

APPENDIX.

PART I.

CLAUSE.

1776. July 9.

DAVID CUNYNGHAME *against* ROBERT MYRTON CUNYNGHAME.

By postnuptial contract of marriage betwixt Sir Robert Myrton of Gogar, and Dame Mary Campbell, the grand-parents of the above parties, the estate of Gogar is provided, after failure of heirs male of that or any other marriage, “to the heir female procreated or to be procreated betwixt the said Sir Robert and his said spouse the eldest heir female, excluding all other heirs portioners.” Sir Robert, however, reserves power to entail his estate by such prohibitive, irritant, and resolute clauses, as he should think fit; and in the event of no heirs male, and of their being, “two, three, or more daughters of this marriage, then it shall be in the power of the said Sir Robert to settle his estate upon any one or other of the daughters of this marriage, even in preference to the eldest daughter.” And, on the other hand, Lady Myrton conveys her whole fortune to her husband, amounting to about £10,000. Sterling.

There were only three daughters procreated of this marriage, Magdalen, married to Captain Erskine of Torrie, who died without issue; Jane, married to Andrew Fletcher of Salton, who died leaving only one child, who survived her but a short time; and Frances, who, after the death of the rest, was the heir apparent of this marriage, when in 1768 she was married to Sir William Augustus Cunynghame of Livingston.

By contract of marriage with Andrew Fletcher, the husband of Jane, Sir Robert renounced, and for ever discharged, the reserved faculty contained in his own marriage contract, both as to the power of entailing and the power of preferring any of his daughters to the eldest, and he therein provides the estate of Gogar, failing his own heirs male, to Mrs. Fletcher and the heirs male of her body, “whom failing, to Mrs. Frances Myrton, his youngest daughter, (after-

No. I.
Whether a reserved faculty to settle an estate upon any one daughter in preference to the eldest daughter, will also confer that option as to the children of a daughter?—
Jus quasitum by a discharge of that reserved power.

No. 1. “ward lady Cunynghame) and the *heirs whatsoever of her body*, the eldest heir
“female succeeding without division.”

In the marriage contract betwixt Sir William and Lady Cunynghame, Sir William accepts of the provisions therein made in full of portion natural, &c. except in so far, “as he is eventually provided to the lands and estate of Gogar
“by the contract of marriage betwixt the said Sir Robert Myrton, her father,
“and Dame Mary Campbell, her mother now deceased.”

After Lady Cunynghame’s death, Sir Robert Myrton made a new settlement of his estate upon Robert the second son of Lady Cunynghame, in order to preserve the representation of his own family distinct from that of Sir William Cunynghame, into which it must have sunk had the estate of Gogar devolved upon Sir William’s eldest son, conform to the marriage contract.

A reduction of this settlement was brought by David the eldest son, and the cause having been reported to the Court, and a hearing in presence having taken place, it was

Pleaded for the pursuer,

That he is unquestionably the heir of provision to the estate of Gogar under his grand-father Sir Robert Myrton’s contract of marriage, with his wife, the pursuer’s grand-mother; for he claims as heir at law to his mother Lady Cunynghame, the only child of that marriage, who left issue, and is therefore entitled to claim the estate in question under that marriage contract, and to challenge any deeds which may have been executed to the prejudice of his right derived therefrom.

It is a point clearly established in the law of Scotland, that the heir of a marriage contract is a creditor to the full amount of the estate, or provision thereby provided. Stair, B. 3. Tit. 5. § 19. Erskine, B. 3. Tit. 8. § 38. It is on this principle that an action is competent to the heir of the marriage, either against his father, himself, or his other representatives and separate estate, to relieve the estate provided in the marriage contract; M’Intosh against the Laird of Aberarder, 23d January 1717, No. 36. p. 12883. Fotheringham against Fotheringham, 5th December 1734, No. 71. p. 12929. and 27th January 1730, Henderson, No. 70. p. 12928. A father in consequence of the fee remaining in him, may dispose of the estate for onerous causes, though provided to the heir of the marriage, and such estate will be affected with his onerous debts and deeds, which may disappoint the effect of the obligation the father had come under; but will not vacate the obligation itself. The *jus crediti* arising to the heir from the contract remains in full force, and he is entitled to make the same effectual against the father and his representatives or gratuitous donees. The pursuer, therefore, being the heir of that marriage, and the sole creditor in the obligation which Sir Robert came under by his marriage contract, is entitled to contend that this obligation could not be defeated by Sir Robert, by a voluntary gratuitous deed of settlement.

