

Patrick Haldane, Esq;	- - -	<i>Appellant;</i>	Case 134. Edgar, 29 Dec. 1724.
Sir Alexander Anstruther, Bart. Robert Lumiden of Innergellie, and Isabel Lady Dowager of Innergellie, his Mother, Mr. Walter Wilson, and Sir John Anstruther, Bart.	- - - - -	<i>Respondents.</i>	

20th March 1726-7.

Sale.—By articles of agreement for the sale of an estate, the disposition was to be delivered by a day certain, and the price to be paid ten days afterwards; but the seller was not obliged to deliver the disposition till heritable security was granted for the price.

The estate being much incumbered, the creditors are preferred to the price upon assigning their debts with absolute warrandice.

ON the 6th of August 1720 the respondent, Sir Alexander Anstruther, granted a faculty to his lady, empowering her in his name to receive all sums of money due to him, and to sell and dispose of any of his real estate, promising to ratify what she should do therein. By articles of agreement, bearing date the 17th of the said month of August, entered into between Sir Alexander's lady and the appellant, she sold to the appellant the lands of New Grange, and others therein mentioned; and became bound, that Sir Alexander should execute a proper conveyance of the premises, with absolute warrandice, to the appellant, his heirs and assignees, with an assignation to the rents for the year 1720, to be delivered to the appellant on or before the 1st day of November then next, with a sufficient progress of writs: in consideration whereof the appellant became bound to pay to the respondent Sir Alexander the price of the said lands, at the rate of 30 years' purchase, conform to a rental to be given in thereof; the appellant, at the execution of the articles, paid 7000 merks to Sir Alexander's lady, and agreed to pay the residue of the price on or before the 11th day of the said month of November.

The appellant was immediately let into the possession of; and continued to possess the premises, and receive the rents thenceforward. By a rental delivered to him, it appeared, that he was to pay the sum of 19,021*l.* 1*s.* 8*d.* Scots over and above the sum paid by him at the execution of the articles. On the 21st of September 1720, Sir Alexander executed a disposition and conveyance of the premises, which was tendered to the appellant before the 1st of November that year; but application being then made to the appellant to give a real security upon the same lands for the price, which was payable eleven days after, the appellant refused to accept the disposition under the condition insisted on relative to the security.

The

The respondent Sir Alexander being much encumbered with debts to the respondents and sundry other creditors, the respondents arrested the price in the appellant's hands, and afterwards brought an action of forthcoming against him. The appellant also brought an action of multiple poinding, in which various proceedings were had, and interlocutors pronounced, on the subject of the preferences of the creditors upon the price, not necessary to be detailed.

The appellant afterwards brought an action for reduction of the said articles, upon the ground that the disposition was not delivered to him at the day limited, and because the premises were encumbered and the title thereto not clear. The cause coming to be heard before the Lord Ordinary, his lordship, on the 31st of January 1723, "Found that the creditors of Sir Alexander must purge or clear the incumbrances, as also produce in court the writs of the lands of New Grange, before the decree in their favour be extracted." And after further proceedings, the Court, on the 30th of December 1724, "Found the said articles a binding contract upon the appellant, the said Sir Alexander producing his brother's infestment, and a sufficient progress, unless the appellant could condescend upon incumbrances that would exclude his right; but before payment of the price, found that all the creditors ought to be brought into the multiple poinding now depending, in order to be discussed."

The appellant having stated in debate, that his right was excluded by adjudications led on the premises of a date posterior to the articles, the Lord Ordinary, on the 20th of July 1725, "Found that the right made by Sir Alexander Anstruther to the appellant of the lands of New Grange is not excluded by the posterior adjudications." One of the creditors, adjudgers, having reclaimed against this interlocutor, the Court, on the 11th of November 1725, "having considered that the bargain of sale had taken effect, refused the desire of the petition, and adhered to the Lord Ordinary's interlocutor."

And it having been remitted to the Lord Ordinary to hear parties upon the warrandice to be given by the creditors arresters upon their receiving their money, his lordship, on the 7th of January 1726, "Ordnained the creditors, upon payments of their debts, to discharge the appellant of so much of the purchase-money as the said debts amounted to, with absolute warrandice, and for his further security to assign their debts to Mr. Haldane, so far as the same might affect his purchase, for his further security thereof allenary; and ordnained the decree to go out and be extracted accordingly."

The appeal was brought from "several interlocutory sentences of the Lords of Session, of the 18th of July 1722, the 31st of January, the 9th of July, and 26th of December 1723, the 13th of February, the 18th of June, the 2d and 30th of De-

“ cember

“ cember 1724, the 23d of June, the 20th of July, and 18th of
 “ November 1725, and the 7th of January 1726 (a).

