with that of the 21ſt of November 1717, have decreed that he ſhould be paid his juſt debts.

Heads of the Reſpondent's Argument.

The appellant has kept the reſpondent out of the poſſeſſion of his eſtate for above ten years, and put him to a tedious and expenſive law-ſuit, to the almoſt utter ruin of the reſpondent and his family. The appellant has ſtill more than two years rent of the eſtate remaining in his hands unaccounted for; and if there were any articles not brought into the account, he has his remedy againſt the reſpondeht, by virtue of the reſervation in the interlocutors now appealed from.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutor of the Lords of Seſſion and the affirmances thereof be affirmed.* Judgment, 21 Feb. 1721-22.

For Appellant, *Sam. Mead.* *Will. Hamilton.*
For Reſpondent, *Rob. Raymond.*

In the appeal caſes in this cauſe, the whole proceedings ſtated in the former cauſe, No. 52, of this collection, are recapitulated.

Charlotte Marchioneſs Dowager of Annandale, *Appellant*; Caſe 93.
James Marquis of Annandale. *Reſpondent.*

15th *Dec.* 1722.

Proviſions to heirs and children—Huſband and wife.—In a contract of marriage with a firſt wife, a perſon obliges himſelf to ſettle his eſtate on the heirs of the marriage; by a procuratory of reſignation, executed in ſame terms, he reſerved power to grant proviſions to a ſecond wife and younger children, on which infeftment followed; and by another deed he afterwards reſtricted his right of granting proviſions to a ſecond wife, and children, to the extent of 100,000*l.* Scots: After a ſecond marriage, he grants a bond to a ſecond wife for an annuity or jointure of 1000*l.* ſterling: but made no proviſions for children of the ſecond marriage. This ſecond wife in a queſtion with the heir of the firſt marriage, is declared to have the right to her jointure, till ſhe drew thereout the ſum of 100,000*l.* Scots.

Regiſtration.—A deed reſtricting an unlimited power of granting proviſions to a ſecond wife and younger children, which unlimited power was contained in infeftments upon record, is found valid, though not regiſtered, in a queſtion between the heir and a ſecond wife.

BY the marriage-contract in 1686, between William Marquis of Annandale, and Sophia Fairholme his firſt wife, in conſideration of the marriage, and of 80,000 merks Scots paid down for the lady's portion, the Marquis obliged himſelf to ſettle all the lands he was then ſeiſed or poſſeſſed of, in favour of himſelf, and the heirs male of the marriage, and that the ſaid heirs male ſhould ſucceed to him in his honours and dignities, and in all and whatſoever

ſoever lands and others then any way appertaining to him. The jointure thereby ſettled upon the ſaid Sophia was 8000 merks Scots per annum. In terms of the ſaid marriage-contract the Marquis on the 25th of February 1690, executed a procuratory for reſigning all his lands, therein particularly mentioned, to have new infeftments thereof granted to himſelf in life-rent, and to the reſpondent his eldeſt ſon, then an infant of tender years, in fee, under ſeveral proviſoes and conditions; particularly, that the ſame ſhould be ſubject to the jointure ſettled upon the then Marchioneſs, or any additional life-rent proviſion he ſhould give her, or any other wife he ſhould happen to marry; and that the ſame ſhould alſo be ſubject to all the juſt debts then owing by him, and to ſuch proviſions as he was then obliged, or ſhould be thereafter obliged to pay to his younger children, of that or any other ſubſequent marriage; and he reſerved to himſelf a power of charging the premiſes with debts to the amount of 40,000 merks Scots. Upon this procuratory a crown-charter was obtained, and infeftment taken thereon.