The contract between Sir Robert and Mr. Fletcher of Salton is corroborative of the pursuer's right under the marriage settlement 1735; for by it this estate, failing heirs of the body of Mrs. Fletcher, is settled upon the pursuer's mother and the heirs whatsoever of her body, under which description he is evidently entitled to the estate.

The contract of marriage, likewise, betwixt Sir William Cunynghame and his Lady proceeded upon the idea that the estate of Gogar was to descend to her, failing heirs of her sister; and Sir William, accordingly, upon the faith of this, made several provisions out of his own estate, which he otherwise would not have done.

The deed under reduction is besides irrational and absurd. The first limitation is to Sir Robert himself, and the heirs whatsoever to be procreated of his body, and only failing them, to Robert Cunynghame his second grandson. If Sir Robert had married again, and had begot daughters, they must have excluded the whole issue of his daughter Lady Cunynghame, in direct opposition to his own contract of marriage.

Pleaded for the defender:

The marriage contract betwixt Sir Robert and his wife, Dame Mary Campbell, being a postnuptial contract, cannot be considered as equally onerous and obligatory with an antinuptial settlement or contract. In a contract executed before marriage, the marriage itself in such a case takes place on the faith of the settlement, and is an onerous cause for the provisions thereby made. The father, accordingly, ought not to be permitted by a mere gratuitous or arbitrary deed to alter such settlement. But the reason fails in the case of a contract after marriage, and where the marriage must subsist whether any future provisions are made for the wife and children or not. The wife is presumed to have trusted to such provisions as the law only would give her, independent of conventional ones, and the children have no *jus crediti* or claim on the father, other than their legal provisions of legitim or the like. And even though postnuptial contracts may be as effectual to a wife as a settlement before marriage, if the provisions made for her are reasonable, and may thus bar the husband's revocation, yet the case is different as to the children who are no parties to such contract, and for whom the wife had no right to bind the husband after she had already entered into the marriage. Any postnuptial provisions made for them must be deemed voluntary on the part of the father, and subject to his controul or alteration.

But in the *second* place, supposing this postnuptial contract to be the same as a contract before marriage, there was still nothing to prevent Sir Robert from making the settlement now sought to be reduced.

A marriage contract, wherein the husband obliges himself to provide his estate to himself and the heirs of the marriage, is the most usual settlement that occurs in the law and practice of Scotland. It properly imports no more

No. 1. than that the husband shall take the investiture of the estate to himself and the heirs mentioned in the contract. This being done, the obligation in the contract is implemented. The fee of the estate remains notwithstanding with the father himself, and the only thing granted to the heirs is a right of succession, which may be made effectual by service after the death of the proprietor. They are in no better situation than other heirs appointed to succeed by simple destination. All the debts and deeds of the father, of whatever kind, are effectual over the estate, and the line of succession is alterable at pleasure. This was our law even in very old times; Craig, L. 2. D. 15. § 2. The notion of a father being restrained by the marriage contract from executing posterior settlements, unless when there was an express covenant to the contrary, is considered by a great authority as an innovation in the law of Scotland: Dirleton's Doubts, *voce* OBLIGEMENTS IN CONTRACTS OF MARRIAGE. Where a deed of the father is challenged as *in fraudem* of the marriage contract, the nature and rationality of the deed itself must be considered by the Court; Stair, B. 3. Tit. 5. § 19. Sir George Mackenzie, Part 3. Tit. 8. In a number of cases, the Court have refused to reduce voluntary deeds granted by a father when rational or expedient, although he had agreed in his marriage contract to provide his estate to the heirs of the marriage; Douglas of Tilliewhillie, 10th June 1724, No. 125. p. 13002; Thomson of Northumberhead, 1762, No. 135. p. 13018; Halkett of Pitferran, 1770, (not reported.) In questions with respect to a father's power of subjecting the heirs of a marriage to the fetters of an entail, the Court, though they frequently reduce such entails, yet in all such cases proceed on the irrationality of the deed itself, or other particular circumstances or defects, and not upon the father's want of power to execute any entail. Obligations in marriage contracts, therefore, do not restrain the father from granting even voluntary deeds, provided they are neither irrational nor granted in fraud of the marriage contract. And in those cases where the father has been found to be restrained, such restraint has been held to proceed not so much from a defect of power, as from a personal prohibition against granting deeds of a certain nature, supposed to be implied in the contract. The radical right of fee remains with him unimpaired, notwithstanding the marriage contract, and is sufficient to give effect to all his just deeds and settlements.

