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Appellants' Authorities—3. Reg. Maj. 8.—Town of Edin. March 11, 1630. (14500.) 1540, c. 117. 2. Ersk. 2. 7. 1579. c. 80. 1581. c. 4. 1593. c. 179.—Novell, 73. 4. —Sheriff, July 8, 1622. (16877.)—Colvill, July 15, 1669. (16882.)—Falconer. Feb. 3, 1665, (16883.)—Dow, Jan. 4. 1668. (16884.)—Cunningham, Dec. 5, 1665. (17019.)—Sharp and Maxwell, Feb. 2, 1710, (17027.)—Ogilvie, Feb. 22, 1676, (16860.)—Dishington, March 12, 1628. (17015.)—Duke of Douglas, Jan. 6. 1747. (17035.)—Weir, Nov. 29, 1609. (17011.)—Redpath, June 24, 1611. (Ib.)—Hay, June 7, 1709. (17025.)—4 St. 20. 22.—Bell on Testing Deeds, 272, 246, et seq. and cases there.—Buchan, June 26, 1823.—(Shaw and Dunlop, vol. II. No. 410.)—Smith *v.* Bank of Scotland, 1821.—(House of Lords, 1824.)

Respondents' Authorities.—Novell 73. de Inst. de Caut. et Fidel.—Reg. Maj. 2. 38.—1540. c. 117.—1579, c. 80.—1681, c. 5.—Mackenzie's Obs.—Kilk. in D. of Douglas, Art. 8. *v.* Writ.—Bell on Testing of Deeds.—1. Bank. 11. 28. and 10. 229—3. Ersk. 2. 7.—Stevenson, 1682, (16886.)—Blair and Peddie, 1684. (13942.)—Campbell, Nov. 1698. (16887.)—Phillips, June 13, 1738. (Elchies, Nov. 10, *v.* Witness.)—Shaw *v.* M'Phail, (mentioned A. S. Feb. 6, 1765.)—Young and Ritchie, Feb. 2, 1761. (17047.)—Walker *v.* Adamson, June 8, 1716. (16896.)—Sibbald, Jan. 18, 1776. (Bell, p. 245.)—Frank, June 10, 1809. (F. C.)

J. CHALMER—SPOTTISWOODE and ROBERTSON, Solicitors.

No. 20.

SIMON TAYLOR OGILVIE, Esq. Appellant.—*Shadwell*—*Buchanan.*

BARBARA DUNDAS and MARGARET LINDSAY, and Others, Respondents.—*Adam*—*Keay.*

Right in Security—Heir and Executor.—A husband, possessed of property in Jamaica, having, by marriage-articles, bound himself to secure to his wife, in case of her surviving him, an annuity of £400, payable out of his Jamaica estates; and binding himself, in the event of purchasing lands in Scotland, to take the titles to himself and wife in joint fee and liferent, in further security of the annuity; and having bought lands in Scotland, but having taken the titles to himself and his heirs alone, and having died,—Held (reversing the judgment of the Court of Session), 1. that the annuity constituted a proper burden on the Jamaica estate, and not on the Scotch estate; and, 2. that a party taking the former under a testamentary deed, had no relief against the heir succeeding to the estate in Scotland.

May 22, 1826.

2D DIVISION. Lord Mackenzie.

THE late George Ogilvie resided for many years in Jamaica, and acquired in that island a large property called Langley. He was a native of and returned to Scotland in 1785, and soon after married Barbara Dundas. By the marriage-articles he bound and obliged himself, and his representatives, to pay her, in case she survived him, an annuity of £400, 'in lieu and bar of 'dower, which annuity is to be secured and made effectual on 'the said George Ogilvie's estate, plantation, and sugar-work, 'called Langley estate,' &c.; and accordingly he engaged, 'within 'three calendar months from the time of subscribing the present articles, to execute, subscribe, and deliver to George Dundas, Esq. of Dundas, brother-german to the said Barbara Dundas, or to any person to be named by him, a legal and formal 'deed of settlement with the said Barbara Dundas, or proper

'trustees for the several purposes aforesaid, made out agreeably to the laws and customs of Jamaica, so as effectually and validly to charge the said George Ogilvy's estate, plantation, and sugar-works, lands, slaves, and premises aforesaid in Jamaica, called Langley, with the payment of the annuity of £400 sterling, hereby made payable to the said Barbara Dundas, making the same a real burden, lien, charge, and encumbrance on said estate, plantation, sugar-works, lands, slaves, and premises aforesaid.' The deed also provides, that 'in case the said George Ogilvie think proper to lay out any part of his fortune in the purchasing land in Scotland, he is to take the rights and securities thereto in favour of himself and the said Barbara Dundas, in joint fee and liferent, in further security to her of the payment of the said annuity of £400 sterling, and to his heirs or assignees in fee, in full lieu, bar, and satisfaction as aforesaid; and when the payment of the said annuity to the said Barbara Dundas shall thereby, or by any other ways and means, be sufficiently secured to the satisfaction of the persons afternamed, at whose instance execution is to go on the present articles, or to the satisfaction of the majority of them then in life and in Scotland, then, and in that case, the said Barbara Dundas binds and obliges herself to grant and subscribe all deeds that shall be advised by counsel versant in the laws and customs of Jamaica, necessary for discharging and disburdening the said George Ogilvie's estate in Jamaica, on which the said annuity is to be made chargeable as aftermentioned.' May 22, 1826.

