No 134.

3*tio*, 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.*

4*to*, 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

Court repelled the reason of reduction, and assoilzied the defenders. And what chiefly moved the Judges, was the insolvency of the heir of the marriage. For though, according to the strict interpretation of common law, he was entitled to the fee, yet, in a contract of marriage, intended for the benefit of those who should spring from the marriage, it could never be the intention of the contractors to secure the estate to creditors, in case of the heir's bankruptcy, and thereby to rob all their descendants. The case was put, of the heir being forfeited for treason; and it was agreed by all the Judges, that he could be removed from the succession. There is *par ratio* in the present case.—See *Principles of Equity*, Edit. 3. vol. 1. p. 263. No 135.

Fol. Dic. v. 4. *p.* 179. *Sel. Dec. No* 187. *p.* 251.

1766. *January* 4.

MICHAEL RIDDEL *against* ROBERT RIDDEL of Glenriddel.

No 1
A gratuitous deed in favour of a second son, found ineffectual against a prior obligation in a contract of marriage in favour of the heir-male.

WALTER RIDDEL, in his contract of marriage, 1694, became bound to secure his whole land estate to the heir-male of the marriage. In the year 1727, purposing to fulfil that obligation, he disponed to his eldest son, Robert, the lands therein specified, burdened with his debts, reserving only to himself an annuity of 2000 merks. The lands of Stewarton, which came under the obligation, were left out of the disposition 1727. But that they were omitted by the oversight of the writer, without intention, was made evident from the following circumstances; 1*mo*, That the title-deeds of that farm were delivered to the son, along with the other title-deeds of the estate; 2*do*, That he entered into possession of the whole; 3*tio*, That a subsequent deed by the father, *anno* 1733, relative to the former, proceeds upon this narrative, 'That the whole lands belonging to him were conveyed to his son, by the disposition 1727.' Many years after, the father having discovered that Stewarton was not comprehended in the said disposition, ventured to convey them to his second son, who was already competently provided. In this case, it was not pretended that Stewarton was actually conveyed to the son, which could not be without a formal disposition. But as there was sufficient evidence of the agreement to convey these lands as part of the estate, which the father remained still bound to fulfil, the Court judged this a sufficient foundation to void the gratuitous disposition to the second son.

Sel. Dec. No 237. *p.* 311.