1766. *June* 13. POOR JANET ANDERSON, residenter in Edinburgh, *against* ALEXANDER DONALDSON, Bookseller in Edinburgh, and OTHERS.

Provision to a daughter payable Year and Day after her Marriage.

[*Faculty Collection, IV.* 258; *Dictionary,* 12,972.]

On the 26th February 1699, Mr Thomas Anderson, burgess of Edinburgh, became bound, by his marriage-contract, " in case there should happen to be but one daughter procreated by the said marriage, to pay to her the sum of 18,000 merks; and if there should be two, to them the sum of 20,000 merks; and if there should be three, to them the sum of 30,000 merks, whereof 12,000 merks to the eldest, 10,000 merks to the second, and 8000 merks to the youngest; and that within year and day after their respective marriages." Of this marriage there were issue four daughters. Elizabeth, the second, was married to William Couts. On the 27th March 1725, Janet, the fourth daughter, was married to Robert Nicol. The three elder sisters deduced adjudications or certain tenements in Edinburgh, belonging to their father, in order to operate payment of their shares of the 30,000 merks contained in the marriage-contract. More particularly, on the 19th January 1726, Elizabeth, the second daughter, deduced an adjudication for 10,000 merks, as her share of the 30,000 merks. In 1727, Janet, the fourth daughter, insisted in an action against her father and her three sisters, concluding for a share of the 30,000 merks, upon the medium of the presumed intention of parties, that, in the event of the existence of four daughters, the fourth was not to be left destitute, while the others were provided.

On the 31st July 1729,—" The Lords found, That the fourth daughter is entitled to a proportion of the 30,000 merks, in the case which has happened, of the existence of four daughters; and found her proportion, suitable to the provision made in the contract of marriage, is 4500 merks, so as to restrict the provision of the eldest daughter to 10,500 merks; the provision of the second to 8,500 merks; and the provision of the third daughter to 6500 merks:" (that is, the Court took the sum of 1500 merks from each of the provisions, and gave it to Janet, the fourth daughter.) The Court further declared,—" That no decree for the said 30,000 merks, as being the provision decerned to be paid to the three sisters proportionally, ought to extinguish the portion of the said Janet, or be anywise hurtful or prejudicial to her, the fourth daughter, of her foresaid proportion thereof; and, accordingly, farther decerned and ordained the said three other daughters to repeat and pay back to the said Janet, and her husband for his interest, such sums of money as have been intromitted with by them of their father's means and estate, in prejudice of the said Janet's free share and proportion, as aforesaid." Interest also was decreed to Janet Anderson from the time mentioned in the marriage-contract, that is, year and day after marriage, or from the 28th March 1726, being upwards of thee years preceding the date of the interlocutor. At the date of this interlocutor Geddes of Scotston had right, by assignation, to the provision of one of the daughters, and, of consequence, was a party to the judgment. On the 16th December

1729, Elizabeth, the second daughter, and William Couts, her husband, conveyed to Geddes of Scotston the adjudication for 10,000 merks, which they had deduced in January 1726. The conveyance bore this clause,—"With the burden of L.1000 Scots, decerned to be paid to Janet Anderson, fourth daughter of the said Mr Thomas Anderson, and Robert Nicol, her husband, for his interest, out of the sum of 10,000 merks, conform to a decreet of the Lords of Session, obtained against him for the same." About this time, 1729, a process was raised for ranking the creditors, and for sale of the subjects of Thomas Anderson. In 1732 decreet of ranking was pronounced. In the ranking, Scotston produced the adjudication which had been led by Elizabeth, the second daughter, and her conveyance to him: the clause burdening the conveyance with L.1000 Scots is *verbatim* recited in the decreet of ranking. Upon this interest Scotston was preferred, *secundo loco*, for the principal sum and interest, with the burden of the said sum of L.1000 Scots, decerned to be paid out of the said William Couts's adjudication to Robert Nicol, &c. This L.1000 Scots is expressly excepted out of Scotston's oath on the verity of his debt. The preferences of creditors having been adjusted, the subjects were exposed to sale by order of the court: On the 9th November 1734, they were purchased by Scotston. However, he paid no part of the price; his bond remained unretired in the hands of the clerk of process. Soon after, Scotston sold the tenements to different persons: those purchasers made up feudal titles to the tenements, and again disponed them to others. Janet, the fourth daughter, as having right to the L.1000 Scots, upon Elizabeth's adjudication, insisted in an action of maills and duties against the tenements aforesaid. Donaldson, and the other proprietors by progress from Scotston, appeared for their interest, and pleaded defences.