Soon after his marriage, George Ogilvie purchased a small landed property in Scotland at the price of £10,000, the rental of which was not adequate to pay the annuity, being only about £200; and he took the titles of this property, which he called Langley Park, in favour of himself, his heirs, and assignees, instead of, as stipulated, to himself and Barbara Dundas in joint fee and liferent. In 1791, he died without having executed any deed, formally charging this property or that in Jamaica with her annuity. He left no issue, and his nearest relatives were his sister, Mrs Isabella Clerk, and her two children, George Ogilvie Clerk, and Miss Clementina Clerk. Prior to his marriage, Ogilvie had executed a deed of settlement, by which he conveyed his whole property and effects, including his estate in Jamaica, to trustees for behoof of his nephew George, subject to payment of his whole debts; but by a subsequent deed, he excluded him, and substituted in his place Miss Clementina Clerk. Having made no settlement as to his Scotch landed estate, his sister Mrs Clerk succeeded to it as his heir-at-law; and Miss Clementina Clerk, by virtue of the deed of settlement, acquired right to

May 22, 1826. his whole personal effects, and also to the Jamaica estate, out of which the annuity was paid to the widow for several years.

In 1792, Mrs Clerk sold the Scotch estate for £16,000, and the purchaser granted, in part payment of the price, an heritable bond over the property for £4000. The widow, Barbara Dundas, then raised an action against Mrs Clerk, as representing the late Mr Ogilvie, concluding, that, in terms of the marriage-articles, she should be ordained to secure to her an annuity of £400 out of the Scotch estate; or otherwise, should make payment of £10,000, to be laid out in heritable security to answer that annuity, and on this action she arrested in the purchasers' hands, and executed inhibition.

The trustees under George Ogilvie's settlement, about the same time, instituted proceedings before the Court of Chancery in England for exoneration, and to have the rights of persons interested in the deed declared. The Lord Chancellor in substance directed the widow's annuity to be paid out of the Jamaica funds—'but this is to be without prejudice as to any other 'estate being settled to the payment of the said annuities.' From this source the widow's annuity was accordingly paid.

Mrs Clerk died in 1800, and she was succeeded by her son George, as her heir-at-law, who thus acquired right to the heritable bond, while her personal effects, including the balance of the price of the Scotch estate, fell to her daughter Clementina; who had married a Mr Perry, and assumed the name of Mrs Perry Ogilvie.

On the death of her mother, Clementina raised an action against her brother George, claiming re-payment of the annuities paid by her to the widow, and concluding that he should free and relieve her from such payments in future, or at least should invest £5000 as a security for that purpose. The widow then wakened her action (which had fallen asleep), and transferred it against both George as his mother's heir-at-law, and against Clementina as her executrix; and in these actions the question came to be, whether the widow's annuity formed a burden on George the heir, who had taken up the heritage of Mr Ogilvie, or on Clementina his heir in mobilibus, and who had succeeded to the Jamaica estate. By her it was maintained, that, by the general principles of law, the heir-at-law is liable for the heritable debts, and must relieve the heir of provision (which character she contended she possessed) of all debts, whether real or moveable—and that this principle was fortified by the intention expressed by the deceased, who had bound himself to take the titles of the Scotch heritage to his wife in liferent, in security of her annuity. On the other hand, it was pleaded by George,

that the Jamaica estate was liable primo loco,—that the question as to which of the parties should bear the burden of the debts, was a question of intention, and that it was plain, that in this case it was not intended by Mr Ogilvie that he should relieve the heir of provision. By the widow it was contended, that she was entitled to payment out of both estates—and that the question of relief was one between the other parties, who were both liable to her, and with which she had nothing to do. The Court, on the 29th May 1804, and on the report of the late Lord Meadowbank, pronounced this judgment: 'Find, that the 'annuity of £400 Sterling was an heritable debt, for which the 'estate in Scotland that belonged to the deceased George Ogilvie, 'the pursuer's husband, was liable, and that it still affects the 'reversion or balance of the price of the said estate, and therefore 'find that the defenders, Mrs Clementina Ogilvie, and her hus-'band George Perry Ogilvie, are bound to assign and convey the 'reversion of the said price in as far as it is not exhausted by pre-'ferable debts to the pursuer in liferent, in further security of her 'said annuity; but upon receiving such conveyance, find that she 'must discharge the Jamaica estate to the extent of that pro-'portion of the annuity for which she will then be secured in 'the property in Scotland; and find that the heir and executor 'in Scotland are to be relieved by the heir or devisee of the Ja-'maica estate, in the proportion that the free value of said estate 'bore at the death of George Ogilvie, to the free reversion of 'the Scotch estate; the said annuity of £400 being to be con-'sidered as a catholic debt affecting said estates in Jamaica 'and Scotland, but not rendered a real burden thereon; and re-'mit to the Lord Ordinary to apply this interlocutor, and to de-'termine the other points in the cause.' Thereafter, the Court altered this interlocutor, and found, 'that Mrs Clementina 'Ogilvie, the heir of the Jamaica estate, is entitled to a total 'relief of the pursuer Mrs Barbara Dundas's annuity of £400 'from George Clerk Ogilvie, the heir to the estate in Scotland, 'left by the said George Ogilvie deceased, to the extent of the 'reversion of the said estate;' and their Lordships afterwards, on the 27th November 1804, adhered.* In consequence of this judgment, the heritable bond was transferred in relief to the sister Clementina; and thereafter, by virtue of a decree of the Court, and certain other proceedings, Mr Charles Stewart, W.S. acquired right to it. May 22, 1826.

George Clerk Ogilvie died, and was succeeded by his son Simon Taylor Ogilvie, a minor.

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* See Morr. No. 1. Ap. Discussion.

