1782.

FLEMINGS
v.
FLEMING.

Ordered and adjudged that the interlocutor be affirmed, with £100 costs.

For Appellant, *Ilay Campbell, Thos. Crosbie.*
For Respondent, *Henry Dundas* (*Lord Advocate*), *B. W. M'Leod, J. H. Frazer.*

Unreported in Court of Session.

CATHERINE and WILLIAMINA FLEMINGS, daughters of WILLIAM FLEMING, Esq. deceased, - - - } *Appellants;*

MALCOLM FLEMING, Esq. - *Respondent.*

House of Lords, 12*th March* 1782.

ANTENUPTIAL CONTRACT—ENTAIL — FACULTY—JUS CREDITI.—Parties, before their marriage, entered into an antenuptial contract of marriage, conveying the estate of the husband to himself, and the heirs-male of the marriage, reserving power to limit the said heirs, with and under such irritant and resolutive clauses as he should think proper. He afterwards executed an entail, in favour of the same series of heirs, prohibiting selling, disponing, or contracting debt, and even selling to pay the entailer's debt. In the contract, he bound himself to "do no fact or deed, whereby the "order or course of succession might be altered or diverted." He thereafter contracted debts to a considerable amount: Held, in a reduction brought of the entail by the heir of the marriage, as in contravention of the contract, that, in the special circumstances of the case, the entail was reducible, and reduced accordingly.

William Fleming, Esq. of Barochan, and Catherine Durham, entered into an antenuptial contract of marriage, by which William Fleming conveyed his estate to himself, and the heirs-male of the marriage; whom failing, to the heirs-male lawfully to be procreated of the said William Fleming, his body, of any other marriage; whom failing, to James Fleming, brother to the said William Fleming, and the heirs-male of his body; whom failing, to the heirs female to be procreated of the marriage between the said William and Catherine, the eldest heir-female always succeeding, without division; whom failing, to the said William Fleming, his heirs and assignees whatsoever, *with power always to the*

said William Fleming, with consent of the persons at whose instance execution was to pass on the contract, or major part of them in life for the time, and failing of them, with consent of two of the nearest of kin of the said Catherine Durham, and no otherwise to limit the said heirs to be procreate betwixt him and the said Catherine Durham, with and under such irritant and resolutive clauses as he should think proper. The contract further bound him to do no other deed, directly, or indirectly, whereby the order of succession might be altered or diverted.

There were two sons and two daughters born of this marriage, Malcolm, the eldest son, (respondent), Adam, since dead, and the appellants, Catherine and Williamina. James Fleming, his brother, had, in the meantime, died, and so had the trustees named in the above marriage contract, at whose instance execution was to pass. In pursuance of the power reserved to him in the above marriage contract, he, in 1761, executed an entail of the estate, setting forth, "with "special advice and consent of the said Mrs. Catherine "Durham, my wife, and Adam Cunningham Durham of "Bonnington, and Isobel Durham, daughter of the said de- "ceased Adam Durham of Luffness, and who are the two "nearest in kin to the said Catherine, my wife, and their "sister," &c. By this entail he limited the estate to the same series of heirs as in the contract. It contained prohibitions, and irritant and resolutive clauses, against altering the order of succession, selling, and contracting debt. And even prohibited to sell any part of the estate, for payment of the entailer's debts; while, on the other hand, the next succeeding heir was taken bound to pay these debts, within seven years, otherwise to forfeit the estate.

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On William Fleming's death, in 1767, his eldest son, Malcolm, succeeded, and was infeft upon the precept in the entail; but sometime thereafter he brought this action for reducing this entail, on the ground, 1st, That by the contract of marriage, his father was barred from executing an entail of the estate, the same being provided to the heir of the marriage; 2d, That this was not a due exercise of the power reserved in the contract, and had not the consent of the parties appointed to see execution pass upon the same. In defence, the appellants, substitutes in the entail, insisted that it was executed agreeably to powers reserved in the contract, and had the consent of the parties mentioned therein.

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The Lord Ordinary repelled the objection, that the proper consents were not adhibited to the entail, and the question then came to be, How far the entail thus made was executed in terms consistent with the powers in the person of the said William Fleming, reserved by his marriage contract or otherwise? It was stated by the respondent, in point of fact, that the estate at the entailer's death was only worth £300 per annum. That £3500 of the entailer's debt was still owing, and adding to this, the debts contracted by himself, the rent of the estate was more than exhausted by payment of interest and taxes. In point of law he contended that it was not in the power of his father to defeat the *jus crediti* right conferred on him by the antenuptial contract of marriage, but was bound, when he settled the estate on the heirs of the marriage, to allow it to descend *tanquam optimam maximam*, unimpaired by any gratuitous deeds whatsoever, limiting or encumbering it. The reserved power in the contract did not give express power to make an entail prohibiting selling, disponing, contracting of debt, or even selling to pay the entailer's debt. In answer, it was contended that the entailer's debts were not so great as here represented, and that, in point of law, the entail could not be set aside as *contra fidem tabularum nuptialium*, because it was executed in pursuance of powers reserved by the contract itself.

