

## SECT. XVI.

Powers of the Father where the Fee is provided by his marriage-contract to the Heir of the Marriage.

No 138.

1747. *January 23.*      *KER against KERS.*

KER of Abbotrule, who had become bound in his contract of marriage to settle his estate, which was about 6000 merks a-year, upon the heir-male of the marriage, executed an entail thereof in favour of William his eldest son; in which, besides other unreasonable clauses, he imposed on him a strict prohibition, under an irritancy, to grant a jointure to his wife exceeding L. 20 yearly, or provisions to his children exceeding two year's rent. William Ker having pursued reduction of the entail against his own children, and the other substitutes, the LORDS found, That the entail contained clauses irrational, contrary to the marriage contract, and reduced.

*Fol. Dic. v. 4. p. 179. Kilkerran. D. Falconer.*

\* \* \* This case is No 116. p. 12987.,

No 139.

Destination inconsistent with a post-nuptial contract of marriage reduced.

1776. *July 9.*      *CUNNINGHAM against MYRTON-CUNNINGHAM.*

SIR ROBERT MYRTON, in a postnuptial contract of marriage with his wife Dame Mary Campbell, provided the estate of Gogar, failing heirs-male of that or any other marriage, to the eldest heir-female; but reserving power to himself, on failure of heirs-male, and in case there should be two, three, or more daughters, to entail and settle the estate on any one of them, even in preference to the eldest; and Lady Myrton, on the other hand, conveyed her whole fortune to her husband. Of this marriage there existed only three daughters. The eldest died without issue; the second, Jane, married Fletcher of Salton, and left an only child, who survived her but a short time; and the third, Frances, after the death of her two sisters, was married to Sir William Cunningham of Livingston. Sir Robert Myrton, in the contract of marriage between his daughter Jane and Mr Fletcher, renounced and discharged his reserved faculty, both as to the power of entailing, and of preferring any younger daughter to the eldest; and he therein provides the estate of Gogar, failing his own heirs-male, to Mrs Fletcher and her heirs-male; failing whom, to his youngest daughter Frances, and the heirs whatsoever of her body, the eldest heir-female succeeding without division. In the contract of marriage betwixt

Sir William and Lady Cunningham, Sir William accepts the provision therein made in full, &c. except in so far as he is eventually provided to the estate of Gogar by the contract of marriage betwixt Sir Robert Myrton and Dame Mary Campbell. After Lady Cunningham's death, Sir Robert Myrton made a settlement of Gogar on Robert, the second son of Lady Cunningham, in order that his own family might not be sunk in that of Livingston. Of this settlement a reduction was brought by David the eldest son of Sir William Cunningham, on the ground, that he was the heir of provision to that estate under his grandfather Sir Robert Myrton's contract of marriage with his wife, being heir at law to his mother Lady Cunningham, the only child of that marriage who left issue, and therefore entitled to challenge any gratuitous deed to the prejudice of his right thence derived. *Urged* in defence, That the contract of marriage between the pursuer's grandfather and grandmother, being postnuptial, does not convey the same *jus crediti* or indefeasible right as if it had been an antenuptial contract; but that, even had the contract been antenuptial, it would have had no other effect than a simple destination, affectable by all the rational debts and deeds of the obligee, and subject to his power of altering the destination, or giving the estate to any child of the marriage at his pleasure. Where a deed of the father is challenged as *in fraudem* of such destination by a marriage-contract, the deed must be shown to be irrational and inexpedient, and actually contrary to the obligations in the contract. But in the present case, the settlement in question is highly rational and expedient, and is perfectly agreeable to the spirit and intention of the contract, which clearly was to prevent the estates from being united, and the one family sunk in the other. That with regard to the obligations in Mr Fletcher's contract of marriage, all that was given to the other substitutes in that settlement was a *spes successionis*, alterable at pleasure. Sir Robert's renunciation of his reserved powers in favour of Mrs Fletcher and her heirs, was not an act favourable to Lady Cunningham, but the contrary; and, on the whole, as by the original contract of marriage of Sir Robert Myrton he had a right to chuse his heir among his own daughters, there is no reason why that right should not extend to the children of his daughters. THE LORDS, on a hearing in presence, sustained the reasons of reduction. This judgment was affirmed on appeal. See APPENDIX.

*Fol. Dic. v. 4. p. 180.*

1776. December 20.

DICK against LINDSAY.

No 140.

DICK, by his marriage-contract, disposed to the children of the marriage his whole heritable and moveable property at his death, under the burden of a provision to his wife. Being displeased with the conduct of his eldest son Richard, he altered this settlement, leaving only a trifle to Richard's wife and children.