

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.

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; *1mo*, 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.

*2do*, 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.

No 133.

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.

No 134.

3tio, The pursuer, as heir of the deceased Francis Paton, is liable to the defender, by the clause of warrandice in the second contract of marriage, *et frustra petit quod mox est restitutura.*

4to, There can be no claim for annualrent, as both contracts of marriage declare, that the sum of 900 merks shall be in lieu of all the pursuer can ask or claim through her father's decease.

*Answered* to the *first*; It could by no means be constructed a rational provision, in favour of the defender, to give her a total liferent of the subject, and to allow the children to starve during her life.

To the *second*; The tenement and lands, mentioned in the second contract of marriage, are expressly declared to be subject to the burden of 900 merks, to the children of the first marriage; and though there is no repetition of this burden in the clause securing the defender in her liferent, yet she has consented to this, by subscribing the contract, and by possessing in consequence thereof; *et nemo potest idem approbare et reprobare.*

To the *third*; It is a begging of the question to say, that the pursuer, as heir to her father, is liable in the warrandice; for the pursuer contends, that the defender's liferent right is burdened with this provision.

To the *fourth*; The first contract of marriage declares, that the sum shall be laid out upon annualrent; and, by the second, the provisions in the first, so far as regard the children, are renewed, and expressly reserved; consequently, the annualrent, as well as the principal sum, is due.

“ THE LORDS found the defender liable for the annualrent of the 900 merks, from the time of her husband's decease, and in time coming, during her life.”

Act. James Dundas.

Alt. J. Craigie.

Clerk, Kirkpatrick.

W. S.

Fol. Dic. v. 4. p. 178. Fac. Col. No 221. p. 321.

1762. February 11.

JAMES THOMSON and his CREDITORS against His CHILDREN.

No 135.

A man, who, in his contract of marriage, has provided his estate to the heirs of the marriage, can he alter that provision, where the heir turns out a bankrupt?

JAMES THOMSON, in his marriage-contract with Janet Greenshiells, *anno* 1712, provides the heirs of the marriage to succeed him in the lands of Northcumberhead, and in all other lands, heritages, sums of money, and others he shall happen to acquire during the marriage.' James Thomson being industrious, and living long, acquired a considerable fortune. But his eldest son, being idle and profligate, contracted debts, and became bankrupt; which induced the old man to execute a disposition of his effects in liferent to his son James, the heir of the marriage, and to his children in fee. After the granter's death, the heir's Creditors brought a reduction of this settlement, as in defraud of the marriage-contract, providing the estate to their debtor, the heir of the marriage. The