May 22, 1826. On attaining majority, Simon Taylor Ogilvie appealed, but in consequence of Mr Stewart, the holder of the bond, not having been made a party, the case was remitted back, with directions to sist him as a party. He had, however, died in the meanwhile; and Simon Ogilvie having petitioned the Court of Session to carry the remit into effect, they sisted the representatives of Mr Stewart as parties, and remitted to Lord Mackenzie, as Ordinary, to proceed in the cause. Ogilvie having then raised an action of reduction of the decree and proceedings transferring the bond of £4000 to Mr Stewart, the Lord Ordinary conjoined the actions, and assoilzied the defenders, with expenses; and the Court, on the 1st March 1823, refused a petition without answers.

Simon Clerk Ogilvie appealed, and called as respondents the representatives of Mr Stewart, and subsequently also the widow Barbara Dundas.

Appellant.—The Jamaica estates were charged with the annuity. Had the testator intended to disburthen them, he would have taken the titles to the Scotch estate to himself in fee, and his wife in liferent—but he did not do so. Both as a matter of intention, and express legal obligation, the Jamaica estate is the proper debtor for the annuity, and thus the application of the ordinary rules of law as to relief between heir and executor is excluded.

Respondents.—(*Stewart's Representatives.*) In the case of heritable succession partly testate and partly intestate, the general rule of law is, that the heir, ab intestato, must relieve the party favoured by the settlement, of all debts chargeable against the testator. Besides, the deceased indicated, by the most express terms, his intention to burden the Scotch estate, and to relieve the Jamaica estate.

Respondent.—(*Barbara Dundas.*) The widow is, by the marriage settlement, a catholic creditor on both the estates in Jamaica and Scotland, for payment of her annuity. This is res judicata as to the Jamaica estate; and as to the Scotch estate, even if there had been no express obligation by the deceased to burden that estate with her annuity, she would have been entitled at common law to have claimed from the heir succeeding. She has nothing to do with the question of relief between the heir and executor. She asks complete and full security, and this she is entitled to claim from both estates. Her demand is

in no ways affected by the circumstance that the Scotch estate was not of such value as, of itself, to meet the annuity. Still, such as it is, she is entitled to hold it in security. May 22, 1826.

The House of Lords found, that, 'by the marriage-articles, 'the annuity of £400, provided for Barbara Dundas, became, 'in equity, an express charge upon the Jamaica estate, accord-'ing to the law of Jamaica; agreeably to which law, the said ar-'ticles are to be construed against all persons claiming interests 'on that estate, under the testamentary dispositions, or other 'acts taking effect after the date of the said articles; and that 'according to the true intent of the said articles, the said annui-'ty was to be considered as primarily charged upon the Jamaica 'estate, until the same was sufficiently wholly secured, as is 'mentioned in the articles, to the satisfaction of the persons 'named in the articles, upon land purchased in Scotland, when, 'after the same was so wholly secured, the estate of Jamaica 'was to be wholly discharged and disburthened thereof; and 'regard being had to all the circumstances of this case, which 'took place after the execution of the articles, the Lords find 'that the Jamaica estate is to be considered as remaining pri-'marily liable to pay the whole of the annuity of £400 a-year, 'if the same can be wholly paid thereout; and that, in such 'case, the persons entitled to the Jamaica estate are not entitled 'to any relief or contribution from the estate in Scotland, or 'the reversion or balance of the price of that estate; and in such 'case also, the said Barbara Dundas is not entitled to payment, 'or part payment, of the said annuity, from the estates in Scot-'land, or the reversion or balance of the price of that estate; 'and it is ordered and adjudged, that the several interlocutors 'complained of in the said appeal, so far as they are inconsist-'ent with this declaration and finding, be, and the same are 'hereby, reversed: And it is farther ordered, That, with this 'declaration and finding, the cause be remitted back to the 'Court of Session in Scotland, to do therein, as is just and con-'sistent herewith.'

LORD CHANCELLOR.—My Lords, there is a case which has been argued at your Bar, in which Simon Taylor Ogilvie, Esq. son and heir of George Clerk Ogilvie, Esq. is the appellant, and Mrs Margaret Lindsay or Stewart, relict of the late Charles Stewart, Esq. W. S., and several others, who are his surviving trustees, are the respondents. (His Lordship then detailed the proceedings in the Court of Session.)

The question arising in this case is this, namely, Whether the Court of Session in Scotland is right in considering this case as a question between two estates to be judged of merely by the law of Scotland? My Lords, under the circumstances which I have to state, I apprehend this

May 22, 1826. case must be judged of as a case, in which the provision was made, not under the law of Scotland, but under the law of Jamaica. It appears that Mr Ogilvie had resided many years in that Island; that he had acquired a very large fortune, and particularly a sugar plantation called Langley. He returned to this country after having been in Jamaica for a considerable time. He made his will, of which I do not think it necessary to state farther than to say, that he directed that out of his real and personal estate, all his debts and legacies should be paid; and then he declared further, that the plantation in Jamaica, with the whole stock and effects therein, should be held in trust, and one moiety of the annual rents should be paid to his nephew, the late George Clerk, for his natural life; and the other moiety held in trust for the second, third, fourth, fifth, and sixth sons of his sister, Mrs Isabella Clerk. After he had made this will, he married, and executed marriage-articles, the effect of which, judged of by the law of Jamaica, I apprehend, would be exactly the same as if it had been a marriage settlement in England, directing an annuity on the Jamaica estate. By those marriage-articles, he bound and obliged himself, his heirs, executors, and successors, to pay to his promised spouse, in case she should survive him, an annuity of £400 sterling, in lieu of her dower, which annuity is to be secured and made effectual on the estate, plantation, and sugar-work, called Langley estate, in Jamaica.