On the 15th of March 1715, the Marquis executed a deed, reciting the ſettlement of 1690, and the clauſe therein contained, reſerving power to make proviſions for the wives and children of future marriages, which proceeds thus: "And now ſeeing we "are reſolved further to explain the clauſe of proviſion above "narrated, and to ſignify our pleaſure thereanent; and to deter-"mine how far we think fit to extend the aforeſaid reſerved fa-"culty of providing the haill other children of this preſent mar-"riage, or for the proviſion of haill other children and wives of "ſubſequent marriages: Therefore," &c. "Wit ye us to be "bound, like as we by theſe preſents bind us, not to exerciſe the "foreſaid faculty to a further extent than 100,000*l.* Scots, to "haill other children procreate, or to be procreate of my body "in this preſent marriage, or for the haill proviſions in favour of "the haill children or wives of ſubſequent marriages; to which "ſum of 100,000*l.* money foreſaid, the indefinite faculty above "narrated, of providing the haill other children aforeſaid is ex-"preſsly hereby reſtricted." The deed of reſtriction was not regiſtered, but was kept by the Marquis in his own cuſtody.

Marchioneſs Sophia died in December 1716, and in 1718 the ſaid late Marquis intermarried with the appellant, the daughter of Mr. Vanden Bempde, his ſecond wife. No contract or ſettlement was made upon this ſecond marriage, but the late Marquis on the 20th of February 1719, granted an heritable bond of proviſion to the appellant for a life-rent of 1000*l.* ſterling *per annum*, iſſuing out of his eſtates, during her life; upon this ſhe was infeft on the 6th of March following, and her ſeiſin duly regiſtered.

The late Marquis dying upon the 14th of January 1721, and the reſpondent his eldeſt ſon and heir refuſing to pay the ſaid life-rent of 1000*l.* ſterling *per annum* to the appellant, ſhe brought a proceſs before the Court of Seſſion for poinding the ground. The reſpondent and his tenants appeared, and made defences; and the Court on the 15th of February 1722, "Found, that the late Mar-

"quis

" quis of Annandale by his contract of marriage did oblige him-
" ſelf, that the heir male of the marriage ſhould ſucceed to him
" in his honours and eſtate, and that the faculty reſerved to the
" late Marquis in the procuratory of reſignation 1690, and in the
" charter and ſeiſin following thereupon, whereby he reſerved
" power to burthen his heir with any life-rent proviſion to a lady
" whom he might afterwards happen to marry, did not import an
" unlimited power to burthen the heir with an unlimited life-rent
" at his pleaſure; but that the ſame was qualified by his contract
" of marriage; and that by the ſaid contract and reſerved faculty
" he had only power to burthen the reſpondent, the heir of pro-
" viſion, with competent life-rent proviſions in favour of the ap-
" pellant his ſecond lady, ſuitable to the circumſtances of his
" family and eſtate at the time, and remit it to the Lord Ordinary
" to proceed accordingly."

The appellant reclaimed againſt this interlocutor, praying that at leaſt her life-rent proviſion ſhould ſubſiſt till ſhe drew out of it the ſum of 100,000*l.* Scots: but after anſwers for the reſpondent, the Court on the 27th of February 1722, " Adhered to their
" former interlocutor, and found, that by the deed of reſtriction
" made by the late Marquis in 1715, the faculty reſerved by him
" in the writ of tailzie made by him in the year 1690, was in all
" events reſtricted to 100,000*l.* Scots for proviſions to a ſecond
" lady and younger children, and that the appellant's intereſt
" herein cannot exceed the annual rent of the ſaid ſum of
" 100,000*l.* Scots."

The appellant brought this interlocutor under review, and ſtated that as the reſtriction was not to be diſcovered upon the record, it could have no effect againſt her: the reſpondent made anſwers, and the Court on the 26th of June 1722 " Adhered to their former in-
" terlocutor, and found that the aforeſaid reſtriction, though not re-
" giſtered, is effectual both againſt the Marchioneſs and her child-
" ren."

The appeal was brought from " ſeveral interlocutors and decrees
" of the Lords of Seſſion of the 15th and 27th of February, and
" 26th of June 1722." Entered 12 Oct. 1722.

Heads of the Appellant's Argument.