Heads of the Appellant's Argument.

This bargain was not performed on Sir Alexander's part on the 1st of November 1720, nor at any time thereafter; on the contrary, he refused to deliver any conveyance to the appellant except upon the terms of having the purchase-money paid or secured to him at the time of delivery; though by the articles of agreement the conveyance was to have been delivered some days before the price became due, to give the appellant an opportunity of examining into the sufficiency of the right; and establishing his own title before he paid the money.

The admitting of a few of Sir Alexander's personal creditors to perform the articles for him is a great stretch of the articles to the disadvantage of the appellant. For the warranty appointed to be given to the appellant is not such as he is entitled to by the articles, that being one warranty for the quiet possession of the lands, whereby the appellant might have affected the whole other estate of Sir Alexander; but these are several warranties, not for securing the purchase, but only for refunding certain parts of the purchase-money to be taken from Sir Alexander's different creditors, some of whom have no estates, or but very small ones, liable to be affected by such warranties.

Heads of the Respondents' Argument.

The appellant, immediately upon the execution of the articles, was let into the possession of the premises, and is now in possession thereof, and has received all the rents and profits to his own use. Though the price was not to be paid till the 11th of November, yet nobody is obliged to deliver an absolute conveyance to an estate, without having the price paid or secured; and all that was desired of the appellant was only to give an heritable security, upon the premises sold, for securing the payment of the price, not to the respondent Sir Alexander, but to such of the respondents, Sir Alexander's creditors, as had the prior incumbrances affecting the premises sold.

All the creditors of the respondent Sir Alexander, claiming any right to the premises, are parties to the suit: their several rights have been produced, and considered by the Judges, who have determined the priority in which the creditors are to be paid; to this determination the creditors have submitted, and no complaint is made by any of them. There seems, then, no occasion for the appellant to make use of this as a handle against paying the price, especially since the Judges have directed, that the creditors shall not only assign their debts to the appellant to protect the inheritance; but that the several creditors, upon payment, shall give absolute warranty: the effect of which is, that they

(a) It appears to be unnecessary in this case to de all the numerous interlocutors, which chiefly related to the preferences of the creditors.

shall be obliged to indemnify the appellant, as to any demands, so far as relates to the several sums to them respectively paid, which is rather a confirmation of the appellant's title, than any prejudice to it.

Judgment,
20 March
1726-7.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed; and that the several interlocutory sentences therein complained of be affirmed.*

For Appellant, P. Yorke. J. Willis.
For Respondents, Dun. Forbes. C. Talbot. Will. Hamilton.

Case 135. Elizabeth Duchefs of Hamilton, - - Appellant;
James Duke of Hamilton, - - Respondent.

29th March 1727.

Process.—A widow brings an action against her son, as his father's heir, to make good a jointure, which she alleged was deficient: the son contends that the pursuer had not implemented her part of the marriage-articles, and calls upon her to produce her duplicate of them; stating that the other duplicate was produced by him in a suit between the parties in Chancery in England: she declining to do this, is ordered before answer to produce her part of the marriage-articles.

THE appellant in the year 1722, brought her action against her son the respondent, setting forth: That previous to her marriage with James late Duke of Hamilton, he by his bond of provision, bearing date the 15th of July 1698, for and in consideration of the said marriage, and of the appellant's portion of 10,000*l.* sterling, of which he acknowledged the receipt, bound and obliged himself, his heirs and successors, to provide and secure the lands and baronies of Kinneil, Caridden and Abbotscarse, with the castles, towers, fortalices, and pertinents, therein particularly mentioned and described, to the appellant in life-rent for her jointure, during all the days of her lifetime, and to infest and seise her in life-rent therein; and the duke warranted these lands, baronies, and others to be then worth, and to be worth and pay yearly at the appellant's entry thereto, and during her lifetime the sum of 1500*l.* sterling, by and attour the manor-place of Kinneil; and he bound himself to free and relieve the appellant yearly during her lifetime of all feu duties, blench duties, teinds, ministers' and schoolmasters' stipends, building and repairing of manes, repairing of churches and church-yard dikes, and the king's ordinary taxation:

That the said duke not being himself infest in the said lands, baronies, and others in 1702, joined with his mother Ann late Duchefs of Hamilton, in whom the feudal right was vested, in executing a confirmation of the said bond of provision, containing a precept of seisin, upon which the appellant was accordingly infest;

That