The Lord Pitfour, Ordinary, upon the 16th July 1765, "sustained the pursuer's title, but allowed the defenders to produce a title to exclude." Upon advising a representation and answers, together with the writings produced, the Lord Ordinary, upon the 29th January 1766, pronounced the following interlocutor:—"Finds, that the pursuer, Janet Anderson, in virtue of the decreet of this court in 1729, is entitled to the sum of L.1000 Scots, as a part of the portion of 10,000 merks, provided to her sister Elizabeth by their father's contract of marriage, for which Elizabeth had adjudged his estate in the year 1726; and that the pursuer is entitled, in virtue of said adjudication, to insist for a decreet of maills and duties, against the said tenements, for such part of the accumulated sums contained in the adjudication as shall appear to arise from the said L.1000 Scots, and interest thereof adjudged for: and decerns in the maills and duties accordingly."

The defenders reclaimed. Answers were put in to their petition.

ARGUMENT FOR THE DEFENDERS:—

The question resolves into this, Whether has the pursuer's claim for L.1000 Scots such a real lien upon the lands as to affect the singular successors of Scotston, who was the purchaser at the judicial sale. Had the pursuer and her husband denuded Elizabeth and her husband of the adjudication, to the extent of L.1000, and obtained themselves ranked on it *proprio nomine*, such incumbrance would have remained a charge upon the estate, not only against the purchaser at a judicial sale, but against all others acquiring from him; for that

such purchaser can never be discharged but by payment of the debts ranked: those debts, until paid, retain their security in the ranking. But, here, it was Scotston who stood in the right of Elizabeth's adjudication, and who was accordingly ranked, with the burden, indeed, of paying L.1000 Scots to Nicol, the pursuer's husband; and as Scotston stood in the right of the adjudication, he alone could receive payment, or discharge the adjudication. Had the adjudication for 10,000 merks remained with Elizabeth and her husband, and had Scotston paid the whole sum to them, it is certain that such payment would have effectually discharged the estate of that adjudication. As Scotston, who became purchaser at the sale, did at that time stand in the right of that adjudication, and was accordingly ranked for the whole 10,000 merks, it follows that the adjudication was as much extinguished in his person as it would have been if paid to Elizabeth and her husband. Scotston, by his purchase, came to have payment in his own hands, and this is equivalent to payment to a third party. The persons acquiring from Scotston cannot have their purchase burdened with a debt so extinguished. That rights acquired by putative heirs, or others *in titulo* for the time, do accresce to the true owners, is a principle which the defenders do not dispute. Hence, the pursuer and her husband might have compelled Elizabeth and her husband to denude of the adjudication to the extent of the L.1000, and they might have obtained themselves ranked for it; but this they neglected to do: Satisfying themselves with the personal decerniture against Elizabeth and her husband, they suffered Scotston to be ranked for the whole 10,000 merks, with the burden of L.1000. There remained, then, a personal obligation against Scotston for payment of the L.1000, but no real burden on the lands. The purchasers from Scotston acquired upon the faith of the records, for onerous causes; their rights were completed by charter and infeftment. They cannot suffer by the neglect of the pursuer and her husband, who, instead of denuding Elizabeth and her husband, and thereby rendering the burden real, allowed the burden to remain personal, first against Elizabeth, and afterwards against Scotston.

Secondly, Supposing the L.1000 to be still a real incumbrance upon the subjects, still the pursuer is not entitled to the benefit which may thence arise. The adjudication, if subsisting at all, stands in the person of Scotston. The pursuer was married upon the 27th March 1725; the money in question was not payable till the 28th March 1726, *i. e.* year and day after her marriage: as there was no obligation for payment of annualrent, it was a subject purely moveable, and carried by the *jus mariti* of Nicol. Elizabeth's adjudication for the 10,000 merks, if it accresced, must have accresced to Nicol the husband, as in the right of the debt itself.

