John Arratt, Esq, John Wilson of Baikie. Appellant; Case 92.
Respondent.

21 Feb. 1721-2.

Appeal.—In an action of declarator of trust an interlocutor is pronounced, holding a defender as confessed upon an account of charge and discharge, given in by the pursuer, and he is ordered to denude. Afterwards upon the defender's application, the Court allowed him ten days longer to give in his accounts, but before the expiration of these ten days, he brings his appeal against certain interlocutors, and amongst others, against the interlocutors holding him as confest; all which are specially affirmed by the House of Peers. After the determination of the first appeal, the desender applied to the Court to have liberty to give in his accounts in ten days, as allowed by the interlocutor before the appeal: but it was found that his right was extinguished, and that he must denude in terms of the decree affirmed by the House of Lords.

AFTER the determination of the former appeal, No. 52. of this Collection, the parties returned to the Court of Session, and a new litigation took place between them relative to the judgment of the House of Lords. In detailing this litigation, it is necessary to recapitulate some of the steps taken previous to the former appeal.

former appeal.

The Court, by interlocutor on the 9th of July 1717, "Found that the disposition executed by the respondent to the appellant of the estate of Baikie, was redeemable by payment of the " sums resting due to the appellant after deduction of his intro-" missions, and ordained him to continue in the possession of the " said estate until it were instructed, that he was paid, and remit-" ted to the Lord Ordinary to proceed accordingly." The Lord Ordinary, when the cause was called before him, on the 23d of July 1717, "Ordered the appellant to give in an account of " charge and discharge of his intromissions with the said estate in terms of the act of sederunt about accounts and reckonings, " and an account of what was truly paid by him, in acquiring " the rights upon the said estate, as also of his necessary charges, " and the vouchers thereof by Tuesday then next." This term was afterwards at different times enlarged; and the respondent in the mean time gave in an account of the appellant's intromissions and disbursements, making the balance due to the respondent 811. 11s. 4d. Scots. The appellant having still craved further time, the Lord Ordinary on the 13th of November 1717, gave him till the Tuesday following, " with certification that if he si failed, he should be found liable to the penalty in the act of " sederunt." The cause afterwards coming to a hearing, upon the 21st of November 1717 the Lord Ordinary pronounced the following interlocutor: " In regard the appellant has failed to ", give in his accounts, and that the respondent has given in an " account of charge and discharge signed by him upon oath in " the terms of the act of sederunt, holds the appellant as conse fessed upon the said account given in by the respondent, and " finds finds that by the said account the appellant was paid off all his rights on the said estate; and therefore decerns the appellant to denude himself thereof in favour of the respondent, and declares in terms of the respondent's libel, and also decerns the appellant to pay to the respondent 811. 115. 4d. Scots, being the balance of the said account."

The appellant having reclaimed, their lordships "allowed him ten days longer to give in his accounts." Instead of giving in his accounts, however, he brought his appeal to the House of Lords, against fundry interlocutors, and particularly against the said interlocutor of the 21st of November 1717, whereby he was held as confessed upon the account given in by the respondent. And all the interlocutors appealed from (as stated in the former appeal) were, on the 23d of March 1713-19, assirtmed, with 40l. costs to the respondent.

The respondent afterwards made application to the Court of Session to put the said judgment in force against the appellant, by compelling him to denude himself of the said estate in savour of the respondent, pursuant to the said interlocutor of the 21st of November 1717, and for payment of the 81st. 11st. 4d. Scots, the balance of the account whereon he was held confessed; and the appellant contending that he was still at liberty to give in an account of charge and discharge, the Court on the 9th of July 1719 Found the appellant's right to be extinguished, and that he must denude in the terms of the decree assirmed by the House of Lords, reserving action to the said appellant for any articles that were not brought into the said account." And to this interlocutor the Court adhered on the 11th of July and 16th of September following.

Entered, 20 Jan. 2720-1.

The appeal was brought from "an interlocutor of the Lords of "Session of the 9th of July 1719, and the assirmances thereof the 11th of the same month and 16th of September following."

Heads of the Appellant's Argument.

Though the interlocutor of the 21st of November 1717, came in the recital of the proceedings to be mentioned in the said petition and appeal, yet the same was not insisted on in the case, nor pleaded at the bar; as the appellant well knew that interlocutors of that kind, which are pronounced by default, are easily altered and relieved against by the Judges themselves. In the present case, that interlocutor had been set aside by the Court, and ten days longer time allowed to the appellant to give in his vouchers, within which ten days the order on the appeal having been served upon the respondent, the Court could have no further proceedings till the appeal were discussed. After that the appellant expected that he had the same liberty to apply to the Court, and give in his vouchers, as he had at the time when the order was served: and he conceived, that it never was the intention of the House of Lords to oblige him to re-convey the estate without being paid the money he had really laid out, especially since some of the interlocutors mentioned in the former appeal, and equally affirmed with

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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 respondent, by virtue of the reservation in the interlocutors now appealed from.

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

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 swife.—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 insestment followed; and by another deed he afterwards restricted his right of granting provisions to a second wife, and children, to the extent of 100,000s. Scots: After a second marriage, he grants a bond to a second wife for an annuity or jointure of 1000s. Sterling: but made no provisions for children of the second marriage. This second wife in a question with the heir of the sirst marriage, is declared to have the right to her jointure, till she drew thereout the sum of 100,000s. Scots.

Registration.—A deed restricting an unlimited power of granting provisions to a second wife and younger children, which unlimited power was contained in infestments 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 savour 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 what-some