

# APPENDIX.

## PART I.

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### DISCUSSION.

1804. November 27.

DUNDAS *against* CLARKE OGILVY and PERRY OGILVIE.

GEORGE OGILVY, being possessed of a valuable property in Jamaica, but having no property of any kind in this country, in the year 1732, executed a trust deed, in the English form, as his last will and testament, bequeathing all his property to certain persons: "In the first place, To retain the costs and charges which they shall suffer or sustain, or be put into, in the execution of the trust, by this my will in them reposed, and afterwards to pay thereout all my just debts, and the several legacies herein before given, and the annuities aforesaid, from time to time, as the same shall respectively become payable, the remainder of my personal estate, not herein before otherwise disposed of, being first applied for the said purposes;" and, in the next place, that it should be held in trust for George Clarke, the son of his sister.

Of this date, (14th September 1785); he entered into marriage-articles, by which he "bound and obliged himself, his heirs, executors, and successors, to pay to Barbara Dundas, 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 said George Ogilvy's estate, plantation and sugar-work, called Langley, in St Mary's parish, county of Middlesex, in the Island of Jamaica." Again the fourth article is in these words: "In case the said George Ogilvy shall think 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 further 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

No. 1.

The heir-at-law must give a total relief to the heir of provision.

No. .

“ 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 after named, at whose instance execution is to go on the present articles, or to the satisfaction of a 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 Ogilvy’s esate in Jamaica, on which the said annuity is to be made chargeable, as after mentioned.”

Soon after the marriage, Mr Ogilvy purchased a property in the neighbourhood of Montrose, to which he gave the name of Langley Park for £10,000, which he burdened by heritable securities for borrowed money. The titles were taken to himself simply in property ; and neither then, nor at any other time, did any alteration take place in the security of Mrs. Ogilvy’s annuity.

Mr. Ogilvy, of this date, (17th January 1791), made an addition to the settlement 1782, by which he put his niece Clementina in the room of her brother, to whom he left only a legacy of £100. and appointed different persons to be trustees under the foresaid settlement, in the place and stead of the persons therein and above named, in the same manner, and as effectually to all intents and purposes, as if they had been therein specially named and engaged, and to have and to hold the whole subjects thereby devised, upon the several trusts therein mentioned.”

Soon after this, Mr. Ogilvy died without issue. The estate of Langley Park descended to his sister Mrs. Isabella Clarke, the mother both of George and Clementina, as his heir-at-law, while Clementina succeeded, under the will, to the rest of the fortune of her uncle.

The trustees brought an action of exoneration in the Court of Chancery in England, where Mrs. Ogilvy entered her claim as a creditor, and obtained decree for payment of her annuity, first out of the personal property, and then out of the Jamaica estate : “ But this is to be without prejudice as to any other estate being settled to the payment of the said annuities.”

Mrs. Clarke sold the property of Langley Park ; the proceeds of which, after paying off heritable debts, was secured upon bond.

Mrs. Ogilvy brought an action of reduction against Mrs. Clarke, as Mr. Ogilvy’s heir, concluding to have a sum of money set apart out of these proceeds, for payment of the annuity, in terms of the marriage-articles. Upon the dependence, inhibition and arrestment were used.

Mrs. Clarke having died without making any settlement, her son George succeeded as heir-at-law, and her daughter Clementina as her executor.

Against them the action of constitution was transferred, and an action of relief was brought by Clementina against her brother, both as to future and past payments of the annuity.

The Lord Ordinary ordered informations, and the Court pronounced the following interlocutor, (23d May 1804): " Upon report of Lord Meadowbank, and having advised the informations for the parties, the Lords find, " That the annuity of £400. Sterling was an heritable debt, for which the " estate in Scotland, that belonged to the deceased George Ogilvy, 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 defender Mrs. " Clementina Ogilvy, and her husband, and George Clarke Ogilvy, are bound " to assign and convey the reversion of the said price, in as far as it is not exhausted by preferable debts to the pursuer, (*i. e.* Mrs. Ogilvy, the relict), " 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 proportion of the annuity for which she will then be secured on " property in Scotland; and find, That the heirs and executors in Scotland " are entitled to be relieved by the heir or devisee of the Jamaica estate, " in the proportion that the free value of said estate bore at the death of " George Ogilvy, to the free reversion of the Scotch estate; the said annuity " of £400. being to be considered as a catholic debt, affecting said estates in " Jamaica and Scotland; but not rendered real burdens thereon; and remit to " the Lord Ordinary to apply this interlocutor, and to determine the other " points of the cause."