ARGUMENT FOR THE PURSUER:—

Elizabeth secured the 10,000 merks by leading adjudication in 1726; the pursuer was afterwards found entitled to L.1000 Scots of that sum; the conveyance of the adjudication made to Scotston, and produced in the ranking, was burdened with that L.1000 Scots. By the decreet of ranking, the adjudication was burdened with that sum. It was accordingly excepted out of Scotston's oath on the verity of his debt, and this oath is *verbatim* inserted in the decreet of ranking. From all which the pursuer contended that the L.1000 still continues a real burden upon the subjects contained in the adjudication; and,

of consequence, that her right therein is sufficient to entitle her to a decreet of maills and duties. Her general plea will be illustrated by the consideration of the following particulars: The pursuer's claim for her provision took its rise from the marriage-contract of her father in 1699. The judgment of the court in 1729, proceeded upon the implied will of the father, in the event of the existence of a fourth daughter. The Court *declared* but did not *create* her right. Hence, the pursuer was found entitled to interest from the term of year and day after her marriage, that is, from a period preceding her action, and no less than a period of three years previous to the decree in her favour. Hence, also, there was no decreet pronounced against her sisters personally; and, indeed, the judgment 1729 expressly found the pursuer entitled to a proportion of the 10,000 merks. This proposition being once established, the pursuer's right, *pro rata*, to the adjudication deduced by Elizabeth, is evident. In 1726, Elizabeth considered herself as entitled to the L.1000 Scots, as well as to the rest of the 10,000 merks. The adjudication which she then deduced, was from that time connected with the right, for security of which it was deduced; and it must of consequence devolve to the pursuer, who was afterwards found entitled to L.1000, as a proportion of the 10,000 merks; for it is an uncontroverted rule in law, that every security in a subject, taken by a putative proprietor, accresces to the real proprietor. But, independent of this, the conveyance of the adjudication from Elizabeth to Scotston was burdened with the L.1000; and this conveyance was produced by him as his title in the ranking: the preference of the adjudication in the ranking was expressly burdened with the L.1000. Hence the pursuer is, to the extent of L.1000, preferable to Scotston, and, of course, to those deriving right from him. The repeated mention of this burden made in the decreet of ranking, with which Scotston's title was immediately connected, has this consequence, that they who purchased from Scotston, without regarding the burden, must be held to have acted either *mala fide*, or with supine and unpardonable negligence. That Scotston did himself obtain the decreet of sale, will not vary the case. From the statute 1695, it is evident that, until the price is paid, a decreet of sale does not purge the debts and diligences affecting the estate; and so it was determined by the Court, *24th July* 1739, *Creditors of Bonhard.* To the objections urged by the defenders, the following answers are made. *First* objection: "Although the pursuer and her husband might have denuded Elizabeth and her husband, yet they did not, so that here there is nothing except a personal claim against Elizabeth."

Answer to the *first* objection:—

1*mo*, If it be doubtful whether the right in the adjudication, *pro rata*, of L.1000, be in Elizabeth, or in the pursuer, this is *jus tertii* to Scotston and his successors: It matters not to them, whether the sum be paid to the second or to the fourth daughter of Thomas Anderson. 2*do*, Supposing that the pursuer may plead in the right of Elizabeth, she contends that the adjudication to the extent of L.1000 is properly vested in her. There is no occasion for any form of legal diligence, in order to make a security, taken by a putative proprietor, accresce to the real proprietor. The law requires not superfluous diligence and fruitless expense. That such diligence is not necessary, appears from the very term *accresce*. Were a process required for denuding the leader of the se-