My Lords, I have much better authority than my own for saying, that a Court of Equity in England would consider these marriage-articles to amount to a direct specific charge upon that Jamaica estate of this £400 a-year, because there was a suit instituted in the Court of Chancery, which came on to be heard before my predecessor; and in that suit he expressly declared this £400 to be a charge upon the estate in Jamaica; nevertheless, qualifying that decree by saying, it was to be without prejudice as to any other estate being settled to the payment of the said annuities, if any claim could be maintained and made good, but expressly stating, that which I feel to be perfectly clear, that nobody, under the will of this gentleman, or under any instrument, could have taken this Jamaica estate, other than subject to the payment of that £400 a-year. The question, however, arose in this way:—This gentleman, by his marriage-articles, bound and obliged himself to execute within three calendar months, a legal deed of settlement in favour of Barbara Dundas, or proper trustees, made out agreeably to the laws and customs of Jamaica, so as effectually and validly to charge the Langley estate with the payment of the annuity, and making the same a real burden, lien, charge, and encumbrance, upon this estate (so that, in the express terms of this covenant, it was to be clearly a charge and encumbrance on this estate); and then follows a clause, with reference to which, it appears to me that the Court of Session in Scotland have considered this as a case in which they were at liberty, as they thought upon their first interlocutor, to make the Jamaica estate, and another estate marked in the passage I am about to read, contribute in proportion to this annuity of £400 a-year: and by their other interlocutor, they have thrown the whole upon the estate in Scotland. The words occur in the settlement respecting the Ja-

maica estate, and must be construed according to the law of Jamaica. The words respecting the estate in Scotland are these: 'And in case the said 'George Ogilvie thinks proper to lay out any part of his fortune in the 'purchasing land in Scotland, he is to take the rights and securities there-'to in favour of himself and the said Barbara Dundas, in joint fee and 'life-rent, in farther security to her of the payment of the said annuity of '£400 sterling, and to his heirs and assignees, in fee, in full lieu, bar, 'and satisfaction, as aforesaid.' If the clause had stopped here, it is plain that the intention would have been of this nature,—that if he thought proper to lay out part of his property in Scotland, he was to take the right to that estate, in such a way that it should be a further security for the £400 a-year. Then, being only in further security of the payment of £400 a-year, it could never be considered as discharging that which had been made the primary security, but only as providing a further security. May 22, 1826.

But it did not rest there: and I presume it is upon these words that the decision of the Court of Scotland has been rested as between these two estates, without recollecting that the one was a Jamaica estate, (perhaps not in the way in which it appeared to the Court,) and the other was a Scotch estate; for the clause continues, 'and when the pay-'ment of the said annuity to the said Barbara Dundas shall thereby, or 'by any other ways or means, be sufficiently secured to the satisfaction 'of the persons after-named, &c., and any other person that may be 'appointed by the said Barbara Ogilvie for that purpose, at whose in-'stance execution is to go on the present articles, or to the satisfaction 'of the majority of them in life and in Scotland; then, and in that case, 'the said Barbara Dundas binds and obliges herself to grant and subscribe 'all deeds that shall be advised by counsel versant in the laws and cus-'toms of Jamaica necessary for discharging and disburdening the said 'George Ogilvie's estate in Jamaica, on which the said annuity is to be 'made chargeable as after-mentioned.' So that it is clear the Scotch estate was to be only a farther security; and if your Lordships are to look at the subsequent part of the clause, it is extremely clear, that the Jamaica estate was not to be disburdened, unless that case arose in which the payment of the annuity was sufficiently secured to the satisfaction of all these persons, or a majority of them. Then Mrs Ogilvie was compellable, under this last clause, to have subscribed deeds entirely discharging and disburdening Mr Ogilvie's estate in Jamaica. The consequences of which would be, that that estate being so entirely discharged and disburdened, would not be encumbered with the annuity, but the annuity would be wholly upon the Scotch estate that was so settled to the satisfaction of those trustees.

My Lords, it appears that Mr Ogilvie afterwards purchased an estate, by no means at the time equal to the payment of £400 a-year; that he lived a considerable time afterwards, but that no arrangement took place at all about the settling of this property. After his death, the annuity was paid out of the Jamaica estate for a very considerable time; and it cannot be contended, that anything took place which can be represented as altering the arrangement made by him in his lifetime, under which the

May 22, 1826.