The late Marquis was no further bound by the contract of marriage of 1686, than that the eſtate ſhould deſcend to the reſpondent as his heir, and that he ſhould not inſtitute another heir, or diſpoſe of that eſtate to a third party, without an onerous conſideration. But the late Marquis ſtill had an abſolute power of charging the eſtate with debts at pleaſure, and might have ſold the whole or any part of it for a valuable conſideration; and the reſpondent, the heir of that contract, would have been obliged to fulfil and make good, not only all deeds done for valuable conſiderations, but alſo all rational deeds done by the Marquis touching that eſtate. The jointure given to the appellant was no fraudulent deed, nor done with intention to diſappoint the reſpondent's ſucceſſion, but was rational and ſuitable to the Marquis's quality; and marriage has always been looked upon in law as a valuable con-

conſideration for a jointure. If any difficulty ariſes from the contract, it is fully removed by conſideration of the procuratory 1690, which was a-new ſettlement, which gave ſeveral advantages to the reſpondent, by reſtricting the Marquis's abſolute power of charging the eſtate with debt at pleaſure to a very limited ſum, 40,000 merks Scots, and by veſting the property of the eſtate in the reſpondent, and reſtricting the late Marquis's right to a life-rent, which prevented him from ſelling. On the other hand, the only advantage allowed to the Marquis was the allowing the eſtates to be charged with a jointure to a ſecond wife; and although this ſettlement was made in the reſpondent's minority, he neither does nor can pretend to ſet it aſide, it being the title under which he enjoys the eſtate, and a deed which he has acknowledged by writings under his hand.

The deed of reſtriction 1715, can never be underſtood to relate to the Marquis's power of providing a life-rent or jointure for a wife; it appears that he only meant to reſtrict the faculty of providing for children; and though the word *wives* is thrown in, in a very ſtrange manner, it muſt have been done either *per incuriam* of the writer, or from a belief that the late Marquis had a power to give a proviſion in money to a wife, over and above her jointure; and, therefore, the Marquis is reſtricted that he ſhall not charge the eſtate with a ſum of money to a wife and children above 100,000*l.* Scots. Beſides, this life-rent is but a ſuitable proviſion, nowiſe exorbitant for the Marquis's widow, who has alſo two ſons by him unprovided for.

The deed of reſtriction can have no effect againſt the appellant, as it was not recorded in the regiſter of reverſions, but kept up as a latent deed to enſnare creditors or a ſecond wife; and no notice was given to the appellant before her marriage, nor before her infeftment was taken and recorded upon her life-rent. The argument here is the ſtronger, becauſe the Marquis's power being conſtituted by inſeftment, it could not be taken away, but by a renunciation duly regiſtered.

Under the late Marquis's contract of marriage with his firſt wife, the appellant would have been entitled to her terce, if no ſettlement had been made upon her, which would not have fallen much ſhort of the life-rent: and even by the deed of reſtriction the late Marquis had power to charge the eſtate with 100,000*l.* Scots for proviſions for his ſecond lady and iſſue; and the Marquis having made no other charge than the life-rent, the appellant muſt in the worſt event be thereby entitled to the ſaid 100,000*l.* Scots, or the life-rent, till that ſum with intereſt be exhauſted, which may equal if not exceed the life-rent.

In the progreſs of this action, the appellant prayed to have ſome aliment pending the action, which the Court refuſed her; ſo that ſhe has had no maintenance for herſelf and two children out of the late Marquis's eſtate, ſince his death.

Heads

Heads of the Reſpondent's Argument.

The reſpondent as heir of proviſion by his mother's contract of marriage in 1686, is ſo far from being liable to perform all his father's deeds, that he as creditor to his father under that contract has an undoubted right in law to reduce all voluntary deeds, eſpecially unreaſonable proviſions for a ſecond wife and her children, in prejudice of his ſucceſſion, which was ſettled in conſideration of his mother's fortune.

