gill had good grounds with being dissatisfied with Robert's conduct and that of his wife, so as not to choose their daughter for his representative. January 29. 1678, Stewart, No 4. p. 12842.; December 16. 1738, Campbell, No 127. p. 13004.; Craig, lib. 2. Dieg. 14. § 11; Stair, lib. 3. tit. 15. § 19. January 20, 1725, Adair, See APPENDIX; January 1736, Heirs Portioners of Milne, See APPENDIX; January 1737, Trail, No 114. p. 12985. No 132.

THE LORDS found, that the estate both of the husband and wife, being provided by the contract of marriage betwixt John Stewart and Agnes Stewart, to the heirs of the marriage, the said John Stewart had no power to make the deed of entail 1719; and that the same was *contra fidem tabularum nuptialium*, and therefore reduced the same.

Fol. Dic. v. 4. p. 179. C. Home, No 234. p. 381.

1752. *June* 12,

CHARLES, ELIZABETH, and JEAN OUCHTERLONYS *against* GILBERT OUCHTERLONY of Pitforthie.

No 133.
Provision in a contract of marriage in favour of the children of the marriage, is binding on the eldest son, on whom the father has settled the fee of an estate acquired during the marriage, tho' at the date of that settlement, the father have sufficient separate funds for satisfying the provision.

ALEXANDER OUCHTERLONY, father to the pursuers and defender, by his contract of marriage with Elizabeth Tyrie, obliged himself, his heirs, &c. "to provide and have in readiness, against the term of Martinmas next (1722) the sum of 6000 merks Scots; which, with 2000 merks money foresaid of tocher to be paid to the said Alexander by David Tyrie the bride's father, the said Alexander Ouchterlony binds and obliges him, and his foresaids, to employ upon land or bond, and to infeft and secure himself, and his said future spouse in liferent, in 6000 merks; and the children to be procreated of the marriage in fee of the hail 8000 merks; and how oft the said sum shall be uplifted, to re-employ it in the same manner." And by another clause of the contract, it is declared, "that in case the said Alexander Ouchterlonie shall predecease his future spouse, leaving children behind him in life, one or more, without providing them in part or pertinencies, then, and in that case, David Ouchterlony, brother to the said Alexander, and the said David Tyrie, or their heirs, shall divide to the children, one or more, the foresaid 8000 merks, or what fund may be free, conform to their discretion."

After the date of this contract, Alexander Ouchterlony purchased a land estate of the value of 30,000 merks Scots, and took the rights thereof in favour of himself in liferent, and of Gilbert Oughterlony, the eldest son of the marriage, in fee, but reserved power to burden the said lands with such sums of money as he should think proper, for provisions to his younger children; and with the sum of 11,000 merks, to be employed by him for any use and purpose he should think fit.

No 133. After this he contracted debts to the value of the 11,000 merks, and predeceased his spouse in 1736, leaving the said Gilbert Ouchterlony, his eldest son, and six younger children, but without making any provision in favour of the younger children.

In 1749, David Tyrie, the grandfather, observing the power of dividing the 8000 merks amongst the children vested in him and David Ouchterlony and their heirs by the contract of marriage, he applied to Patrick Ouchterlony son to David, David being dead, and they, by a writing under their hands, dated 8th July 1749, allotted the sum of 1160 merks to Gilbert Ouchterlony, and the sum of 1140 merks to each of the six younger children, making in all 8000 merks, with annualrent from the term of Whitsunday 1736, being the first term after Alexander Auchterlony's decease, but with deduction of a proportional part of the liferent provided to their mother by the contract of marriage.

As Gilbert Auchterlony refused to pay the sums allotted to the younger children, three of them who were in the country, the other three bring abroad, brought a process against him for payment.