curity, before such security could be conjoined with the subject, and become vested in the proprietor of the subject, how could it be said to accresce? See Stair, 13*th July* 1664, *Earl of Lauderdale* against *Woolmet;* Fountainhall, 24*th January* 1696, *Earl of Cassilis* against *Montgomery;* and Forbes, 10*th January* 1712, *White* against *Reid.* In all those cases it was understood that the securities accresced without any necessity of denuding the persons who had led them. *3tio,* Had an assignation from Elizabeth to this adjudication been required, the judgment 1729 was virtually such. By it, the Court "provided—that no decree obtained by the three sisters for their shares of the 30,000 merks, should be in any degree hurtful or prejudicial to Janet Anderson." When the Court added this proviso, it had the adjudications in its view; and, if it had not meant to give the pursuer a right to the diligences already deduced, as well as to the sum itself, it would have given her nothing: She could not render her claim to the sum effectual against her father, for he was a bankrupt: his subjects were affected with diligence, and a ranking of his creditors and sale of his estate depended; nor against her sisters, for, with respect to them, she had no personal claim of debt. *4to,* It cannot be denied that the judgment 1729 is equivalent to a conveyance from Elizabeth of the L.1000 itself, without regard to the adjudication. Now, this is sufficient to carry the adjudication, *pro rata,* along with the sum conveyed. Thus, it was found, 28*th February* 1751, *Wilson* against *Burrel,*—"That an adjudication led on an heritable bond was carried by the disposition of the sums in the said heritable bond, albeit the said adjudication was not there specially conveyed." *5to,* Even supposing an express conveyance of the adjudication to have been necessary, and supposing the judgment, 1729, to be negative, and not an absolute conveyance, yet still the clause in Elizabeth's conveyance to Scotston, burdened with the L.1000, must be considered as an absolute conveyance of the diligence, *pro rata,* of the L.1000, in favour of the pursuer. It matters not that the pursuer was no party to that conveyance; for, where one can receive advantage only from a transaction between third parties, his consent is presumed, unless he absolutely recede. See Dictionary, title *Jus quaesitum tertio.*

Second objection for the defenders:—

"The burdening clause in the conveyance by Elizabeth, and in the decreet of ranking, did not create a real burden on the subject adjudged. Scotston was the creditor in the adjudication, and he alone was personally liable to the pursuers." *Answers* to the second objection. If the pursuer's former plea be good, this objection, although not contradicted, would avail nothing. A burden for an uncertain sum is not a real right, even when laid on an heritable right. This principle has been established for the security of the records, and of singular successors; but, when the conveyance of a right is burdened with a certain sum, there such burden affects every singular successor to the subject; and no one, of the least prudence or attention to his affairs, can ever suffer any prejudice from the establishment of such a principle. See Gosford, 20*th February* 1673, *Morison* against *the Creditors of Darsie;* Fountainhall, 14*th December* 1698, *Countess of Rothes* against *French;* 10*th January* 1738, *Creditors of Smith* against *Smiths;* and 17*th November* 1757, *Isobel Gordon* against *Katharine Ross,* where lands, being disponed by a father to his son, with the burden of paying a certain sum to his grand-daughter, "the sum was found a real burden

upon the lands in a competition with the son's creditors." The circumstance of this burden being repeatedly mentioned in the decreet of ranking, deprives the pursuers of all pretence of *bona fides;* for, upon that decreet, the title of their author depended. The defender's argument proceeds upon this mistake, —that Scotston alone stood in right of the whole adjudication, and was in a capacity to have granted a discharge thereof; whereas in truth his right was limited to 8500 merks of the sum for which the adjudication was deduced. The pursuers stood in the right of the remaining part of the sum, and her discharge would have been sufficient to the purchaser at the sale. Had a scheme of division been made out, the L.1000 would have been thereby declared payable to the pursuer, not to Scotston.

