second wife, and being much under her influence, executed another deed in her favour, settling upon her as an additional jointure, and upon Alexander Bruce their eldest son, for five years after her decease, the mansion-house of Kinnaird, office-houses, gardens, and the whole inclosures lying round the house, amounting to about L. 50 Sterling yearly, the whole estate being under L. 400. And the inductive cause mentioned in the deed is for the "better support of her and her children." David Bruce at the same time executed a strict entail of his estate to James Bruce his eldest son and heir in liferent, and to the heirs-male of his body in fee; which failing, to the granter's heirs-male of his present marriage, &c. And it is remarkable, that James Bruce only is subjected to the clauses irritant and resolutive, and not the heirs of the second marriage.

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James Bruce, heir of the first marriage, to whom the estate was bound by his mother's contract of marriage, brought a reduction of these two deeds after his father's death. The entail was given up, as inconsistent with the obligation the maker was under of settling his estate upon the heirs-male of the first marriage. But the widow, who could not justify the other deed, as an additional jointure to herself, endeavoured to justify it as an additional provision to her children, which, she contended, their great number made rational, if not necessary. It was *urged*, That the L. 2000 Sterling or 36,060 merks provided in the contract of marriage, might be a rational provision for any number that would probably exist, yet that it was by far too small a provision for ten children; and therefore, that the additional provision in their favour cannot be held irrational, or meant in any measure to disappoint the obligation in the first contract of marriage.

It was *answered*, 1*mo*, That this additional provision is in favour of the wife, not of the children; that she is not bound to communicate one farthing of it to them; and that in case of a second marriage, it would go entirely to her husband; 2*do*, This provision cannot be supported, were it directly in favour of the children. The wife and her friends, in her contract of marriage, took the chance of the number of children, and accepted of a lump sum for the whole, one or many; and therefore, the additional provision is in every view a mere gratuitous deed. And the deed was accordingly reduced.

The Judges were of opinion, that the number of children could not justify this deed, supposing it to have been intended for the children. If David Bruce, in his second contract of marriage, had provided every child that should be born, even to the extent of L. 400, the provision would have been rational, and the heir would have had no good cause of complaint, though the sum would have amounted to the value of half the estate; because he had on the other hand a chance of being liable for L. 400 only, the provision of a single child. But to be subjected in so great a sum as L. 2000, even in the case of a single child, and to be subjected still to more in case of a great number, is unfair, because it turns all chances against him.

Another consideration had great weight with the Court. After provisions are settled in a second contract of marriage upon the wife and children, it would be pernicious to the interest of families, to indulge any latitude in making additional provisions to either. The husband, engaged in affection to his present wife and family, is easily drawn to make deeds in their favour. And a deed so impetrated will readily be so irrational as to destroy both parties by law-suits. It was added by some of the Judges, that with regard to cases like the present, nothing will more tend to preserve the peace of a family, than to put an absolute bar against such additional provisions. For while any power remains with the husband, he will be laid open to perpetual teasing and solicitation, which always tend to discord.

Sel. Dec. No 174. *p.* 237.