Scotch estate was to be only in further security of the payment of the annuity, unless a settlement were made sufficiently securing the whole of the annuity to the satisfaction of the persons who on her behalf were to be satisfied, and who, upon receiving that satisfaction on her behalf, were to call on her to subscribe all deeds that should be advised by counsel versant in the laws and customs of Jamaica necessary for discharging and disburdening Mr Ogilvie's estate in Jamaica. It does not appear that there are any circumstances indicative of any such settlement having been made; and in looking at the value of this property that was purchased in Scotland, from time to time, and the utter want of all attempt even to shift the whole of the £400, or part of it, to this Scotch estate, it does not appear to me, that there was any intention, either on the part of Mr Ogilvie, or on the part of Mrs Ogilvie, to change the liability. It was a mere question between one property of Mr Ogilvie and another property of Mr Ogilvie. The lady received her £400 a-year out of the Jamaica estate for several years after his death; her right to do so was declared under the Court of Chancery in this country; and there is nothing to prove to us, that the change was contemplated. She was content with it as it was; and the object of Mr Ogilvie being to shift the whole from one estate to another, and not merely to charge a part of the annuity on the Scotch estate, when the Scotch estate could not pay the whole, but to shift it entirely from the one to the other,—she having a sufficiency from the Jamaica estate, and never calling for the settlement of the Scotch estate in his lifetime, or expressing any other than satisfaction to take the security of the Jamaica estate,—it does appear to me, that the party left this at his death a charge upon the Jamaica estate; that the charge upon the Scotch estate was not intended in his lifetime, nor called for by her for a very considerable period after his death; nay, so far from it, the Scotch estate was sold; and it was upon the conversion of it into money that this question, as between the two different estates, has been raised. Under these circumstances, my opinion, my Lords, is, that the Jamaica estate is the estate wholly responsible for this £400 a-year. If your Lordships think proper to adopt that opinion, the consequences must be, that this judgment must be reversed. At the same time, I think it but right to say, that if the case could be put upon the principles which the Court of Session of Scotland have applied to it, I do not mean to say, that the judgment would be wrong; and with a view, therefore, to show the grounds on which I humbly propose these interlocutors should be reversed, I have endeavoured to frame a judgment expressed in special terms, which judgment, if your Lordships please to adopt, I should take the liberty of proposing in the course of to-morrow.

Lord Chancellor.—My Lords, your Lordships were pleased, upon my application, to adopt the suggestion of resuming the farther consideration to-day of the case of Simon Taylor Ogilvie, and Mrs Lindsay, relict of Mr Stewart, and his representatives; and I beg to state to your Lordships, that, in consequence of seeing the agents in this business, I am very much afraid that it will be impossible for your Lordships to come

to a final judgment upon the case, without hearing one counsel upon each side on the part of Mrs Ogilvie, who claims an interest in this subject; because, in no way in which I can look at this case, will it be possible for your Lordships to adopt a judgment of such a nature as was proposed by the individual now addressing your Lordships, in the House last year. If such a judgment as that should be adopted by the House, it appears to me, upon reading certain articles of marriage, that it would cut off that lady altogether, if that should be the proper construction of the articles to which I alluded. I stated the other day to some of your Lordships then present, that I thought the judgment had been given in the course of last session of Parliament; but being put in mind of what passed, the amount of it proved to be no more than this, that a proposed judgment had been intimated to the parties, and they had desired that the interest of Mrs Ogilvie should be saved; and there the matter rested; and also not merely on account of Mrs Ogilvie's claim, but by reason that I find in my papers notes in the hand-writing of a noble and learned Lord (Lord Redesdale), who will not be in town till the latter end of this week; and it must have been a matter of difficulty to have given a final judgment in this case in the absence of that learned and noble Lord. However, upon considering what has been further stated to me, as to Mrs Ogilvie's interest, and as it would be found a matter of extreme difficulty to save that interest, the proper mode would be that her interest should be discussed by one counsel on a side, before your Lordships pronounce a final judgment upon the matter,—taking care that those counsel should be heard as early as a due attention to her interests, and the convenience of the House, will allow. At the same time, it may be right to open once more the nature of this case, with a view that this House may understand the point to which it may be necessary that those counsel, when heard, should address themselves. And I feel myself rather the more anxious to go into it on account of certain papers, in another cause, that have been laid upon your Lordships' table. May 22, 1826.

My Lords, your Lordships will find, from what is stated in the Cases, that the late Mr Ogilvie of Langley Park, in the county of Forfar, had for many years resided in Jamaica, where he acquired a valuable property, and carrying those feelings with him which men naturally enough carry with them from the place of their nativity, and to which they intend to return, he called that place also by the name of Langley. In 1785, he returned from Jamaica, and married Mrs Barbara Dundas; and, by his marriage-articles, he obliged himself and his representatives to pay to Barbara Dundas, in case she should survive him, an annuity of £400 sterling, in lieu and bar of dower. This, your Lordships observe, was a charge upon the estate in Jamaica; the effect of which charge being to be considered according to the laws of Jamaica, as administered in the law and equity courts; and it is to be in lieu and bar of what is called dower. This was to be secured upon his plantation and sugar-work, called Langley estate, in Saint Mary's parish, county of Middlesex, and island of Jamaica; and he expressly bound himself to charge his said

May 22, 1826. estate, and all its appurtenances, with the payment of that annuity of £400 Sterling.

My Lords, as far as I have now stated the contents of these articles, they would appear to justify me in stating, that, by virtue of these articles, that estate was specifically bound to supply that annuity, in lieu and bar of dower; and if the laws of Jamaica in respect to real estates are, with some small difference, the same as the laws of England, your Lordships would have to consider this estate in Jamaica bound in the same manner, with respect to the payment of the annuity, as an estate would be bound by similar articles, if, instead of being situated in Jamaica, it were situated in Yorkshire.