Pleaded for the defender, That the right which the children have upon the contract of marriage does not make them properly creditors. It is merely an obligation of succession, which imports no more than that they shall succeed to 8000 merks, if the father leave as much free gear. This is the legal interpretation of such clauses; and in the present case, is so explained by the contract; for the power of division given to the friends is, to divide to the children, one or more, the foresaid 8000 merks, or what fund may be free." But here there was no fund free at Alexander Ouchterlony's death, and therefore the friends had no subject which they could divide; for the estate given to the defender by his father, was not a free subject, affectable with these provisions, seeing the father, when he purchased the estate for his son, reserved to himself a faculty of burdening the estate to the extent of 11,000 merks, which was more than sufficient for satisfying the provisions to the younger children; and his afterwards contracting debt to the extent of 11,000 merks, cannot entitle the children to come against the eldest son, no more than if he had actually lent out the 8000 merks in terms of the contract, and afterwards contracted debt to the extent thereof; such contractions could not prejudge the eldest son, because contracted posterior to the date of his right; and although they would have affected the 8000 merks because the father remained fiar, yet that would not have intitled the younger children to recourse against their elder brother. A provision in a contract of marriage, of a certain sum in favour of the children, cannot debar the father from making a rational settlement on his eldest son, or even from making a pure donation, when he reserves a fund more than sufficient for satisfying the obligation; for such a donation would not be reducible at the instance of creditors on the act 1621, as the granter did not thereby become insolvent; and as the fee was never in the father, this settlement cannot be considered as *præceptio hæreditatis*, especially

when the question is not with proper creditors, in whose favour only that passive title was introduced. No 133.

2*do*, Supposing there had been a free fund, yet the sums allocated to the younger children ought not to bear interest till the time the division was actually made; for the 8000 merks, provided in the contract of marriage, does not bear interest, seeing it was not laid out upon a bond bearing annualrent, nor is there any time specified in the contract for laying it out.

Answered for the pursuers, That the provisions in their father's contract of marriage, in their favour, cannot be disappointed by any gratuitous deed of their father's; and the disposition, in favour of the eldest son, is confessedly a gratuitous deed, and therefore can afford no defence against their claiming these provisions. Nor does it alter the case, that the father reserved power to burden the estate with 11,000 merks, and contracted debt to that extent; for even the supposed case of his laying out 8000 merks in terms of the contract, and afterwards spending that sum, would not have barred the younger children from claiming their provisions from their father's representatives; for the obligation in the contract was not merely to lay out a sum in these terms, but to make the same effectual to the children; and that the defender does represent his father is evident; for a gratuitous settlement by a father, of the fee of an estate upon his eldest son, does not make that son a singular successor, but he is at least liable, *in valorem* of the estate, to fulfil all his father's obligations contracted prior to the date of his right. And the present claim is further supported by the settlement of the estate on the defender; for the father thereby reserves power to burden the lands with provisions to his younger children, and the antecedant obligation ought to have the benefit of this faculty, as it has often been found, that lands, disponed with a power to contract debts, are equally affectable by debts contracted prior to the disposition, as with those contracted after it.

With respect to the annualrent, *answered*, That, by the contract of marriage, the father was bound to lay out upon land or bond, in responsal mens hands, 8000 merks, and to secure his spouse in the liferent of 6000 merks thereof and the children in the fee of the whole; and to re-employ this sum so oft as it should happen to be uplifted; which plainly implied, that the sum was not to be a dead stock, but to be laid out as a fund yielding rent or annualrent, to which the children are entitled from the dissolution of the marriage, subject to the liferent provided to their mother; and therefore it is not the deed of division, but the contract, that entitles them to the annualrent from the dissolution of the marriage.

"THE LORDS found, That David Tyrie and Patrick Ouchterlony had power to make a division of the 8000 merks, provided by the contract of marriage to the children of the marriage; and that the defender was liable to the pursuers,

No 133. each of them for their own parts, as settled by the deed of division libelled on."

Act. *Scrymgeour.* Alt. *Henry Home.* Clerk, *Gibson.*

B. *Fol. Dic. v.* 4. *p.* 178. *Fac. Col. No* 12. *p.* 21.

*** Kilkerran reports this case:

By contract of marriage, in 1721, between Alexander Ouchterlony and Elizabeth Tyrie, Ouchterlony bound himself to have in readiness 6000 merks, and to lay out the same, with 2000 merks given him in tocher, for the wife's liferent, in case of her survivance, to the extent of 6000 merks thereof, and the whole 8000 merks to the children of the marriage in fee; and in case of his decease, leaving children behind him in life, and without providing them, it was agreed, that David Ouchterlony, his brother, and David Tyrie, the wife's father, should have power to divide the 8000 merks among the children, conform to their discretion.