In the contract of marriage 1686, there is no power expreſsly reſerved to the late Marquis to make any proviſion for the wife or children of a ſubſequent marriage, nor was it neceſſary, becauſe the fee being then in himſelf, under an obligation to reſign in favour of the heirs male of that marriage, he had by law a power to make a reaſonable proviſion for the wife and children of a ſecond marriage, with due regard to the eſtate and circumſtances of the family, and the portion which ſuch ſecond wife might bring. But he had not power to make a ſettlement to what extent he pleaſed; for every ſuch ſettlement is by the undoubted principles of the Scots law reduceable by the judges to an equitable proportion, wherein the greateſt regard is always had to the intereſt of the heir of the firſt marriage, and the fortune of his mother. But in the ſettlement of 1690, when the late Marquis diveſted himſelf of the fee, and reſigned the ſame to the reſpondent, it was neceſſary to reſerve an expreſs power of making proviſion for the wife and children of a ſubſequent marriage, for otherwiſe he would have been abſolutely barred for ever. But he could not by his own deed create a new power, or reſerve to himſelf more than he was entitled to by law at the time of ſuch reſignation; and therefore the reſerved power in the deed being indefinite, muſt be conſtrued to be only ſuch a power as he had by law before.

The reſpondent's acceptance of the ſettlement 1690, appears only by a deed of the 26th March 1715, which was not executed till after his father had by his deed of the 15th of ſame month, expreſsly reſtricted his power to the ſum of 100,000*l.* Scots.

The power reſerved by the ſettlement 1690, being only perſonal, needed not to have been regiſtered, but happened to be ſo by accident, being recited in the inſtruments conſequent upon the procuratory of reſignation, which were neceſſary to be regiſtered: and as the reſervation of the power itſelf, and the exerciſe of it by any perſonal deed, would have been effectual without regiſtration; ſo the reſtriction of it by the deed 1715, was valid though not regiſtered; and though ſuch powers, or the exerciſe or reſtriction of them be not regiſtered, it can be of no ill conſequence to purchaſers for a valuable conſideration, ſince they muſt know that ſuch deeds need not be regiſtered. It is well known in the Scots Law, that ſeveral rights on record can be avoided by perſonal bonds or receipts, though not upon record, ſuch as adjudications and heritable bonds upon which infeftment has followed. There

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is an expreſs law for recording ſaſines, &c., which particularly recites all deeds thereby appointed to be recorded, and appoints a record for that purpoſe; but there is no order of law for recording diſcharges or reſtrictions of perſonal faculties and powers.

But whatever claim a creditor for a valuable conſideration might pretend, in the preſent caſe there can be no ſuch queſtion; here there was no ſettlement before marriage, the appellant took her hazard of the legal proviſions; nor was there any portion paid to entitle her to be a purchaſer for a valuable conſideration, and ſhe can claim no more than what the Marquis could voluntarily give: he could certainly never extend that proviſion beyond the powers he had by law, and the limits he had given to himſelf in the explanatory or reſtricting deed.

It is plain from the words of this deed, 1715, that the Marquis meant to extend the reſtriction to proviſions to wives, as well as to children. In ſeveral places of it the Marquis mentions his deſign to reſtrict his power of providing for younger children, and wives of ſubſequent marriages to 100,000*l.* Scots.

By the uniform practice and conſtruction of the law of Scotland, where any ſum of money is ſet aſide, or appointed for a wife and children, the wife's intereſt in that ſum is different from the childrens': the intereſt of the children extends to the fee; and the intereſt of the wife to the life-rent only; ſo that the proviſion in the deed of reſtriction 1715, has the ſame effect in law, as if the power reſerved to the late Marquis had been in expreſs words to provide the life-rent or intereſt of 100,000*l.* Scots to the wife, and the fee of that ſum to the children. If a perſon in the diſpoſition of his eſtate to his eldeſt ſon, reſerve a faculty in caſe of a future marriage, to ſettle one of the baronies diſponed for the proviſion of a wife and children of a ſubſequent marriage, no one will imagine, that this reſervation would enable him to diſpoſe of the fee of ſuch barony to the wife, or to give her any other intereſt in it than a life-rent; and the power reſerved to the late Marquis by the deed 1690, to make proviſion for a ſubſequent wife, was only by a life-rent, though not reſtrained to a certain ſum; and the deed 1715, only reſtrains ſuch powers reſerved by the deed 1690, to a certain ſum, but does not change or alter the nature of them.