My Lords, there was then a particular clause in those articles, which is, in truth, the clause upon which the question arises, namely, 'that in 'case the said George Ogilvie should think proper to lay out any part of 'his fortune in purchasing land in Scotland,' &c. (Here his Lordship quoted the passage.) There is no doubt, therefore, I apprehend, that by virtue of these articles and the annuity clause, stated in the articles of agreement, that the Jamaica estate was bound in equity; and it was to have been in a very short time bound in law, to the payment of this annuity; but Mrs Ogilvie being a Scotch lady, probably those who acted for her naturally enough thought that it would be a much more convenient thing to her to have an annuity upon the Scottish estate; and one question in the cause turns upon the meaning of the article I have read to your Lordships. There are two questions proposed; first, What is the effect of the law of Scotland as between these two estates, the one of which goes to the heir of line, and the other to the heir of provision? How is the law of Scotland, as to this property, independent of the effect of this clause of obligation in the articles of agreement? The other question is, What is the effect of this clause in the articles of agreement? I shall just repeat the words again:—'That in case the said George Ogil-'vie should think proper to lay out any part of his fortune in the purcha-'sing land in Scotland, he is to take the rights and securities thereto in 'favour of himself and the said Barbara Dundas, in joint fee and liferent, 'in further security to her of the payment of the said annuity of £400 'Sterling, and to his heirs or assignees in fee, in full lieu, bar, and sa-'tisfaction, as aforesaid.' It seems extremely difficult to say, if the land in Scotland were not worth more than two hundred pounds a-year, that it was to be taken 'in full lieu, bar, and satisfaction of dower;' and 'when the payment of the annuity shall thereby, or by any other ways 'and means, be sufficiently secured, to the satisfaction of the persons 'after named, at whose instance execution is to go on the present arti-'cles, or to the satisfaction of the majority of them in life and in Scot-'land, then, and in that case, the said Barbara Dundas binds and obliges 'herself to grant and subscribe all deeds that shall be advised by counsel 'versant in the laws and customs of Jamaica, necessary for discharging 'and disburdening the said George Ogilvie's estate in Jamaica, on which 'the said annuity is to be made chargeable, as after mentioned.' This

obligation, and this charge upon Langley, that is, the Scotch estate, was never to take place, till the trustees were satisfied, and the Jamaica estate should be exonerated; and it can never be supposed, that it was the intention of these parties that the Jamaica estate should be discharged, until the £400 a-year was secured upon the Scotch estate. May 22, 1826.

Another question is, whether, if the Scotch estate did not produce £400 a-year, but would produce £200, whether it was the intention of these articles, that, in that case, the Jamaica estate should pay £200, and the Scotch estate £200 a-year, or whether the whole charge should remain upon the Jamaica estate until the Scotch estate could pay the whole?

Mr Ogilvie purchased an estate in Scotland, for which he gave £10,000. He built a house upon it, and borrowed a good deal of money to pay for it. He died. The effect of the decisions in the Court of Session, in consequence of suits instituted there some period after his death, was, that those estates were to be contributary; and it is contended by the appellant, that no act having been done by the trustees, nor by this lady, before these suits were instituted, the Jamaica estate is the estate at this moment liable to the whole of this annuity; and that there is no recourse to be had to contribution, between the two estates, because the Scotch estate was thought so little liable, by way of contribution, as to have been sold; and the judgment now, upon the notion of contribution, affects the price, and not the estate itself.

My Lords, your Lordships perceive that this is a question, supposing this Scotch estate to have been sold, to be decided, first, Upon what is the law of Scotland, supposing there to be no articles of agreement? Secondly, How is it to be decided, regard being had to those articles of agreement? And with reference to both those questions, your Lordships will be pleased to permit me to point out to you, that this is not the case of two Scotch estates, but it is the case of an estate in Jamaica, (which, I presume to hope, I may be allowed to state, is a circumstance that obliges us to look to the laws of England, so far as the laws of England are the laws of Jamaica, in respect of real property,) and an estate in Scotland; and admitting all the views of the law of Scotland, if they had been two estates in Scotland, I think it will be found very difficult to apply the Scotch law to Jamaica property, under the circumstances I have stated.

My Lords, I have taken the liberty to say, that I may allude to the laws of England; and I confess I feel it right to take the liberty of so stating the matter, because, in turning over some papers upon your Lordships' table, in the case of Gordon against Robertson, I find laid upon your Lordships' table, a report of a judgment in the case of the Duke of Roxburghe against John Roberton, stated to have been pronounced by the individual who has now the honour of addressing your Lordships, where the question was, Whether the tenant was obliged to use all the hay and straw upon the premises?—And I am reported to have observed, 'It has been said, 'that the custom of the country is, as it was represented to your Lord-'ships at the Bar. I believe it to be so; but whether it be so or not, I 'will take it to be so; but I apprehend, if we are to administer Scotch law

May 22, 1826. ‘ on English principles, when persons enter into a tack, their engagements, ‘ as far as engagements provide for certain things therein expressed, shut ‘ out the custom of the country.’ But I must beg leave to say, that although this note was taken by a gentleman remarkable for his accuracy, I mean Mr Gurney, I am perfectly sure there is a mistake here ; for, from the first moment in which I have had the honour of addressing the House as Speaker of the House in matters of Scotch law, I have felt it to be a very difficult duty to discharge, but a duty I was bound to struggle to discharge, never to decide a Scotch case by taking what was the law in England upon the subject. I think I speak in the presence of those who can bear me out in that statement ; but if I were to say, that my mind, affected as it must be by belonging to a person who has been connected with the English law fifty years, can escape an influence, no man, I admit, would give me credit. But feeling this most strongly, I have upon every occasion, since I have had the honour of addressing this House, made it my first duty to recollect, that I was not to decide a Scotch cause according to English law. I will not say that I may not have done so, but it has been done without being conscious that such was the case, and after I had struggled extremely to take care I should not do so. And I believe what I have referred to, to be a mistake, for more reasons than one ; because, if you will look back to the sentence that precedes what I am now observing upon, you will see an intimation of my conviction, that the case ought to be decided, not according to the English law, but the Scotch law ; and you will find, that I am making this distinction between the English law and Scotch law, that if an English tenant be bound to leave upon the farm all those articles, hay and straw, and so forth, that whether there is any provision that he shall have a right of entry or not, he shall have a right to enter and enjoy to that extent. The English law says this, If you, the landlord, reserve these things for yourself, it is implied in that reservation that the tenant has a right, though it is not expressed, to come upon the premises and enjoy those things. But I expressly go on to state, ‘ We have here to construe a written contract, and if the Scotch ‘ laws are to be administered on the same principles of English law, or ‘ any law founded upon principle, we must hold that the engagement of ‘ parties to each other by the express stipulation of a written instrument, ‘ exclude all consideration of the custom of the country.’ This has been very much commented upon, and very freely commented upon, in the papers we are now furnished with. And I am farther confirmed in my notion that this is an error, as there is another report of this case by Mr Bligh ;* and I am informed by Lord Gifford, who has looked into that report, that there is no such passage in it.