After the date of this contract, Alexander Ouchterlony was lucky in a considerable succession to a friend in the West Indies; and purchasing a land estate much above the value of 8000 merks, took the right thereto in the name of Gilbert, his eldest son, reserving power to burden him with such sums as he should think proper, for provisions to his younger children.

Alexander thereafter died in 1736, without making any provision for his younger children; and David Ouchterlony and David Tyrie, in consequence of the power given them by the foresaid contract of marriage, by deed in 1749, divided the 8000 merks as follows: They gave 1160 merks thereof to Gilbert, the eldest son, and 1140 merks to each of six younger children, with annualrent from Whitsunday 1736, being the first term after Alexander their father's death.

In the action brought by three of the above six younger children against Gilbert, their eldest brother, it was not pretended to be argued, that the estate given to the eldest son was implement of the provision in his father's contract of marriage, that notion being now exploded, that such provisions are *familiæ*, and implemented when made in favour of any of the children: But it was *alleged* for the defender, That he did not represent Alexander his father; and although he had accepted the said disposition, yet that could not subject him, as his father had, at the time of granting it, much more effects than were sufficient to answer the 8000 merks.

This the Lords had no regard to, as the person who is *alioqui successurus*, accepting a gratuitous disposition, is *passive* liable to all debts contracted prior to the disposition, at least *in valorem*.

It was *alleged*, 2*do*, That the nominees had exceeded their power, 1*mo*, In making the sum allocated to the younger children bear annualrent *retro* from

No 133

the first term after Alexander Ouchterlony's death in 1736; whereas, the annualrent ought only to have commenced from the date of the deed of division in 1749; and reference was made to a decision, said to be parallel to this, in January 1739, Anderson *contra* Anderson, See APPENDIX.

But this was repelled. Anderson's case was that of a faculty reserved to a father in a disposition to his son, to burden with a certain sum to a younger child; and the Lords justly thought, that the father could not make the sum bear annualrent, but from the date of the deed by which he exerted the faculty; whereas, in this case, Alexander the father was under an obligation to have made a division, to take effect at his death; and, therefore, it was just to give annualrent from that period.

Kilkerran, (PROVISION TO HEIRS AND CHILDREN.) *No* 15. *p.* 467.

1756. *December* 14. JEAN PATON *against* KATHARINE ALEXANDER.

No 134.

A provision to children of the first marriage, which the father was bound to lay out on an annualrent, being declared a burden upon the infeftment of a wife and children of a second marriage, was found to affect the second wife's liferent for the annualrents, and the children's fee for the principal.

FRANCIS PATON, the pursuer's father, by his contract of marriage with his first wife, obliged himself to provide and secure 900 merks to himself and wife, in conjunct fee and liferent, and to the children of the marriage in fee, and to lay out the same upon annualrent. He afterwards married the defender, Katharine Alexander, and his contract of marriage with her proceeds upon a narrative, That he intends to do justice to his children by his first marriage; and provides and declares, that certain tenements and lands, therein mentioned, shall be affected with, and shall be a real security to the said children, for the foresaid sum of 900 merks, which they are to accept in lieu of all they can ask or claim through his decease. Then follows a clause, obliging the husband, his heirs, &c. to infeft and seise the defender in the said tenements; and, for that effect, binds him and his heirs in absolute warrandice.

Jean Paton, the only child of the first marriage, brought a process against Katharine Alexander, the relict, to have it found and declared, that the tenements and lands, mentioned in the second contract of marriage, are affected with the said 900 merks; and that the defender should be found liable in payment of the annualrents thereof from the death of her said husband.

Pleaded for the defender; 1*mo*, That the provision in the first contract of marriage, in favour of the pursuer, which she could only take by way of succession, could not exclude the onerous deeds of her father, such as a rational provision to a second wife.

2*do*, That the real security intended to be given to that provision is only against the fee of these subjects, as provided to the children of the second marriage; and there is no clause burdening the defender's liferent with the said sum.