The Court of Session pronounced the following interlocu-
June 27, 1781. tor: "In respect that William Fleming, the maker of the
"entail, stood bound by the contract of marriage libelled, to
"transmit his estate, which at his death amounted to about
"£300 Sterling per annum, to the pursuer, the heir-male of
"the marriage, free of debt; and that *contra fidem* of that
"contract, it is averred by the pursuer, and not denied by
"the defenders, that he had contracted debt to the amount
"of about £3000 Sterling, the interest of which amounted
"to the one half of the rents of the estate; which was like-
"wise subject to his widow's jointure of £100 Sterling per
"annum, and that by the said entail, the pursuer, the heir
"male of the marriage, had no power to sell any part of the
"said estate for payment of the tailzier's debts; but on the
"contrary, was taken bound, as a condition of the entail, to
"make up the titles to the said estate by virtue thereof, and
"to redeem several adjudications even for the entailer's
"debts seven years before expiration of the legal thereof,
"though these adjudications might have been led in the

"tailzier's lifetime, and that there was no provision for re-
"demption of special adjudications. Therefore, and on
"consideration of the other special circumstances of the
"case, they sustain the reasons of reduction, and reduce and
"decern." On reclaiming petition the Court adhered. July 14, 1781.

Against this interlocutor the present appeal was brought.

Pleaded for the Appellants.—A settlement of an estate in a contract of marriage to the heirs *nascituri* of the marriage gives no more than a *spes successionis* in the children, and infers no more than an obligation on the father not to alter the order of succession gratuitously, and binds him only to leave the estate to descend to heirs of the marriage, *tantum et tale,* as it was in him at his death. Contracting debt, or selling a part of the estate, is no infringement of such an obligation, nor are rational deeds—gratuitous deeds might be so, but not his onerous debts,—and deeds which might wholly disappoint the heir. This being the law, the entail in question was a deed that he had power to grant. It contained of course prohibitions against selling or alienating any part of the estate, and an obligation to redeem adjudications; but these are leading clauses in all entails. No doubt, no power is given to sell any part of the estate to pay the entailer's debts; but this is not a ground at common law for setting aside the entail. And for this a remedy can be had from the legislature. It is said that he was bound to transmit the estate to the respondent *free of debt;* but no such obligation is either expressed in or implied from the contract of marriage. All that he is bound to there, is, to do no deed, directly or indirectly to alter the order of succession. He has not done such deed, because the entail does not alter the order of succession; on the contrary, it conveys the estate to the same series of heirs, and he never *covenanted* that the estate should descend *free of debt.* But the entail in question forms a part of the contract of marriage, because in the contract power is reserved "to limit the said heirs to "be procreated betwixt him and the said Catherine with "and under such irritant and resolutive clauses as he shall "think proper;" and the entail, proceeding upon a recital of the powers so reserved, makes those two deeds one.

Pleaded for the Respondent.—William Fleming had no power to execute the entail in question, because, by the previous contract of marriage, he settled the estate instantly on the respondent, the heir of the marriage; and thereby became bound to transmit the same to him free of debt,

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"and to do no fact or deed whereby the order or course of "succession might be altered or diverted." The entail here was entirely subversive of that obligation, because, besides prohibitions against selling, alienating, and contracting debts, and obligation to redeem adjudication, the father reserves power to himself to sell and dispose of the estate, to contract debt, and burden and affect the same at pleasure; and even to alter the entail itself. But all this could only proceed upon a mistaken notion of his powers, and a total disregard of that *jus crediti* then existing in the heir of the marriage; because where a father, by his contract of marriage, settles his estate upon such heir, he is bound to transmit it to him unencumbered and unprejudiced by any gratuitous or even onerous deeds. "He is not only heir but quodammodo creditor to his father." 2. Although a reserved power to execute a deed limiting the heirs with irritant and resolutive clauses was contained in the marriage contract, this did not authorize a power in the father to burden the estate with debt; because he was thereby expressly taken bound "to do no act or deed" to defeat the purposes of the marriage settlement, and the power reserved must always be construed subject to the express obligations.

Ersk. vol. ii. p. 561, § 38.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be *affirmed*.

For the Appellants, *H. Dundas, T. Erskine.*
For the Respondent, *Ar. Macdonald, Dav. Rae.*

NOTE.—This case not reported in Court of Session.

(M. 7085.)

JOHN THOMSON, Jun., Merchant, Leith, *Appellant;*
GEORGE BUCHANAN and Others, Underwriters, *Respondents.*

House of Lords, 13*th March* 1782.

INSURANCE—CONCEALMENT.—Circumstances in which it was held that where a letter of advice is concealed from the insurer, which only refers to matters of public notoriety, known to all insurance offices, as affecting the risk in insuring a particular voyage, that such concealment will not void the policy.

The appellant insured his ship Gizzy for Gibraltar with orders to the Captain to proceed from thence to Malaga,