My Lords, I find that Lord Hermand remarks,—and I take the liberty to mention him, because I can never look at an observation of his in the Court of Session, without recollecting periods that are now long gone by, in which we fought most manfully together, very frequently in the old

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* Bligh's Reports, vol. II. p. 257.

House of Lords, but we have never been together in this apartment, in which I have now the honour to address your Lordships;—and extremely happy should I be to have an opportunity of giving him an answer to the question he puts from the Bench upon my statement—'Suppose (says 'he) a landlord had inserted in the articles the condition that the tenant 'should hang himself the last year of the lease, I should like very much to 'know what the Lord Chancellor would say to that.' I do not know, my Lords, whether what I am stating will or will not be conveyed to my excellent friend; but if anybody do intimate to him what I am now stating, I wish he would add, that at Lord Hermand's time of life and my time of life, he may be assured that I entertain as high a regard for him as I did when we met so often here in our earlier days; and if I could only have the honour of meeting him anywhere except in a court of justice, and he would ask me, 'Supposing a landlord had inserted in his 'articles the condition that the tenant should hang himself the last year 'of his lease, I should like to know what the Lord Chancellor would 'say to it;' I would undoubtedly, as Lord Chancellor, give him an answer to the question. But in a court of justice I must decline doing so. His Lordship then proceeds:—'I see that reference is made to 'English authorities. An Englishman can know nothing of the matter. 'But there is no tenant or landlord in Scotland, who does not under-'stand what has been the law of two centuries, that a stipulation in a 'lease for consuming the fodder has nothing to do with the last year of 'the lease.'* To a certain extent I go along with my learned friend; but I ought to put him in mind (and I certainly should put him in mind, if I had the happiness of seeing him), that when we met to argue matters as counsel on the same side of the Bar, with all the zeal that influences young men, and which generally generates conviction that they are right, although, if they live longer, they find that they are wrong, I cannot say, that at that period my learned coadjutor was so constantly sure that the Court of Session was right, as of late years he seems to think. But, my Lords, I now say, what I am sure I have said over and over again in this House, that I think, in a Scotch cause, reference can be only made to English authorities, for the purpose of seeing what the reason and wisdom of such authorities are in such a case; and, on the contrary, I have always had a most conscientious conviction, not only that I would not be discharging my duty in advising your Lordships, but betraying my duty, if I called upon you to determine a Scotch case by English law. But I do not pretend to say, that my mind may not have been influenced in a degree, in which it would not have been influenced, if I had been bred a Scotch lawyer instead of being bred an English lawyer. This principle I think it right to state, and whenever my conduct shall come to be discussed, now or hereafter, I must stand or fall in the opinion of those trying it, by the fact, whether I have or have not, know-

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* This speech was delivered in the case of Gordon against Anderson, which was not then under appeal, but depended on that against Robertson, &c.

May 22, 1826. ingly, or with the least suspicion that I was so doing, ever decided a Scotch case upon English principles, without looking at the question, whether it could be properly so decided; and without avowing that it never could be properly so decided, unless the law of England and Scotland were the same upon that point.

My Lords, the question now to be decided in the present case, is this, namely, recollecting that the Jamaica estate is not a Scotch estate, and recollecting the effect of these articles of agreement upon the Jamaica estate, not the Scotch estate, and looking at the real meaning of the clause by which the annuity was to be shifted from the one estate to the other estate, whether the decision of the Court of Session was right or not? My Lords, I have stated to your Lordships, that I had communicated what had occurred to me upon this subject in the course of the last Session, to the agents at the Bar; and it is intimated to me this morning, that there might be no objection to that judgment, if the interest of Mrs Ogilvie could be reserved for future consideration; but that appeared to me to be impossible, because if your Lordships, in one way of deciding it, should be of opinion that the judgment of the Court of Session is right, there would be no occasion to reserve the consideration of her interest. On the other hand, if your Lordships should be of opinion that the judgment is wrong, you cannot decide that the judgment of the Court of Session is wrong, without deciding it upon a ground which may materially affect the rights of Mrs Ogilvie. Therefore, it would be the safest and the better way of proceeding; first, as to the uniformity of proceeding, and secondly, with respect to that which you will look at with great attention, namely, the interests of those supposed to be interested, to direct that Mrs Ogilvie should be heard for her interest, by one counsel at the Bar, on any day, as soon as the parties can communicate to your Lordships that they are ready to have that interest so provided for, by arguing at the Bar. I should suggest, therefore, that the farther consideration of this case should be adjourned to this day se'ennight, and upon this day se'ennight the agents can inform the House upon what day they will be ready to argue the case on the part of Mrs Ogilvie. These are the circumstances of the case. I would, therefore, in the terms I have stated to your Lordships, move that the farther consideration of this case be adjourned to Monday next.