Judgment, 15 Dec. 1722.

After hearing counſel, *It is ordered and adjudged that the ſaid interlocutor of the* 15th *of February, complained of in the ſaid appeal, and ſo much of the ſaid two other interlocutors as affirm the firſt interlocutor be reverſed: And it is further ordered and adjudged, that ſo much of the interlacutor of the* 26th *of June, whereby the Lords of Seſſion, found that by the ſaid deed of reſtriction made by the ſaid Marquis of Annandale, the* 15th *of March* 1715, *though not regiſtered is effectual againſt the appellant and her children be affirmed: And it is further ordered and adjudged, that ſo much of the interlocutor of the* 27th *of February, whereby the Lords of Seſſion found, "that by the "ſaid deed of reſtriction made by the ſaid Marquis in* 1715, *the fa- "culty reſerved by him in the writ of tailzie, made by him in the year "* 1690, *was in all events reſtricted to* 100,000*l. Scots, for proviſions "to*

" *to a ſecond lady and younger childern, and that the appellant's intereſt* " *therein, cannot exceed the annual rent of* 100,000l. *Scots*" *be reverſed: And it is hereby further ordered and adjudged, that the appellant's life rent of* 1000l. per annum, *is a charge on the eſtate, until ſhe has drawn thereout* 100,000l. *Scots with intereſt thereof, from the deceaſe of the ſaid late Marquis, and no longer, and that the ſaid* 1000l. *per annum, be accordingly paid to the appellant, at the reſpective terms appointed for payment thereof, in the bond of proviſion, with intereſt to be computed for ſuch part thereof, as is now in arrear from the times the ſame ought to have been paid, until the ſame ſhall be paid: And it is further ordered that the Lords of Seſſion do direct proper diligences, both perſonal and real for the appellant's recovery of the arrears of the ſaid annuity, and all future payments thereof yearly, and termly as the ſame ſhall fall due, together with the intereſt for the before-mentioned arrears, from the times at which the ſame became due, until the ſame ſhall be ſatisfied.*

For Appellant, *Rob. Raymond. Ro. Dundas.*
For Reſpondent, *Dun. Forbes. C. Talbot. Will. Hamilton.*

Caſe 94.

Charlotta Marchioneſs Dowager of Annandale, and the Lords George, and John Johnſton, her Children, Infants, by their Mother and Guardian, *Appellants;*

James Marquis of Annandale: *Reſpondent.*

21ſt *Dec.* 1722.

Proviſions to heirs and children.—Preſumption of revocation.—A father executes a deed in favour of his heir giving him a locality over part of his eſtate, and aſſigning the tacks to him, with warrandice from fact and deed, and a power of revocation by *writ under the grantor's hand:* The firſt year the father marked the rents of the allocated lands, in his rentals, as to be paid to the ſon; the next year this was not done, and the factor received a letter to pay no more of the ſon's bills. The allocation was not thereby revoked.—But a deed of revocation found in the grantor's repoſitories after his death, though not publiſhed or recorded, revoked the allocation.

WILLIAM Marquis of Annandale, in 1686, married Sophia, the daughter and only child of John Fairholme, Eſq. who was poſſeſſed of a large eſtate, which afterwards came to the ſaid marquis. By the contract of marriage, the ſaid marquis in conſideration thereof, and of 80,000 merks Scots, paid down for the lady's portion, bound himſelf to reſign his eſtates for new infeftments thereof, in favour of himſelf and the heirs male of that marriage; and accordingly he afterwards executed a deed of entail on the 25th of February 1690, reſigning and ſettling all his lands and eſtates therein particularly mentioned to himſelf in life-rent, and to the reſpondent his eldeſt ſon of the ſaid marriage