The settlement sought to be reduced is, besides, so far from being in fraud of the marriage contract founded upon, that it was *bona fide* executed in the true spirit and meaning of that contract. It was such as Sir Robert was called upon to make for the preservation of his name and family, which was the intention of parties in the original contract of marriage. That contract, therefore, can never be set up as a bar to a deed made agreeably to the intention thereof, and of which the only effect is to prevent the family of Myrton of Gogar from being entirely sunk in that of Cunynghame of Livingston.

As to the contract between Sir Robert and Mr. Fletcher of Salton, the only thing given to the other substitutes in this settlement was a *spes successionis* , alterable at pleasure. Sir Robert renouncing his reserved powers in favour of Mrs. Fletcher and her issue, was not an act favourable to Lady Cunyngham, but against her and her children, as it meant to take from Sir Robert the power which he otherwise had of settling the estate upon her in preference to her elder sister Mrs. Fletcher. And on the whole matter, regarding the original contract of marriage as the contract itself, Sir Robert had a right to chuse his heir among his own daughters, no reason can be assigned why that right and power should not extend to the children of his daughter.

It was answered, on the part of the pursuer, that the cases quoted by the defender were exceedingly different from the present. In the case of Tilliewhillie, the heir was insane. In the case of Pitferran, the heir was a natural idiot. In the case of Thomson of Cumberhead, the heir was a prodigal and bankrupt, and it depended, besides, upon other circumstances. In favour of his own plea, the pursuer, on this point of the cause, referred to the case of Stewart of Phisgill, 9th June, 1743, No. 132. p. 13010. and the case of Ker of Abbotrule, 23d January, 1747, No. 116. p. 12987.

As to the special clause in the marriage contract, by which Sir Robert, failing heirs male, reserved a power of preferring any of his daughters, nothing farther was in view by it than to give him an option of chusing a younger daughter in place of an elder; and this reserved power was favourable to Lady Cunyngham, whom he might have preferred. This condition, however, was discharged upon the marriage of his second daughter, Mrs. Fletcher, and matters were put into the same situation as if the marriage contract had been conceived in the usual form, upon the daughters *seriatim* in the order of their seniority. In this way, by the death of the other daughters, the estate devolved upon Lady Cunyngham, and of consequence upon the pursuer her heir at law.

The Court pronounced the following interlocutor: "On report of Lord A. M. and having advised the informations given in for either party, and heard parties procurators, the Lords sustain the reasons of reduction, and find, reduce, decern, and declare, in terms of the libel."

To this interlocutor the Court adhered, upon advising a reclaiming petition and answers.

Lord Reporter, *Alva*. Act. *M. Queen, Hay Campbell*. Alt. *Rae, Blair*.

D. C.

* * * These interlocutors were affirmed upon appeal. See No. 139. p. 13024.

1776. July 9.

GEORGE FRAZER against JANET SMITH, and ROBERT OLIPHANT her Husband.

AGNES FRAZER, relict of the deceased George Smith, merchant in Leith; a few days before her death, disposed "to and in favour of Janet Smith, at and after her decease, all and hail her moveable goods and gear, whole body

No. 1.

No. 2.

A banker's promissory note found not to fall