

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 invest 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 invest 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 invest;

That

That the said duke died in November 1712, leaving the respondent his eldest son and heir; and Ann Duchefs of Hamilton died in October 1716, and upon her death, the appellant became entitled to the possession of the said jointure, lands, baronies, and others:

That the appellant having entered upon the same, found that they were not worth above 1000*l.* sterling per annum, clear of all deductions; so that the appellant suffered the loss of 500*l.* sterling per annum: and her action concluded, that the respondent should make payment to her of the *inlake* of 500*l.* per annum since she had been entitled to her jointure, and in time coming, agreeably to the bond of provision, and deed in confirmation thereof; and that the appellant should also be quieted in the enjoyment of the said lands, baronies, and premises.

The respondent stated for defences in this action, that by the articles of marriage executed between the appellant and his father, the appellant was bound to settle her estate in England in favour of a trustee for the behoof of the eldest son of the marriage; but that the appellant had not fulfilled this obligation upon her part; and the bond of provision libelled on having been of same date, and granted in part performance of these marriage-articles, the several provisions in which, in favour of each party, were the mutual causes of one another, he contended that no process could be sustained at the appellant's instance on the bond of provision, until she settled her English estate in the manner agreed on by the marriage-article. Of these marriage-articles he produced, what he stated to be, a copy, mentioning that his father's part or duplicate thereof was produced by him in a suit in Chancery in England between the appellant and him: and he contended that she should produce her part or duplicate of these marriage-articles.

This cause was reported by the Lord Ordinary, and having been argued before the Court, their lordships on the 8th of December 1724 "Before answer ordained the appellant to produce her part of the principal marriage-articles."

The appeal was brought from "an interlocutor order of the Lords of Session of the 8th day of December 1724."

Entered,
1 Feb.
1726-7.

Heads of the Appellant's Argument.

The appellant ought not to be obliged to produce before the Lords of Council and Session her part of the marriage-articles, but the respondent having a part thereof in his own custody, and having admitted the same in the proceedings, if he intended to have any benefit thereby in the said action, it was incumbent upon him to produce the same; and if the fact had been that the respondent's part of the marriage-articles was produced, and then lying before the Court of Chancery of England, in a suit betwixt him and the appellant (as was alleged on the respondent's part), yet that would not have been a sufficient foundation whereon to ground the interlocutor; for it would be as necessary for the appellant to have her part of the said marriage-articles in England to

to make her defence in the said suit, as for the respondent to have his part.

If this rule be admitted, it will follow that if any person being in England is forced to sue in the courts of justice in Scotland, and the defender thinks fit to allege some articles or settlements concerning the title to the pursuer's estate in England, though not strictly in issue in the cause, such pursuer must be for ever stopped in his suit, unless he sends down the title-deeds of his estate in England to be produced before the Judges in Scotland.

Heads of the Respondent's Argument.

If an action is brought for the performance of an agreement, and the defender insists that the pursuer has a deed in his possession which will be a bar to the suit, or stay the proceedings therein, the pursuer ought to be decreed to produce that deed; and it is the constant and daily practice in the Court of Session so to do. If the pursuer does not comply with such direction, he has himself only to blame that the suit is at a stand: and as the appellant does not pretend she has not a part of these articles, so, had she produced them, the suit might have been at an end before this time. The respondent's part of the said articles was then in England, and could not be produced at that time; but he produced a copy of the articles, and was willing it should be taken as a true copy; and if the appellant would have agreed to that, the necessity of even her producing the articles might have been saved; but that was not agreed to.

Judgment,
29 March
1727.

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

For Appellant, P. Yorke. J. Strange.
For Respondent, Dun. Forbes. C. Talbot. Will. Hamilton.