Mrs. Clementina Perry Ogilvy

Pleaded: The annuity clearly constituted a debt against the heir, being heritable, both *sua natura*, and in terms of the marriage-articles. He is, therefore, to be discussed first; the heir of provision being only liable *subsidiarè*. It may vary this rule, if an estate, specially burdened with a real debt, descends to an heir of provision; Rose, 17th January 1786, No. 22. p. 5229. But if the testator has shewn that his intention was to relieve the favoured person, the general rule again operates, and he has relief from the heir-general.

The annuity was to be secured upon the Jamaica estate only until a Scotch estate should be provided to bear this burden; so that when this was purchased, the husband could have compelled his wife to discharge the Jamaica estate, and accept of sufficient security out of the Scotch estate. The same right is competent to the heir of provision in the Jamaica estate, who is therefore clearly entitled to relief from the heir-general succeeding to the Scotch estate, as heir-at-law, as the widow is suing to have implement of her marriage-articles. The husband was absolute proprietor of both estates, and he might have burdened either the one or the other as he pleased. The annuity, however, has not been made more a real lien upon the one than the other: Thus, nothing has been done to exclude from the relief competent by the operation of law.

Answered: The general rule regarding the relief of two sets of heirs, or of heir and executor, can operate only when the succession has been regulated

No. 1. by the rules of law. But, *provisio hominis tollit provisionem legis*. Here the devise of the Jamaica estate is expressly declared to be made under burden of all debts; and the annuity itself is expressly secured upon it, as one of those debts, of which, in a certain event indeed, it might have been disburdened, but in fact never was, by the only persons who were parties to it, and who therefore could found upon it. It is altogether *jus tertii* to the heir of the Jamaica estate. The widow, indeed, might have had her annuity secured out of the Scotch estate; but she never thought of doing so while the estate remained his property; but now that it is sold, and he dead, he cannot be called upon to implement this clause. It was mutually passed from by the parties, as no attempt was made to fulfil it, when it was possible to do so. Although, indeed, the annuity was not made real upon the Jamaica estate, but merely an obligation taken to make it real, in a question among heirs, this is quite sufficient; Ersk. B. 2. T. 2. § 14.; it must be held to be a real burden, though the necessary steps for making it so against onerous creditors, or singular successors, have not been carried into execution. Besides, its payment out of the Jamaica estate was just as much provided for by the trust-deed, as if it had been real; and the decree in Chancery followed out this intention, by awarding payment from that fund, from which accordingly it has been hitherto paid.

“ The Lords (July 6th, 1804) having advised this petition, with the counter-petition for George Clarke Ogilvy, alter the interlocutor reclaimed against, and find, That Mrs. Clementina Ogilvy, the heir of the Jamaica estate, is entitled to a total relief of the pursuer Mrs. Barbara Dundas’s annuity of £400. Sterling, from George Clarke Ogilvy, the heir to the estate in Scotland, left by the said George Ogilvy, deceased, to the extent of the reversion of the said estate, and remit to the Lord Ordinary to proceed accordingly.”

To which the Court adhered, (27th November 1804,) by refusing a reclaiming petition for George Clarke Ogilvy.

In this case, the Court were a good deal divided in opinion, and the final judgment was pronounced by a narrow majority.

Lord Ordinary, <i>Meadowbank.</i>	For Clementina, <i>Solicitor-General Blair, Robertson, Maconochie.</i>
Agent, <i>Ro. Playfair.</i>	For Mrs. Ogilvie, <i>Cathcart.</i> Agent, <i>Jo. Dundas, W. S.</i>
For George, <i>Hay, Gillies, Jeffrey.</i>	Agent, <i>Jo. Morison, W. S.</i> Clerk, <i>Walker.</i>