LORD CHANCELLOR.—My Lords, there is a case that was heard in the last Session of Parliament, the case of Ogilvie *v.* Dundas. A judgment had been prepared in that case, but it appeared that a lady of the name of Mrs Barbara Dundas had not appeared; and it appearing from the nature of that judgment, that she had an interest in the case, your Lordships were pleased, in the course of the present Session of Parliament, to hear her by her counsel; and it is now my intention to move your Lordships to dispose of the cause by the best judgment I can suggest upon the case as fit to be pronounced by your Lordships. My Lords, after having attentively considered, not only in the last year, but the present year also, what is to be the construction of the instrument, under

which this lady would take an annuity out of the Jamaica estate; and also, in certain circumstances, have a claim upon the Scotch estate which was purchased, or the reversion or price of that estate, I still continue of opinion, that these articles of agreement, relating to the Jamaica estate, must be construed according to the laws of Jamaica; and that, whatever may be the law of Scotland in a case where there is a claim between two Scotch estates, the right of this lady must be determined as the rights of persons respectively entitled to Jamaica estates and Scotch estates must be determined, by the true intent and meaning of those articles in Jamaica. The consequence of which is, that I should propose to your Lordships the following judgment, desiring that, if your Lordships adopt this judgment, it may be drawn out in proper form, with reference to the different circumstances laid before the House, and with reference to the fact, that Mrs Barbara Dundas has been heard. I would propose to your Lordships, that the judgment to be adopted should be this: That it be declared by the Lords Spiritual and Temporal in Parliament assembled, (and, after stating that this lady had been heard by her counsel,) that by the marriage articles, the annuity of so much a-year provided for Barbara Dundas became an equitable and express charge upon the Jamaica estate, according to the law of Jamaica; agreeably to which law, the said articles are to be considered against all persons claiming interests in that estate, under testamentary dispositions, or other acts, taking effect after the date of the said articles; and that, according to the true intent of the said articles, the said annuity is to be considered primarily charged upon the Jamaica estate, until the same was wholly secured, as is mentioned in the articles, to the satisfaction of the persons named in the articles, upon lands purchased in Scotland; when, after the same was so wholly secured, the estate in Jamaica was to be wholly discharged and disburdened thereof; and, regard being had to all the circumstances of this case, which took place after the execution of the articles, to find that the Jamaica estate was to be considered as remaining primarily liable to pay the whole of the annuity, if the same can be wholly paid thereout; that in such case the persons entitled to the Jamaica estate are not entitled to relief from the estate in Scotland, or to the price or reversion of it; and that, in such case also, the said Barbara Dundas is not entitled to payment, or part payment, from the estate in Scotland, or the reversion or price of the said estate; and to order and adjudge that the several interlocutors complained of, be, as they are hereby, so far as they are inconsistent with this declaration, reversed; and to order further, that, with this declaration, the cause be remitted back to the Court of Session in Scotland, that they may do therein as is just and right. I would propose to your Lordships that this form of judgment should be delivered to the agents on both sides, with a view that they may see that it is properly drawn up, before your Lordships' judgment is rendered final, in point of form. I cannot close what I have to say, without declaring that I am perfectly convinced that this is the true intent and meaning of these articles, and that is the correct judgment. Perhaps it is to be lamented, on the part of Mrs Barbara

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May 22, 1826. Dundas, that more care was not taken on her behalf, in the first instance; but that is a matter we cannot supply here in this stage of the cause.

Respondents' Authorities—Russel, Jan. 23, 1745 (5211). Campbell, Jan. 4, 1747 (5213). 3 Ersk. 2, 50, 52.

T. DUTHIE—J. RICHARDSON—*Solicitors.*

No. 21. MAGISTRATES of GLASGOW and TACKSMAN, Appellants.—*Adam—Keay.*

DAWSONS and MITCHELL, Respondents.—*Robertson—Campbell.*

Burgh Royal—Feu—Thirlage.—The Court of Session having found that certain lands, situated within the territory of the royal burgh of Glasgow, and which had been disponed by the Magistrates in feu-farm for payment of a feu-duty, but to be held burgage, and the titles having been made up as if held in feu, were to be considered as holding feu; and that grain imported within their bounds was not liable to certain burgh taxes, called ladle-dues; and that a clause of thirlage did not apply to invecta et illata;—the House of Lords remitted the case for the opinion of all the Judges.

1ST DIVISION.
May 22, 1826.
Lord Alloway.

THREE questions were involved in this case: 1st, Whether certain lands belonging to Dawson, one of the respondents, were held feu or burgage? 2d, Whether certain dues were exigible by the Magistrates of Glasgow, for grain brought on to these lands? And, 3d, Whether the lands were subject to a thirlage, not only of grana crescentia, but also of invecta et illata? They arose out of these circumstances.

In the immediate vicinity, and on the north side of the burgh of Glasgow, is situated a piece of land or muir called the Easter and Wester Common, which it was alleged had always been regarded as part of the ancient common good, although of this there was no record in existence.

In 1730, the Magistrates sold part of this common or muir to James Rae; and in 1747, they exposed to sale, by public roup,

'the muir of these parts of the lands of Wester Common, be-
'longing to the town of Glasgow, and within the territory of the
'burgh, not yet sold off.' They also bound themselves to 'grant
'to the purchaser a disposition of the said lands, to be holden in
'free burgage for service of burgh used and wont, and for pay-
'ment to the said Magistrates and Council, and their successors
'in office, or their treasurers, factors, and chamberlains, in their
'name. for the use and behoof of the community of the said