Third OBJECTION by the defenders :—

" Supposing the L.1000 to be still a real burden upon the subject, yet it fell under the *jus mariti* of her husband." ANSWER to the third objection. The defenders confound this case with that of a moveable bond granted to a wife and her representatives, upon which an heritable security was led after the marriage : but, in truth, the pursuer's ground of claim is different in its nature. The portion provided to her was indeed a conditional provision. Had she died within year and day of her marriage, neither she nor her husband would have had any claim to it. It was not a debt which existed at the marriage and upon which an heritable security was afterwards led. At the time of the marriage it was a conditional claim.---That condition was purified by her living year and day after the marriage; so that, for a twelvemonth after the marriage, her right had no existence. Before her right existed, the adjudication was deduced, and the debt thereby rendered heritable : and thus the pursuer's claim was at no time moveable. When the adjudication was deduced, the L.1000 belonged to Elizabeth, and would have continued to belong to her, had not the pursuer survived the year and day. Thus the question is not whether a debt, moveable at the time of marriage, is withdrawn from under the *jus mariti* by a supervening adjudication; but whether a claim, upon which an adjudication has been led, and which afterwards opens to the wife during the marriage, does fall under the *jus mariti,* although rendered heritable before it belonged to the wife ? And the pursuer apprehends that it does not. Not even the annualrents of this claim fall under the *jus mariti ;* for it was solemnly decided, 3*d February* 1738, *Ramsay* against *the Creditors of Clapperton,* " that all the sums contained in an adjudication, principal, annualrents, and *accessaries,* are heritable not moveable." The reason is, that an adjudication is of the nature of a proper sale, where the land comes in place of the debt.

" The Lords adhered to the interlocutor of the Lord Ordinary."

Act. J. Fergusson. *Alt.* A. Lockhart.

OPINIONS.

AUCHINLECK. The first question, How far Scotston, being in right of Elizabeth's adjudication, did, by purchasing the subjects, sopite the debt, and leave no more than a personal claim to Janet Anderson :—Although Elizabeth deduced an adjudication for 10,000 merks, yet she was found to have no title to more than her share of that sum, that is, to 10,000 merks, minus L.1000 Scots. Scots-

ton had a conveyance to no more than Elizabeth's share. Janet's share accres ced to herself, nor did she need a conveyance: Although the debt had been conveyed to Scotston, even as to Janet's share, still Scotston's purchase would not have sopited the debt. Here, Elizabeth, as a putative claimant, adjudged for too much, and that *too much* accresced to Janet.

KAIMES. I doubt as to the explanation of the interlocutor 1729, which is offered by Janet Anderson. When Elizabeth deduced her adjudication, her right was good, to the full extent of 10,000 merks: afterwards, *ex equitate*, Janet was allowed a share therein. The Court did not find that the adjudication was to be conveyed from each sister to Janet, *pro rata*, of L.1000: the Court only made Janet a creditor to her sisters respectively in that sum.

ELLIOCK. Although the interlocutor of the Court does not find Elizabeth bound to convey, yet it finds Janet to have a right in the sum, which is virtually the same thing.

PITFOUR. Here there was a trust in Elizabeth for the behoof of Janet, not so much *ex equitate* as *ex praesumpta voluntate testatoris.* The diligence of the trustee must accresce. Elizabeth was more than a putative claimant; she was the real proprietor, and would have so continued, had not Janet survived a twelvemonth after marriage.

KENNET. The conveyance to Scotston is *with the burden*, and he is so ranked.

PRESIDENT. The interlocutor 1729 found the 30,000 merks left to *four* daughters, not to *three*. Whether that judgment was right or wrong is not the question. The question is as to the explanation of an interlocutor which is now final and irreversible. Janet was a creditor to her father, not to her sisters: One of her sisters, Elizabeth, adjudged: This adjudication accresced *pro tanto* to Janet. Elizabeth did not convey her adjudication simply, but only her share in the adjudication; Scotston, by this conveyance, became the trustee of Janet: the decreet of ranking preferred Scotston, with the burden of payment to Janet. Here there was no purchase from Scotston upon the faith of the records: The burden appeared *ex facie* of the right; the bond granted by Scotston for the price remains unretired; there is not so much as a *bona fides* in the purchasers from Scotston.

AUCHINLECK. As to the *second* question, the *jus mariti* of Nicol,—the sum found to belong to Janet was due year and day after the marriage; and by that time the debt had become heritable by adjudication, and excluded the *jus mariti.*

PITFOUR. Whenever there is a condition depending upon a certain time, the obligation is not due till that time come. Dictionary, title *Implied Condition.*

PRESIDENT. When there is a condition which may exist or may not, until the term of payment no *jus crediti.*